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INFO MEMO

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March 21, 2003 3:50 P.M.

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel *WJ Haynes*

SUBJECT: Intelligence Support to Colombia

- You asked whether gathering intelligence in Colombia (and presumably sharing it with the Colombian military and government), in the absence of a rescue operation or self-defense, violates the law.¹ We generally conclude that it does not.
- The statute in question prohibits United States Armed Forces personnel or United States civilian contractors employed by the United States from "participat[ing] in any combat operation...." (Tab A) If gathering intelligence constitutes "participation in a combat operation," then the United States Armed Forces may not gather intelligence.
- While section 305(d) does not define "combat operations," the term is commonly understood to refer to physical engagement in a military theater. Thus, intelligence collection that is removed from, and independent of the combat element, would not constitute "participation in a combat operation."
- Not only does the common understanding of the term "combat operation" support this view, but other laws make it clear that Congress did not intend to restrict intelligence collection when it enacted section 305. Congress is well aware of, and has repeatedly endorsed, Departmental programs designed to provide intelligence support to the Colombian military.
- Congress has repeatedly re-enacted section 1004 of the National Defense Authorization Act for Fiscal Year 1991, as amended. (Tab B) This provision specifically allows the Department to establish and operate counternarcotics intelligence bases of operation, provide intelligence analysis services (including developing target packages), and conduct aerial reconnaissance to support Colombian counter-drug activities. Under accepted principles of statutory construction, section 305 should be given its common sense meaning and construed harmoniously with existing law.

¹ On its face, the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on America, as amended, permits participation in a combat operation for the purpose of acting in self-defense or rescuing any United States citizen to include ... civilian contractors employed by the United States. Pub.L. 107-206, amended by Pub.L. 107-248, Section 305(d).

BPL ASSISTANT DI RITA	
SR MA CRADDOCK	
MA BUCH	
EXECUTIVE WHITMORE	<i>WJH</i>

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- Section 305 complements section 1004. It provides authority to use funds available to the Department for assistance to the Government of Colombia (counter-drug appropriations) to support a unified campaign. Nothing in the text or legislative history of section 305 suggests that Congress intended to diminish the U.S. government's intelligence support activities.
- Longstanding Department of Defense practice also supports the view that intelligence collection does not constitute "participation in combat operations." Enclosure H ("Counterdrug Support Operations") of Chairman of the Joint Chiefs of Staff Instruction 3121.01A, "Standing Rules of Engagement for US Forces," which implements the Standing Rules of Engagement approved by the Secretary of Defense, (Tab C) and is included in all counternarcotics deployment orders, proscribes direct participation in a range of activities, such as accompanying host nation law enforcement or military forces on actual field operations or participating in any counternarcotics activities where counternarcotics related hostilities are imminent. This proscription distinguishes more passive activities that are authorized, such as training or providing intelligence support, from those that constitute direct participation.
- In sum, intelligence collection does not per se constitute "participation in a combat operation." Of course, tactical intelligence conducted at the unit level, as part of a field operation, might well violate section 305(d). However, a military helicopter crew collecting intelligence in the theater would not be "participat[ing] in a combat operation" unless the crew otherwise is engaged in a combat operation.

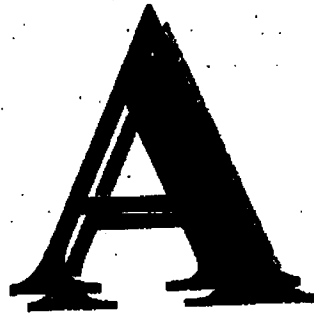
COORDINATION: None

Attachments: As stated

cc:

Chairman, Joint Chiefs of Staff
Commander, U.S. Southern Command

Prepared by: Ed Frothingham, Associate Deputy General Counsel (Intelligence), (703)
696-7626



**2002 SUPPLEMENTAL APPROPRIATIONS ACT FOR FURTHER
RECOVERY FROM AND RESPONSE TO TERRORIST ATTACKS ON
THE UNITED STATES, as amended¹**

Sec. 305. (a)(1) In fiscal years 2002 and 2003, funds available to the Department of Defense for assistance to the Government of Colombia shall be available to support a unified campaign against narcotics trafficking, against activities by organizations designated as terrorist organizations such as the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), and the United Self-Defense Forces of Colombia (AUC), and to take actions to protect human health and welfare in emergency circumstances, including undertaking rescue operations.

(2) The provision shall also apply to unexpired balances and assistance previously provided from prior years' Acts available for purposes identified in subsection (a)(1).

(3) The authority in this section is in addition to authorities currently available to provide assistance to Colombia.

(b) The authorities provided in subsection (a) shall not be exercised until the Secretary of Defense certifies to the Congress that the provisions of section 601(b) of this Act have been complied with.

(c) Sections 556, 567, and 568 of Public Law 107-115, section 8093 of the Department of Defense Appropriations Act, 2002, and the numerical limitations on the number of United States military personnel and United States individual civilian contractors in section 3204(b)(1) of Public Law 106-246, as amended, shall be applicable to funds made available pursuant to the authority contained in subsection (a).

(d) No United States Armed Forces personnel or United States civilian contractor employed by the United States will participate in any combat operation in connection with assistance made available under this chapter, except for the purpose of acting in self defense or rescuing any United States citizen to include United States Armed Forces personnel, United States civilian employees, and civilian contractors employed by the United States.

¹ Pub. L. 107-206 amended by §8145, National Defense Appropriation Act for Fiscal Year (FY) 2003, Pub. L. No. 107-248.

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FY02

Section 1004, National Defense Authorization Act for Fiscal Year 1991, as amended¹, "Additional Support for Counter-Drug Activities":

(a) **SUPPORT TO OTHER AGENCIES.** -- During fiscal years 2002 through 2006, the Secretary of Defense may provide support for the counter-drug activities of any other department or agency of the Federal Government or of any State, local, or foreign law enforcement agency for any of the purposes set forth in subsection (b) if such support is requested--

(1) by the official who has responsibility for the counter-drug activities of the department or agency of the Federal Government, in the case of support for other departments or agencies of the Federal Government;

(2) by the appropriate official of a State or local government, in the case of support for State or local law enforcement agencies; or

(3) by an appropriate official of a department or agency of the Federal Government that has counter-drug responsibilities, in the case of support for foreign law enforcement agencies.

(b) **TYPES OF SUPPORT.** -- The purposes for which the Secretary may provide support under subsection (a) are the following:

(1) The maintenance and repair of equipment that has been made available to any department or agency of the Federal Government or to any State or local government by the Department of Defense for the purposes of--

(A) preserving the potential future utility of such equipment for the Department of Defense; and

(B) upgrading such equipment to ensure compatibility of that equipment with other equipment used by the Department of Defense.

(2) The maintenance, repair, or upgrading of equipment (including computer software), other than equipment referred to in subparagraph (1) for the purpose of--

(A) ensuring that the equipment being maintained or repaired is compatible with equipment used by the Department of Defense; and

(B) upgrading such equipment to ensure the compatibility of that equipment with equipment used by the Department of Defense.

(3) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counter-drug activities within or outside the United States.

(4) The establishment (including an unspecified minor military construction project) and operation of bases of operations or training facilities for the purpose of facilitating

¹ Pub. L. No. 101-510, amended by §1088(a), National Defense Authorization Act (NDAA) for Fiscal Year (FY) 1992 and 1993, Pub. L. No. 102-190; §1041, NDAA for FY 1993, Pub. L. No. 102-484; §1121(a) and (b), NDAA for FY 1994, Pub. L. No. 103-160; §1011, NDAA for FY 1995, Pub. L. No. 103-337; §1021, NDAA for FY 1999, Pub. L. No. 105-261, and §1021, NDAA for FY 2002, Pub. L. No. 107-107.

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counter-drug activities of the Department of Defense or any Federal, State, or local law enforcement agency within or outside the United States or counter-drug activities of a foreign law enforcement agency outside the United States.

(5) Counter-drug related training of law enforcement personnel of the Federal Government, of State and local governments, and of foreign countries, including associated support expenses for trainees and the provision of materials necessary to carry out such training.

(6) The detection, monitoring, and communication of the movement of--

(A) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and

(B) surface traffic outside the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary.

(7) Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.

(8) Establishment of command, control, communications, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

(9) The provision of linguist and intelligence analysis services.

(10) Aerial and ground reconnaissance.

(c) **LIMITATION ON COUNTER-DRUG REQUIREMENTS.** -- The Secretary of Defense may not limit the requirements for which support may be provided under subsection (a) only to critical, emergent, or unanticipated requirements.

(d) **CONTRACT AUTHORITY.** -- In carrying out subsection (a), the Secretary of Defense may acquire services or equipment by contract for support provided under that subsection if the Department of Defense would normally acquire such services or equipment by contract for the purpose of conducting a similar activity for the Department of Defense.

(e) **LIMITED WAIVER OF PROHIBITION.** -- Notwithstanding section 376 of title 10, United States Code, the Secretary of Defense may provide support pursuant to subsection (a) in any case in which the Secretary determines that the provision of such support would adversely affect the military preparedness of the United States in the short term if the Secretary determines that the importance of providing such support outweighs such short-term adverse effect.

(f) **CONDUCT OF TRAINING OR OPERATION TO AID CIVILIAN AGENCIES.** -- In providing support pursuant to subsection (a), the Secretary of Defense may plan and execute otherwise valid military training or operations (including training exercises undertaken pursuant to section 1206(a) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; 103 Stat. 1564)) for the purpose of aiding civilian law enforcement agencies.

(g) **RELATIONSHIP TO OTHER LAWS.** -- (1) The authority provided in this section for the support of counter-drug activities by the Department of Defense is in addition to, and except as provided in paragraph (2), not subject to the requirements of chapter 18 of title 10, United States Code.

(2) Support under this section shall be subject to the provisions of section 375 and, except as provided in subsection (e), section 376 of title 10, United States Code.

(h) **CONGRESSIONAL NOTIFICATION OF FACILITIES PROJECTS.** -- (1) When a decision is made to carry out a military construction project described in paragraph (2), The Secretary of

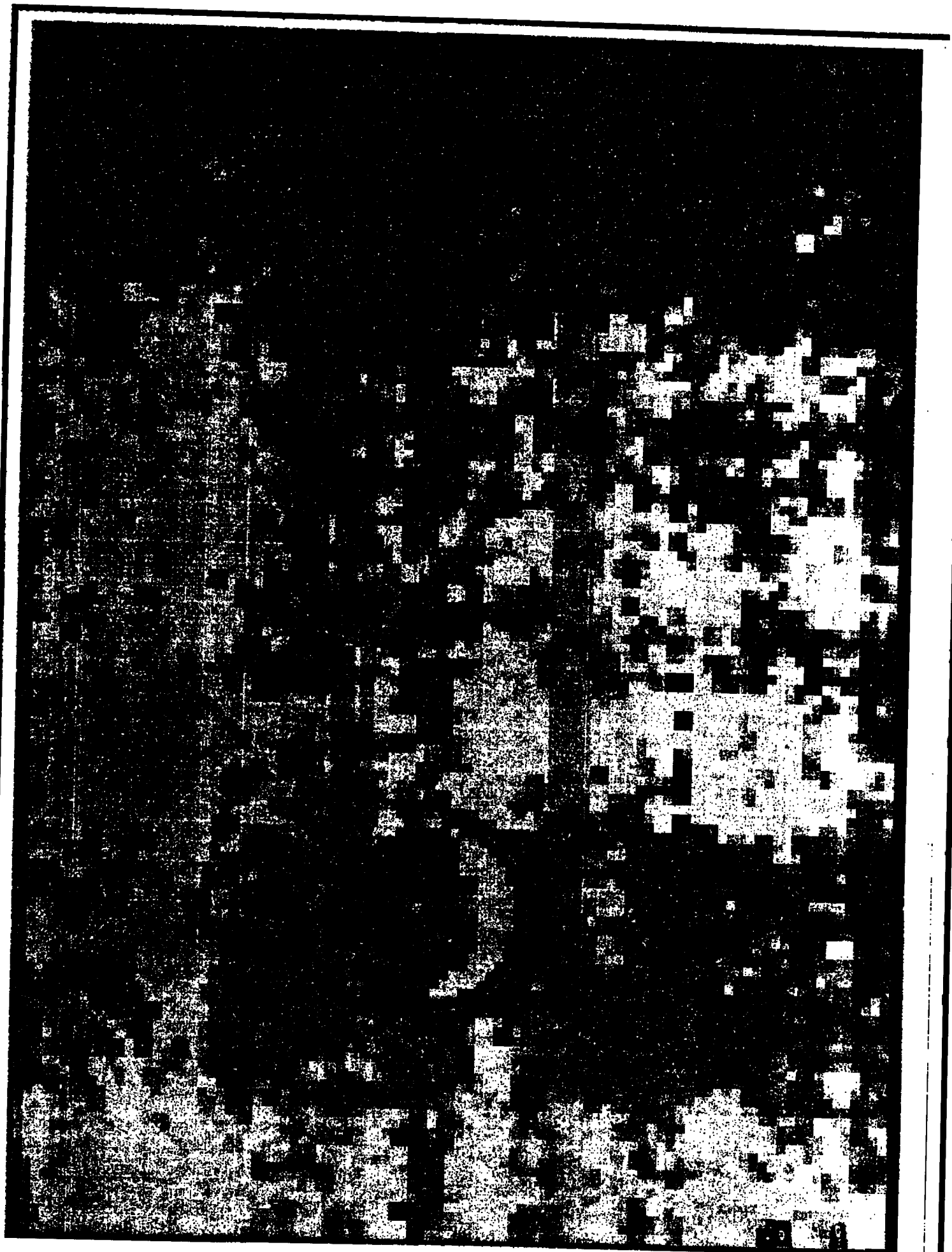
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Defense shall submit to the congressional defense committees written notice of the decision, including the justification of the project and the estimated cost of the project. The project may be commenced only after the end of the 21-day period beginning on the date on which the written notice is received by Congress.

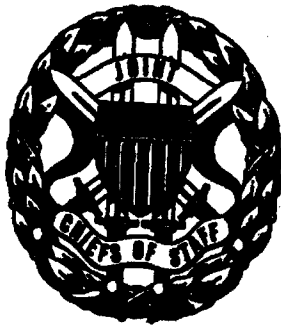
(2) Paragraph (1) applies to an unspecified minor military construction project that--

(A) is intended for the modification or repair of a Department of Defense facility for the purpose set forth in subsection (b)(4); and

(B) has an estimated cost of more than \$500,000.



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CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION

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DISTRIBUTION: A, C, S

CJCSI 3121.01A

15 January 2000

STANDING RULES OF ENGAGEMENT FOR US FORCES

Reference: See Enclosure M.

1. **Purpose.** This instruction establishes:
 - a. SecDef-approved standing rules of engagement (SROE) that implement the inherent right of self-defense and provide guidance for the application of force for mission accomplishment.
 - b. Fundamental policies and procedures governing action to be taken by US force commanders during all military operations and contingencies as specified in paragraph 3.
2. **Cancellation.** CJCSI 3121.01, 1 October 1994, is canceled.
3. **Applicability.** ROE apply to US forces during military attacks against the United States and during all military operations, contingencies, and terrorist attacks occurring outside the territorial jurisdiction of the United States. The territorial jurisdiction of the United States includes the 50 states, the Commonwealths of Puerto Rico and Northern Marianas, US possessions, and US territories.
 - a. Peacetime operations conducted by the US military within the territorial jurisdiction of the United States are governed by use-of-force rules contained in other directives or as determined on a case-by-case basis for specific missions (see paragraph 4 of Enclosure H and Enclosure I).
 - b. Inclusion of NORAD. For purposes of this document, the Commander, US Element NORAD, will be referred to as a CINC.
4. **Policy.** See Enclosure A.

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ENCLOSURE H

COUNTERDRUG SUPPORT OPERATIONS (U)

1. (U) Purpose and Scope

a. (U) Section A provides policy and rules on the use of force by DOD personnel involved in counterdrug (CD) support operations outside the United States.

b. (U) Section B provides an overview of use of force policies for DOD personnel involved in CD support operations within the territorial limits of the United States with cross-reference to directives governing use of force for self-defense of DOD personnel providing support to US Federal, state, or local CD law enforcement authorities.

c. (U) DOD units under USCG OPCON or TACON conducting CD support operations both outside and within the territorial limits of the US will follow the Use-of-Force Policy issued by the Commandant, USCG, but only to the extent of use of warning shots and disabling fire per 14 USC 637 (reference w). US naval units or personnel operating under USCG OPCON or TACON and outside the territorial limits of the US, retain the authority and obligation to use all necessary means available and to take all appropriate actions in unit or individual self-defense in accordance with these SROE.

2. (U) Policy. As established in Enclosure A, these rules do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate actions in self-defense of the commander's unit and other US forces in the vicinity.

3. (U) Section A. ROE for CD-Support Operations Outside the United States.

a. (U) DOD personnel may not accompany US law enforcement agencies (LEAs), HN LEAs, or HN military forces on actual CD field operations, or participate in any CD activities where CD-related hostilities are imminent, unless specifically authorized by the NCA.

Classified by: VADM S. A. Fry, DJ-3
Reason: 1.5 (a) (d) (g)
Declassify on: X-4, X-6, X-7

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b. (U) DOD personnel may not accompany US LEAs or HN personnel to or provide CD support from a location outside a secured base or area.

(1) (U) This limitation is not intended to prevent DOD personnel from accompanying LEAs on authorized transportation, aerial reconnaissance and/or detection and monitoring support missions, or on other authorized support missions from one secure area to another provided that the latter is no closer than small-arms range from the site of the anticipated LEA activity.

(2) (U) DOD personnel may proceed to a forward operating or support base or area only after the commander or other official designated by the responsible CINC makes a determination that such a base or area is secure and adequately protected.

c. ~~(C)~~ (U) DOD personnel may accompany USCG law enforcement detachments in a foreign nation's internal waters, territorial sea and airspace, archipelagic waters, or in international waters.

d. (U) The limitations described above are not meant to prevent US military forces from conducting exercises or training in designated drug interdiction areas as authorized by reference w. Should exercises or training be conducted in drug interdiction areas, appropriate measures will be taken to ensure that US military forces will not be in a location where involvement in CD-related hostilities is likely to occur or placed in situations or an environment where there is high probability or information that confrontation with civilians, armed or otherwise, is likely to occur.

e. ~~(C)~~ (U) Following or pursuing hostile forces is authorized, but only if necessary in self-defense and/or for the extraction of US forces or other DOD personnel and, when authorized by appropriate authority, US LEAs and collocated forces to include HN LEAs and military forces on CD-related deployments. Pursuit across international land boundaries, for purposes other than those cited above, is forbidden unless authorized by the NCA or agreed to by the nation whose territory will be entered.

f. (U) DOD personnel will make every attempt to avoid confrontation with nonmission personnel or civilians.

g. ~~(C)~~ (U) The employment of IO is governed by policy and procedures delineated in Enclosure F.

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h. (U) USG space assets may be used for detection, monitoring, and communication of suspected narcotrafficker activities in support of CD operations, consistent with applicable policy and law.

i. (U) The employment of RCA by DOD personnel is governed by references c and u.

j. (U) Force will only be used in self-defense unless otherwise directed by the NCA or as provided by law (see subparagraph 3k(2) below).

(1) (U) Use of Force. The right to use force in self-defense may not be used to justify the substitution of DOD personnel for US or HN law enforcement personnel, for HN military forces on CD-related deployments acting in a law enforcement capacity, or to augment the offensive use of force by these law enforcement personnel in CD operations intended to apprehend drug traffickers.

(2) (U) Self-Defense. Unit and individual self-defense will be (a) in accordance with this instruction and, if designated, in (b) defense of collocated forces including US LEAs, HN LEAs, or HN military forces on CD-related deployments. Request supplemental measure 008 if necessary (see Appendix A to Enclosure J).

(3) (U) Hostile Act and Hostile Intent. If a force commits a hostile act or exhibits hostile intent, DOD personnel on CD-support missions may use all necessary means available and, take all appropriate actions to defend US forces, other DOD personnel and, if designated, collocated US LEAs, HN LEAs, and military forces on CD-related deployments. Request supplemental measure 008 if necessary (see Appendix A to Enclosure J).

(4) (U) Temporary Detention in Self-Defense. When participating in CD-support operations, self-defense includes the right to temporarily subdue and detain any person who commits a hostile act or exhibits hostile intent towards US forces, other DOD personnel, collocated US LEAs, and designated HN LEAs and military forces. All such persons will be released to the appropriate civilian authorities at the earliest practical opportunity.

(5) (U) Defense of Property and Equipment. DOD personnel may use all necessary means available and take all appropriate actions to

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protect US national security assets, including US Embassies, DOD aircraft, and such other assets as may be designated by the commander assigned OPCON over DOD personnel. If approved by the NCA, DOD personnel may similarly protect property and equipment, regardless of national ownership, designated as critical to the accomplishment of the CD-support mission. Request supplemental measure 010 if necessary (see Appendix A to Enclosure J).

k. (U) Definitions

(1) (U) Accompany. To physically be or go with. DOD personnel "accompany" US or HN LEAs or HN military forces on CD-related deployments when they travel with such personnel on foot or in the same vehicle, aircraft, ship, or boat, including any groupings of the same. When DOD personnel are authorized to accompany US or HN LEAs or HN military forces on CD-related deployments in order to provide CD support, such personnel are not authorized to participate in the underlying law enforcement functions. At all times, DOD CD support to LEAs must remain distinguishable from the LEAs' law enforcement functions. DOD personnel will respond in self-defense and have a duty to come to the defense of USCG Law Enforcement Detachment (LEDET) when faced with demonstrated hostile intent or a hostile act. However, the right to use force in self-defense may not be used to justify use of DOD personnel on board a target of interest, nor to augment the USCG LEDET boarding party during the boarding phase or at any time law enforcement activities are being carried out, including search and/or seizure.

(2) (U) Actual CD Field Operations. Activities during which the intent, or the reasonable expectation, is that the US or HN LEAs or HN military forces on CD-related deployments will conduct CD law enforcement functions.

(3) (U) Law Enforcement Functions. These activities include, but are not limited to, search, seizure, arrest, or other similar activities.

(4) (U) Imminent. All available facts indicate that a CD activity or CD-related hostile action is about to occur.

4. (U) Section B. Rules for the use of force for CD-support operations inside the United States.

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- a. (U) DOD personnel providing support to LEAs will **not** engage in law enforcement activities including, but not limited to, search, seizure, arrest, and other related activities.
- b. (U) DOD CD-support missions must be separate and distinguishable from LEA law enforcement activities.
- c. (U) DOD personnel are prohibited from accompanying US LEAs on actual CD field operations or participating in any activity in which CD-related hostilities are imminent.
- d. (U) DOD personnel may accompany USCG law enforcement detachments in the US territorial sea, internal waters, and superjacent airspace.
- e. (U) DOD personnel will make every effort to minimize the possibility of confrontation, armed or otherwise, with civilians. This does not prevent DOD personnel from accompanying US LEAs on authorized aerial reconnaissance and/or detection and monitoring support missions and other authorized support missions from a secure area to a secure area (no closer than small-arms range from the site of the anticipated LEA activity).
- f. (U) The right to use force in self-defense as defined in the applicable use of force policy may not be used to justify the substitution of DOD personnel for law enforcement personnel or to augment the offensive force capability of LEA personnel conducting operations to apprehend drug traffickers. The right to use force in self-defense may not be used to justify use of DOD personnel on board a target of interest, nor to augment the USCG LEDET boarding party during the boarding phase or at any time law enforcement activities are being carried out, including search and/or seizure.
- g. (U) DOD personnel may conduct exercises or training in designated drug interdiction areas as authorized by reference w. Such exercises or training will incorporate appropriate measures to ensure that DOD personnel will not be placed in situations or an environment where there is a high probability that confrontation, armed or otherwise, with civilians is likely to occur.
- h. (U) CJCSI 3121.02 (draft), undated, "Standing Rules on the Use of Force by DOD Personnel During Military Operations Providing

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Counterdrug Support to Law Enforcement Agencies in the United States," governs use of force for DOD personnel participating in CD-support missions.

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