



NATIONAL SECURITY RESEARCH DIVISION

CHILDREN AND FAMILIES
EDUCATION AND THE ARTS
ENERGY AND ENVIRONMENT
HEALTH AND HEALTH CARE
INFRASTRUCTURE AND
TRANSPORTATION
INTERNATIONAL AFFAIRS
LAW AND BUSINESS
NATIONAL SECURITY
POPULATION AND AGING
PUBLIC SAFETY
SCIENCE AND TECHNOLOGY
TERRORISM AND
HOMELAND SECURITY

The RAND Corporation is a nonprofit institution that helps improve policy and decisionmaking through research and analysis.

This electronic document was made available from www.rand.org as a public service of the RAND Corporation.

Skip all front matter: [Jump to Page 1](#) ▼

Support RAND

[Purchase this document](#)

[Browse Reports & Bookstore](#)

[Make a charitable contribution](#)

For More Information

Visit RAND at www.rand.org

Explore the [RAND National Security Research Division](#)

View [document details](#)

Limited Electronic Distribution Rights

This document and trademark(s) contained herein are protected by law as indicated in a notice appearing later in this work. This electronic representation of RAND intellectual property is provided for non-commercial use only. Unauthorized posting of RAND electronic documents to a non-RAND website is prohibited. RAND electronic documents are protected under copyright law. Permission is required from RAND to reproduce, or reuse in another form, any of our research documents for commercial use. For information on reprint and linking permissions, please see [RAND Permissions](#).

This report is part of the RAND Corporation research report series. RAND reports present research findings and objective analysis that address the challenges facing the public and private sectors. All RAND reports undergo rigorous peer review to ensure high standards for research quality and objectivity.



Improving Interagency Information Sharing Using Technology Demonstrations

The Legal Basis for Using New Sensor
Technologies for Counterdrug Operations
Along the U.S. Border

Daniel Gonzales, Sarah Harting, Jason Mastbaum, Carolyn Wong



NATIONAL SECURITY RESEARCH DIVISION

Improving Interagency Information Sharing Using Technology Demonstrations

The Legal Basis for Using New Sensor
Technologies for Counterdrug Operations
Along the U.S. Border

Daniel Gonzales, Sarah Harting, Jason Mastbaum, Carolyn Wong

This research was sponsored by the Rapid Reaction Technology Office within the Office of the Secretary of Defense for Acquisition, Technology and Logistics, and conducted within the International Security and Defense Policy Center of the RAND National Defense Research Institute, a federally funded research and development center sponsored by the Office of the Secretary of Defense, the Joint Staff, the Unified Combatant Commands, the Navy, the Marine Corps, the defense agencies, and the defense Intelligence Community.

Library of Congress Cataloging-in-Publication Data

ISBN: 978-0-8330-8494-1

The RAND Corporation is a nonprofit institution that helps improve policy and decisionmaking through research and analysis. RAND's publications do not necessarily reflect the opinions of its research clients and sponsors.

Support RAND—make a tax-deductible charitable contribution at www.rand.org/giving/contribute.html

RAND® is a registered trademark.

© Copyright 2014 RAND Corporation

This document and trademark(s) contained herein are protected by law. This representation of RAND intellectual property is provided for noncommercial use only. Unauthorized posting of RAND documents to a non-RAND website is prohibited. RAND documents are protected under copyright law. Permission is given to duplicate this document for personal use only, as long as it is unaltered and complete. Permission is required from RAND to reproduce, or reuse in another form, any of our research documents for commercial use. For information on reprint and linking permissions, please see the RAND permissions page (www.rand.org/pubs/permissions.html).

RAND OFFICES

SANTA MONICA, CA • WASHINGTON, DC

PITTSBURGH, PA • NEW ORLEANS, LA • JACKSON, MS • BOSTON, MA

CAMBRIDGE, UK • BRUSSELS, BE

www.rand.org

Preface

This report provides a summary of legal and policy authorities and restrictions that pertain to Department of Defense (DoD) counterdrug operations and to the demonstration of related advanced technologies. In particular, it identifies U.S. laws and DoD policies that permit or restrict information sharing in actual operations as well as technology demonstrations between federal government agencies, with a particular emphasis on information sharing between DoD and the Department of Homeland Security.

This research was sponsored by the Rapid Reaction Technology Office within the Office of the Secretary of Defense for Acquisition, Technology and Logistics, and conducted within the International Security and Defense Policy Center of the RAND National Defense Research Institute, a federally funded research and development center sponsored by the Office of the Secretary of Defense, the Joint Staff, the Unified Combatant Commands, the Navy, the Marine Corps, the defense agencies, and the defense Intelligence Community.

For more information on the RAND International Security and Defense Policy Center, see <http://www.rand.org/nsrd/ndri/centers/isdp.html> or contact the director (contact information is provided on the web page).

Contents

Preface	iii
Figures and Tables	vii
Summary	ix
Acknowledgments	xv
Abbreviations	xvii

CHAPTER ONE

Introduction	1
Background	1
Thunderstorm Demonstrations	3
Legal Issues	3
Purpose	4
Approach	5
Caveats	5
Organization	5

CHAPTER TWO

Relevant U.S. Law	7
The Legislative Process	7
Federal Laws Relevant to Information Sharing	8
Federal Laws Relevant to Counterdrug Operations	13
Title 10 United States Code	13
Relevant National Defense Authorization Acts	15
Relevant Fiscal Law	19
Restrictions on the Use of Military Forces for Domestic Law Enforcement Activities	24
Restrictions on the Use of Electronic Surveillance by U.S. Military Forces	25
Summary of Legal Analysis	27

CHAPTER THREE

Relevant Department of Defense Policy	29
Department of Defense Directives and Instructions	29
Other Relevant Department of Defense Policy	31
Summary of Relevant Law and Policy	33

CHAPTER FOUR

Thunderstorm Demonstrations and Approval Processes	37
Thunderstorm Goals	37
Thunderstorm Options and Associated Counterdrug Test Approval Issues	39
Preferred Thunderstorm Option	43

CHAPTER FIVE

Findings and Recommendations	47
Findings	48
Recommendations	49

APPENDIXES

A. National Defense Authorization Acts Relevant to Counterdrug Operations	51
B. National Defense Authorization Act for Fiscal Year 1991, Section 1004, as Amended	55
C. Public Law 100-456, Chapter 18 of Title 10, United States Code	59

References	81
-------------------------	----

Figures and Tables

Figures

2.1.	The Legislative Process	8
3.1.	Timeline of Legal and Policy Authorities	34
4.1.	Vignette 1: Technology Demonstration with Role Players	40
4.2.	Vignette 2: Technology Demonstration Halted When Live Targets Detected.....	41
4.3.	Vignette 3: Technology Demonstration; Live Targets Authorized.....	42
4.4.	Vignette 4: Technology Demonstration; Live Targets Not Authorized.....	43
4.5.	Thunderstorm Demonstrations Should Be Deconflicted with Appropriate Joint Task Force	45

Tables

2.1.	Federal Laws Pertaining to Interagency Information Sharing.....	10
2.2.	Sections of U.S. Law Pertaining to U.S. Military Support to Civil Authorities	14
2.3.	Key Provisions in National Defense Authorization Acts	16
2.4.	Fiscal Law Applies Generally to All Department of Defense Appropriations and Specifically to Counterdrug Activities	22
3.1.	Department of Defense Policies Relevant to Department of Defense Support to Civil Authorities.....	30
A.1	National Defense Authorization Acts Relevant to Counterdrug Operations.....	49

Summary

The Department of Defense (DoD) has been developing new sensor and data fusion capabilities for military forces for many years, and has significant experience in developing advanced sensor capabilities for a wide range of contingencies and missions. New and innovative intelligence, surveillance, and reconnaissance (ISR) capabilities have been developed to support military forces operating in Iraq and Afghanistan. These new capabilities, initially developed for overseas operations, may have the potential to provide important new detection and monitoring (D&M) capabilities that could be used along the U.S. border by the Department of Homeland Security (DHS), the Drug Enforcement Administration (DEA), and DoD.

DoD's Office of the Assistant Secretary of Defense, Research and Engineering (OASD/R&E), Rapid Reaction Technology Office (RRTO) organizes U.S.-based technology demonstrations to test and demonstrate the potential of such ISR technologies in as realistic an operational environment as possible (i.e., in field conditions that closely resemble those found in current theaters of operation, such as areas along the southern U.S. border). In this report, we focus on RRTO's Thunderstorm series of demonstrations.¹

U.S. law mandates information sharing among federal departments and agencies for national security purposes. Title 6 of the U.S. Code (USC) calls for the President to establish an information sharing environment (ISE) that all federal agencies are to use and share. Title 6 USC also directs DoD and other government agencies to support the development of an ISE that enables relevant national security and surveillance information to be shared between government agencies. The information sharing and safeguarding strategy published by the White House has specified that the ISE should also apply to information relevant to counterdrug operations.²

Title 10 USC directs DoD to play a key role in domestic counterdrug (CD) operations in support of U.S. law enforcement agencies. Title 10 USC, Section 124, designates DoD as the lead federal agency for D&M of air and maritime traffic to detect the transit of illicit drugs across the U.S. border. Furthermore, Section 1205 of the 1990 National Defense Authorization Act (NDAA) states that the Secretary of Defense should ensure that DoD conducts adequate research and development activities to improve its ability to carry out the CD D&M

¹ Thunderstorm demonstrations are conducted and sponsored by RRTO. Their purpose is to provide an enduring technology demonstration venue: to identify new, emerging, and transformational ISR technologies; demonstrate sensor, fusion, and display capabilities; and to improve information processing, exploitation, and dissemination concepts of operation. Thunderstorm participants have come from DoD, U.S. industry, U.S. Interagency partners, academia, and international industry firms.

² The White House, *National Strategy for Information Sharing and Safeguarding*, Washington, D.C., December 2012.

functions assigned to it.³ Therefore, it is appropriate for DoD acquisition authorities to undertake initiatives that can demonstrate effective CD D&M capabilities and effective interagency information sharing for CD operations.

Legal concerns have been raised as to whether Thunderstorm demonstrations, with this objective, would fully comply with U.S. law when they include advanced DoD sensors. A related question is whether advanced DoD sensors can legally be used in domestic CD operations when they are operated by U.S. military forces.

In this study, we sought to address both legal questions above. More specifically, we seek to answer legal questions that fall into two categories. First, does U.S. law restrict or prevent the use of DoD sensors in CD operations along the U.S. border? Here, we are also concerned with several caveats:

- If the sensor was not developed for CD operations
- If the sensor was developed using counterterrorism funds
- If a mission-based source of sensor development funding cannot be identified.

The second major question is: Does U.S. law restrict or prevent the use of DoD sensors or ISR capabilities in DoD technology demonstrations along the U.S. border? The type of technology demonstrations that we consider are those that would be used to assess the utility of DoD sensors under development that could support domestic civil authorities or U.S. military forces conducting counterinsurgency or counterterrorism operations overseas.

Our focus is on these two key questions because such issues have been raised in the past when RRTO has tried to evaluate new dual-use sensor technologies in demonstrations along the U.S. border.

Findings

We examined U.S. laws governing U.S. military CD support to federal, state, and local authorities and did not identify a legal basis for restricting the use of DoD sensors, which do not collect personally identifiable information or private information on U.S. citizens, in DoD or in joint DoD and Customs and Border Protection (CBP) demonstrations along the southern U.S. border, as long as these demonstrations do not directly involve DoD personnel searching, seizing, or arresting U.S. citizens.⁴ Furthermore, our analysis of U.S. law found that fiscal or appropriations law does not prohibit the use of DoD research, development, test, and evaluation (RDT&E) or private-sector internal research and development (IRAD) funds in technology demonstrations with a CD nexus, or restrict the use of a DoD sensor funded from a particular account.

Review of U.S. Law

Title 10 USC, Section 371, provides DoD broad authority to share information with law enforcement collected by DoD sensors during the normal course of military operations and

³ Section 1205 of P. Law 101-189, recorded as a note to Title 10, Section 124.

⁴ U.S. Code, Title 10, Section 375, "Restriction on Direct Participation by Military Personnel," added December 1, 1981.

training that “may be relevant to a violation of any Federal or State law.”⁵ Separate from normal military operations or training activities, U.S. law does not restrict the use of DoD sensors in domestic CD operations conducted by law enforcement agencies (LEAs) and supported with U.S. military forces, if a valid request for DoD CD support is made by an appropriate LEA official, as long as DoD is not directly engaged in law enforcement activities prohibited by Title 10 USC, Section 375, and as long as DoD sensor use is constrained to the geographic area along the U.S. border specified in Title 10 USC, Sections 124 and 374.⁶ We found no specific restrictions that pertain to sensor funding sources in either case.

As mentioned above, Title 10 USC, Section 124, designates DoD as the lead agency for D&M of targets suspected of transiting illegal drugs into the United States by aerial or maritime means. Title 10 USC, Section 374, also grants DoD the authority to detect and monitor surface targets suspected of smuggling illegal drugs into the United States, and specifies the geographic boundaries along the U.S. border where U.S. military units may conduct CD D&M operations.

The U.S. military has been granted additional authorities to support U.S. government CD operations on U.S. territory. These additional temporary authorities have been in place since 1991 (as defined in Section 1004 of the 1991 NDAA, as amended on December 31, 2011) and include the same geographic restrictions on where U.S. forces can conduct CD D&M operations as specified in Title 10 USC, Sections 124 and 374. This temporary provision of U.S. law grants DoD the authority to conduct any type of D&M operation within the specified geographic area, as long as a valid request for CD support is made by an appropriate LEA official.

Two other elements of the law that pertain to the use of the U.S. military within the borders of the United States are the Posse Comitatus Act (Title 18 USC, Section 1385) and Title 10 USC, Section 375 (mentioned above). Section 375 prohibits the direct participation of the U.S. military in a search, seizure, or arrest unless explicitly authorized in other parts of U.S. law. The Posse Comitatus Act states that it is a crime for an LEA official to use the U.S. military “willfully” to execute the law on U.S. territory, whereas Title 10 USC 375 prohibits the military units from performing law enforcement functions with U.S. territory unless specifically authorized by the President per Title 10 Sections 331 and 332. Both elements of the law are important for the purposes of our analysis because they govern how and when DoD sensors can be used, and how and when DoD is permitted to share real-time information over communication networks with LEA units, in support of LEA activities.

Some senior law enforcement officials have argued that it could be a violation of the Posse Comitatus Act if LEAs were to use real-time information provided by the U.S. military during the search, seizure, or arrest of a suspect, absent a valid LEA request for DoD support. This is one reason why Thunderstorm demonstrations would be halted temporarily and no real-time data would be shared with LEA if a suspect inadvertently entered the area of operation (and if no valid request and approval for DoD CD support to LEAs was in place).⁷ The legal basis for

⁵ U.S. Code, Title 10, Section 371, “Use of Information Collected During Military Operations,” added December 1, 1981.

⁶ Section 1004 of the 1991 NDAA, recorded as a note to Title 10, Section 374. All three sections of Title 10 stipulate the same geographic limit where DoD is authorized to conduct D&M operations, which is up to 25 miles into U.S. territory.

⁷ The second reason that Thunderstorm demonstrations are halted is the concern that DoD actions would be in violation of Title 10 USC, Section 375.

halting the demonstration stems from a concern that U.S. military access to real-time communications and monitoring data of the search, seizure, and arrest of a suspect would constitute the direct (and unapproved) participation of U.S. military personnel in these activities, and would therefore be a violation of the Posse Comitatus Act. However, if the Thunderstorm demonstration is conducted with the appropriate approvals in place (i.e., the 1004 approval process),⁸ then the demonstration could proceed in the event a suspect enters the area of operation, and real-time support could be provided to LEAs (just as in current ongoing LEA and DoD CD operations along the U.S. border). This information could then be used to evaluate the utility of these systems to support the real-time monitoring, seizure, and arrest of suspects.

Therefore, there appears to be no legal reason why a DoD sensor should be excluded from use in a Thunderstorm demonstration or in an actual CD operation as long as a valid request for support is made by an appropriate LEA official and so long as no personally identifiable information is collected. We also found no restrictions on the basis of how sensors were funded. Thunderstorm demonstrations are funded by RDT&E funds (BA3 [government, as opposed to private-sector] funds in particular), which permits the demonstrations to test sensors regardless of the mission that the technologies may be used for in the future. In contrast, there have at times been some restrictions on how actual CD operations can be funded, although these restrictions have been relaxed in the most recent NDAs signed into law in 2012 and 2013.

To be sure, sensors are ultimately scientific and engineering instruments—a sensor designed for one mission may be applicable and usable for other missions; however, a given sensor’s usefulness may not be determined until tested in a realistic operational environment.

Review of Department of Defense Policy

We also reviewed pertinent DoD policy governing CD operations. We found that gaps exist in DoD policy governing CD operations, tests, and demonstrations. While key policies do exist that govern U.S. military support to domestic CD operations (e.g., Chairman of the Joint Chiefs of Staff Instruction [CJCSI] 3710.01B and the Deputy Secretary of Defense memorandum in 2003⁹), these policies are necessary but not sufficient, for several reasons. First, CJCSI 3710.01B does not provide guidance on DoD technology demonstrations that have a CD nexus. Second, CJCSI 3710.01B applies only to the military departments and combatant commands, and not to the Office of the Secretary of Defense (OSD) nor to the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (OUSD[AT&L]) in particular (Thunderstorm demonstrations are RDT&E activities led by OUSD[AT&L]). The appropriate place to provide guidance for DoD technology demonstrations is in a DoD directive or instruction. However, existing DoD directives and instructions also do not address technology demonstrations with a CD nexus. In addition, some relevant sections of DoD CD directives and instructions have been canceled, and not replaced nor updated.

Another complication of DoD CD policy is the approval process for guiding CD operations and technology demonstrations with a CD nexus. In terms of CD operations, some of the approval processes and authorities are located in memoranda not codified in DoD policy and not easily accessible, and the relevant organizations discussed in the memoranda may have

⁸ Amendment to Title 10 USC, Section 374, “Additional Support for Counter-Drug Activities,” current amendment in force from fiscal years 2012 to 2014.

⁹ U.S. Deputy Secretary of Defense, “Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities,” Department of Defense Memorandum, Washington, D.C., October 2, 2003.

changed since the guidance was produced. In terms of DoD tests and technology demonstrations with a CD nexus (and not funded using CD funds), no DoD policy exists, requiring officials to apply the approval process for CD operations in an ad hoc manner to technology demonstrations that are deemed to fall within the CD mission space.

Recommendations

The Office of the Under Secretary of Defense for Policy (OUSD[P]) should update and streamline DoD CD policy by developing a single DoD directive that consolidates all relevant DoD CD policy. This directive should:

- Incorporate the 2003 Deputy Secretary of Defense memoranda into a directive.
- Establish an approval process for technology demonstrations with a CD nexus. This process should include a coordination and deconfliction mechanism for the technology demonstration authorities and the relevant joint task force.

One challenge with updating DoD CD policy is that important DoD authorities that are now current and in force and may not be renewed in future law. One way to address this possibility is to clearly identify which parts of DoD policy rely on the temporary authorities granted in Section 1004 of the 1991 NDAA, and which do not.

Recognizing that an update to policy may take time, we have several near-term recommendations:

- The DoD Office of the General Counsel should issue a memorandum of instruction to clarify the legal requirements for approving DoD sensor use in technology demonstrations with a CD nexus.
- If the DoD Office of the General Counsel declines to pursue this matter, the Secretary of Defense or Under Secretary of Defense for Policy could issue a policy memorandum in the interim that provides clear guidance on how the DoD acquisition community should conduct and seek approval for DoD technology demonstrations with a CD nexus.
- RRTO should focus Thunderstorm demonstration mission objectives on CD operations (as opposed to counterterrorism operations) to streamline the approval process.

Finally, we recommend that DoD and DHS develop an interagency/interdepartmental agreement to clarify the legal framework for technology demonstrations. This agreement would be signed by the appropriate DoD and DHS officials, such as OUSD(P) and/or OUSD(AT&L) within DoD and the Office of Technology Innovation and Acquisition within DHS.

Acknowledgments

This research would not have been possible without the efforts of Glenn Fogg, Director, Office of the Assistant Secretary of Defense, Research and Engineering (OASD/R&E), Rapid Reaction Technology Office (RRTTO). His insights regarding the approval process for the Thunderstorm series of exercises were instrumental in guiding this research.

We also owe a great deal of thanks to Lt Col Beverly Sloan, project manager for Thunderstorm Spirals, RRTTO, for her guidance and support. She made available to us her large library of DoD and DHS policy, as well as other relevant materials and background information. She has been involved in the day-to-day challenges associated with obtaining approval for the Thunderstorm series of demonstrations, and her detailed recounting of these travails has been particularly instructive in helping us identify key legal and policy challenges associated with this process.

We also thank Colonel Ermer, director, Emerging Capabilities Division, RRTTO, and Tracy O'Connor (RRTTO) for sharing their insights and advice throughout the course of this effort.

We express our gratitude to Ben Riley, the Principal Deputy, Deputy Assistant Secretary of Defense for Rapid Fielding, for allowing our participation in the Thunderstorm Senior Steering Group (SSG) and for providing us the opportunity to brief our efforts to members of the SSG. This interchange was instrumental in clarifying a number of key legal issues examined in this report.

Next, we extend our sincere thanks to Michael Keegan, Senior Counsel, Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS), for sharing his legal insights regarding modern interpretations of the Posse Comitatus Act. We owe similar thanks to our RAND colleague, Douglas Shontz, for his cogent legal review of an earlier version of this work.

We also thank Colonel Perry Sarver, in the Office of the Deputy Assistant Secretary of Defense for Counternarcotics and Global Threats. He helped clarify the approval process now in place for DoD counterdrug operational support to domestic law enforcement agencies.

We owe similar thanks to Jerry Walsh, in the Office of the Deputy Assistant Secretary of Defense for Homeland Security, for his review of our work and for helping us navigate the many offices in the Office of the Under Secretary of Defense for Policy that have or could have purview over counterdrug operations.

Lastly, we thank Ambassador Jim Dobbins, the former director of the RAND National Defense Research Institute (NDRI) International Security and Defense Policy Center; Eric Peltz, the acting director of the RAND NDRI International Security and Defense Policy Center; and Seth Jones and Olga Oliker, his associate directors, for their guidance during all phases of this research. We also thank Eric Landree and Michael Wermuth for their thorough

reviews of this report; our work is greatly improved as a result of their constructive reviews. And, finally, we thank Lovancy Ingram for her expert assistance in the preparation of this report.

Abbreviations

BA3	government
C3	command, control, and communications
CBP	Customs and Border Protection
CD	counterdrug
CJCS	Chairman of the Joint Chief of Staff
CJCSI	Chairman of the Joint Chiefs of Staff Instruction
COIN	counterinsurgency
CT	counterterrorism
D&M	detection and monitoring
DEA	Drug Enforcement Administration
DHS	Department of Homeland Security
DoD	Department of Defense
DoDD	Department of Defense Directive
DoDI	Department of Defense Instruction
FAA	Federal Aviation Administration
FCC	Federal Communications Commission
FY	fiscal year
GAO	Government Accountability Office
IRAD	Internal Research and Development
ISE	information sharing environment
ISR	intelligence, surveillance, and reconnaissance
JIATF	Joint Interagency Task Force
JTF	joint task force
LEA	law enforcement agency
MILPERS	military personnel
NDAA	National Defense Authorization Act
O&M	operations and maintenance
OSD	Office of the Secretary of Defense
OUSDP	Office of the Under Secretary of Defense for Policy

OUSD(AT&L)	Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics
PII	personally identifiable information
R&D	research and development
RDT&E	Research, Development, Test and Evaluation
RRTO	Rapid Reaction Technology Office
SAG	Senior Advisory Group
TRA	Technology Readiness Assessment
TRL	Technology Readiness Level
USC	United States Code

Introduction

Background

Recent technology advances have led to the development of new information collection, processing, and dissemination capabilities for Department of Defense (DoD) users. Because information technology is advancing at such a rapid pace, many of these new capabilities are not being developed in traditional acquisition programs of record. Instead, they are being developed and refined in experiments and technology demonstrations. This is due not only to the fact that important underlying technologies invented in the commercial world have utility for military operations, but also because many innovative ideas have been generated in the DoD research and development (R&D) community and by small companies.

It is important to evaluate any candidate new technology in a realistic operational environment and not just in the laboratory. This is necessary to enable senior decisionmakers to make development and deployment decisions based on high-quality and realistic performance assessment information and to enable military operators to evaluate the military utility of these new technologies in the proper context. For this reason, DoD acquisition policy and U.S. law mandate that operational testing be done in a realistic operational environment.¹ In this respect, the U.S. border provides such an environment for evaluating the utility of sensors and other information technologies for a variety of missions, such as counterdrug (CD) operations. The target set of interest along the U.S. border—drug smugglers who attempt to bring contraband or illegal weapons into the United States—resembles the target set of concern in counterinsurgency (COIN) and counterterrorism (CT) operations in many countries around the globe where U.S. forces are operating or could be in the future. While the operational problems are by no means identical, sensor technologies could potentially be dual-hatted in terms of their applicability and use. In addition, the desert Southwest in the United States provides an environment that, while not identical in flora and fauna to operational environments in the Middle East, for example, has many similar environmental characteristics that are important for testing and evaluating sensors. For example, do dust clouds degrade the performance of sensors that use microwaves or radio waves? Such dust storms are common in parts of the Middle East and can also occur in the desert Southwest. Dust storms can also provide poten-

¹ Title 10 USC, Section 2399, “Operational Test and Evaluation of Defense Acquisition Programs,” describes the responsibilities of the DoD Director of Operational Test and Evaluation for the testing of major defense acquisition programs. Title 10 USC, Section 139, defines the term “operational test and evaluation” as “the field test, under realistic combat conditions, of any item of (or key component of) weapons, equipment, or munitions for the purpose of determining the effectiveness and suitability of the weapons, equipment, or munitions for use in combat by typical military users.” U.S. Code, Title 10, Section 2399, “Operational Test and Evaluation of Defense Acquisition Programs,” added November 29, 1989; U.S. Code, Title 10, Section 139, “Director of Operational Test and Evaluation,” added September 24, 1983.

tial cover for drug smugglers attempting to enter into the country undetected. Therefore, it is not surprising that acquisition authorities in DoD are attracted to the southern U.S. border as a potential venue for demonstrating and testing the utility of new sensor technologies.

The DoD Rapid Reaction Technology Office (RRTO) has played an important role in developing and evaluating new intelligence, surveillance, and reconnaissance (ISR) capabilities. RRTO has, for example, spearheaded the development of new high-performance wide-area surveillance sensors for COIN operations. RRTO has recognized the utility of the southern border for evaluating potential new ISR technologies across a range of mission sets because of the realistic operational environment it provides.

New ISR capabilities developed by RRTO for one mission may have utility in another. For example, ISR technologies developed for COIN operations could also play an important role in CD operations (i.e., in border detection and monitoring [D&M] operations). RRTO recognizes that while such ISR capabilities may not have been originally developed for U.S. border control operations, they may have utility for CD operations along the U.S. border.² Indeed, a new sensor may be able to detect and monitor a wide range of targets, even if these targets exhibit different behaviors, are composed of different materials, or are covered by different materials or clothing. Consequently, it would be a mistake to label a particular type of sensor as a CT sensor, a CD sensor, or even a COIN sensor. Many sensors, in other words, may have a multi-mission capability. However, experimentation and careful evaluation of sensor performance in a realistic operational environment is needed to make such a determination.

The department responsible for securing the U.S. border is the Department of Homeland Security (DHS) and its Customs and Border Protection (CBP) component.³ The DHS Science and Technology (S&T) directorate has responsibility for developing new technologies for DHS. In theory, one could argue that there would appear to be little need for DoD to develop new technologies for domestic CD operations. However, DoD has a long history and considerable experience and expertise in developing new technologies for ISR missions, many of which could have value for domestic operations. To be sure, in many technology areas DoD's R&D capabilities are unmatched within the larger federal government. Therefore, the partnering between DoD and DHS in this area yields many potential benefits, particularly for domestic CD operations. In addition, because DHS, CBP, and the Drug Enforcement Administration (DEA) and other entities within the Department of Justice have significant operational experience in CD operations, it would also be beneficial if these other federal agencies participated in the operational evaluation of new technologies along the U.S. border through technology demonstrations. Finally, it should be noted that DoD has a responsibility to improve its D&M capabilities for CD operations. Congress has directed the Secretary of Defense to ensure that DoD adequately funds R&D activities in this area.⁴

² For the purposes of this report, we consider *counter-narcotics* and *counterdrug* (CD) to be the same. DoD policy uses both terms, but in this report we use CD to avoid confusion.

³ We note that CBP is a law enforcement agency.

⁴ This is a permanent provision first stated in Section 1205 of the 1990 National Defense Authorization Act (NDAA), recorded as a note to Section 124 of Title 10 (as amended December 31, 2012).

Thunderstorm Demonstrations⁵

To better understand the operational effectiveness of new ISR systems in operations along the U.S. border and coastline, RRTO has sponsored the Thunderstorm series of joint technology demonstrations. Thunderstorm demonstrations have taken place in Texas, Arizona, Florida, in U.S. coastal waters, and as far away as the Caribbean Sea. These Thunderstorm demonstrations provide a realistic operational environment to identify and evaluate new ISR technologies, including sensors, information processing and fusion capabilities, and communications systems for disseminating ISR data among dispersed units.

RRTO has regularly invited DHS and CBP units to participate in Thunderstorm demonstrations to assist in the evaluation of new ISR capabilities, to demonstrate new interagency information sharing concepts, and to improve interoperability between U.S. military and DHS CBP units.⁶

Thunderstorm spirals may focus on specific areas.⁷ For example, in Thunderstorm spiral 4.0, RRTO seeks to demonstrate the utility of a network of advanced sensors originally developed by DoD for COIN and CT operations along the U.S. border. This spiral also seeks to demonstrate intelligence and information collection systems within or over U.S. territory.

Legal Issues

Complex policy and legal restrictions come into effect when U.S. government information and intelligence collection systems are employed within or over U.S. territory and U.S. airspace or if these systems have the potential to collect information on U.S. citizens residing within the United States. The legal constraints for employing ISR systems within the boundaries of the United States are even more restrictive for the U.S. military. However, federal law, under certain conditions, does grant DoD the authority to conduct CD operations in specific foreign countries, and to support law enforcement agency (LEA) CD operations on U.S. territory provided that DoD does not engage directly in law enforcement activities.

Recent restrictions that some DoD decisionmakers have put into place regarding interagency information sharing in DoD technology demonstrations with a CD nexus may not accurately reflect the intent of U.S. law.⁸ In this regard, legal concerns have been raised that new sensors developed for other missions or those developed using non-CD-funding accounts cannot be used in domestic CD operations, on the grounds that such use could violate U.S. law. Others in DoD, however, dispute whether these legal concerns are valid, and worry that excessive restrictions on DoD sensors will create barriers to interagency information sharing that should not exist and that, in fact, may not be in compliance with White House policy on the implementation of an Information Sharing Environment (or ISE, in accordance with Title 6 of the U.S. Code).

⁵ We discuss Thunderstorm demonstrations in greater detail later in this report.

⁶ Consistent with U.S. law, RRTO does not transfer funds to DHS or CBP to support Thunderstorm activities.

⁷ Thunderstorm technology demonstrations are held periodically. Each demonstration is called a spiral, with the intent that capabilities are developed incrementally in each spiral.

⁸ Past Thunderstorm demonstrations have confronted legal challenges as part of the approval process.

Important legal questions regarding DoD CD operations are:

- Does U.S. law *restrict or prevent* the use of DoD sensors for CD operations along the U.S. border:
 - If the sensor is not developed for CD operations?
 - If the sensor is developed using CT or overseas contingency operations funds?
 - If the original sources of sensor development funding cannot be identified?
- Furthermore, does U.S. law *restrict or prevent* the use of DoD ISR sensors along the U.S. border in technology demonstrations that:
 - Assess utility of DoD sensors for support of civil authorities?
 - Assess utility of DoD sensors for DoD COIN operations?

A key related question is what type of funds can be used to support DoD CD operations, and whether DoD technology demonstrations with a CD focus can be funded using standard R&D accounts or other acquisition accounts.

In this study, we also examine whether current DoD policy may be leading to information sharing barriers that are more restrictive than those prescribed in U.S. law. It could be that DoD policy, and not law, may be preventing effective information sharing between U.S. government agencies operating along the U.S. border and may impose limitations on DoD technology demonstrations.

Purpose

This study began with the following broad high-level objectives:

- Identify key provisions of U.S. law that govern interagency information sharing.
- Identify specific parts of DoD and DHS policy that permit or restrict interagency sharing between DoD and DHS units operating along the U.S. border.
- Recommend a way ahead for enhancing interagency information sharing between DoD and DHS that is consistent with U.S. law.

As the study progressed, we focused our research on specific cases of interagency information sharing in CD operations and on the Thunderstorm series of technology demonstrations.

More specifically, this study examines the legal and policy restrictions that apply to employing DoD information collection and intelligence systems along the U.S. border for CD operations and in technology demonstrations with a CD nexus. In particular, we identify and examine legal constraints on using DoD sensors in U.S. border operations if the sensors were not developed for CD operations.⁹ In addition, the study identifies any limitations to using DoD sensors in U.S. border operations if the sensors were developed using CT funds. Finally, the study ascertains how federal law addresses the use of DoD sensors if a mission-based source of sensor development funding cannot be identified. Our examinations are necessarily centered on the sensor development mission and funding source because sensors are not normally

⁹ DoD develops relatively few sensors or other equipment specifically designed for CD operations, but develops a wide range of other sensors for other missions that may have applicability to CD operations.

designated as CT or CD sensors—as noted earlier, sensors can usually support many types of missions. In addition, such legal restrictions have been cited to assert that some types of DoD and DHS information sharing operations along the U.S. border would violate U.S. law.

Approach

Our first task was to identify and examine relevant federal law to find legal restrictions on the use of DoD sensors in U.S. CD operations and technology demonstrations. Next we examined relevant DoD policy to identify constraints and conditions placed on the use of DoD sensors in CD operations or technology demonstrations along the U.S. border. We compared the limitations in the policies to the legal constraints to determine whether DoD policy constraints are based on law. Next, we examined the Thunderstorm demonstration sensor approval process to determine the extent to which the process is based on law or policy. Our findings regarding the differences in law and policy and the basis of the Thunderstorm sensor approval process led to recommendations to improve both policy and the approval process.

Caveats

It is important to mention one caveat that constrains this research. In this study, we carefully analyzed U.S. law that pertains to ISR information collection and information sharing for CD operations and technology demonstrations. Additional laws apply to CT operations and interagency information sharing in support of CT activities; however, analysis of those laws is beyond the scope of our report. For example, many readers will be aware that the USA PATRIOT Act that was signed in 2001 governs many aspects of ISR collection and information sharing for domestic CT operations.¹⁰ We did not examine many aspects of the USA PATRIOT Act in this analysis. Furthermore, recent events precipitated by the disclosure of classified information by Edward Snowden have brought to light that secret case law exists that has been produced for many years by the U.S. Foreign Intelligence Surveillance Court (FISC).¹¹ This classified case law that has resulted from FISC court rulings and its interpretation of the USA PATRIOT Act are beyond the scope of this study.

Organization

We present the examination of federal law relevant to interagency information sharing and the use of DoD sensors along the U.S. border in Chapter Two. In this chapter, we analyze the law to determine the authorities given to U.S. military forces to conduct domestic CD operations and to share information with domestic law enforcement agencies. We also examine the restrictions established by the law on such operations and information sharing activities. Chapter Three contains a discussion of federal policy that governs DoD support to U.S. civil authorities and related policy relevant to the use of DoD sensors in CD border operations. In

¹⁰ The USA PATRIOT Act stands for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. See Public Law 107-56, USA PATRIOT Act, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, 2001.

¹¹ Eric Lichtblau, *New York Times*, 2013.

Chapter Three, we also examine whether DoD policy is consistent with U.S. law pertaining to domestic CD operations. Chapter Four presents a discussion on applying relevant guidance to Thunderstorm demonstrations and how Thunderstorm can be structured in different ways to comply with the law and with policy guidance. Chapter Five presents our findings and recommendations to improve relevant DoD policy and the Thunderstorm approval process.

Relevant U.S. Law

The policies of all federal departments and agencies must be consistent with federal statutory provisions. If U.S. law were static or unchanging over time, it would be relatively easy to ensure that DoD policy is consistent with the law. However, many parts of the law are amended each year. The U.S. Congress passes new laws to address ever-changing circumstances and priorities. Many laws passed by Congress are permanent in nature and enter into the U.S. Code. Other provisions are temporary and have been given explicit expiration dates by Congress. For example, some sections of the USA PATRIOT Act contain temporary provisions, as do many pieces of CD legislation. In this chapter, we review the overall legislative process and the permanent as well as temporary provisions of the law pertaining to interagency information sharing, CD operations, and acquisition and fiscal law pertaining to the development and use of DoD sensors. The examination of the latter subject is required because it is possible that acquisition or fiscal law could restrict the use of DoD sensors in domestic CD operations and related technology demonstrations conducted on U.S. territory.¹

The Legislative Process

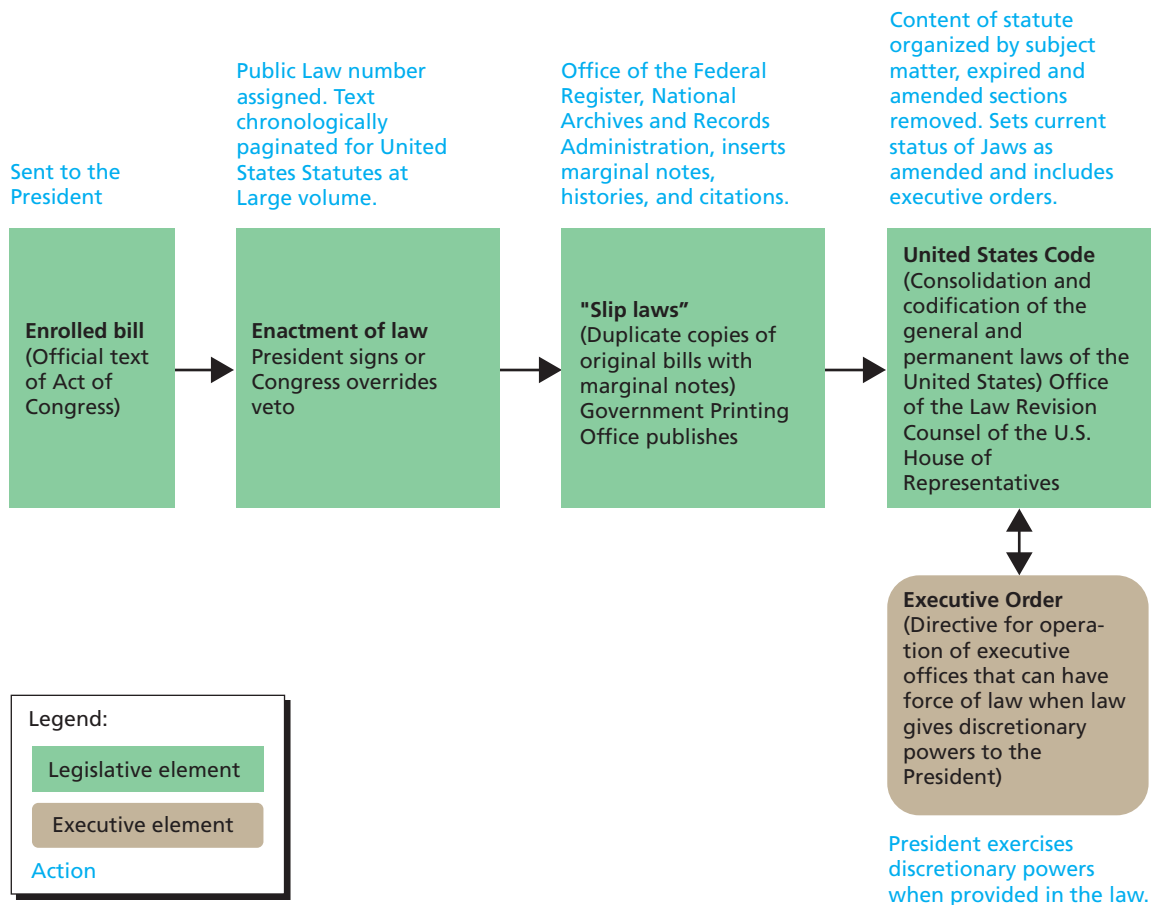
This section presents a brief summary of the legislative process to introduce the terminology applied to federal laws. The official text of an act of Congress is called an enrolled bill. The primary way that an enrolled bill is enacted into federal law is with the President's signature or with a congressional override of a presidential veto. Another way that an enrolled bill may become law is if the President does not sign the bill within ten days, unless Congress adjourns during the ten-day period.² Once an enrolled bill is enacted into law, it becomes a public law and is placed into the U.S. Statutes at Large. The Office of the Federal Register inserts marginal notes, histories, and citations to public laws, and these notated copies are called slip laws. The notations in the slip laws help the Office of the Law Revision Counsel of the U.S. House of Representatives place the text of U.S. Statutes at Large into the appropriate sections of the U.S. Code (USC). In this process, the slip laws are reorganized by subject matter, expired amendments are deleted, amended sections are removed, and executive orders are added where appropriate to form the authoritative version of the law, called the U.S. Code. There are 50 titles in

¹ Such legal restrictions have been voiced with concern that some types of DoD and DHS information sharing in ISR operations on the U.S. border would violate U.S. law. These objections have been raised by a legal counsel within DoD.

² If Congress adjourns during the ten-day period and the President does not sign the enrolled bill, then that is known as a "pocket veto." See Article 1, Section 7, Clause 2 of the U.S. Constitution.

the U.S. Code, and each title is composed of sections. Federal laws are commonly cited using the title and section designations of the USC. Figure 2.1 shows the legislative process that leads to the creation of the USC from the original legislation passed by Congress.

Figure 2.1
The Legislative Process



SOURCE: Adapted from Figure 1.2 in Daniel Gonzales, Carolyn Wong, Eric Landree, and Leland Joe, *Are Law and Policy Clear and Consistent? Roles and Responsibilities of the Defense Acquisition Executive and the Chief Information Officer*, Santa Monica, Calif.: RAND Corporation, MG-958-NAVY, 2010.

RAND RR551-2.1

Federal Laws Relevant to Information Sharing

Federal laws that are relevant to interagency information sharing and specifically to information sharing between DoD and DHS in Thunderstorm demonstrations include statutes applicable to a variety of topics such as: border control and protection, military cooperation with civilian law enforcement, interagency data and information sharing, military participation and support of domestic activities, and CD and CT operations. Our review of U.S. law indicated that several laws are relevant to the issues of this study:

- The National Security Act of 1947

- Military Cooperation with Civilian Law Enforcement Agencies Act of 1981³
- Homeland Security Act of 2002
- The Intelligence Reform and Terrorism Prevention Act of 2004
- Implementing Recommendations of the 9/11 Commission Act of 2007.

To identify these and related statutes, we used keyword searches of the USC and conducted interviews with officials in DoD and DHS with expertise in U.S. law. In addition to the U.S. Code, executive orders and White House and the Office of Management and Budget (OMB) memoranda provide further guidance on information sharing efforts.⁴ Shown in Table 2.1 are sections of the U.S. Code potentially relevant to this study. We examined these sections of the U.S. Code to determine their relevance to interagency information sharing with U.S. military and DoD organizations.

The subject of Title 6 is domestic security. This title establishes DHS and assigns its responsibilities. All but one of the sections of Title 6 shown in Table 2.1 have narrow or specific application to interagency information sharing. Additionally, all but one of these sections focus on interagency information sharing with other agencies; that is, they do not apply to DoD. For example, 6 USC Section 195b establishes a center for national biological surveillance. It requires the director of this new center to share information on biological events of national concern with other parts of DHS, but does not require or involve information sharing with DoD. The one section of Title 6 that is relevant to this study is Section 485, which we discuss below.

Title 8 covers the Immigration and Nationalization Service (INS) and border security. Section 1721 of Title 8 covers information sharing between the Department of State, DHS, and elements of the intelligence community. Section 1722 directs the INS to make the information systems used within this agency interoperable and also specifies some of the functionality these systems should have. Section 1723 of Title 8 establishes a commission to examine data interoperability issues. Although a range of information sharing issues is discussed in Title 8, none apply to DoD.

Title 12 applies to banks and banking. Section 1828b of Title 12 applies to bank agency information sharing and is not relevant to interagency information sharing with DoD.

Chapter 67 of Title 18 applies to the U.S. military and covers crimes and criminal procedures applicable to the military. Section 1385 of Title 18 is the Posse Comitatus Act, which we discuss in detail later in this report. Other parts of Chapter 67 are not relevant to the interagency information sharing issues that are the subject of this study.

Chapter 33 of Title 28 applies to the Federal Bureau of Investigation (FBI). Most sections of this chapter do not apply to the issues of concern to this study except possibly for Section 534, which is listed in Table 2.1. This section assigns the Attorney General the responsibility for collecting and preserving identification and criminal record information. It also authorizes the Attorney General to share this information with other authorized officials of the federal government as well as state and local law enforcement agencies. It does not explicitly authorize or restrict the exchange of information with DoD.

³ Codified in law in Title 10 USC, Chapter 18, “Military Support for Civilian Law Enforcement Agencies.”

⁴ See The White House, *National Strategy for Information Sharing and Safeguarding*, Washington, D.C., December 2012, and The White House, *Executive Order 13311: Homeland Security Information Sharing*, Washington, D.C., June 2003.

Table 2.1
Federal Laws Pertaining to Interagency Information Sharing

Title	Section or Chapter	Subject	Date Last Amended
Title 6 USC	195b	National Biosurveillance Integration Center	August 2007
Title 6 USC	482	Facilitating homeland security information sharing	2003
Title 6 USC	485	Information sharing	2010
Title 6 USC	580	Border interoperability demonstration project	August 2007
Title 8 USC	1379	Technology standard to confirm identity	May 2002
Title 8 USC	1722	Interoperable law enforcement and intelligence data system with name-matching capacity and training	May 2002
Title 8 USC	1723	Commission on Interoperable Data Sharing	May 2002
Title 10 USC*	Ch. 18	Military Support for Civilian Law Enforcement Agencies	January 2011
Title 10 USC*	124	Detection and monitoring of aerial and maritime transit of illegal drugs: Department of Defense to be lead agency	1991
Title 12 USC	1828b	Interagency data sharing	March 2000
Title 18 USC	Ch. 67	Crimes and Criminal Procedure	October 2009
Title 28 USC	534	Acquisition, preservation, and exchange of identification records and information	2011
Title 32 USC	112	Drug interdiction and counter-drug activities	2004
Title 46 USC	70107A	Interagency operational centers for port security	2010
Title 50 USC	404n-2	Terrorist Identification Classification System	2010
Title 50 USC	1825	Use of information	2008

* 10 USC provides specific guidance for sharing information between DoD and domestic civilian agencies.

Title 32 applies to the National Guard. There are no sections of this title that explicitly discuss interagency information sharing. However, Section 112 does apply to drug interdiction and CD activities of the National Guard. It covers personnel, funding, planning, and strength issues for this mission area, but does not touch on interagency information sharing issues.

Title 46 covers shipping regulations and law. Section 70107a establishes operation centers for port security with interagency responsibilities. It authorizes these centers to conduct maritime intelligence activities and information sharing consistent with the National Security Intelligence Reform Act of 2004 (6 USC 485) and Homeland Security Information Sharing Act (6 USC 481). The types of information that these centers are authorized to share include short- and long-range vessel tracking and transportation security incident response plans, and other activities as determined by the Secretary of Homeland Security.

Title 50 covers a wide range of topics pertinent to war and national defense, including the use of atomic weapons, the protection of information pertaining to nuclear materials, and intelligence matters. Section 404n-2 of this title directs the Director of National Intelligence (DNI) to

(A) establish and maintain a list of individuals who are known or suspected international terrorists, and of organizations that are known or suspected international terrorist organizations; and

(B) ensure that pertinent information on the list is shared with the departments, agencies, and organizations described by subsection (c) of this section.

(2) The list under paragraph (1), and the mechanisms for sharing information on the list, shall be known as the “Terrorist Identification Classification System”.⁵

This title authorizes the DNI to share this list, and information on the list, with other parts of the U.S. government, as the DNI considers appropriate.

Section 1825 of Title 50 pertains to the use of information in the criminal investigation of espionage activities of law enforcement officials and does not explicitly address interagency information sharing in military or CD operations.

Besides Chapter 18 of Title 10 USC, there is one other part of U.S. law that has broad implications for interagency information sharing between DoD and other government agencies—Title 6, Section 485. This part of U.S. law was motivated by findings of the 9/11 Commission, which noted that there was information available on 9/11 terrorists in different government agency databases that was never combined and synthesized to identify and locate the terrorists in time to prevent the attacks. After the publication of the findings of the 9/11 Commission,⁶ Congress passed the legislation for Title 6 USC 485 to enable and encourage better information sharing between federal agencies.

Title 6 USC 485 states

(1) The President shall—

(A) create an information sharing environment (ISE) for the sharing of terrorism information in a manner consistent with national security and with applicable legal standards relating to privacy and civil liberties;

(B) designate the organizational and management structures that will be used to operate and manage the ISE; and

(C) determine and enforce the policies, directives, and rules that will govern the content and usage of the ISE.⁷

Title 6 USC 485 also directs the President to create an ISE that is to be used to share terrorism information with federal, state, local, and tribal entities and the private sector:

⁵ Public Law 113-36, U.S. Code, Title 15, Section 404n-2, “Terrorist Identification Classification System,” added November 27, 2002.

⁶ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, Washington, D.C.: U.S. Government Printing Office, July 2004.

⁷ U.S. Code, Title 6, Section 485, “Information Sharing,” added December 17, 2004.

(2) Attributes

The President shall, through the structures described in subparagraphs (B) and (C) of paragraph (1), ensure that the ISE provides and facilitates the means for sharing terrorism information among all appropriate Federal, State, local, and tribal entities, and the private sector through the use of policy guidelines and technologies. The President shall, to the greatest extent practicable, ensure that the ISE provides the functional equivalent of, or otherwise supports, a decentralized, distributed, and coordinated environment that—

(A) connects existing systems, where appropriate, provides no single points of failure, and allows users to share information among agencies, between levels of government, and, as appropriate, with the private sector;

(B) ensures direct and continuous online electronic access to information; . . .⁸

After Title 6 USC 485 was passed, the White House issued a national strategy for information sharing and safeguarding.⁹ In that strategy, the President broadened the goals of the ISE beyond CT operations to include information used in CD operations, in other types of law enforcement activities, and for acquisition programs.

The Government Accountability Office (GAO) has tracked the progress of federal agencies in establishing the ISE since it was called for in Title 6 USC and has found progress to be uneven. For example, the GAO has found shortcomings in the sharing and integration of national security information across agencies:

Information is a crucial tool in national security and its timely dissemination is critical for maintaining national security. However, despite progress made in sharing terrorism-related information, agencies and private-sector partners do not always share relevant information with their national security partners due to a lack of clear guidelines for sharing information and security clearance issues.¹⁰

Furthermore, a separate GAO investigation found that a number of federal agencies had developed information processing and fusion centers to combat terrorism and illegal drug activity in the United States. However, it found that some of these fusion centers were not connected and were unable to share information.¹¹ Some of these interoperability issues cross federal agency boundaries and indicate a need for improving interagency information sharing.

A traditional view of military intelligence community and law enforcement roles and responsibilities is that the legal basis for each type of agency would be defined in separate parts

⁸ Title 6 USC 485.

⁹ The White House, *National Strategy for Information Sharing and Safeguarding*, Washington, D.C., December 2012; The White House, *Executive Order 13311: Homeland Security Information Sharing*, Washington, D.C., June 2003.

¹⁰ U.S. Government Accountability Office, *Interagency Collaboration: Key Issues for Congressional Oversight of National Security Strategies, Organizations, Workforce, and Information Sharing*, GAO-09-904SP, Washington, D.C., September 2009; U.S. Government Accountability Office, *Information Sharing Environment: Better Road Map Needed to Guide Implementation and Investments*, GAO-11-455, Washington, D.C., July 2011; U.S. Government Accountability Office, *Information Sharing: DHS Has Demonstrated Leadership and Progress, But Additional Actions Could Help Sustain and Strengthen Efforts*, GAO-12-809, Washington, D.C., September 2012.

¹¹ U.S. Government Accountability Office, *Information Sharing: Agencies Could Better Coordinate to Reduce Overlap in Field-Based Activities*, GAO-13-471, Washington, D.C., April 2013.

of the law and, in fact, the law would be written to minimize potential overlaps or conflicts in responsibilities. The Posse Comitatus Act is an example of this traditional clear demarcation between the roles and responsibilities for different parts of federal and state authorities. (We will discuss the Posse Comitatus Act in detail later in this report.)

Even prior to 9/11, Congress had identified the need for better information sharing and coordination between the U.S. military and LEAs. This is indicated by changes to U.S. law made in the 1980s (as they appear in Title 32 and Title 10 of the U.S. Code). Sections of Title 10 USC provide specific guidance on sharing information between DoD and domestic civilian agencies. We will examine this part of the law in detail in this report.

Federal Laws Relevant to Counterdrug Operations

In the 1980s, U.S. lawmakers became increasingly concerned about the illegal drug trade and the smuggling of drugs across U.S. borders into the United States. A concern expressed was that LEAs were increasingly unable to counter the growing sophistication of drug smuggling cartels on their own. In response, Congress passed a series of laws that provide DoD with significant CD authorities. In this, section we address both the permanent and temporary provisions of the law that pertain to DoD support of civil authorities for CD activities.

Title 10 United States Code

Shown in Table 2.2 are sections of Title 10 USC that provide DoD with important authorities and responsibilities in support of civil authorities.

Title 10 USC, Section 124, designates DoD as the single lead agency of the federal government for “the detection and monitoring (D&M) of aerial and maritime transit of illegal drugs into the United States.”¹² In effect, this provision is a tacit recognition that DoD has the best capabilities among all relevant federal agencies for detecting and monitoring air and maritime traffic entering the United States. It also states that these D&M responsibilities

shall be carried out in support of the counter-drug activities of Federal, State, local, and foreign law enforcement agencies.¹³

Equally important, Section 371 grants DoD the authority to provide any information collected during the normal course of training or operations to federal, state, and local LEAs.¹⁴ In addition, Section 371, Subsection B, requires DoD, “to the maximum extent practicable,” to take the needs of LEAs into account in planning for training and operations, and Subsection C requires DoD to provide relevant intelligence to LEAs “consistent with national security.”

Section 372 also grants the U.S. Secretary of Defense an important authority to make any equipment or base/research facility available to LEA. Because a research facility may include

¹² U.S. Code, Title 10, Section 124, “Detection and Monitoring of Aerial and Maritime Transit of Illegal Drugs: Department of Defense to Be Lead Agency,” added November 29, 1989.

¹³ U.S. Code, Title 10, Section 124, “Detection and Monitoring of Aerial and Maritime Transit of Illegal Drugs: Department of Defense to Be Lead Agency,” added November 29, 1989.

¹⁴ U.S. Code, Title 10, Section 371, “Use of Information Collected During Military Operations,” added December 1, 1981. See full text in Appendix C of this report.

Table 2.2
Sections of U.S. Law Pertaining to U.S. Military Support to Civil Authorities

Section	Year Last Amended	Subject
124	1991	The Department of Defense shall serve as the single <i>lead agency</i> of the Federal Government <i>for the detection and monitoring of aerial and maritime transit of illegal drugs</i> into the United States.
371	1988	DoD may provide to Federal, State, or local civilian law enforcement officials <i>any information collected</i> during the normal course of military training or operations.
372	2013	SECDEF may make available <i>any DoD equipment, base facility or research facility</i> to any civilian law enforcement official for law enforcement purposes.
373	1988	SECDEF may make DoD personnel available (1) <i>to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment...</i> ; and (2) <i>to provide such law enforcement officials with expert advice . . .</i>
374	2006	SECDEF may <i>make DoD personnel available for the maintenance of equipment for Federal, State, and local civilian law enforcement officials</i> . DoD personnel provided under this authority <i>may operate equipment to track surface traffic up to 25 miles within U.S. territory if the initial detection occurred outside of the boundary</i> .
375	1989	Restriction on direct participation by military personnel: The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter <i>does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law</i> .
2578	2002	A military vessel may be transferred or otherwise made available without reimbursement . . . to the Department of Homeland Security.

NOTES: Emphasis (italics) added by the author. SECDEF = Secretary of Defense.

DoD sensors under development, this authority would appear to enable DoD to share any sensor (even those under development) with local law enforcement, if such a capability could be of use in CD operations.

Section 373 allows DoD personnel to train and advise LEAs on the operation of equipment, whether this is equipment owned by LEAs or equipment provided by DoD.¹⁵

Section 374 provides the Secretary of Defense with additional authorities for sharing DoD personnel and for maintaining and operating equipment for LEAs: for specific detection, monitoring, and communications purposes; for aerial reconnaissance; for transportation of LEA personnel; and for the operation of LEA bases of operation. This section limits DoD authority to operate equipment (including DoD sensors) “to track surface traffic up to 25 miles within U.S. territory if the initial detection occurred outside of the boundary.”¹⁶

Section 375 places important restrictions on the direct participation of military personnel in some law enforcement activities. We discuss these restrictions in more detail later in this report.

¹⁵ U.S. Code, Title 10, Section 373, “Training and Advising Civilian Law Enforcement Officials,” added December 1, 1981. See full text in Appendix C of this report.

¹⁶ U.S. Code, Title 10, Section 374, “Maintenance and Operation of Equipment,” added December 1, 1981.

Relevant National Defense Authorization Acts

Permanent and temporary provisions have been added to the law pertaining to CD operations over time. These provisions can be found in the original legislation, the National Defense Authorization Acts (NDAA), passed from 1989 until now. The key NDAA that pertain to DoD support of CD operations are listed in Table 2.3. A complete list of all such NDAA is given in Appendix A of this report.

The 1989 NDAA directed DoD to become more involved in U.S. government CD operations. One of the provisions of this NDAA directed the “Establishment of command, control, communications, and computer networks for improved integration of law enforcement, active military, and National Guard activities.”¹⁷ This provision has been carried forward in subsequent NDAA and is still recorded as a temporary provision. However, a similar provision with nearly identical wording is included as permanent law as a note in Title 10 USC, Section 124.¹⁸

DoD has chosen to implement this provision by establishing three joint task forces (JTFs) that could provide command, control, and communications (C3) in support of U.S. military forces and LEA units operating in specific areas inside the United States and along U.S. borders. These JTFs provide C3 networks to link U.S. military units to LEA command and information processing centers. These JTFs were originally entitled JTF-4 (Key West, Florida), JTF-5 (Alameda, California), and JT-6 (El Paso, Texas); they are now called Joint Interagency Task Force (JIATF)–South (Key West, FL), JIATF-West (Honolulu, HI), and JTF-North (El Paso, Texas).¹⁹ In our judgment, these JTFs are now permanently authorized by law (Title 10 USC, Section 374).

Other parts of the 1989 NDAA were incorporated into permanent sections of the U.S. code, in Sections 371 to 380.

A key provision in the 1990 NDAA designated DoD the lead agency for the D&M of air and maritime traffic into the United States (see Table 2.3). This provision has been incorporated into permanent sections of Title 10 USC, Section 124. Another relevant provision in Section 1205 of the 1990 NDAA directs the Secretary of Defense to ensure that adequate R&D activities are devoted to technologies that improve DoD CD D&M functions (the responsibility defined in Title 10 USC, Section 124).²⁰ This provision is permanent and authorizes DoD to undertake R&D activities in this area. Such activities typically include technology demonstrations to verify that new systems and technologies operate effectively in a realistic operational environment.²¹

The 1991 NDAA enhanced authorities of the Secretary of Defense to support CD operations, including the authority to transport supplies, equipment, and local domestic law enforcement personnel to support CD operations. It also authorized DoD to provide training to LEA

¹⁷ Public Law 100-456, National Defense Authorization Act 1989, Section 1103, “Communications Network,” September 29, 1988.

¹⁸ Public Law 112-81, National Defense Authorization Act 2012, Section 1005, “Three-year Extension and Modification of Authority of Department of Defense to Provide Additional Support for Counterdrug Activities of Other Governmental Agencies,” December 31, 2011.

¹⁹ U.S. Northern Command, “Joint Task Force North Command Briefing,” El Paso, Tex., October 30, 2012.

²⁰ Public Law 101-189, National Defense Authorization Act 1990, Section 1205, “Research and Development,” November 29, 1989.

²¹ U.S. Code, Title 10, Section 2399, “Operational Test and Evaluation of Defense Acquisition Programs,” added November 29, 1989; U.S. Code, Title 10, Section 139, “Director of Operational Test and Evaluation,” added September 24, 1983.

Table 2.3
Key Provisions in National Defense Authorization Acts

NDAAs	Section	Subject
PL 100-456 NDAAs 1989	1102	"The <i>Department of Defense shall serve as the single lead agency</i> of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States."
	1103	"The President shall direct that command, control, communications, and technical intelligence assets of the United States that are dedicated to the interdiction of illegal drugs be integrated by the Secretary of Defense into an effective communications network."
	1104	"ENHANCED DRUG INTERDICTION AND LAW ENFORCEMENT SUPPORT BY THE DEPARTMENT OF DEFENSE: Revision of support for civilian law enforcement agencies." [Incorporated into Title 10 USC as Sec. 371-380]
PL 101-189 NDAAs 1990	1202	"DEPARTMENT OF DEFENSE AS LEAD AGENCY FOR THE DETECTION AND MONITORING OF AERIAL AND MARITIME TRANSIT OF ILLEGAL DRUGS" [Incorporated into Title 10 USC as Sec. 124]
	1205	"RESEARCH AND DEVELOPMENT: The Secretary of Defense shall ensure that <i>adequate research and development activities of the Department of Defense . . . are devoted to technologies designed to improve—</i> (1) the ability of the Department to carry out the <i>detection and monitoring function</i> of the Department under section 124 of title 10, United States Code, as added by section 1202; and (2) <i>the ability to detect illicit drugs and other dangerous and illegal substances that are concealed in containers.</i> "
PL 101-510 NDAAs 1991	1004	"ADDITIONAL SUPPORT FOR COUNTER-DRUG ACTIVITIES: (a) Support to other agencies-- During fiscal year 1991, 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) <i>if such support is requested—</i> (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."
PL 108-136 NDAAs 2004	1022	"AUTHORITY FOR <i>JOINT TASK FORCES</i> TO PROVIDE SUPPORT TO LAW ENFORCEMENT AGENCIES CONDUCTING <i>COUNTER-TERRORISM</i> ACTIVITIES. (a) Authority—A joint task force of the Department of Defense that provides support to law enforcement agencies conducting <i>counter-drug</i> activities may also provide, subject to all applicable laws and regulations, support to law enforcement agencies conducting <i>counter-terrorism</i> activities."
PL 111-383 NDAAs 2011	1012	"EXTENSION AND MODIFICATION OF <i>JOINT TASK FORCES</i> SUPPORT TO LAW ENFORCEMENT AGENCIES CONDUCTING <i>COUNTER-TERRORISM</i> ACTIVITIES."
PL 112-81 NDAAs 2012	1004	"EXTENSION AND AUTHORITY FOR <i>JOINT TASK FORCES</i> TO PROVIDE SUPPORT TO LAW ENFORCEMENT AGENCIES CONDUCTING <i>COUNTER-TERRORISM</i> ACTIVITIES."
	1005	" <i>THREE-YEAR EXTENSION</i> AND MODIFICATION OF AUTHORITY OF <i>DEPARTMENT OF DEFENSE</i> TO PROVIDE ADDITIONAL SUPPORT FOR <i>COUNTERDRUG</i> ACTIVITIES OF OTHER GOVERNMENTAL AGENCIES."
	1404	"Funds are hereby authorized to be appropriated for the Department of Defense for fiscal year 2012 for expenses, not otherwise provided for, for Drug Interdiction and Counter-Drug Activities, Defense-wide . . ."
PL 112-239 NDAAs 2013		"EXTENSION OF AUTHORITY FOR <i>JOINT TASK FORCES</i> TO PROVIDE SUPPORT TO LAW ENFORCEMENT AGENCIES CONDUCTING <i>COUNTER-TERRORISM</i> ACTIVITIES."

NOTE: Emphasis (italics) added by the author.

personnel, and to support the construction of roads, fences, and lighting to block drug smuggling along the U.S. border.

Section 1004 of the 1991 NDAA authorizes DoD to conduct

Aerial and ground reconnaissance outside, at, or near the borders of the United States.²²

The 2002 NDAA refined the geographic coverage that DoD D&M assets may provide for CD operations along the U.S. border:

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.

(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.²³

The geographic restrictions originally established in the 2002 NDAA have since become permanent and are part of Title 10 USC, Section 374.

Other important provisions in Section 1004 in the 1991 NDAA were temporary, but have been renewed and extended over time (current expiration date is 2014). An important temporary restriction that has remained in place since the 1991 NDAA is the requirement that *a valid request for CD support first be made by an appropriate federal, state, local, or tribal LEA official before a U.S. military unit can provide CD operations support.*

This original restriction was established in Section 1004 of the 1991 NDAA, and it has been carried forward with minor changes in wording since then. The complete statement of the restriction can be found as a note to Title 10 USC, Section 374 (which includes the updates included in Section 1005 of NDAA 2012), and reads:

ADDITIONAL SUPPORT FOR COUNTER-DRUG ACTIVITIES

“(a) SUPPORT TO OTHER AGENCIES.—During fiscal years 2012 through 2014, 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, tribal, or foreign law enforcement agency for any of the purposes set forth in subsection (b) if such support is requested—

²² Public Law 101-510, National Defense Authorization Act 1991, Section 1004, “Additional Support for Counter-drug Activities,” November 5, 1990.

²³ Public Law 107-107, National Defense Authorization Act 2002, Section 1004, “Additional Support for Counter-drug Activities,” December 28, 2001.

“(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, local, or tribal government, in the case of support for State, local, or tribal 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.”²⁴

The temporary Section 1004 provision (as amended and recorded as a note to Title 10 USC, Section 374) also states that U.S. military units operating under a valid LEA request can perform the following activities:

(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.

We interpret this Section 1004 provision as authorizing U.S. military units to conduct any type of CD D&M operations anywhere within the geographic restrictions established in Title 10 USC, Section 374, even if the operation is not one conducted during the normal course of military operations or training (the restriction present in Title 10 USC, Section 124), but only if an appropriate LEA official makes a request for CD operations support. Furthermore, it is also consistent to interpret this provision as authorizing DoD to share information collected by any type of DoD sensor used in the operation—including sensors under development (ones that would not be used during the course of normal military operations) with the requesting LEA.

Another NDAA relevant to DoD CD operations was signed in 2004. Section 1022, also a temporary provision, grants DoD JTFs that support LEAs in CD activities to also conduct CT operations in their area of responsibility.²⁵ More precisely, Section 1022 states that “a joint task force of the Department of Defense that provides support to law enforcement agencies

²⁴ U.S. Code, Title 10, Section 374 Note, temporary provision, “Additional Support for Counter-drug Activities.” The list of supporting NDAs and respective section numbers for this amendment are available in Title 10. A list of these NDAs is provided in Appendix A.

²⁵ Public Law 108-136, National Defense Authorization Act 2004, Section 1022, “Authority for Joint Task Forces to Provide Support to Law Enforcement Agencies Conducting Counter-Terrorism Activities,” November 24, 2003.

conducting CD activities may also provide, subject to all applicable laws and regulations, support to law enforcement agencies conducting CT activities.”²⁶ As is the case for CD operations, in order for a DoD JTF to support LEA in CT operations, *a valid request must be made by an appropriate LEA official*. DoD cannot initiate a CD or CT operation along the U.S. border on its own behalf.

The 2011 NDAA, Section 1012, extends and modifies this authority, and the 2012 NDAA, Section 1004, extends the authority of DoD JTFs to also support CT activities. In addition, Section 1005 of NDAA 2012 grants DoD a three-year extension and modifies the DoD authority to provide additional support for CD activities of other government agencies. These extensions (including the three-year extension) are the authorities originally granted by the 1991 NDAA (now shown as a note at the end of Title 10 USC, Section 374).

Relevant Fiscal Law

A legal question regarding DoD counterdrug operations that has been raised by some DoD decisionmakers is what type of funds can be used to support DoD CD operations or DoD technology demonstrations with a CD nexus.

National Defense Authorization Act Funding Guidance

Congress has typically established a CD operations and maintenance (O&M) funding account each year. In some years, pertinent language in the NDAA limited the amount of funds that could be spent from this CD O&M account on “Section 1004” authorized CD operations. For example, Section 1001 of the 1991 NDAA set the following funding limits:

Funds authorized to be appropriated pursuant to section 301(a)(14) for drug interdiction and counter-drug activities of the Department of Defense shall be available for the purposes and in the amounts specified as follows:

- (1) For operation and maintenance, \$585,600,000.
- (2) For procurement, \$345,300,000.
- (3) For National Guard pay and allowances, \$105,500,000.
- (4) For research, development, test, and evaluation, \$47,700,000.²⁷

The 1991 NDAA limited the amount of funds that DoD could spend on “Section 1004” support to:

(g) AVAILABILITY OF FUNDS- Of the amount made available for operation and maintenance under section 1001(1), \$50,000,000 shall be available to the Secretary of Defense for the purpose of carrying out this section.²⁸

²⁶ Public Law 108-136, National Defense Authorization Act 2004, Section 1022, “Authority for Joint Task Forces to Provide Support to Law Enforcement Agencies Conducting Counter-Terrorism Activities,” November 24, 2003.

²⁷ Public Law 101-510, National Defense Authorization Act 1991, Section 1001, “Drug Interdiction and Counter-drug Activities Funding,” November 5, 1990.

²⁸ Public Law 101-510, National Defense Authorization Act 1991, Section 1004, “Additional Support for Counter-drug Activities,” November 5, 1990, paragraph g.

The 1991 NDAA, Section 1004, as amended in 2011, establishes certain specific DoD CD contracting authorities.²⁹ That section also provides enhanced authority for ten types of support in particular (two of which are potentially relevant for Thunderstorm demonstrations: aerial and ground reconnaissance, and C3 networks)³⁰ and states that DoD may use existing contracting authority to provide LEA CD support if such contract authority exists for similar services or equipment:

(c) 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.³¹

Therefore, similar sensors (i.e., dual-use sensors) developed for other purposes could be used for LEA CD support (e.g., if an acquisition program is developing a sensor that will be used to support COIN operations, the same sensor can be permitted for use for CD support).

Section 1005 of the 1991 NDAA is also relevant for this area as it addresses the transfer of DoD defense equipment for other purposes. It states:

. . . the Secretary of Defense shall review the availability of equipment resulting from the withdrawal of United States forces from Europe and Asia for the purpose of identifying excess equipment that may be suitable for drug enforcement activities for transfer to appropriate Federal, State, or local civilian law enforcement authorities.³²

While much of the original 1991 NDAA language pertains to overseas CD operations and support to foreign military forces conducting operations against drug cartels, it did authorize up to \$50 million to be applied to CD operations along the U.S. border if a “Section 1004” authorization was obtained (i.e., if a valid request for support from an appropriate LEA was obtained). As in 1991, in some later years, the current in force NDAA restricted the source of funds that could be used by U.S. military forces in CD operations. For example, Section 303 of the 2004 NDAA specifies the amount of funds authorized for DoD CD activities within a stated fiscal year (FY),³³ and Section 1021 includes a maximum annual amount of support for all DoD CD activities worldwide.³⁴ We note that the authority is not limited by the source of funding for DoD equipment or the type of capability. Additionally, the authority is consistent with the broader declaration of authority established in Title 10 USC, Section 371.

²⁹ While these provisions are temporary, they are still in force (as of the publishing of this report) and are recorded as a note at the end of 10 USC 374.

³⁰ Public Law 101-510, National Defense Authorization Act 1991, Section 1004, “Additional Support for Counter-drug Activities,” November 5, 1990.

³¹ Public Law 101-510, National Defense Authorization Act 1991, Section 1004, “Additional Support for Counter-drug Activities,” November 5, 1990.

³² Public Law 101-510, National Defense Authorization Act 1991, Section 1005, “Transfer of Excess Defense Articles,” November 5, 1990.

³³ Public Law 108-136, National Defense Authorization Act 2004, Section 303, “Other Department of Defense Programs,” November 24, 2003.

³⁴ Public Law 108-136, National Defense Authorization Act 2004, Section 1021, “Expansion and Extension of Authority to Provide Additional Support for Counter-drug Activities,” November 24, 2003.

Such funding restrictions have been recently eliminated. Section 1005 of the NDAA 2012 authorizes a three-year extension for DoD “Section 1004” support to LEAs for CD operations to other government agencies. Furthermore, Section 1404 of the 2012 NDAA authorizes the expenditure of funds for DoD drug interdiction and CD activities defense-wide.³⁵ In other words, DoD may expend funds for CD activities in addition to those provided by the central CD O&M account.

Section 1404 of the 2012 NDAA states:

DoD DRUG INTERDICTION AND COUNTER-DRUG ACTIVITIES
- DEFENSE-WIDE.

– Funds are hereby authorized to be appropriated for the Department of Defense for fiscal year 2012 for expenses, not otherwise provided for, for Drug Interdiction and Counter-Drug Activities, Defense-wide, as specified in the funding table in section 4501.³⁶

Valid Funding Sources for Technology Demonstrations

A key remaining question is whether DoD technology demonstrations with a CD nexus must be funded using standard R&D accounts or may also be funded by other acquisition accounts. Key pieces of fiscal law pertinent to this question are detailed in the Table 2.4. First, we briefly review U.S appropriations law and the results of pertinent court cases that illustrate the types of expenses that are or are not allowed to be paid for by a federal appropriation. The first is the Purpose Statute—Title 31, Section 1301—which states:

(a) Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

(b) The reappropriation and diversion of the unexpended balance of an appropriation for a purpose other than that for which the appropriation originally was made shall be construed and accounted for as a new appropriation. The unexpended balance shall be reduced by the amount to be diverted.

(c) An appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation—

(1) is for rivers and harbors, lighthouses, public buildings, or the pay of the Navy and Marine Corps; or

(2) expressly provides that it is available after the fiscal year covered by the law in which it appears.

³⁵ Public Law 112-81, National Defense Authorization Act 2012, Section 1404, “Drug Interdiction and Counter-Drug Activities, Defense-wide,” December 31, 2011.

³⁶ Public Law 112-81, National Defense Authorization Act 2012, Section 1404, “Drug Interdiction and Counter-Drug Activities, Defense-wide,” December 31, 2011.

Table 2.4
Fiscal Law Applies Generally to All Department of Defense Appropriations and Specifically to Counterdrug Activities

Law or Other Publication	Sections of Interest	Subject	Date
Title 31 (Purpose Statute)	Sec 1301	(a) Appropriations shall be applied only to the objects for which the appropriations were made <i>except as otherwise provided by law</i> .	July 1984
Principles of Federal Appropriations Law (GAO)	p. 4–11	An appropriation for the extension and remodeling of the State Department building was not available to construct a pneumatic tube delivery system to the White House.	March 2013 (last update)
	p. 4–20	When an acquisition appropriation is made, the appropriation extends to all related costs, unless funding is provided elsewhere or such use of the funds is explicitly prohibited by Congress.	
Conference Report 107-732 accompanies H.R. 5010 (2003)	Sec. 8079	Civil Air Patrol funds may be used for operational and training drug reconnaissance missions for other government agencies; and for equipment needed for mission support or performance.	October 2002
H.R. 1473 (2011)	Sec. 8045	<i>No DoD funds</i> for drug interdiction or counter-drug activities may be transferred to any other department or agency except as specifically provided in an appropriations law.	April 2011 (PL 112-010)

NOTE: Emphasis (italics) added by the author.

(d) A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made.³⁷

Table 2.4 also includes two key aspects of Federal Appropriations Law from the GAO Red Book, including case law from court cases where funding decisions made by federal government acquisition managers were challenged in court. An important court case in this area illustrates where an appropriation was disallowed upon court appeal because it violated the Purpose Statute (second row in Table 2.4). The second case cited from the GAO Red Book shown in the third row of Table 2.4 gives acquisition program managers broad authority to expend funds in their acquisition account to pay for all related costs of the appropriation, unless a specific use of those funds is explicitly prohibited elsewhere in the law. Finally, it is important to note that specifically when it comes to DoD CD activities and appropriation accounts, it is illegal for DoD to transfer those funds to another government agency.

DoD support to LEAs that is provided by active duty military forces is paid for out of a DoD military O&M appropriations account. Technology demonstrations are not operational activities, and are usually not classified as such in DoD funding documents. Technology demonstrations are used to support the research and development of new systems and are therefore acquisition activities that should be paid for out of an acquisition funding account.

With respect to technology demonstrations, DoD Financial Management Regulation 7000.14-R notes that acquisition programs can be supported by the following budget categories:

³⁷ U.S. Code, Title 31, Section 1301, “Application,” added September 13, 1982.

Research, Development, Test and Evaluation (RDT&E); Procurement; Operation and Maintenance (O&M); Military Personnel (MILPERS); and Military Construction (MILCON).³⁸ In Thunderstorm demonstrations, subsystems and prototypes are integrated and tested, and these can come directly from contractors or from DoD acquisition programs. Test equipment, test personnel, and other test specific costs in Thunderstorm demonstrations are funded by BA3 (government as opposed to private-sector) funds (RDT&E) and not O&M or CD (and therefore are not subject to Section 1004 restrictions).

Specifically, RRTO, the director and sponsor of Thunderstorm demonstrations, uses BA3 funds to fund test personnel, field test preparation, and test and evaluation activities. All of these are valid uses of BA3 (government) or Internal Research and Development (IRAD) (private-sector) funds. We also note that the U.S. border provides a realistic testing environment to test COIN and CD sensors, and by law acquisition programs must conduct realistic operational testing.³⁹ Therefore, we judge the use of BA3 funds for Thunderstorm, unless restricted by law for some other reason (besides fiscal law), to be a valid use of DoD RDT&E funds.

The funds used to transport and demonstrate systems at Thunderstorm demonstrations come from different funding sources. All private-sector vendors “pay to play” (e.g., provide their own funding to support their participation) in Thunderstorm demonstrations, and no DoD procurement funds are involved. Contractors who bring their own sensors to Thunderstorm have in general used their own corporate internal R&D (IRAD) funds (and not government funds) for sensor development. The use of such private corporate funds in a DoD technology demonstration is not restricted by U.S. law.

It is important to note that the 2012 NDAA (Section 1404) does not restrict the use of RDT&E funds for CD operations, nor have we identified any such restriction in previous NDAAs signed into law. Furthermore, Section 1205 of the 1990 NDAA directs DoD to perform R&D activities to improve the ability of the department to carry out the D&M functions assigned to in Title 10 USC, Section 124.⁴⁰

Therefore, in accordance with the Purpose Statute, Thunderstorm demonstrations along the U.S. border are a legal and valid use of RDT&E funds as long as the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (OSD[AT&L]) does not transfer funds to other government agencies.⁴¹

To summarize the above discussion, the temporary “Section 1004” provision provides DoD the authority to conduct CD operations along the U.S. border as long as a valid request from an appropriate LEA official is made. Other parts of the law determine the amount and types of the funds that DoD may use to support U.S. military operations carried out under the “Section 1004” authority. It is important to note that in FY12, DoD JTF and non-JTF units were authorized to conduct CD operations using funds from multiple sources by the 2012

³⁸ U.S. Department of Defense, *DoD Financial Management Regulation 7000.14-R*, Volume 2B, Budget Formulation and Presentation (Chapters 4–19), Washington, D.C., July 2013.

³⁹ U.S. Code, Title 10, Section 2399, “Operational Test and Evaluation of Defense Acquisition Programs,” added November 29, 1989; U.S. Code, Title 10, Section 139, “Director of Operational Test and Evaluation,” added September 24, 1983.

⁴⁰ Public Law 101-189, National Defense Authorization Act 1990, Section 1205, “Research and Development,” November 29, 1989, included as a note to 10 USC Section 124.

⁴¹ U.S. Department of Defense, *DoD Financial Management Regulation*, DoD 7000.14-R, Volume 11A, Washington, D.C., July 2013.

NDAA, Section 1404. None of these current or past funding restrictions apply to DoD technology demonstrations funded with RDT&E or private-sector IRAD funds.

Restrictions on the Use of Military Forces for Domestic Law Enforcement Activities

There are two key provisions in the law that govern the use of U.S. military forces in support of domestic law enforcement activities. The first and oldest of these is the Posse Comitatus Act. The second provision is contained in Title 10 USC, Section 375. In this section, we address both provisions, beginning with a discussion of the Posse Comitatus Act.

The Posse Comitatus Act

The Posse Comitatus Act (Title 18 USC, Section 1385, “Use of Army and Air Force as posse comitatus”) states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.⁴²

Passed in 1878, the Posse Comitatus Act provides a clear demarcation between the roles and responsibilities of the U.S. military and those of state and local law enforcement agencies. At its essence, the act prohibits either LEAs or anyone else from “willfully” using the Army or Air Force to serve as a posse comitatus, except where expressly authorized by federal law. This act originally applied only to the U.S. Army, and was modified to apply to the U.S. Air Force when the service was established; DoD policy since has extended its application to all branches of the U.S. military.

Just as with volunteer fire departments, in early U.S. history the presiding law enforcement official of a jurisdiction could call upon the local citizenry for assistance in enforcing the law and could form a posse comitatus. Originally, the Posse Comitatus Act was enacted to prevent Army troops from monitoring polling places during post-reconstruction in the South. It is important to note that prior to its passage, Army troops were used in U.S. territory during the 1800s in a number of states under the direction of the president. Most of those cases may have involved the use of the Army in sparsely populated parts of the country where local LEAs were particularly weak. Between 1877 and 1945, there were reportedly 125 cases where the U.S. military was used in domestic law enforcement activities.⁴³ Most, if not all, of these cases were authorized under other parts of U.S. law, such as the insurrection statute.⁴⁴

Title 10 United States Code, Section 375

Another important provision of the law that restricts the use of U.S. military in law enforcement activities is Title 10 USC, Section 375:

⁴² U.S. Code, Title 18, Section 1385, “Use of Army and Air Force as Posse Comitatus” (otherwise referred to as The Posse Comitatus Act), originally passed in 1878. A *posse comitatus* is the body of persons that a peace officer of a county is empowered to call upon for assistance in preserving the peace, making arrests, and serving writs.

⁴³ Gary Felicetti and John Luce, “The Posse Comitatus Act: Liberation from Lawyers,” *Parameters, The Army War College Quarterly*, Vol. 34, No. 3. Autumn 2004, pp. 100–101.

⁴⁴ U.S. Code, Title 10, Section 332, “Use of Militia and Armed Forces to Enforce Federal Authority,” derived from Act July 29, 1861.

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.⁴⁵

In general, this provision of the law prohibits the use of the military to search, seize, or arrest U.S. citizens or other persons on U.S. territory. However, as described earlier in this chapter, the U.S. military can provide indirect assistance and support to LEAs in accordance with Title 10 USC, Sections 371–374.⁴⁶ Of note, Section 371 states:

The Secretary of Defense may, in accordance with other applicable law, provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.⁴⁷

Restrictions on the Use of Electronic Surveillance by U.S. Military Forces

Are there other parts of the law that prevent the U.S. military from using some forms of electronic surveillance in support of LEAs in CD operations along the U.S. border? To be sure, many methods of electronic surveillance have been developed and deployed to support U.S. military operations abroad. Generally speaking, there are many forms of electronic surveillance. Some forms collect personally identifiable information (PII) or private information on individuals (e.g., biometrics sensors, such as iris scans), some collect private communications (e.g., voice recordings), and some collect general surveillance information that cannot be tied directly to individuals without the use of further law enforcement information (e.g., aircraft video of vehicle traffic). As it pertains to use on U.S. soil, some of these means of electronic surveillance may be illegal for private citizens to use and can only be used by LEAs if a search warrant is executed and signed by the proper court.⁴⁸ These domestic restrictions on the use of electronic surveillance equipment have been put into place to protect the Fourth Amendment rights of U.S. citizens and the PII of U.S. citizens (Privacy Act of 1974).⁴⁹ Those means of electronic surveillance, which are legal only when an authorized LEA has obtained a search

⁴⁵ U.S. Code, Title 10, Section 375, “Restriction on Direct Participation by Military Personnel,” added December 1, 1981.

⁴⁶ U.S. Code, Title, 10, Section 371, “Use of Information Collected During Military Operations,” Section 372, “Use of Military Equipment and Facilities,” Section 373, “Training and Advising Civilian Law Enforcement Officials,” and Section 374, “Maintenance and Operation of Equipment,” all added on December 1, 1981.

⁴⁷ U.S. Code, Title 10, Section 371, “Use of Information Collected During Military Operations,” added December 1, 1981.

⁴⁸ U.S. wiretapping law varies by state. Some states, such as New York, make it a crime to record or eavesdrop on an in-person or telephone conversation unless one party to the conversation consents to the recording (see, for example, N.Y. Penal Law, Article 250, Offenses Against the Right to Privacy, Section 250.05, “Eavesdropping”). Other states, such as California, make it a crime to record or eavesdrop on an in-person or telephone conversation unless all parties to the conversation consent to the recording (see, for example, California Penal Code, Sections 630–638).

⁴⁹ The Fourth amendment: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S.

warrant, are illegal for the U.S. military to use on U.S. territory if there is a reasonable expectation that the electronic surveillance system would detect and collect PII and/or monitor the private communications of U.S. citizens. As a result, if an LEA official willfully requests that a U.S. military unit collect and share electronic surveillance information on a suspect with DoD equipment that collects PII or private information on the suspect without a court order, the requesting LEA official would be violating the Fourth Amendment and the Posse Comitatus Act.⁵⁰

There are exceptions that would allow for the U.S. military to use DoD sensors on U.S. territory. For example, sensors that do not collect PII or private communications of citizens are allowed if they are used in the normal course of military operations or training on U.S. territory (as implied in 10 USC 371). Such sensors can also be used by private companies (e.g., video surveillance of highway traffic from aircraft). Furthermore, when on public property there is no expectation of privacy, and therefore government surveillance of public property is not considered to be a search.⁵¹

There are other electronic surveillance considerations. Sensors that collect electronic surveillance information are advancing rapidly. Many of these advanced sensors are of interest to DoD and can help U.S. military forces perform their missions more effectively in actual combat, and hence are of interest for testing in venues such as Thunderstorm demonstrations. In addition, U.S. citizens are using a growing number of electronic, wireless, and digital communications devices, networks, and applications. These can be subject to electronic surveillance by a variety of means. In many respects, these technological advances have outstripped the traditional legal framework used to constrain their use and are introducing new legal challenges when considered for use by the U.S. military or other government agencies on U.S. soil.

For example, the FBI has launched a \$1 billion facial recognition project (the Next Generation Identification [NGI] program).⁵² Some states are already submitting data to support the NGI program, and privacy advocates are concerned that people with no criminal record will become logged in the system. The Electronic Privacy Information Center has filed a Freedom of Information Act lawsuit against the FBI to obtain documents about NGI.⁵³

Legal challenges are also pending for other new forms of electronic surveillance that do not capture PII or private information directly, but which can capture “metadata” associated with private communications, vehicle movements, or the movements of individuals on private and public property. License plate readers (LPRs) offer such an example. Private companies operate LPRs and then sell access to LEAs, but John Dalinsky, president of the now-defunct company Plate Scan, stated that there are no real guidelines for handling LPR data.⁵⁴ U.S. Immigration and Customs Enforcement has awarded a \$25,000 contract to another LPR com-

Constitution, Amendment IV, 1791. See also U.S. Code, Title 5, Section 552a, “Records Maintained on Individuals” (also referred to as the Privacy Act of 1974), added December 31, 1971.

⁵⁰ Comment by Michael Keegan, CBP Senior Counsel, during Thunderstorm Senior Steering Group Meeting, April 10, 2013.

⁵¹ Supreme Court of the United States, *Oliver v. United States*, 466 U. S. 170, 1984.

⁵² William G. McKinsey, *Next Generation Identification, Bigger-Better-Faster*, Federal Bureau of Investigation, Criminal Justice Information Services Division, 2013.

⁵³ Electronic Privacy Information Center, “Face Recognition,” web page, no date (accessed December 5, 2013).

⁵⁴ Cyrus Farivar, “Your Car, Tracked: The Rapid Rise of License Plate Readers,” *Ars Technica*, September 27, 2012.

pany, Vigilant Video. The DEA says that LPR information can be stored for up to two years and shared with other federal agencies and local police.⁵⁵ Other agencies (e.g., the New York State Police) state that there are no limits on how long the data can be retained.⁵⁶ This indicates that data retention limits appear to be ad hoc from agency to agency and are not yet guided by law or regulation. The American Civil Liberties Union (ACLU) is concerned that if these LPR databases are used for tracking the movements of individuals, they can be used to build a comprehensive picture of the movements of U.S. citizens, which is an alleged violation of the Privacy Act.⁵⁷

Additionally, the collection of cell phone call metadata presents similar concerns. The monitoring of private communications within the United States is considered a search for Fourth Amendment purposes and therefore requires a warrant from an appropriate court. However, in traditional wireline telephone networks, pen register and trap-and-trace devices do not require a warrant, as these record only information such as the dialing number and the location of the caller, and not the contents of the call. Cell phone call metadata, however, contain more information and can be used to track the movements of the caller. The ACLU has also alleged that police departments throughout the country have routinely violated Americans' privacy rights through warrantless cell phone tracking. Some local governments claim the authority to collect cell phone call metadata of American citizens without a warrant. And, recently, a federal appeals court ruled that government authorities could extract historical location data directly from telecommunications carriers without a search warrant.⁵⁸

It would not be surprising if innovative industry firms and defense contractors do not propose to test new forms of electronic surveillance, such as those described above, to enhance DoD D&M capabilities along the U.S. border or for application in COIN operations overseas. Some new types of D&M sensors may fall into the gray legal areas mentioned above. In this report, we will not provide a legal judgment concerning what new types of D&M sensors could be legally used by DoD in CD operations along the U.S. border. We do note however, that such legal restrictions, if they exist, would not apply to their use in overseas COIN or CT operations in a combat zone.

Summary of Legal Analysis

There is a wide range of disparate legal provisions that govern and restrict the use of U.S. military forces and associated DoD sensors operated by these forces on U.S. territory. U.S. law mandates that U.S. military units share information with other government agencies when it can provide assistance in their mission (6 USC 384). U.S. law also stipulates that U.S. military units can share *any information* collected “during the normal course of military training or operations that may be relevant to a violation of federal or state law within the jurisdiction of

⁵⁵ G. W. Schulz, “DEA Installs License-plate Recognition Devices Near Southwest Border,” *Ars Technica*, July 11, 2012.

⁵⁶ Cyrus Farivar, “Your Car, Tracked: The Rapid Rise of License Plate Readers,” *Ars Technica*, September 27, 2012.

⁵⁷ David Perera, “Storing and Sharing License Plate Reader Scans Challenges Americans’ Privacy,” *FierceGovernmentIT*, July 17, 2013.

⁵⁸ Somini Sengupta, “Warrantless Cellphone Tracking Is Upheld,” *New York Times*, July 30, 2013.

such officials.”⁵⁹ While the U.S. military is encouraged to share information with LEAs under approved circumstances, the U.S. military is not permitted to directly participate in some enforcement activities (i.e., search, seizure, arrest, or similar activity).⁶⁰

Furthermore, if the U.S. military is not conducting routine training or operations on U.S. soil, there may be restrictions on the type of support that can be provided to domestic civilian authorities. For example, the Secretary of Defense is prohibited from providing such support if it would have an adverse effect on military preparedness.⁶¹ Since the early 1990s, U.S. law has encouraged DoD to provide support to domestic CD operations conducted by LEAs, and has also provided funds within the DoD budget for such support. However, the 2012 NDAA stipulates the need for a valid request from an appropriate LEA official for U.S. military support to CD activities.⁶² The provision of such DoD support on U.S. territory must be in accordance with other parts of U.S. law described earlier, including restrictions on the use of certain types of DoD sensors collecting PII or private communications of U.S. citizens.

⁵⁹ U.S. Code, Title 10, Section 371, “Use of Information Collected During Military Operations,” added December 1, 1981.

⁶⁰ U.S. Code, Title 10, Section 375, “Restriction on Direct Participation by Military Personnel,” added December 1, 1981.

⁶¹ U.S. Code, Title 10, Section 376, “Support Not to Affect Adversely Military Preparedness,” added December 1, 1981.

⁶² Public Law 101-510, National Defense Authorization Act 1991, Section 1004, “Additional Support for Counter-drug Activities,” November 5, 1990, and as recorded as a note in Title 10, Section 374, as amended December 31, 2012.

Relevant Department of Defense Policy

DoD policy can be issued in a number of forms: DoD directives (DoDDs) or instructions (DoDIs), memoranda signed by the Secretary of Defense or Deputy Secretary of Defense, or policy issued by the Chairman of the Joint Chiefs of Staff (CJCS). These two types of memoranda are the only DoD memoranda recognized as DoD policy and having the associated authority. DoDDs, DoDIs, and memoranda issued by the Secretary of Defense or the Deputy Secretary of Defense apply to various members of DoD. CJCS policy is issued in the form of Chairman of the Joint Chiefs of Staff Instructions (CJCSIs). Generally speaking, CJCSIs apply only to the members of the military departments and combatant commands. Finally, it should be noted that the vast majority, but not all, of DoD policy is unclassified and publicly available.

Department of Defense Directives and Instructions

DoD has a large body of policy that has been in place for many years that governs the support that U.S. military units can provide to civil authorities. Table 3.1 shows the DoDDs and DoDIs that represent authoritative policies issued by the Office of the Secretary of Defense (OSD).

In this chapter, we present only the summary of our analysis of DoD policy that is relevant to the question of interagency information sharing and DoD support to civil authorities in CD operations.¹ The corpus of DoD policy is large and covers many policy areas, and DoD policy is not strictly organized by distinct policy areas. As a result, multiple guidance documents can cover related policy issues. Our analysis process was to conduct keyword searches on the entire set of DoD policy to identify and examine those most relevant to our core research questions. Through that process, we identified the policies listed in Table 3.1, and we now examine these documents in detail.

We note that some key policy documents in this area were signed in the 1980s (e.g., DoDD 5200.27, DoD 5240 1-R, and DoDD 5525.5), but other documents have been released more recently. Three primary DoD directives and instructions that have guided DoD support to civil authorities:

- DoDD 5525.5 (1986): includes DoD support to civil authorities for counternarcotic operations

¹ DoD military units can support civil authorities in several other ways and for several other missions besides CD and CT missions. In this report, we consider such support only for CD missions.

Table 3.1
Department of Defense Policies Relevant to Department of Defense Support to Civil Authorities

Document	Date	Subject
DoDD 5200.27	Jan. 7, 1980	Acquisition of Information Concerning Persons and Organizations Not Affiliated with the Department of Defense
DoD 5240 1-R	Dec. 1982	Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons
DoDD 5525.5*	Jan. 15, 1986	DoD Cooperation with Civilian Law Enforcement Officials
DoD 3025.1-M	June 1994	Manual for Civil Emergencies
DoDD 5160.54	Jan. 20, 1998	Critical Asset Assurance Program (CAAP)
DoDD 1100.20	April 12, 2004	Support and Services for Eligible Organizations and Activities Outside the Department of Defense
CJCSI 3710.01B	Jan. 26, 2007	DoD Counterdrug Support
DoDD 5240.01	Aug. 27, 2007	DoD Intelligence Activities
DoD JOC	Oct. 1, 2007	Department of Defense Homeland Defense and Civil Support Joint Operating Concept
DoDD 3025.18*	Dec. 29, 2010	Defense Support of Civil Authorities (DSCA)
DoDD 5210.56	Apr. 1, 2011	Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order, or Counterintelligence Activities
DoDD 5200.31E	Aug. 10, 2011	DoD Military Working Dog (MWD) Program
DoDI 3025.16	Sept. 8, 2011	Defense Emergency Preparedness Liaison Officer (EPLO) Programs
DoDI 3025.21*	Feb. 27, 2013	Defense Support of Civil Law Enforcement Agencies

* DoDI 3025.21 incorporates and cancels DoDD 5525.5 (which addresses CD activities). However, DoDI 3025.21 does not apply to counternarcotic activities (which we interpret to be the same as CD activities), and DoDD 3025.18 does not apply to counternarcotic operations that fall under section 1004 of Public Law 101-510 (1991) (again, we interpret counternarcotic operations to be the same as CD operations).

- DoDD 3025.18 (2010): covers a broad range of missions, but does not apply to counternarcotic operations.
- DoDI 3025.21 (2013): covers a broad range of defense support to domestic LEAs.

DoDD 5525.5 was a major component of policy on DoD support to civil authorities. However, this directive was published before the JTFs that support civil authorities were established in 1989, which is when DoD was designated the lead agency for CD operations detection and monitoring. Section 1004 of the 1991 NDAA established additional JTFs and authorized additional categories of support they can provide to LEAs beyond CD.

In February 2013, DoDD 5525.5, which covers DoD support to civil authorities for domestic counternarcotic/CD operations, was canceled and incorporated by DoDI 3025.21. However, DoDI 3025.21 states prominently in the opening sections of the document that it “does not apply to counternarcotics activities.”² Nevertheless, later sections of the document still include a discussion of CD operations, including language taken directly from

² U.S. Department of Defense, *Defense Support of Civilian Law Enforcement Agencies*, DoDI 3025.21, Washington, D.C., February 27, 2013, p. 2.

DoDD 5525.5.³ Therefore, DoDI 3025.21 is self-contradictory. If the former disclaimer in DoDD 5525.5 is accepted on face value, this new directive may leave a gap in DoD CD policy (in the next section, we discuss other DoD policy documents that apply to this area, but not to all parts of DoD). Nevertheless, given the dated language of DoDD 5525.5 inserted into DoDD 3025.21, the subsequent cancellation of DoDD 5525.5, and the language contained up-front in DoDI 3025.21, one is left to conclude that there is no longer any overarching DoD directive or instruction governing DoD CD operations.

Other Relevant Department of Defense Policy

Separate from these directives and instructions, there are two other important policy documents that provide guidance to U.S. military units and policymakers on CD operations: CJCSI 3710.01B, “DoD Counterdrug Support,” and the 2003 Deputy Secretary of Defense memorandum titled “Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities.”⁴

The Deputy Secretary of Defense memorandum designates the Under Secretary of Defense for Policy (USD[P]) as the approval authority for all requests for Title 10 USC CD support to LEAs, except where authority is delegated per CJCSI 3710.01B. Specifically, per CJCSI 3710.01B, the Secretary of Defense retains approval authority for the following:

- (1) All DOD support requiring the transfer of operational control (OPCON) of forces between combatant commanders, except as otherwise described and delegated herein.
- (2) Requests for listening and observation posts and mobile patrols.
- (3) Requests (pursuant to reference b, section 1004(b)(6) (as amended), or otherwise) to target or track suspicious buildings, vehicles, vessels, or persons in the United States to provide their continuing coordinates to LEAs or to conduct systematic and deliberate observation on a continuing basis, unless the activity is a proper continuation of an approved ground, aerial, or maritime detection and monitoring mission under provisions of 10 USC 124 (reference a). The restriction against these types of activities (see reference c and 18 USC 1385) is not intended to preclude approval of continuing visual observation from a fixed point on the ground as a part of otherwise approved military training missions but may limit it.
- (4) Requests (pursuant to reference b, section 1004(b)(6) (as amended)) for the monitoring of suspected illegal drug air, sea, and surface traffic bound for the United States (for hand-

³ For example, see discussion of illegal drugs on page 10 of DoDD 5525.5 and page 35 of DoDI 3025.21. (U.S. Department of Defense, *DoD Cooperation with Civilian Law Enforcement Officials*, DoDD 5525.5, Washington, D.C., January 15, 1986; U.S. Department of Defense, *Defense Support of Civilian Law Enforcement Agencies*, DoDI 3025.21, Washington, D.C., February 27, 2013.)

⁴ CJCSI 3710.01B does not apply to OSD(AT&L), which is the body that funds and organizes Thunderstorm demonstrations; the Deputy Secretary of Defense memorandum applies to both OSD(AT&L) and OSD Policy. See Chairman of the Joint Chiefs of Staff, *DoD Counterdrug Support*, CJCSI 3710.01B, Washington, D.C., January 26, 2007, and U.S. Deputy Secretary of Defense, *Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities*, Department of Defense Memorandum, Washington, D.C., October 2, 2003.

off to an LEA) first detected outside the boundary of the United States to within 25 miles of US territory (including 25 miles from the 12 nautical mile territorial sea limit).⁵

The Deputy Secretary of Defense memorandum also establishes criteria for approving support requests. Such requests for support must meet the following criteria:

- Must have a valid CD activities nexus.
- Must be militarily unique.
- Must have training value.
- Must have limited duration.
- Federal law must authorize the department to provide the requested support.
- DoD personnel may provide support as long as that support improves unit readiness and mission capability.

Additionally, all support requests shall include the “source of funds” to be used to conduct the CD operation. Consistent with CJCSI 3710.01B, the memorandum asks that funding sources be identified and does not stipulate that only CD funds be used for such missions.

This Deputy Secretary of Defense memorandum is now the only DoD policy document that provides overarching guidance to the entire department on the subject of CD operations. At least in some aspects of DoD policy, it is the practice of the department to incorporate directive memoranda issued by the Secretary of Defense and the Deputy Secretary of Defense into current or new DoD directives or instructions. Unfortunately in the case of this directive memorandum governing CD operations, this practice has not been followed.

CJCSI 3710.01B, “DoD Counterdrug Support,” was published on January 26, 2007, and is “current as of 28 January 2008.” It institutionalizes CD support under specific delegation of authority from the Secretary of Defense and covers CD activities of the military departments and combatant commands authorized under the permanent provisions of Chapter 18, and many of those under Section 1004, except for those specific ones, among others, reserved specifically to the Secretary of Defense listed above. As this is a direct Secretary of Defense delegation of authority, it becomes, by its terms, the principal DoD policy document for CD support activities. However, it does not apply across the entire defense establishment.

CJCSI 3710.01B specifies the approval process for DoD CD operational support and covers CD D&M missions conducted 25 miles within the U.S. border. The instruction also names a wide range of sensors that geographic combatant commands may authorize for use in D&M missions. The instruction stipulates that requests for support must “originate with a federal, state, or local government agency that has responsibility for CD operations” and have a “valid CD activities nexus.” Required information for mission approval or changes includes “DoD funding source (including specific project code) and estimated funding amount, if applicable.” CJCSI 3710.01B also states that “It is imperative that DoD CD funds be obligated only for the specific activity for which appropriated and transferred. Support provided must be IAW [in accordance with] reference b [NDAA 2002] or other statutory authority.”⁶ We note that the

⁵ Chairman of the Joint Chiefs of Staff, *DoD Counterdrug Support*, CJCSI 3710.01B, Washington, D.C., January 26, 2007.

⁶ Chairman of the Joint Chiefs of Staff, *DoD Counterdrug Support*, CJCSI 3710.01B, Washington, D.C., January 26, 2007, p. A-18.

2012 NDAA authorizes DoD to appropriate funds for expenses, not otherwise provided for in the defense-wide funding account, for CD activities.

Summary of Relevant Law and Policy

Figure 3.1 provides a timeline that shows the legal and policy authorities for DoD CD support to LEA. The figure illustrates that DoD has authorized DoD to conduct domestic CD operations now for over three decades.

Our examination of relevant law and policy yields several observations. Relevant U.S. law has changed annually—much more frequently than DoD CD policy—and there appear to be disconnects between law and policy governing CD operations and technology demonstrations. As described above, DoD is still authorized by law to conduct domestic CD operations. Relevant sections of DoD CD policy have been canceled, and have not been replaced. As noted in this chapter, DoDD 5525.5 (1986) addressed CD support to civil authorities, but was canceled and incorporated into DoDI 3025.21 (2013). Furthermore, DoDI 3025.21 does not apply to counternarcotics/CD activities. The military departments and combatant commands can still request approval for and conduct CD operations in support of LEAs, in compliance with an overarching DoD policy (CJCSI 3710.01B). However, when only DoD directives and instructions are examined, one can conclude that a significant gap in policy has been created by these recent changes in DoD directives and instructions, because no overarching authoritative CD DoD directive or instruction applies across the entire defense establishment.

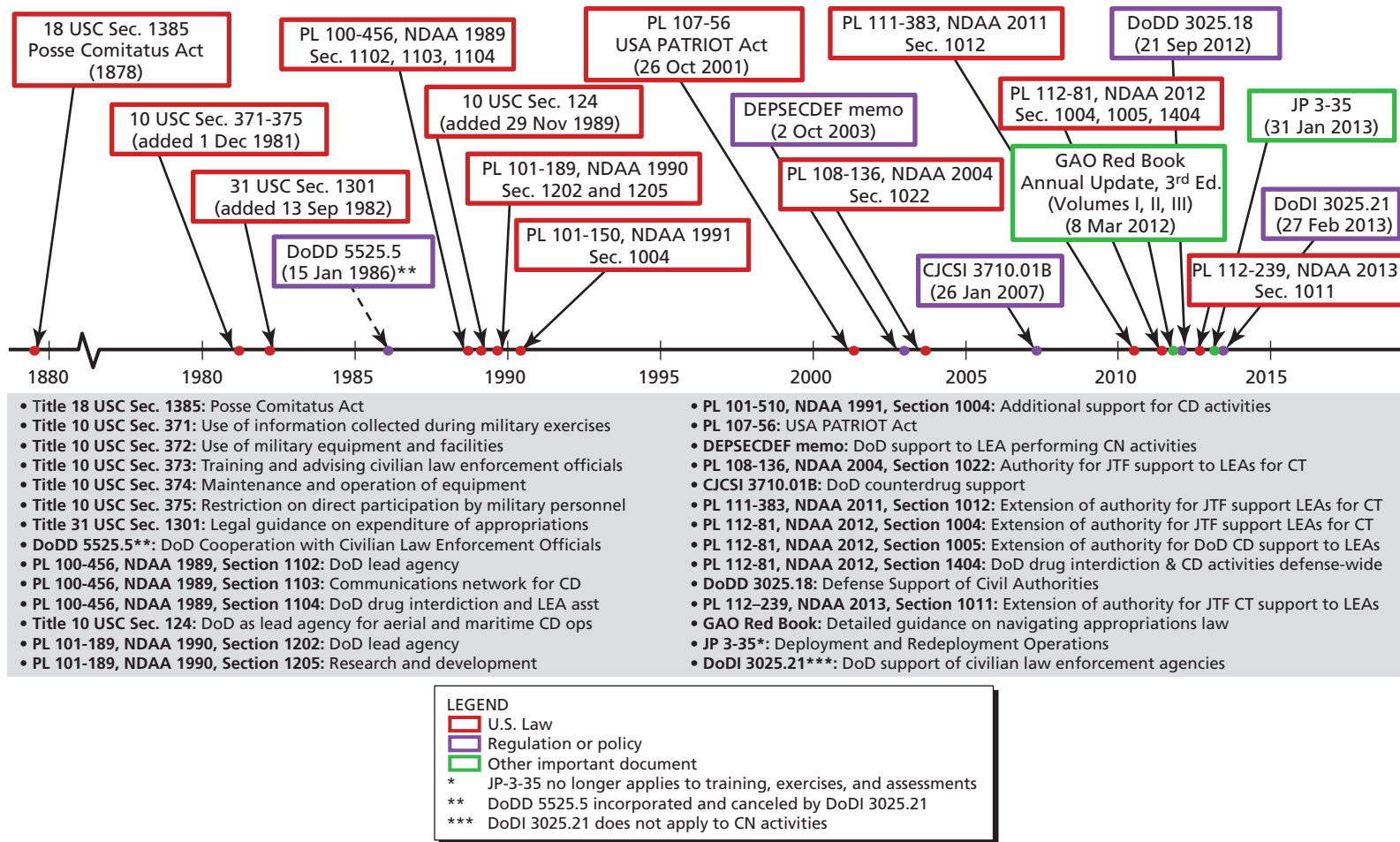
CJCSI 3710.01B (2007) and the Deputy Secretary of Defense memorandum (2003) do address CD operations, but both policy documents are relatively dated. In addition, the 2003 Deputy Secretary of Defense memorandum is “well hidden,” relatively speaking, and is not readily available to many members of the department, including members of the acquisition community. While the existence of the memorandum is well known and is used day-to-day by the key offices in OSD that oversee DoD counterdrug operations, it took a considerable amount of digging by this research team to uncover it.

Perhaps more importantly, neither CJCSI 3710.01B (2007) nor the 2003 Deputy Secretary of Defense memorandum addresses technology demonstrations with a CD focus, nor has the Deputy Secretary of Defense memorandum been formally entered as a DoD instruction, which would make it more readily available to a broader part of the DoD policy and acquisition communities.

All these factors contribute to a muddled approval process and poor understanding in some parts of DoD of the appropriate authorities for technology demonstrations that have a CD mission focus. More generally, DoD policy addresses mission approval authority for operational CD missions but lacks provisions for approving DoD specific technology demonstrations or joint DoD-DHS technology demonstrations that, as an output, could have implications for CD operations conducted by local LEAs.

Despite the confusing nature of policy in this area, in our review of relevant DoD policy we found no policy restrictions that prevent RRTTO from conducting a technology demonstration with a CD operations focus. In this regard, it is relevant to note that no CD funds are used to support Thunderstorm demonstrations. In addition, DoD policy appears to contain no restrictions for specific types of DoD sensors that can be used in actual or live CD missions

Figure 3.1
Timeline of Legal and Policy Authorities



RAND RR551-3.1

that support LEAs or which are evaluated or tested in DoD technology demonstrations. We have found no such CD line-item budget funding restrictions in U.S. law or in DoD policy.

Thunderstorm Demonstrations and Approval Processes

The commercial world and even academia are rapidly developing new technologies that may have important implications for defense and homeland security. Much of this development effort is not specifically targeted for defense or homeland security or being done to meet specific needs and requirements of DoD or DHS acquisition programs; these efforts are taking place outside of the traditional acquisition system. Even for some of the R&D work done by DoD research labs, sometimes there is not a clear path for transitioning these technologies and efforts into operational capabilities. As a result, an important contributor to the rapid fielding of capabilities is technology demonstrations.

Thunderstorm Goals

The purpose of Thunderstorm is to provide an enduring technology demonstration venue to

- identify new, emerging, and transformational ISR technologies
- demonstrate sensor, fusion, and display capabilities
- improve processing, exploitation, and dissemination concepts of operation.¹

Thunderstorm participants have come from DoD, industry, interagency, academia, and international audiences. It is in the interest and intent of RRTTO to be as inclusive as possible so that the widest range of innovative technologies can be evaluated.

In past Thunderstorm technology demonstrations, RRTTO has worked in concert with other organizational partners at the federal level to evaluate new technologies and to demonstrate systems that provide or enable interoperability between DoD and these other organizational partners. Important organizational partners in past Thunderstorm demonstrations have been DHS and CBP, and future spirals anticipate their continued participation. An important consideration in planning for new demonstrations is developing a streamlined and transparent approval process that will enable the latest ISR, sensor, fusion, and display technologies to be evaluated, and also will enable such evaluation results to be shared with all relevant organizational partners.

Thunderstorm demonstrations are designed to provide a realistic operational environment to evaluate new capabilities and technologies. Thunderstorm is a cost-effective demonstration for the host and participants: Participants “pay-to-play,” while DoD and DHS benefit from

¹ For more background on Thunderstorm demonstrations, see, for example, “RFI – THUNDERSTORM Technology Demonstration,” *FedBizOpps.gov*, November 8, 2013.

the display and evaluation of new technologies that they may choose to invest in and further develop for use by operational forces. This also serves to benefit the contractors and academic researchers, as it would be prohibitively expensive for them to develop a realistic operational environment on their own for testing their technologies.

Thunderstorm can potentially lead to the very quick transition of technologies from the laboratory to the field. DoD has long used demonstrations as a means to help transition technologies from the lab to operational capabilities. DHS stands to benefit through this relationship with DoD by identifying technologies used in Thunderstorm that would benefit DHS missions.

The Thunderstorm demonstrations can occur in any domain—an air, space, land, or maritime environment—and they typically take place along the U.S. border but can also extend far from the U.S. border. To the extent that DoD may have a counter-piracy mission in the Gulf of Aden, technologies for that kind of mission can be evaluated in this kind of venue. In other words, Thunderstorm is not focused on a specific mission—indeed, it has broad applicability across a range of possible missions that could occur at home or abroad. For example, Thunderstorm demonstrations with a maritime focus could be a valuable venue for evaluating new ISR technologies for future maritime operations abroad. In the most recent demonstrations, Thunderstorm has evaluated sensor technologies in a complex and realistic operational environment where drug smugglers or insurgents could try to enter the United States by both land and sea.

To be sure, Thunderstorm is not just about evaluating sensors in a complex operational environment. It is also about data fusion and producing a common operational picture using a wide range of sensors and evaluating how well data fusion works in a complex operational environment. It is especially pertinent to evaluate data fusion capabilities in a realistic operational environment, as opposed to a laboratory setting. Data fusion algorithms work by combining information from different sensors into a single integrated or common operational picture. The data that sensors produce in the laboratory environment tend to be “clean” data that do not contain false targets and are degraded because of weather or terrain conditions. The data that sensors produce in the field are often much “dirtier”: Possible target detections may be less accurate, may contain less information, and may actually refer to objects or persons that should not be classified as targets. Data fusion algorithms that work well with clean data may therefore not work well at all with realistic, dirty data. It is very difficult to replicate such dirty data in the laboratory unless “canned” data from a previous operational field test are used. And if canned data are used, it is possible for contractors to game the system and optimize their data fusion algorithms to work against such a limited test data set. In other words, it is almost impossible to replicate all of the complexities of the real world in a laboratory setting. This is why, particularly for data fusion, it is so important to evaluate new technologies in a true operational field environment.

As stated above, one purpose of Thunderstorm demonstrations is to identify new, emerging, and transformational ISR fusion and display technologies and also to improve processing, exploitation, and dissemination concepts of operation. To achieve these goals, a realistic operational environment is an essential ingredient.

Thunderstorm Options and Associated Counterdrug Test Approval Issues

Thunderstorm can be used to demonstrate the value of new and dual-use technologies for actual missions. As explained above, Thunderstorm is not constrained to only one or two DoD missions. However, to focus our analysis, we have chosen to investigate options for structuring Thunderstorm technology demonstrations for just one mission area—CD operations. We have done this to determine how the demonstration can be assessed to be compliant with U.S. law so that it can be readily approved by DoD authorities. Furthermore, a Thunderstorm demonstration that is focused on CD operations would also be effective at demonstrating new DoD and DHS information sharing concepts with new DoD sensor and interoperability technologies.

We made this choice for two reasons: (1) The CD mission resembles the COIN mission in many essential respects (and the COIN mission is a core DoD mission that U.S. deployed forces are executing today); and (2) past and future planned Thunderstorm events have or will take place along the U.S. border, where the CD mission is a high priority. In addition, other federal agency partners have a high interest in this mission area, and Thunderstorm can be used to demonstrate that information from advanced DoD sensors can be shared effectively to support domestic CD missions.

Thunderstorm could be structured in several ways to streamline the approval process for conducting such a demonstration along the U.S. border. In the vignettes below, we examine some of the options for structuring the demonstration. In the next few diagrams, we outline these options and highlight notional information flows for Thunderstorm demonstrations that would take place or which would have to be prevented (depending on what agreements are reached on the structure of Thunderstorm).

The first option, depicted in Figure 4.1 is one that has been used by RRTO to structure past demonstrations in order to obtain approval for conducting the demonstration at all.² In this case, RRTO has used role players and scripted scenarios to replicate actual insurgents or drug smugglers. Vignette 1 is a fully simulated demonstration with role players, where simulated data are shared with LEAs. There are no live targets as part of this demonstration.³

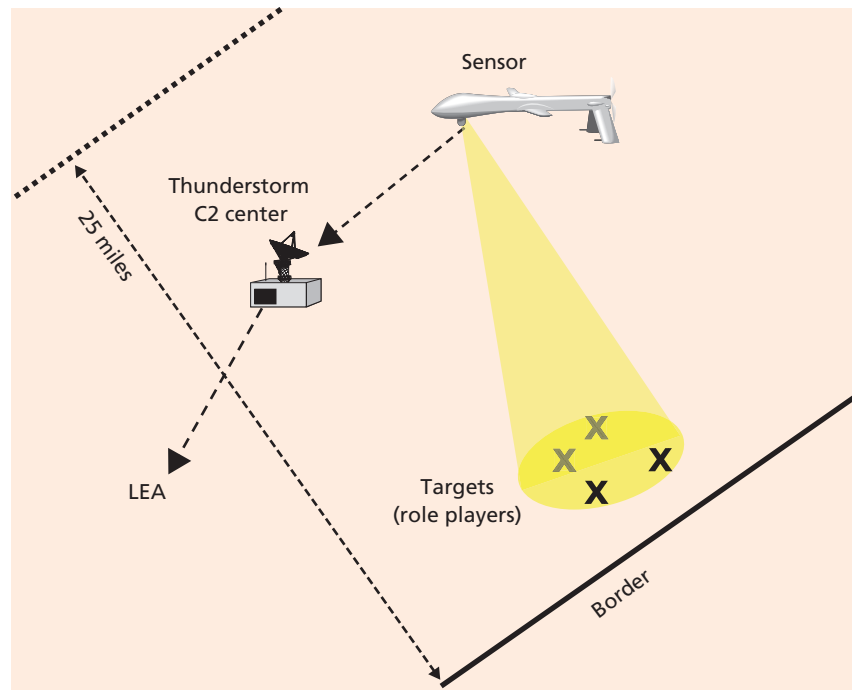
As a result for Vignette 1, the only required approvals for such a demonstration are the use of public land⁴ along with any spectrum use approvals from the Federal Communications Commission (FCC) and associated airspace approvals from the Federal Aviation Administration (FAA). Consistent with our review of U.S. law and DoD policy, there is no requirement to obtain approvals for the use of any specific type of DoD sensor in such a demonstration, and such approval does not hinge upon the source of funds that was used to develop the DoD sensor. This determination has been confirmed in discussions with the Office of the Deputy Assistant Secretary of Defense for Counternarcotics and Global Threats. Vignette 1 could be used to demonstrate new information sharing concepts and interoperability technologies with other organizational partners, such as CBP, but would not use real-time sensor data on live targets, as it relies on scripted activity.

² The approval process for past Thunderstorm demonstrations has proven to be problematic, at least in part because of some of the policy issues that have been identified earlier in this report.

³ Here, we define live targets as a person or vehicle detected entering the United States along a section of the U.S. border where there are no controlled entry points and where scripted role players are not scheduled to appear.

⁴ Here we refer to necessary federal agency approvals required for the use of federal public lands. Additional approvals may be required for public state land (i.e., state parks).

Figure 4.1
Vignette 1: Technology Demonstration with Role Players



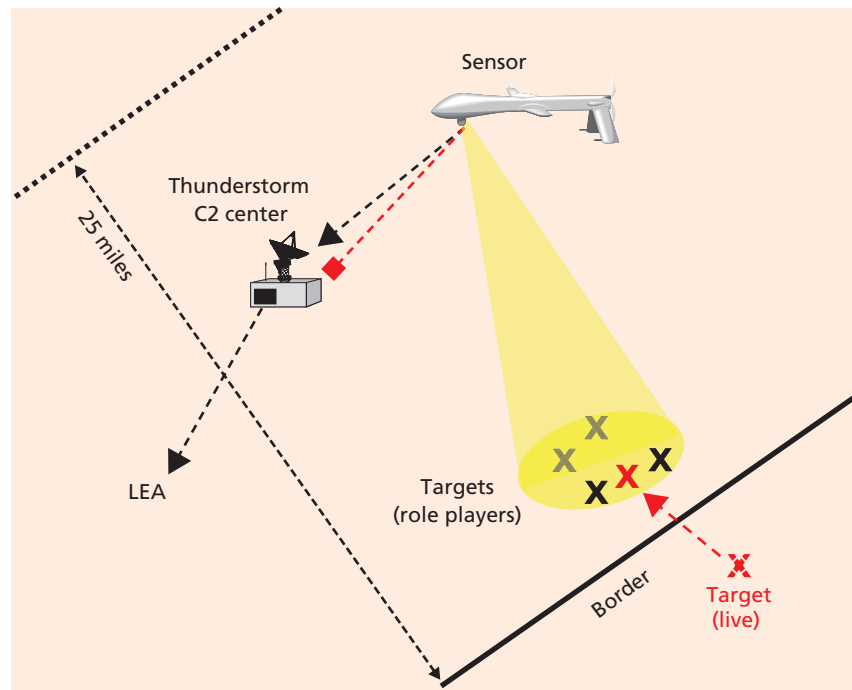
RAND RR551-4.1

Vignette 2, depicted in Figure 4.2, is also a fully simulated demonstration with role players, where simulated data are shared with LEAs. It is a slight variation of Vignette 1. In Vignette 2, if live targets are detected, the demonstration immediately ceases; no live target data are shared with LEA, and no added DoD support is provided to any law enforcement official. As with Vignette 1, approval is required for the use of public land along with any FCC spectrum approvals FAA airspace approvals. This determination has been confirmed in discussions with the Office of the Deputy Assistant Secretary of Defense for Counternarcotics and Global Threats.

The demonstration structure illustrated in Vignette 2 is not ideal, due to the requirement to cease the demonstration should live targets inadvertently intrude upon the demonstration. This will be disruptive to the demonstration and could potentially lengthen the time needed to collect reliable and accurate assessment information. This, in turn, could raise the cost of Thunderstorm demonstrations. This vignette also shares the same drawback as Vignette 1: Even though this vignette would be capable of demonstrating new information interagency information sharing concepts, it could not do so using real-time sensor data on live targets, as it relies on fully scripted activity.

Vignette 3, depicted in Figure 4.3, illustrates another way in which a Thunderstorm demonstration could be structured, such that real-time operational data could be used to assess new technologies. Here, sensors are turned on and data are collected, and there are no role players. Sensor coverage is restricted to U.S. territory (in accordance with geographic limits established in Title 10 USC, Section 374), but including the border area. If live targets enter sensor coverage, the sensors will lock on, data will be shared with LEAs, and LEAs can evalu-

Figure 4.2
Vignette 2: Technology Demonstration Halted When Live Targets Detected



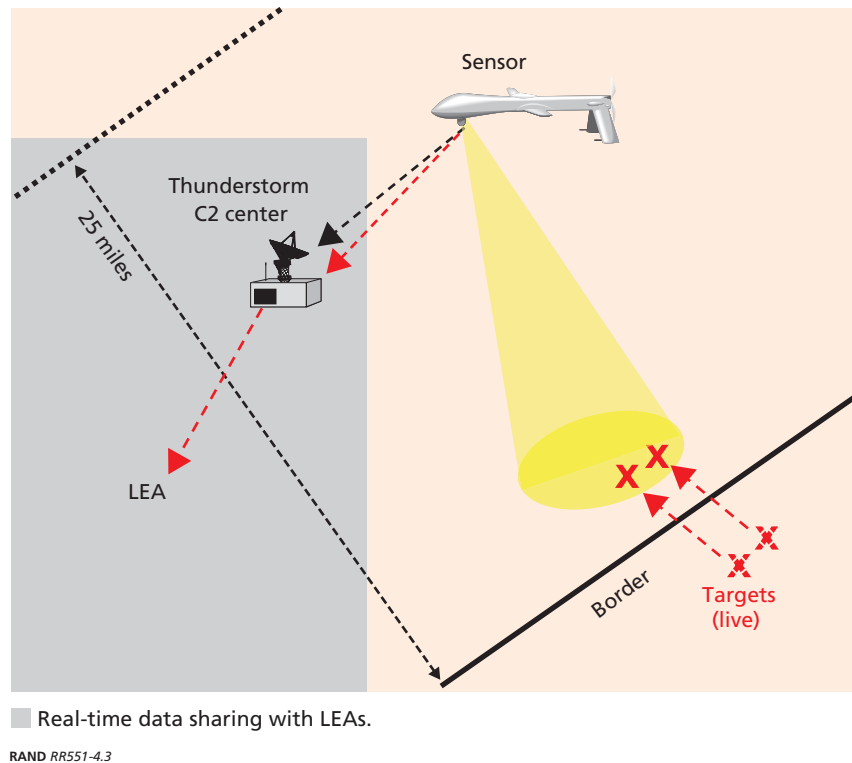
■ = Live targets detected; demonstration ceased. No data shared with LEAs.

RAND RR551-4.2

ate data and make their own determination as to whether they should proceed with any sort of law enforcement action.

According to our review of U.S. law and DoD policy, there is only one type of CD operations approval needed for the use of any specific type of DoD sensor for use in Vignette 3, with the exception of Title 10 USC, Section 375, and Title 18 USC concerns and PII considerations. But approval does not hinge upon the source of funds used to develop the DoD sensor. The approvals required to permit this kind of activity include approval for the use of public land, any airspace and spectrum use approvals, and the 1991 NDAA, Section 1004, approval. A key requirement for this process approval is for an LEA official to make a valid request for CD operations support that is synchronized with the timing and location of Thunderstorm. This can be arranged by coordinating with an appropriate LEA prior to the demonstration. The advantage of structuring a demonstration according to Vignette 3 from an operational test and evaluation perspective is that it provides the ability not only to focus on front-end CD operations using real-time sensor data, but also to potentially assess the sensor's effectiveness with back-end operations, namely support to LEAs after the target has been found. The disadvantage of this demonstration could potentially be the need for a longer planning timeline to allow for all necessary approvals to be obtained prior to the start of the demonstration. As noted earlier in this report, there is no explicit statement in DoD policy that describes the structure and approval process for DoD technology demonstrations with a CD focus, which may contribute to a longer delay in obtaining necessary approvals.

Figure 4.3
Vignette 3: Technology Demonstration; Live Targets Authorized

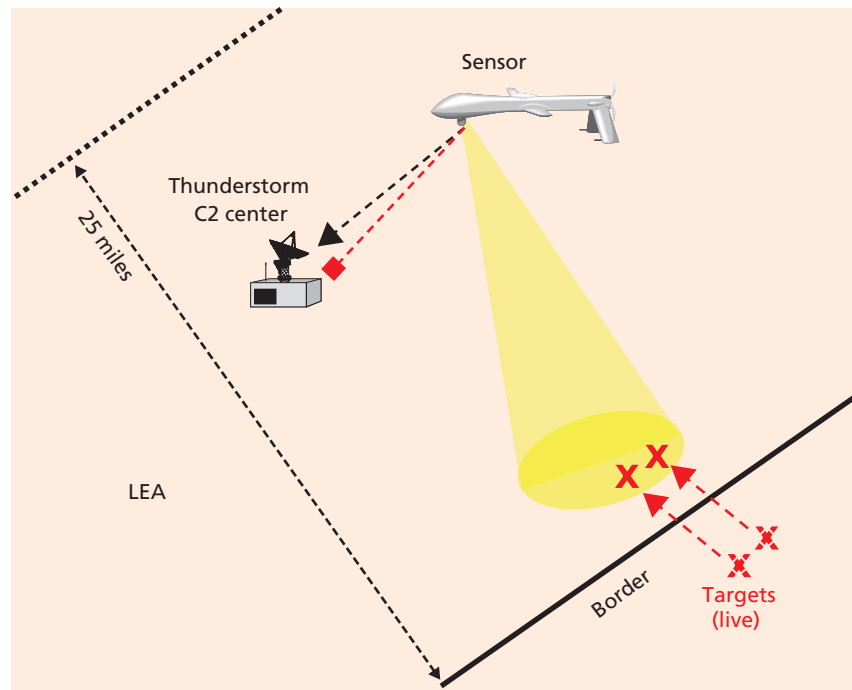


Finally, Vignette 4, depicted in Figure 4.4, describes a Thunderstorm demonstration along the U.S. border in which sensors are turned on and collect real-time data, and there are no role players. In this case, if sensors pick up live targets while operating, data are not shared with LEAs, and no added DoD support is provided to any law enforcement official. According to our assessment, given that no real-time data are shared with LEA, one could argue that the only approval required is for the use of public land along with any spectrum and airspace use approvals. However, this vignette may introduce additional legal complications. As discussed earlier in this report, Title 10 USC, Section 124, designates DoD as “the single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States.”⁵ This would imply DoD responsibility to report the detection of targets suspected of illicit activities to an appropriate law enforcement official. To be sure, it is in the interest of DoD and federal authorities to stop any threat posed to U.S. security interests. But, without a prior LEA request for support and a “Section 1004” approval, such reporting could be construed as a violation of Title 10 USC, Section 375, and a violation of the Posse Comitatus Act if acted upon by the LEA official, especially if law enforcement officials act in real time to seize and arrest the suspect.

The above discussion indicates that without a “Section 1004” approval in place, Thunderstorm demonstration officials could encounter some legal questions and decisions during the course of the demonstration because of the uncertainties related to the legal framework associ-

⁵ U.S. Code, Title 10, Section 124, “Detection and Monitoring of Aerial and Maritime Transit of Illegal Drugs: Department of Defense to Be Lead Agency,” added November 29, 1989.

Figure 4.4
Vignette 4: Technology Demonstration; Live Targets Not Authorized



■ = Live targets detected; no data shared with LEAs.

RAND RR551-4.4

ated with this vignette. For this reason, this alternative is not preferred to the other options. Furthermore, it would not be ideally suited for demonstrating new interagency information sharing concepts and new interoperability technologies.

Preferred Thunderstorm Option

Our analysis of four different alternatives for structuring Thunderstorm technology demonstrations that have a CD nexus indicates that there is one preferred alternative—Vignette 3. In this vignette, an LEA organizational partner would participate in the demonstration, and live targets detected moving across the U.S. border would be detected and that information would be shared with the LEA. This alternative is preferred because it provides the most realistic operational environment to evaluate new ISR capabilities. In addition, it provides the best operational environment to demonstrate new interagency information sharing concepts and new interoperability technologies for domestic CD missions. It satisfies the intent of Title 6 USC and the President’s national strategy for information sharing and safeguarding.

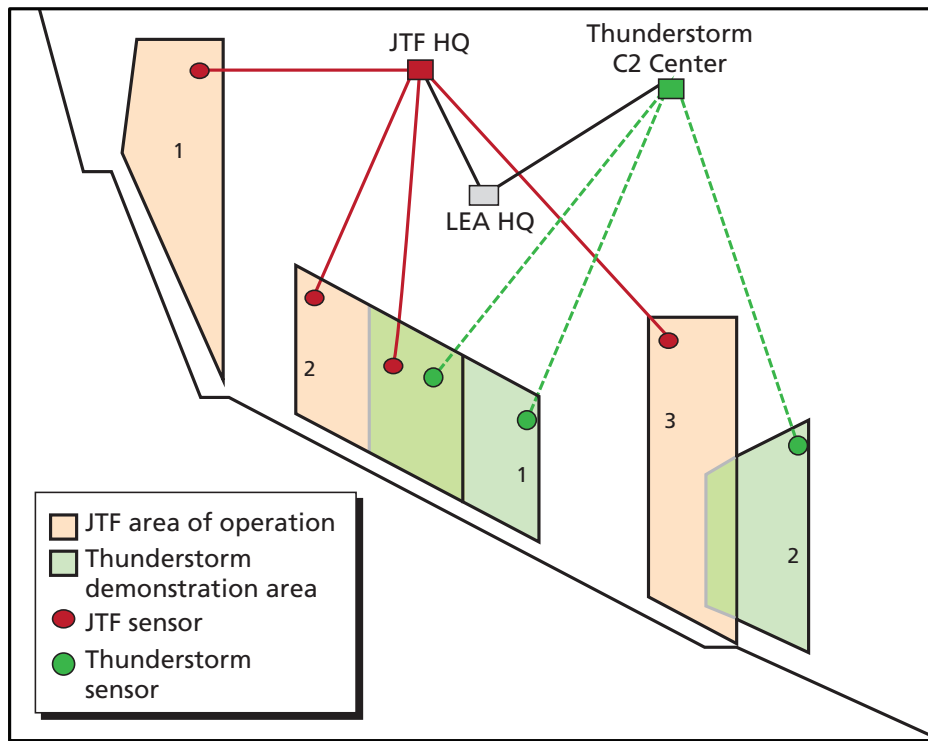
Vignette 3 has one drawback, in that an additional approval process step may be required. However, based on our analysis of U.S. law and DoD policy, we do not believe that there are any specific aspects of Thunderstorm that would preclude such an approval from being granted by DoD authorities. One assumption that we have made, however, is that a valid request for CD operation support will be made by the relevant organizational partner that participates in

the Thunderstorm demonstration. This request may be required to obtain approval to conduct the demonstration.

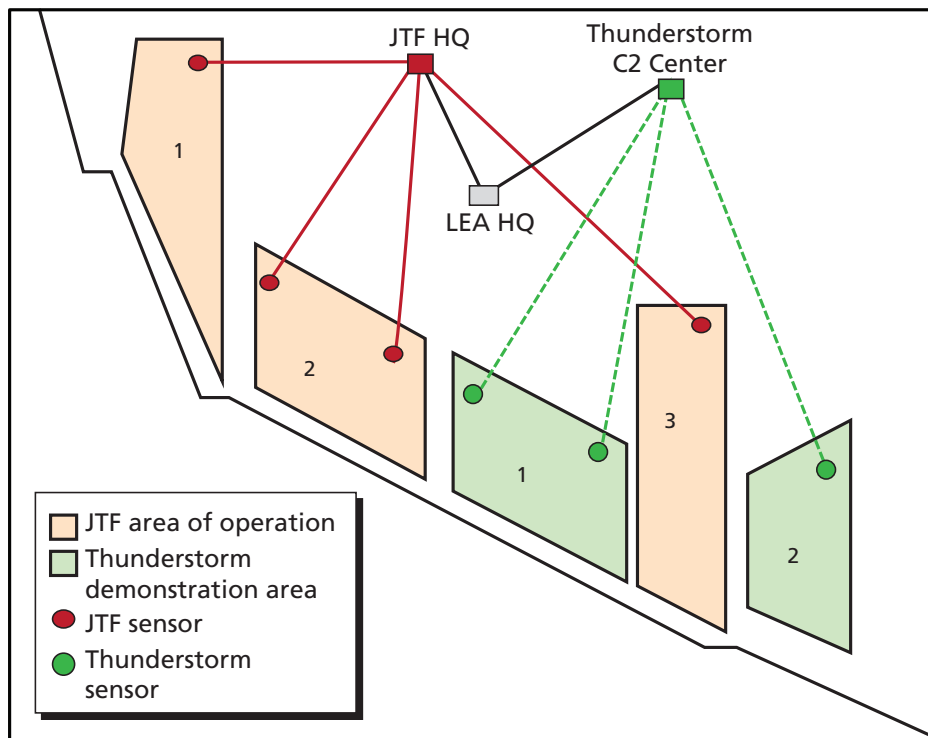
Regardless of the option chosen for structuring Thunderstorm, another important consideration is the need to deconflict and coordinate Thunderstorm activities with the relevant JTF. Figure 4.5 shows a notional diagram of the need for such deconfliction.

As the diagram indicates, absent adequate deconfliction and coordination between Thunderstorm authorities and the appropriate JTF (or JTFs, as the case may be), a situation like that shown in the upper part of the figure may result: Thunderstorm test areas may overlap with an area where JTF CD operations are taking place, which could cause potential confusion in terms of targets (whether scripted or live) or in terms of data feeds. In comparison, the lower figure indicates what a deconflicted Thunderstorm demonstration–JTF situation would look like. Efforts to deconflict any demonstration activities with routine operations are important for minimizing potential legal and safety concerns for all persons involved during all stages of activities.

Figure 4.5
Thunderstorm Demonstrations Should Be Deconflicted with Appropriate Joint Task Force



No deconfliction



Deconflicted operations

Findings and Recommendations

We examined U.S. laws governing U.S. military CD support to federal, state, and local authorities, and in particular we sought to clarify the legal basis for using DoD sensors in DoD or in joint DoD and CBP technology demonstrations along the southern U.S. border that have a CD nexus. U.S. law and DoD policy have been amended and revised in this area over time. In the 1980s, Congress recognized that civilian LEAs were at a significant disadvantage to the growing abilities of drug smugglers that were transporting drugs into the U.S. and across U.S. borders. Changes to U.S. law have been made over time to grant DoD broad authority to conduct CD operations overseas, in international waters, and in countries where drug smugglers have safe havens.¹

As described earlier in this report, Title 10 USC, Section 124, designates DoD as the lead agency for D&M of U.S. airspace and maritime areas along the U.S. border where illicit drug activities frequently occur. U.S. law permits U.S. military forces to share any information collected during the course of normal operations and training anywhere over U.S. territory. However, the law, as currently written, does not authorize U.S. military forces to conduct CD operations independently of LEAs during the course of normal military operations in the United States. U.S. military support to government CD operations on U.S. territory are subject to additional constraints (as defined in the 1990 NDAA, Section 1004, as amended on December 31, 2011) that include geographic restrictions on where U.S. forces can conduct D&M activities and the need for a valid LEA request for DoD CD support.

Furthermore, Section 1205 of the 1990 NDAA states that the Secretary of Defense should ensure that DoD conducts adequate R&D activities to improve its ability to carry out the CD D&M functions assigned to DoD.² Therefore, DoD acquisition authorities should undertake initiatives that can demonstrate effective D&M capabilities and effective interagency information sharing for CD operations. Many of RRTO's recent Thunderstorm demonstrations fall within this category.

By DoD regulation and by law, DoD must demonstrate that systems and capabilities developed actually work in an operational environment.³ This is a requirement for demonstrat-

¹ As discussed earlier in this report, here we also remind the reader that the Secretary of Defense established JTFs in the late 1980s to provide support for domestic LEA CD activities.

² Section 1205 of Public Law 101-189, recorded as a note to Title 10 Section 124.

³ Title 10, Section 2399, "Operational Test and Evaluation of Defense Acquisition Programs," describes the responsibilities of the DoD Director of Operational Test and Evaluation for the testing of major defense acquisition programs. Title 10, Section 139 defines the term "operational test and evaluation" as "the field test, under realistic combat conditions, of any item of (or key component of) weapons, equipment, or munitions for the purpose of determining the effectiveness and suitability of the weapons, equipment, or munitions for use in combat by typical military users."

ing that a system can be assessed at technology readiness level (TRL) 6.⁴ DoD Operational Test and Evaluation (OT&E) has a responsibility to report to Congress whether DoD programs are producing systems and capabilities that are operationally suitable and operationally effective. To make such an assessment, these capabilities have to be assessed in a realistic operational environment. Our analysis indicates that the Thunderstorm series of technology demonstrations provides such a realistic operational environment to evaluate ISR capabilities that may be beneficial to a range of missions (to include counterdrug) in land, sea, and air domains.

One should also remember the ISE provision established in Title 6 USC, which directs DoD as well as other government agencies to support the development of an information sharing environment that enables relevant national security information to be shared between government agencies. The information sharing strategy published by the White House has specified that the ISE should also apply to information relevant to CD operations.

Some within DoD have expressed concern as to whether U.S. military forces or DoD personnel participating in Thunderstorm demonstrations can share real-time information collected during a demonstration with civilian LEAs and whether a Thunderstorm demonstration occurring along the U.S. border is in accordance with U.S. law. Specific legal questions that have been raised include whether acquisition law prevents the expenditure of DoD funds for supporting such demonstrations or the sharing of information between DoD and LEA; whether the Posse Comitatus Act prevents the same; and whether the Fourth Amendment prevents the same. These concerns have been raised despite the ISE provisions of Title 6 USC, the CD information sharing provisions in Title 10 USC (Section 371 in particular), and the temporary (but long-standing) provisions in the 1990 NDAA, Section 1004 (as amended December 31, 2011). Our work addresses these concerns, and we provide our findings below.

Findings

Our analysis of U.S. law has found that fiscal or appropriations law does not prohibit the use of DoD RDT&E or private-sector IRAD funds in technology demonstrations with a CD nexus, nor does it restrict the use of a DoD sensor funded from a particular account. Furthermore, U.S. law does not restrict the use of DoD sensors (that do not collect PII data or private information on U.S. citizens) in CD operations conducted by U.S. military forces if a valid request for such support is made by an appropriate LEA official and as long as DoD is not directly engaged in law enforcement activities prohibited by Title 10 USC, Section 375. Again, we found no specific restrictions that pertain to sensor funding sources in this case.

Therefore, there appears to be no legal reason why any DoD sensor should be excluded from use in a Thunderstorm demonstration under these same conditions. Thunderstorm demonstrations are funded by RDT&E funds (BA3 funds in particular), which permits the demonstrations to test sensors regardless of the mission that the technologies may be used for in the future. In contrast, there have at times been some restrictions on how actual CD operations can be funded, although these restrictions have been relaxed in the most recent NDAs signed into law in 2012 and 2013.

To be sure, sensors are ultimately scientific and engineering instruments—a sensor designed for one mission may be applicable and usable for another mission; however, whether

⁴ U.S. Department of Defense, *DoD Technology Readiness Assessment (TRA) Deskbook*, Washington, D.C., July 2009.

a sensor has such a multi-mission capability may not be determined until tested in a realistic operational environment.

Our analysis also identified gaps in DoD policy governing CD operations, tests, and demonstrations. While key policies do exist that govern U.S. military support to domestic CD operations (e.g., CJCSI 3710.01B), these policies are necessary but not sufficient, for several reasons. First, CJCSI 3710.01B does not provide guidance on DoD technology demonstrations that have a CD nexus. Second, CJCSI 3710.01B applies only to the military departments and combatant commands, and not to OSD or to OSD(AT&L) in particular. (Thunderstorm demonstrations are RDT&E activities lead by OSD[AT&L]). The appropriate place to provide guidance for DoD technology demonstrations is in a DoD directive or instruction. However, existing DoD directives and instructions also do not address technology demonstrations with a CD nexus. In addition, some relevant sections of DoD CD directives and instructions have been canceled, and not replaced nor updated.

Another complication of DoD CD policy is the approval process for guiding CD operations and technology demonstrations with a CD nexus. In terms of CD operations, the approval processes and authorities are buried in memoranda, and the relevant organizations may have changed since the guidance was produced. In addition, some of these memoranda are not codified in DoD policy. In terms of DoD tests and technology demonstrations with a CD nexus (and not funded using CD funds), no DoD policy exists, requiring officials to apply the approval process for CD operations in an ad hoc manner to technology demonstrations that fall within the CD mission space.

Recommendations

We recommend that the Office of the Under Secretary of Defense for Policy (OUSD[P]) update and streamline DoD CD policy by developing a single DoD directive be written that consolidates all relevant DoD CD policy. This directive should do the following:

- Incorporate the 2003 Deputy Secretary of Defense memorandum into a directive.
- Establish an approval process for technology demonstrations with a CD nexus. This process should include a coordination and deconfliction mechanism for the technology demonstration authorities and the relevant JTF.

An added challenge with updating DoD CD policy is that important DoD authorities that are current and in force today may not be renewed in future law. One way to address this possibility is to clearly identify which parts of DoD policy rely on the temporary authorities granted in Section 1004 of the 1991 NDAA, and which do not.

Recognizing that an update to policy may take time, we have several near-term recommendations:

- The DoD Office of the General Counsel should issue a memorandum of instruction to clarify the legal requirements for approving DoD sensor use in technology demonstrations with a CD nexus.
- If the DoD Office of the General Counsel declines to pursue this matter, the Secretary of Defense or Under Secretary of Defense for Policy could issue a policy memorandum in

the interim that provides clear guidance on how the DoD acquisition community should conduct and seek approval for DoD technology demonstrations with a CD nexus.

- RRTO should focus Thunderstorm demonstration mission objectives on CD operations (as opposed to CT operations), to streamline the approval process.

Finally, we recommend that DoD and DHS develop an interagency/interdepartmental agreement to clarify the legal framework for technology demonstrations. This agreement would be signed by the appropriate DoD and DHS officials, such as OUSD(P) and/or OUSD(AT&L) within DoD and the Office of Technology Innovation and Acquisition within DHS.

National Defense Authorization Acts Relevant to Counterdrug Operations

Table A.1.
National Defense Authorization Acts Relevant to Counterdrug Operations

NDAAs	Public Law No.	Sec.	Title	Enacted Date	Expiration Date (if applicable)
NDAAs 1989	100-456	1102	Lead Agency for Detection	Sept. 28, 1988	
		1103	Communications Network		
		1104	Enhanced Drug Interdiction and Law Enforcement Assistance by the Department of Defense		
		1105	Enhanced Drug Interdiction and Enforcement Role for the National Guard		
		1106	Funding of Activities Related to Drug Interdiction		Sept. 30, 1989
NDAAs 1990–1991	101-189	1202	Department of Defense as Lead Agency for the Detection and Monitoring of Aerial and Maritime Transit of Illegal Drugs	Nov. 29, 1989	
		1205	Research and Development		
		1206	Training Exercises in Drug-Interdiction Areas		
		1207	Drug Interdiction and Counter-drug Activities of the National Guard		
		1212	Additional Support for Counter-drug Activities		Sept. 30, 1990
NDAAs 1991	101-510	1004	Additional Support for Counter-drug Activities	Nov. 5, 1990	Sept. 30, 1991
NDAAs 1992–1993	102-190	905	Additional Department of Defense Support for Counter-drug Activities	Dec. 5, 1991	Sept. 30, 1993
NDAAs 1993	102-484	1041	Additional Support for Counter-drug Activities	Oct. 23, 1992	Sept. 30, 1994
		1043	Counter-drug Detection and Monitoring Systems Plan		
NDAAs 1994	103-160	1021	Department of Defense Support for Counter-drug Activities of Other Agencies	Nov. 30, 1993	Sept. 30, 1995
		1022	Report on Defense Counter-drug Program		

Table A.1—Continued

NDAAs	Public Law No.	Sec.	Title	Enacted Date	Expiration Date (if applicable)
NDAAs 1995	103-337	1011	Department of Defense Support for Counter-drug Activities	Oct. 10, 1994	Dec. 31, 1999
NDAAs 1996	104-106	1021	Revision and Clarification of Authority for Federal Support of Drug Interdiction and Counter-drug Activities of the National Guard	Feb. 10, 1996	
NDAAs 1997	104-201	1032	Availability of Funds for Certain Drug Interdiction and Counter-drug Activities	Sept. 23, 1996	Sept. 30, 1997
NDAAs 1998	105-85	1031	Use of National Guard for State Drug Interdiction and Counter-drug Activities	Nov. 18, 1997	
NDAAs 1999	105-261	1021	Department of Defense Support to Other Agencies for Counter-drug Activities	Oct. 17, 1988	Sept. 30, 2002
		1022	Department of Defense Support of National Guard Drug Interdiction and Counter-drug Activities		
NDAAs 2000	106-65	1021	Modification of Limitation on Funding Assistance for Procurement of Equipment for the National Guard for Drug Interdiction and Counter-drug Activities	Oct. 5, 1999	Sept. 30, 2001
		1022	Temporary Extension to Certain Naval Aircraft of Coast Guard Authority for Drug Interdiction Activities		
NDAAs 2001	106-389	1023	Recommendations on Expansion of Support for Counter-drug Activities	Oct. 30, 2000	
		1026	Sense of Congress Regarding Use of Armed Forces for Counter-drug and Counter-Terrorism Activities		
NDAAs 2002	107-107	1021	Extension and Restatement of Authority to Provide Department of Defense Support for Counter-drug Activities of Other Governmental Agencies	Dec. 28, 2001	Sept. 30, 2006
		1023	Authority to Transfer Tracker Aircraft Currently Used by Armed Forces for Counter-drug Purposes		Sept. 30, 2002*
NDAAs 2003	107-314	301	Operation and Maintenance Funding	Dec. 2, 2002	Sept. 30, 2003
NDAAs 2004	108-136	1021	Expansion and Extension of Authority to Provide Additional Support for Counter-drug Activities	Nov. 24, 2003	Sept. 30, 2006
		1022	Authority for Joint Task Forces to Provide Support to Law Enforcement Agencies Conducting Counter-terrorism Activities		
		1024	Sense of Congress on Reconsideration of Decision to Terminate Border and Seaport Inspection Duties of National Guard Under National Guard Drug Interdiction and Counter-drug Mission		
NDAAs 2005	108-375	303	Other Department of Defense Programs	Oct. 28, 2004	Sept. 30, 2005

Table A.1—Continued

NDAAs	Public Law No.	Sec.	Title	Enacted Date	Expiration Date (if applicable)
NDAA 2006	109-163	1021	Resumption of Reporting Requirement Regarding Department of Defense Expenditures to Support Foreign Counter-drug Activities	Jan. 26, 2006	April 15, 2006
		1022	Clarification of Authority for Joint Task Forces to Support Law Enforcement Agencies Conducting Counter-terrorism Activities		Sept. 30, 2007
		1023	Sense of Congress Regarding Drug Trafficking Deterrence		
NDAA 2007	109-634	1021	Extension of Authority of Department of Defense to Provide Additional Support for Counterdrug Activities of Other Governmental Agencies	Oct. 17, 2006	Sept. 30, 2011
NDAA 2008	110-181	1021	Extension of Authority for Joint Task Forces to Provide Support to Law Enforcement Agencies Conducting Counter-terrorism Activities	Jan. 28, 2008	Sept. 30, 2008
NDAA 2009	110-417	1022	Extension of Authority for Joint Task Forces to Provide Support to Law Enforcement Agencies Conducting Counter-terrorism Activities	Oct. 14, 2008	Sept. 30, 2009
NDAA 2010	111-84	1012	Joint Task Forces Support to Law Enforcement Agencies Conducting Counter-terrorism Activities	Oct. 28, 2009	Sept. 30, 2010
NDAA 2011	111-383	1012	Extension and Modification of Joint Task Forces Support to Law Enforcement Agencies Conducting Counter-terrorism Activities	Jan. 7, 2011	
NDAA 2012	112-81	1004	Extension of Authority for Joint Task Forces to Provide Support to Law Enforcement Agencies Conducting Counter-terrorism Activities	Dec. 31, 2011	Sept. 30, 2012
		1005	Three-year Extension and Modification of Authority of Department of Defense to Provide Additional Support for Counterdrug Activities of Other Governmental Agencies		Sept. 30, 2014
		1404	Drug Interdiction and Counter-Drug Activities, Defense-wide		Sept. 30, 2012
NDAA 2013	112-239	1011	Extension of Authority for Joint Task Forces to Provide Support to Law Enforcement Agencies Conducting Counter-terrorism Activities	Jan. 2, 2013	

* "If the transfer authority provided by subsection (a) is not exercised by the Secretary of Defense by September 30, 2002, any Tracker aircraft remaining in the inventory of the Department of Defense may not be used by the Armed Forces for counter-drug purposes after that date."

National Defense Authorization Act for Fiscal Year 1991, Section 1004, as Amended

“Section 1004” as amended

[NOTE: This language is contained as a note following the current version of 10 USC 374. Accessed October 15, 2013]

Additional Support for Counter-Drug Activities

Pub. L. 101–510, div. A, title X, §1004, Nov. 5, 1990, 104 Stat. 1629, as amended by Pub. L. 102–190, div. A, title X, §1088(a), Dec. 5, 1991, 105 Stat. 1484; Pub. L. 102–484, div. A, title X, §1041(a)–(d)(1), Oct. 23, 1992, 106 Stat. 2491; Pub. L. 103–160, div. A, title XI, §1121(a), (b), Nov. 30, 1993, 107 Stat. 1753; Pub. L. 103–337, div. A, title X, §1011(a), Oct. 5, 1994, 108 Stat. 2836; Pub. L. 105–261, div. A, title X, §1021, Oct. 17, 1998, 112 Stat. 2120; Pub. L. 107–107, div. A, title X, §1021, Dec. 28, 2001, 115 Stat. 1212; Pub. L. 109–364, div. A, title X, §1021, Oct. 17, 2006, 120 Stat. 2382; Pub. L. 111–383, div. A, title X, §1015(a), Jan. 7, 2011, 124 Stat. 4347; Pub. L. 112–81, div. A, title X, §1005, Dec. 31, 2011, 125 Stat. 1556, provided that:

“(a) Support to Other Agencies.-During fiscal years 2012 through 2014, 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, tribal, 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, local, or tribal government, in the case of support for State, local, or tribal 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 of Defense 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, local, or tribal 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 paragraph (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 counter-drug activities of the Department of Defense or any Federal, State, local, or tribal law enforcement agency within or outside the United States or for the purpose of facilitating 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, local, and tribal 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 [10 U.S.C. 124 note])) 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 Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of Senate and House of Representatives] written notice of the decision, including the justification for 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 construction, modification, or repair of any facility for the purposes set forth in subsection (b)(4); and

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

“(3) This subsection may not be construed as an authorization for the use of funds for any military construction project that would exceed the approved cost limitations of an unspecified minor military construction project under section 2805(a)(2) of title 10, United States Code.

“(i) Definitions Relating to Tribal Governments.-In this section:

“(1) The term ‘Indian tribe’ means a federally recognized Indian tribe.

“(2) The term ‘tribal government’ means the governing body of an Indian tribe, the status of whose land is ‘Indian country’ as defined in section 1151 of title 18, United States Code, or held in trust by the United States for the benefit of the Indian tribe.

“(3) The term ‘tribal law enforcement agency’ means the law enforcement agency of a tribal government.”

[Pub. L. 111–383, div. A, title X, §1015(b), Jan. 7, 2011, 124 Stat. 4348, provided that: “The amendments made by subsection (a) [amending section 1004 of Pub. L. 101–510, set out above] shall take effect on the date of the enactment of this Act [Jan. 7, 2011], and shall apply with respect to facilities projects for which a decision is made to be carried out on or after that date.”]

Public Law 100-456, Chapter 18 of Title 10, United States Code

This appendix contains relevant text from those laws in effect on September 18, 2013.

CHAPTER 18—MILITARY SUPPORT FOR CIVILIAN LAW ENFORCEMENT AGENCIES

Sec. 371. Use of information collected during military operations.

Sec. 372. Use of military equipment and facilities.

Sec. 373. Training and advising civilian law enforcement officials.

Sec. 374. Maintenance and operation of equipment.

Sec. 375. Restriction on direct participation by military personnel.

Sec. 376. Support not to affect adversely military preparedness.

Sec. 377. Reimbursement.

Sec. 378. Nonpreemption of other law.

Sec. 379. Assignment of Coast Guard personnel to naval vessels for law enforcement purposes.

Sec. 380. Enhancement of cooperation with civilian law enforcement officials.

Sec. 381. Procurement of equipment by State and local governments through the Department of Defense: equipment for counter-drug, homeland security, and emergency response activities.

Sec. 382. Emergency situations involving weapons of mass destruction.

AMENDMENTS

2011—Pub. L. 111–383, div. A, title X, §1075(b)(10)(C), Jan. 7, 2011, 124 Stat. 4369, added item 382 and struck out former item 382 “Emergency situations involving chemical or biological weapons of mass destruction.”

2008—Pub. L. 110–417, [div. A], title VIII, §885(b)(2), Oct. 14, 2008, 122 Stat. 4561, added item 381 and struck out former item 381 “Procurement by State and local governments of law enforcement equipment suitable for counter-drug activities through the Department of Defense.”

1996—Pub. L. 104–201, div. A, title XIV, §1416(a)(2), Sept. 23, 1996, 110 Stat. 2723, added item 382.

1993—Pub. L. 103–160, div. A, title XI, §1122(a)(2), Nov. 30, 1993, 107 Stat. 1755, added item 381.

1989—Pub. L. 101–189, div. A, title XII, §1216(a), Nov. 29, 1989, 103 Stat. 1569, in chapter heading substituted “18” for “8.”

1988—Pub. L. 100–456, div. A, title XI, §1104(a), Sept. 29, 1988, 102 Stat. 2043, amended chapter analysis generally substituting, in chapter heading “CHAPTER 8—MILITARY SUPPORT FOR CIVILIAN LAW ENFORCEMENT AGENCIES” for “CHAPTER 18—MILITARY COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS,” in item 374 “Maintenance and operation of equipment” for “Assistance by Department of Defense personnel,” in item 376 “Support not to affect adversely military preparedness” for “Assistance not to affect adversely military preparedness” and in item 380 “Enhancement of cooperation with civilian law enforcement officials” for “Department of Defense drug law enforcement assistance: annual plan.”

1987—Pub. L. 100–180, div. A, title XII, §1243(b), Dec. 4, 1987, 101 Stat. 1164, added item 380.

1986—Pub. L. 99–570, title III, §3053(b)(2), Oct. 27, 1986, 100 Stat. 3207–76, added item 379.

§371. Use of information collected during military operations

(a) The Secretary of Defense may, in accordance with other applicable law, provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.

(b) The needs of civilian law enforcement officials for information shall, to the maximum extent practicable, be taken into account in the planning and execution of military training or operations.

(c) The Secretary of Defense shall ensure, to the extent consistent with national security, that intelligence information held by the Department of Defense and relevant to drug interdiction or other civilian law enforcement matters is provided promptly to appropriate civilian law enforcement officials.

(Added Pub. L. 97–86, title IX, §905(a)(1), Dec. 1, 1981, 95 Stat. 1115; amended Pub. L. 100–456, div. A, title XI, §1104(a), Sept. 29, 1988, 102 Stat. 2043.)

AMENDMENTS

1988—Pub. L. 100–456 amended section generally, designating existing provisions as subsec. (a), inserting reference to military training, and adding subsecs. (b) and (c).

SHORT TITLE OF 1986 AMENDMENT

Pub. L. 99–570, title III, §3051, Oct. 27, 1986, 100 Stat. 3207–74, provided that: “This subtitle [subtitle A (§§3051–3059) of title III of Pub. L. 99–570, enacting section 379 of this title, amending sections 374 and 911 of this title, enacting provisions set out as notes under sections 374, 525, and 9441 of this title, and repealing provisions set out as a note under section 89 of Title 14, Coast Guard] may be cited as the ‘Defense Drug Interdiction Assistance Act.’”

AUTHORITY FOR JOINT TASK FORCES TO PROVIDE SUPPORT TO LAW ENFORCEMENT AGENCIES CONDUCTING COUNTER-TERRORISM ACTIVITIES

Pub. L. 108–136, div. A, title X, §1022, Nov. 24, 2003, 117 Stat. 1594, as amended by Pub. L. 109–163, div. A, title X, §1022, Jan. 6, 2006, 119 Stat. 3427; Pub. L. 110–181, div. A,

title X, §1021, Jan. 28, 2008, 122 Stat. 304; Pub. L. 110–417, [div. A], title X, §1022, Oct. 14, 2008, 122 Stat. 4586; Pub. L. 111–84, div. A, title X, §1012, Oct. 28, 2009, 123 Stat. 2441; Pub. L. 111–383, div. A, title X, §1012(a)–(b)(2), Jan. 7, 2011, 124 Stat. 4346, 4347; Pub. L. 112–81, div. A, title X, §1004(a), Dec. 31, 2011, 125 Stat. 1556; Pub. L. 112–239, div. A, title X, §1011, Jan. 2, 2013, 126 Stat. 1907, provided that:

“(a) **AUTHORITY.**—A joint task force of the Department of Defense that provides support to law enforcement agencies conducting counter-drug activities may also provide, subject to all applicable laws and regulations, support to law enforcement agencies conducting counterterrorism activities.

“(b) **AVAILABILITY OF FUNDS.**—During fiscal years 2006 through 2013, funds available to a joint task force to support counter-drug activities may also be used to provide the counter-terrorism support authorized by subsection (a).

“(c) **ANNUAL REPORT.**—Not later than December 31 of each year after 2008 in which the authority in subsection (a) is in effect, the Secretary of Defense shall submit to Congress a report setting forth, for the one-year period ending on the date of such report, the following:

“(1) An assessment of the effect on counter-drug and counter-terrorism activities and objectives of using counter-drug funds of a joint task force to provide counterterrorism support authorized by subsection (a).

“(2) A description of the type of support and any recipient of support provided under subsection (a).

“(3) A list of current joint task forces conducting counter-drug operations.

“(4) A certification by the Secretary of Defense that any support provided under subsection (a) during such one-year period was provided in compliance with the requirements of subsection (d).

“(d) **CONDITIONS.**—(1) Any support provided under subsection (a) may only be provided in the geographic area of responsibility of the joint task force.

“(2)(A) Support for counter-terrorism activities provided under subsection (a) may only be provided if the Secretary of Defense determines that the objectives of using the counter-drug funds of any joint task force to provide such support relate significantly to the objectives of providing support for counter-drug activities by that joint task force or any other joint task force.

“(B) The Secretary of Defense may waive the requirements of subparagraph (A) if the Secretary determines that such a waiver is vital to the national security interests of the United States. The Secretary shall promptly submit to Congress notice in writing of any waiver issued under this subparagraph.

“(C) The Secretary of Defense may delegate any responsibility of the Secretary under subparagraph (B) to the Deputy Secretary of Defense or to the Under Secretary of Defense for Policy. Except as provided in the preceding sentence, such a responsibility may not be delegated to any official of the Department of Defense or any other official.”

[Pub. L. 112–81, div. A, title X, §1004(b), Dec. 31, 2011, 125 Stat. 1556, provided that: “The authority in section 1022 of the National Defense Authorization Act for Fiscal Year 2004 [Pub. L. 108–136, set out above], as amended by subsection (a), may not be exercised unless the Secretary of Defense certifies to Congress, in writing, that the Department of Defense is in compliance with the provisions of paragraph (2) of subsection (d) of such section, as added by section 1012(b) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111–383; 124 Stat. 4346).”]

§372. Use of military equipment and facilities

The Secretary of Defense may, in accordance with other applicable law, make available any equipment (including associated supplies or spare parts), base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes.

(Added Pub. L. 97–86, title IX, §905(a)(1), Dec. 1, 1981, 95 Stat. 1115; amended Pub. L. 100–456, div. A, title XI, §1104(a), Sept. 29, 1988, 102 Stat. 2043; Pub. L. 104–106, div. A, title III, §378, Feb. 10, 1996, 110 Stat. 284; Pub. L. 104–201, div. A, title XIV, §1416(b), Sept. 23, 1996, 110 Stat. 2723; Pub. L. 112–239, div. A, title III, §351, Jan. 2, 2013, 126 Stat. 1701.)

AMENDMENTS

2013—Pub. L. 112–239 struck out “(a) IN GENERAL.—” before “The Secretary” and subsec. (b) which related to emergencies involving chemical and biological agents.

1996—Pub. L. 104–106 designated existing provisions as subsec. (a), inserted heading, and added subsec. (b). Subsec. (b)(1). Pub. L. 104–201 inserted at end “The requirement for a determination that an item is not reasonably available from another source does not apply to assistance provided under section 382 of this title pursuant to a request of the Attorney General for the assistance.”

1988—Pub. L. 100–456 amended section generally, inserting “(including associated supplies or spare parts)” and substituting “Department of Defense” for “Army, Navy, Air Force, or Marine Corps.”

SUPPORT FOR NON-FEDERAL DEVELOPMENT AND TESTING OF MATERIAL FOR CHEMICAL AGENT DEFENSE

Pub. L. 110–181, div. A, title X, §1034, Jan. 28, 2008, 122 Stat. 308, provided that:

“(a) **AUTHORITY TO PROVIDE TOXIC CHEMICALS OR PRECURSORS.**—

“(1) **IN GENERAL.**—The Secretary of Defense, in coordination with the heads of other elements of the Federal Government, may make available, to a State, a unit of local government, or a private entity incorporated in the United States, small quantities of a toxic chemical or precursor for the development or testing, in the United States, of material that is designed to be used for protective purposes.

“(2) **TERMS AND CONDITIONS.**—Any use of the authority under paragraph (1) shall be subject to such terms and conditions as the Secretary considers appropriate.

“(b) **PAYMENT OF COSTS AND DISPOSITION OF FUNDS.**—

“(1) **IN GENERAL.**—The Secretary shall ensure, through the advance payment required by paragraph (2) and through any other payments that may be required, that a recipient of toxic chemicals or precursors under subsection (a) pays for all actual costs, including direct and indirect costs, associated with providing the toxic chemicals or precursors.

“(2) **ADVANCE PAYMENT.**—In carrying out paragraph (1), the Secretary shall require each recipient to make an advance payment in an amount that the Secretary determines will equal all such actual costs.

“(3) **CREDITS.**—A payment received under this subsection shall be credited to the account that was used to cover the costs for which the payment was provided. Amounts so credited shall be merged with amounts in that account, and shall be

available for the same purposes, and subject to the same conditions and limitations, as other amounts in that account.

“(c) **CHEMICAL WEAPONS CONVENTION.**—The Secretary shall ensure that toxic chemicals and precursors are made available under this section for uses and in quantities that comply with the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, signed at Paris on January 13, 1993, and entered into force with respect to the United States on April 29, 1997.

“(d) **REPORT.**—

“(1) Not later than March 15, 2008, and each year thereafter, the Secretary shall submit to Congress a report on the use of the authority under subsection (a) during the previous calendar year. The report shall include a description of each use of the authority and specify what material was made available and to whom it was made available.

“(2) Each report under paragraph (1) shall be submitted in unclassified form, but may include a classified annex.

“(e) **DEFINITIONS.**—In this section, the terms ‘precursor’, ‘protective purposes’, and ‘toxic chemical’ have the meanings given those terms in the convention referred to in subsection (c), in paragraph 2, paragraph 9(b), and paragraph 1, respectively, of article II of that convention.”

TRANSFER OF EXCESS PERSONAL PROPERTY

Pub. L. 101–189, div. A, title XII, §1208, Nov. 29, 1989, 103 Stat. 1566, as amended by Pub. L. 102–484, div. A, title X, §1044, Oct. 23, 1992, 106 Stat. 2493, which authorized the Secretary of Defense to transfer excess personal property of the Department of Defense to Federal and State agencies, provided conditions for transfer, and terminated the Secretary’s authority on Sept. 30, 1997, was repealed and restated in section 2576a of this title by Pub. L. 104–201, div. A, title X, §1033(a)(1), (b)(1), Sept. 23, 1996, 110 Stat. 2639, 2640.

§373. Training and advising civilian law enforcement officials

The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available—

(1) to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment, including equipment made available under section 372 of this title; and

(2) to provide such law enforcement officials with expert advice relevant to the purposes of this chapter.

(Added Pub. L. 97–86, title IX, §905(a)(1), Dec. 1, 1981, 95 Stat. 1115; amended Pub. L. 99–145, title XIV, §1423(a), Nov. 8, 1985, 99 Stat. 752; Pub. L. 100–456, div. A, title XI, §1104(a), Sept. 29, 1988, 102 Stat. 2043.)

AMENDMENTS

1988—Pub. L. 100–456 amended section generally, substituting provisions authorizing Secretary of Defense, in accordance with applicable law, to make Defense Department personnel available for training, etc., for former subsecs. (a) to (c) authorizing Secretary of Defense to assign members of Army, Navy, Air Force, and Marine Corps, etc., for train-

ing, etc., briefing sessions by Attorney General, and other functions of Attorney General and Administrator of General Services.

1985—Pub. L. 99–145 designated existing provisions as subsec. (a) and added subsecs. (b) and (c).

EFFECTIVE DATE OF 1985 AMENDMENT

Pub. L. 99–145, title XIV, §1423(b), Nov. 8, 1985, 99 Stat. 752, provided that: “The amendments made by subsection (a) [amending this section] shall take effect on January 1, 1986.”

§374. Maintenance and operation of equipment

(a) The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available for the maintenance of equipment for Federal, State, and local civilian law enforcement officials, including equipment made available under section 372 of this title.

(b)(1) Subject to paragraph (2) and in accordance with other applicable law, the Secretary of Defense may, upon request from the head of a Federal law enforcement agency, make Department of Defense personnel available to operate equipment (including equipment made available under section 372 of this title) with respect to—

- (A) a criminal violation of a provision of law specified in paragraph (4)(A);
- (B) assistance that such agency is authorized to furnish to a State, local, or foreign government which is involved in the enforcement of similar laws;
- (C) a foreign or domestic counter-terrorism operation; or
- (D) a rendition of a suspected terrorist from a foreign country to the United States to stand trial.

(2) Department of Defense personnel made available to a civilian law enforcement agency under this subsection may operate equipment for the following purposes:

- (A) Detection, monitoring, and communication of the movement of air and sea traffic.
- (B) Detection, monitoring, and communication of the movement of surface traffic outside of 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.
- (C) Aerial reconnaissance.
- (D) Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with such vessels and aircraft to direct such vessels and aircraft to go to a location designated by appropriate civilian officials.
- (E) Operation of equipment to facilitate communications in connection with law enforcement programs specified in paragraph (4)(A).
- (F) Subject to joint approval by the Secretary of Defense and the Attorney General (and the Secretary of State in the case of a law enforcement operation outside of the land area of the United States)—

- (i) the transportation of civilian law enforcement personnel along with any other civilian or military personnel who are supporting, or conducting, a joint operation with civilian law enforcement personnel;

(ii) the operation of a base of operations for civilian law enforcement and supporting personnel; and

(iii) the transportation of suspected terrorists from foreign countries to the United States for trial (so long as the requesting Federal law enforcement agency provides all security for such transportation and maintains custody over the suspect through the duration of the transportation).

(3) Department of Defense personnel made available to operate equipment for the purpose stated in paragraph (2)(D) may continue to operate such equipment into the land area of the United States in cases involving the pursuit of vessels or aircraft where the detection began outside such land area.

(4) In this subsection:

(A) The term “Federal law enforcement agency” means a Federal agency with jurisdiction to enforce any of the following:

(i) The Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.).

(ii) Any of sections 274 through 278 of the Immigration and Nationality Act (8 U.S.C. 1324–1328).

(iii) A law relating to the arrival or departure of merchandise (as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401) into or out of the customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedule of the United States) or any other territory or possession of the United States.

(iv) Chapter 705 of title 46.

(v) Any law, foreign or domestic, prohibiting terrorist activities.

(B) The term “land area of the United States” includes the land area of any territory, commonwealth, or possession of the United States.

(c) The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available to any Federal, State, or local civilian law enforcement agency to operate equipment for purposes other than described in subsection (b)(2) only to the extent that such support does not involve direct participation by such personnel in a civilian law enforcement operation unless such direct participation is otherwise authorized by law.

(Added Pub. L. 97–86, title IX, §905(a)(1), Dec. 1, 1981, 95 Stat. 1115; amended Pub. L. 98–525, title XIV, §1405(9), Oct. 19, 1984, 98 Stat. 2622; Pub. L. 99–570, title III, §3056, Oct. 27, 1986, 100 Stat. 3207–77; Pub. L. 99–661, div. A, title XIII, §1373(c), Nov. 14, 1986, 100 Stat. 4007; Pub. L. 100–418, title I, §1214(a)(1), Aug. 23, 1988, 102 Stat. 1155; Pub. L. 100–456, div. A, title XI, §1104(a), Sept. 29, 1988, 102 Stat. 2043; Pub. L. 101–189, div. A, title XII, §§1210, 1216(b), (c), Nov. 29, 1989, 103 Stat. 1566, 1569; Pub. L. 102–484, div. A, title X, §1042, Oct. 23, 1992, 106 Stat. 2492; Pub. L. 105–277, div. B, title II, §201, Oct. 21, 1998, 112 Stat. 2681–567; Pub. L. 106–65, div. A, title X, §1066(a)(4), Oct. 5, 1999, 113 Stat. 770; Pub. L. 109–304, §17(a)(1), Oct. 6, 2006, 120 Stat. 1706.)

REFERENCES IN TEXT

The Controlled Substances Act, referred to in subsec. (b)(4)(A)(i), is title II of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (§801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

The Controlled Substances Import and Export Act, referred to in subsec. (b)(4)(A)(i), is title III of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1285, as amended, which is classified principally to subchapter II (§951 et seq.) of chapter 13 of Title 21. For complete classification of the Act to the Code, see Short Title note set out under section 951 of Title 21 and Tables.

The Harmonized Tariff Schedule of the United States, referred to in subsec. (b)(4)(A)(iii), is not set out in the Code. See Publication of Harmonized Tariff Schedule note set out under section 1202 of Title 19, Customs Duties.

AMENDMENTS

2006—Subsec. (b)(4)(A)(iv). Pub. L. 109–304 substituted “Chapter 705 of title 46” for “The Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).”

1999—Subsec. (b)(1)(C), (D). Pub. L. 106–65, §1066(a)(4)(A), realigned margins. Subsec. (b)(2)(F)(i). Pub. L. 106–65, §1066(a)(4)(B), struck out semicolon after “law enforcement personnel;”.

1998—Subsec. (b)(1)(C), (D). Pub. L. 105–277, §201(1), (2), added subpars. (C) and (D). Subsec. (b)(2)(F)(i). Pub. L. 105–277, §201(3), inserted “along with any other civilian or military personnel who are supporting, or conducting, a joint operation with civilian law enforcement personnel;” after “transportation of civilian law enforcement personnel” and struck out “and” at end.

Subsec. (b)(2)(F)(ii). Pub. L. 105–277, §201(4)(A), inserted “and supporting” before “personnel.”

Subsec. (b)(2)(F)(iii). Pub. L. 105–277, §201(4)(B), (C), added cl. (iii).

Subsec. (b)(4)(A). Pub. L. 105–277, §201(5), substituted “a Federal agency” for “an agency” in introductory provisions.

Subsec. (b)(4)(A)(v). Pub. L. 105–277, §201(6), added cl. (v).

1992—Subsec. (b)(2)(B) to (F). Pub. L. 102–484, §1042(1), added subpar. (B) and redesignated former subpars. (B) to (E) as (C) to (F), respectively.

Subsec. (b)(3). Pub. L. 102–484, §1042(2), substituted “paragraph (2)(D)” for “paragraph (2)(C).”

1989—Subsec. (b)(2)(E). Pub. L. 101–189, §1210, substituted “and the Attorney General (and the Secretary of State in the case of a law enforcement operation outside of the land area of the United States)” for “, the Attorney General, and the Secretary of State, in connection with a law enforcement operation outside the land area of the United States” in introductory provisions.

Subsec. (b)(4)(A)(iii). Pub. L. 101–189, §1216(b), substituted “general note 2 of the Harmonized Tariff Schedule of the United States” for “general headnote 2 of the Tariff Schedules of the United States.”

Subsec. (c). Pub. L. 101–189, §1216(c), substituted “subsection (b)(2)” for “paragraph (2).”

1988—Pub. L. 100–456 substituted “Maintenance and operation of equipment” for “Assistance by Department of Defense personnel” in section catchline, and amended text generally, revising and restating former subsecs. (a) to (d) as subsecs. (a) to (c).

Subsec. (a)(3). Pub. L. 100–418, which directed substitution of “general note 2 of the Harmonized Tariff Schedule of the United States” for “general headnote 2 of the Tariff Schedules of the United States,” could not be executed because of intervening general amendment by Pub. L. 100–456.

1986—Subsec. (a). Pub. L. 99-570, §3056(a), inserted provision at end relating to assistance that such agency is authorized to furnish to any foreign government which is involved in the enforcement of similar laws.

Subsec. (c). Pub. L. 99-570, §3056(b), amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows:

“(1) In an emergency circumstance, equipment operated by or with the assistance of personnel assigned under subsection (a) may be used outside the land area of the United States (or any territory or possession of the United States) as a base of operations by Federal law enforcement officials to facilitate the enforcement of a law listed in subsection (a) and to transport such law enforcement officials in connection with such operations, if—

“(A) equipment operated by or with the assistance of personnel assigned under subsection (a) is not used to interdict or to interrupt the passage of vessels or aircraft; and

“(B) the Secretary of Defense and the Attorney General jointly determine that an emergency circumstance exists.

“(2) For purposes of this subsection, an emergency circumstance may be determined to exist only when—

“(A) the size or scope of the suspected criminal activity in a given situation poses a serious threat to the interests of the United States; and

“(B) enforcement of a law listed in subsection (a) would be seriously impaired if the assistance described in this subsection were not provided.”

Subsec. (d). Pub. L. 99-661 added subsec. (d).

1984—Subsec. (a)(3). Pub. L. 98-525 struck out “(19 U.S.C. 1202)” after “Tariff Schedules of the United States.”

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-418 effective Jan. 1, 1989, and applicable with respect to articles entered on or after such date, see section 1217(b)(1) of Pub. L. 100-418, set out as an Effective Date note under section 3001 of Title 19, Customs Duties.

FUNDS FOR YOUNG MARINES PROGRAM

Pub. L. 110-116, div. A, title VIII, §8030, Nov. 13, 2007, 121 Stat. 1321, provided that: “Notwithstanding any other provision of law, funds available during the current fiscal year and hereafter for ‘Drug Interdiction and Counter-Drug Activities, Defense’ may be obligated for the Young Marines program.”

Similar provisions were contained in the following prior appropriation acts:

Pub. L. 109-289, div. A, title VIII, §8028, Sept. 29, 2006, 120 Stat. 1279.

Pub. L. 109-148, div. A, title VIII, §8033, Dec. 30, 2005, 119 Stat. 2705.

Pub. L. 108-287, title VIII, §8037, Aug. 5, 2004, 118 Stat. 978.

Pub. L. 108-87, title VIII, §8037, Sept. 30, 2003, 117 Stat. 1080.

Pub. L. 107-248, title VIII, §8037, Oct. 23, 2002, 116 Stat. 1544.

Pub. L. 107-117, div. A, title VIII, §8040, Jan. 10, 2002, 115 Stat. 2256.

Pub. L. 106-259, title VIII, §8040, Aug. 9, 2000, 114 Stat. 683.

Pub. L. 106-79, title VIII, §8043, Oct. 25, 1999, 113 Stat. 1240.

Pub. L. 105-262, title VIII, §8043, Oct. 17, 1998, 112 Stat. 2307.

Pub. L. 105-56, title VIII, §8047, Oct. 8, 1997, 111 Stat. 1231.

Pub. L. 104–208, div. A, title I, §101(b) [title VIII, §8048], Sept. 30, 1996, 110 Stat. 3009–71, 3009–99.

**COUNTER-DRUG ACTIVITIES; CONDITIONS ON TRANSFERS OF FUNDS
AND DETAILING PERSONNEL; RELATIONSHIP TO OTHER LAW**

Pub. L. 103–337, div. A, title X, §1011(b)–(d), Oct. 5, 1994, 108 Stat. 2836, provided that:

“(b) CONDITION ON TRANSFER OF FUNDS.—Funds appropriated for the Department of Defense may not be transferred to a National Drug Control Program agency account except to the extent provided in a law that specifically states—

“(1) the amount authorized to be transferred;

“(2) the account from which such amount is authorized to be transferred; and

“(3) the account to which such amount is authorized to be transferred.

“(c) CONDITION ON DETAILING PERSONNEL.—Personnel of the Department of Defense may not be detailed to another department or agency in order to implement the National Drug Control Strategy unless the Secretary of Defense certifies to Congress that the detail of such personnel is in the national security interest of the United States.

“(d) RELATIONSHIP TO OTHER LAW.—A provision of law may not be construed as modifying or superseding the provisions of subsection (b) or (c) unless that provision of law—

“(1) specifically refers to this section; and

“(2) specifically states that such provision of law modifies or supersedes the provisions of subsection (b) or (c), as the case may be.”

Pub. L. 113–6, div. C, title VIII, §8045(a), Mar. 26, 2013, 127 Stat. 308, provided that: “None of the funds available to the Department of Defense for any fiscal year for drug interdiction or counter-drug activities may be transferred to any other department or agency of the United States except as specifically provided in an appropriations law.”

Similar provisions were contained in the following prior appropriation acts:

Pub. L. 112–74, div. A, title VIII, §8045(a), Dec. 23, 2011, 125 Stat. 817.

Pub. L. 112–10, div. A, title VIII, §8045(a), Apr. 15, 2011, 125 Stat. 67.

Pub. L. 111–118, div. A, title VIII, §8047(a), Dec. 19, 2009, 123 Stat. 3439.

Pub. L. 110–329, div. C, title VIII, §8047(a), Sept. 30, 2008, 122 Stat. 3631.

Pub. L. 110–116, div. A, title VIII, §8048(a), Nov. 13, 2007, 121 Stat. 1325.

Pub. L. 109–289, div. A, title VIII, §8045(a), Sept. 29, 2006, 120 Stat. 1283.

Pub. L. 109–148, div. A, title VIII, §8052(a), Dec. 30, 2005, 119 Stat. 2709.

Pub. L. 108–287, title VIII, §8057(a), Aug. 5, 2004, 118 Stat. 983.

Pub. L. 108–87, title VIII, §8057(a), Sept. 30, 2003, 117 Stat. 1085.

Pub. L. 107–248, title VIII, §8058(a), Oct. 23, 2002, 116 Stat. 1549.

Pub. L. 107–117, div. A, title VIII, §8063(a), Jan. 10, 2002, 115 Stat. 2261.

Pub. L. 106–259, title VIII, §8062(a), Aug. 9, 2000, 114 Stat. 688.

Pub. L. 106–79, title VIII, §8065(a), Oct. 25, 1999, 113 Stat. 1244.

Pub. L. 105–262, title VIII, §8065(a), Oct. 17, 1998, 112 Stat. 2311.

Pub. L. 105–56, title VIII, §8071(a), Oct. 8, 1997, 111 Stat. 1235.

Pub. L. 104–208, div. A, title I, §101(b) [title VIII, §8080(a)], Sept. 30, 1996, 110 Stat. 3009–71, 3009–104.

Pub. L. 104–61, title VIII, §8096(a), Dec. 1, 1995, 109 Stat. 671.

Pub. L. 103–335, title VIII, §8154(a), Sept. 30, 1994, 108 Stat. 2658.

ADDITIONAL SUPPORT FOR COUNTER-DRUG ACTIVITIES

Pub. L. 101–510, div. A, title X, §1004, Nov. 5, 1990, 104 Stat. 1629, as amended by Pub. L. 102–190, div. A, title X, §1088(a), Dec. 5, 1991, 105 Stat. 1484; Pub. L. 102–484, div. A, title X, §1041(a)–(d)(1), Oct. 23, 1992, 106 Stat. 2491; Pub. L. 103–160, div. A, title XI, §1121(a), (b), Nov. 30, 1993, 107 Stat. 1753; Pub. L. 103–337, div. A, title X, §1011(a), Oct. 5, 1994, 108 Stat. 2836; Pub. L. 105–261, div. A, title X, §1021, Oct. 17, 1998, 112 Stat. 2120; Pub. L. 107–107, div. A, title X, §1021, Dec. 28, 2001, 115 Stat. 1212; Pub. L. 109–364, div. A, title X, §1021, Oct. 17, 2006, 120 Stat. 2382; Pub. L. 111–383, div. A, title X, §1015(a), Jan. 7, 2011, 124 Stat. 4347; Pub. L. 112–81, div. A, title X, §1005, Dec. 31, 2011, 125 Stat. 1556, provided that:

“(a) SUPPORT TO OTHER AGENCIES.—During fiscal years 2012 through 2014, 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, tribal, 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, local, or tribal government, in the case of support for State, local, or tribal 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 of Defense 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, local, or tribal 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 paragraph (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 counter-drug activities of the Department of Defense or any Federal, State, local, or tribal law enforcement agency within or outside the United States or for the purpose of

facilitating 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, local, and tribal 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 [10 U.S.C. 124 note])) 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 Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of Senate and House of Representatives] written notice of the decision, including the justification for 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 construction, modification, or repair of any facility for the purposes set forth in subsection (b)(4); and

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

“(3) This subsection may not be construed as an authorization for the use of funds for any military construction project that would exceed the approved cost limitations of an unspecified minor military construction project under section 2805(a)(2) of title 10, United States Code.

“(i) DEFINITIONS RELATING TO TRIBAL GOVERNMENTS.—In this section:

“(1) The term ‘Indian tribe’ means a federally recognized Indian tribe.

“(2) The term ‘tribal government’ means the governing body of an Indian tribe, the status of whose land is ‘Indian country’ as defined in section 1151 of title 18, United States Code, or held in trust by the United States for the benefit of the Indian tribe.

“(3) The term ‘tribal law enforcement agency’ means the law enforcement agency of a tribal government.” [Pub. L. 111–383, div. A, title X, §1015(b), Jan. 7, 2011, 124 Stat. 4348, provided that: “The amendments made by subsection (a) [amending section 1004 of Pub. L. 101–510, set out above] shall take effect on the date of the enactment of this Act [Jan. 7, 2011], and shall apply with respect to facilities projects for which a decision is made to be carried out on or after that date.”]

COMMUNICATIONS NETWORK

Pub. L. 100–456, div. A, title XI, §1103, Sept. 29, 1988, 102 Stat. 2042, related to integration of United States assets dedicated to interdiction of illegal drugs into an effective communications network, prior to repeal by Pub. L. 101–189, div. A, title XII, §1204(b), Nov. 29, 1989, 103 Stat. 1564. See section 1204(a) of Pub. L. 101–189 set out as a note under section 124 of this title.

ENHANCED DRUG INTERDICTION AND ENFORCEMENT ROLE FOR NATIONAL GUARD

Pub. L. 100–456, div. A, title XI, §1105, Sept. 29, 1988, 102 Stat. 2047, related to funding and training of National Guard for purpose of drug interdiction and enforcement operations and for operation and maintenance of equipment and facilities for such purpose, prior to repeal by Pub. L. 101–189, div. A, title XII, §1207(b), Nov. 29, 1989, 103 Stat. 1566. See section 112 of Title 32, National Guard.

ADDITIONAL DEPARTMENT OF DEFENSE DRUG LAW ENFORCEMENT ASSISTANCE

Pub. L. 99–570, title III, §3057, Oct. 27, 1986, 100 Stat. 3207–77, provided that the Secretary of Defense was to submit to Congress, within 90 days after Oct. 27, 1986, a list of all forms of assistance that were to be made available by the Department of Defense to civilian drug law enforcement and drug interdiction agencies and a plan for promptly lending equipment and rendering drug interdiction-related assistance included on the list, provided for con-

gressional approval of the list and plan, required the Secretary to convene a conference of the heads of Government agencies with jurisdiction over drug law enforcement to determine the appropriate distribution of the assets or other assistance to be made available by the Department to such agencies, and provided for monitoring of the Department's performance by the General Accounting Office.

§375. Restriction on direct participation by military personnel

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

(Added Pub. L. 97–86, title IX §905(a)(1), Dec. 1, 1981, 95 Stat. 1116; amended Pub. L. 100–456, div. A, title XI, §1104(a), Sept. 29, 1988, 102 Stat. 2045; Pub. L. 101–189, div. A, title XII, §1211, Nov. 29, 1989, 103 Stat. 1567.)

AMENDMENTS

1989—Pub. L. 101–189 substituted “any activity” for “the provision of any support,” struck out “to any civilian law enforcement official” after “any personnel),” and substituted “a search, seizure, arrest” for “a search and seizure, an arrest.”

1988—Pub. L. 100–456 amended section generally. Prior to amendment, section read as follows: “The Secretary of Defense shall issue such regulations as may be necessary to insure that the provision of any assistance (including the provision of any equipment or facility or the assignment of any personnel) to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.”

§376. Support not to affect adversely military preparedness

Support (including the provision of any equipment or facility or the assignment or detail of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such support will adversely affect the military preparedness of the United States. The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that the provision of any such support does not adversely affect the military preparedness of the United States.

(Added Pub. L. 97–86, title, IX, §905(a)(1), Dec. 1, 1981, 95 Stat. 1116; amended Pub. L. 100–456, div. A, title XI, §1104(a), Sept. 29, 1988, 102 Stat. 2045.)

AMENDMENTS

1988—Pub. L. 100–456 substituted “Support” for “Assistance” in section catchline and amended text generally. Prior to amendment, text read as follows: “Assistance (including the provision of any equipment or facility or the assignment of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such assistance will adversely affect the military preparedness of the United States. The Secretary of Defense

shall issue such regulations as may be necessary to insure that the provision of any such assistance does not adversely affect the military preparedness of the United States.”

§377. Reimbursement

(a) Subject to subsection (c), to the extent otherwise required by section 1535 of title 31 (popularly known as the “Economy Act”) or other applicable law, the Secretary of Defense shall require a civilian law enforcement agency to which support is provided under this chapter to reimburse the Department of Defense for that support.

(b)(1) Subject to subsection (c), the Secretary of Defense shall require a Federal agency to which law enforcement support or support to a national special security event is provided by National Guard personnel performing duty under section 502(f) of title 32 to reimburse the Department of Defense for the costs of that support, notwithstanding any other provision of law. No other provision of this chapter shall apply to such support.

(2) Any funds received by the Department of Defense under this subsection as reimbursement for support provided by personnel of the National Guard shall be credited, at the election of the Secretary of Defense, to the following:

(A) The appropriation, fund, or account used to fund the support.

(B) The appropriation, fund, or account currently available for reimbursement purposes.

(c) An agency to which support is provided under this chapter or section 502(f) of title 32 is not required to reimburse the Department of Defense for such support if the Secretary of Defense waives reimbursement. The Secretary may waive the reimbursement requirement under this subsection if such support—

(1) is provided in the normal course of military training or operations; or

(2) results in a benefit to the element of the Department of Defense or personnel of the National Guard providing the support that is substantially equivalent to that which would otherwise be obtained from military operations or training.

(Added Pub. L. 97-86, title IX, §905(a)(1), Dec. 1, 1981, 95 Stat. 1116; amended Pub. L. 100-456, div. A, title XI, §1104(a), Sept. 29, 1988, 102 Stat. 2045; Pub. L. 110-181, div. A, title X, §1061, Jan. 28, 2008, 122 Stat. 319.)

AMENDMENTS

2008—Subsec. (a). Pub. L. 110-181, §1061(1), substituted “Subject to subsection (c), to the extent” for “To the extent.”

Subsecs. (b), (c). Pub. L. 110-181, §1061(2), added subsecs. (b) and (c) and struck out former subsec. (b) which read as follows: “An agency to which support is provided under this chapter is not required to reimburse the Department of Defense for such support if such support—

“(1) is provided in the normal course of military training or operations; or

“(2) results in a benefit to the element of the Department of Defense providing the support that is substantially equivalent to that which would otherwise be obtained from military operations or training.”

1988—Pub. L. 100-456 amended section generally. Prior to amendment, section read as follows: “The Secretary of Defense shall issue regulations providing that reimbursement may be a condition of assistance to a civilian law enforcement official under this chapter.”

§378. Nonpreemption of other law

Nothing in this chapter shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law before December 1, 1981.

(Added Pub. L. 97–86, title IX, §905(a)(1), Dec. 1, 1981, 95 Stat. 1116; amended Pub. L. 98–525, title XIV, §1405(10), Oct. 19, 1984, 98 Stat. 2622; Pub. L. 100–456, div. A, title XI, §1104(a), Sept. 29, 1988, 102 Stat. 2045.)

AMENDMENTS

1988—Pub. L. 100–456 reenacted section without change.

1984—Pub. L. 98–525 substituted “before December 1, 1981” for “prior to the enactment of this chapter.”

§379. Assignment of Coast Guard personnel to naval vessels for law enforcement purposes

(a) The Secretary of Defense and the Secretary of Homeland Security shall provide that there be assigned on board every appropriate surface naval vessel at sea in a drug-interdiction area members of the Coast Guard who are trained in law enforcement and have powers of the Coast Guard under title 14, including the power to make arrests and to carry out searches and seizures.

(b) Members of the Coast Guard assigned to duty on board naval vessels under this section shall perform such law enforcement functions (including drug-interdiction functions)—

(1) as may be agreed upon by the Secretary of Defense and the Secretary of Homeland Security; and

(2) as are otherwise within the jurisdiction of the Coast Guard.

(c) No fewer than 500 active duty personnel of the Coast Guard shall be assigned each fiscal year to duty under this section. However, if at any time the Secretary of Homeland Security, after consultation with the Secretary of Defense, determines that there are insufficient naval vessels available for purposes of this section, such personnel may be assigned other duty involving enforcement of laws listed in section 374(b) (4)(A) of this title.

(d) In this section, the term “drug-interdiction area” means an area outside the land area of the United States (as defined in section 374(b)(4)(B) of this title) in which the Secretary of Defense (in consultation with the Attorney General) determines that activities involving smuggling of drugs into the United States are ongoing.

(Added Pub. L. 99–570, title III, §3053(b)(1), Oct. 27, 1986, 100 Stat. 3207–75; amended Pub. L. 100–456, div. A, title XI, §1104(a), Sept. 29, 1988, 102 Stat. 2045; Pub. L. 107–296, title XVII, §1704(b)(1), Nov. 25, 2002, 116 Stat. 2314.)

AMENDMENTS

2002—Subsecs. (a), (b)(1), (c). Pub. L. 107–296 substituted “of Homeland Security” for “of Transportation.”

1988—Pub. L. 100–456 amended section generally, substituting “every appropriate surface naval vessel” for “appropriate surface naval vessels” in subsec. (a), substituting “section 374(b)(4)(A)” for “section 374(a)(1)” in subsec. (c), and inserting “(as defined in section 374(b)(4)(B) of this title)” in subsec. (d).

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107-296 effective on the date of transfer of the Coast Guard to the Department of Homeland Security, see section 1704(g) of Pub. L. 107-296, set out as a note under section 101 of this title.

§380. Enhancement of cooperation with civilian law enforcement officials

(a) The Secretary of Defense, in cooperation with the Attorney General, shall conduct an annual briefing of law enforcement personnel of each State (including law enforcement personnel of the political subdivisions of each State) regarding information, training, technical support, and equipment and facilities available to civilian law enforcement personnel from the Department of Defense.

(b) Each briefing conducted under subsection (a) shall include the following:

(1) An explanation of the procedures for civilian law enforcement officials—

(A) to obtain information, equipment, training, expert advice, and other personnel support under this chapter; and

(B) to obtain surplus military equipment.

(2) A description of the types of information, equipment and facilities, and training and advice available to civilian law enforcement officials from the Department of Defense.

(3) A current, comprehensive list of military equipment which is suitable for law enforcement officials from the Department of Defense or available as surplus property from the Administrator of General Services.

(c) The Attorney General and the Administrator of General Services shall—

(1) establish or designate an appropriate office or offices to maintain the list described in subsection (b)(3) and to furnish information to civilian law enforcement officials on the availability of surplus military equipment; and

(2) make available to civilian law enforcement personnel nationwide, tollfree telephone communication with such office or offices.

(Added Pub. L. 100-180, div. A, title XII, §1243(a), Dec. 4, 1987, 101 Stat. 1163; amended Pub. L. 100-456, div. A, title XI, §1104(a), Sept. 29, 1988, 102 Stat. 2046.)

AMENDMENTS

1988—Pub. L. 100-456 amended section generally, substituting provisions relating to annual briefing of law enforcement personnel of each State by Secretary of Defense and Attorney General and establishment of offices and telephone communication with those offices regarding surplus military equipment for provisions requiring the Secretary to report to Congress on the availability of assistance, etc., to civilian law enforcement and drug interdiction agencies and to convene a conference and requiring the Comptroller General to monitor and report on the Secretary's compliance with those requirements.

§381. Procurement of equipment by State and local governments through **the Department of Defense: equipment for counter-drug, homeland security, and emergency response activities**

(a) PROCEDURES.—(1) The Secretary of Defense shall establish procedures in accordance with this subsection under which States and units of local government may purchase

equipment suitable for counter-drug, homeland security, and emergency response activities through the Department of Defense.

The procedures shall require the following:

(A) Each State desiring to participate in a procurement of equipment suitable for counter-drug, homeland security, or emergency response activities through the Department of Defense shall submit to the Department, in such form and manner and at such times as the Secretary prescribes, the following:

(i) A request for equipment.

(ii) Advance payment for such equipment, in an amount determined by the Secretary based on estimated or actual costs of the equipment and administrative costs incurred by the Department.

(B) A State may include in a request submitted under subparagraph (A) only the type of equipment listed in the catalog produced under subsection (c).

(C) A request for equipment shall consist of an enumeration of the equipment that is desired by the State and units of local government within the State. The Governor of a State may establish such procedures as the Governor considers appropriate for administering and coordinating requests for equipment from units of local government within the State.

(D) A State requesting equipment shall be responsible for arranging and paying for shipment of the equipment to the State and localities within the State.

(2) In establishing the procedures, the Secretary of Defense shall coordinate with the General Services Administration and other Federal agencies for purposes of avoiding duplication of effort.

(b) REIMBURSEMENT OF ADMINISTRATIVE COSTS.—In the case of any purchase made by a State or unit of local government under the procedures established under subsection (a), the Secretary of Defense shall require the State or unit of local government to reimburse the Department of Defense for the administrative costs to the Department of such purchase.

(c) GSA CATALOG.—The Administrator of General Services, in coordination with the Secretary of Defense, shall produce and maintain a catalog of equipment suitable for counter-drug, homeland security, and emergency response activities for purchase by States and units of local government under the procedures established by the Secretary under this section.

(d) DEFINITIONS.—In this section:

(1) The term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States.

(2) The term “unit of local government” means any city, county, township, town, borough, parish, village, or other general purpose political subdivision of a State; an Indian tribe which performs law enforcement or emergency response functions as determined by the Secretary of the Interior; or any agency of the District of Columbia government or the United States Government performing law enforcement or emergency response functions in and for the District of Columbia or the Trust Territory of the Pacific Islands.

(3) The term “equipment suitable for counter-drug, homeland security, and emergency response activities” has the meaning given such term in regulations prescribed by the Secretary of Defense. In prescribing the meaning of the term, the Secretary may not include any equipment that the Department of Defense does not procure for its own pur-

poses and, in the case of equipment for homeland security activities, may not include any equipment that is not found on the Authorized Equipment List published by the Department of Homeland Security.

(Added Pub. L. 103–160, div. A, title XI, §1122(a)(1), Nov. 30, 1993, 107 Stat. 1754; amended Pub. L. 110–417, [div. A], title VIII, §885(a), (b)(1), Oct. 14, 2008, 122 Stat. 4560, 4561.)

AMENDMENTS

2008—Pub. L. 110–417, §885(b)(1), substituted “Procurement of equipment by State and local governments through the Department of Defense: equipment for counter-drug, homeland security, and emergency response activities” for “Procurement by State and local governments of law enforcement equipment suitable for counter-drug activities through the Department of Defense” in section catchline.

Subsec. (a)(1). Pub. L. 110–417, §885(a)(1), in introductory provisions, struck out “law enforcement” before “equipment” and inserted “, homeland security, and emergency response” after “counter-drug” in subpar. (A), inserted “, homeland security, or emergency response” after “counter-drug” in introductory provisions and struck out “law enforcement” before “equipment” in cl. (i), in subpar. (C) struck out “law enforcement” before “equipment” wherever appearing, and in subpar. (D) struck out “law enforcement” before “equipment shall.”

Subsec. (c). Pub. L. 110–417, §885(a)(2), struck out “law enforcement” before “equipment” and inserted “, homeland security, and emergency response” after “counter-drug.”

Subsec. (d)(2), (3). Pub. L. 110–417, §885(a)(3), in par. (2) inserted “or emergency response” after “law enforcement” in two places and in par. (3) struck out “law enforcement” before “equipment suitable” and inserted “, homeland security, and emergency response” after “counter-drug” and “and, in the case of equipment for homeland security activities, may not include any equipment that is not found on the Authorized Equipment List published by the Department of Homeland Security” before period at end.

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

DEADLINE FOR ESTABLISHING PROCEDURES

Pub. L. 103–160, div. A, title XI, §1122(b), Nov. 30, 1993, 107 Stat. 1755, directed the Secretary of Defense to establish procedures under subsec. (a) of this section not later than six months after Nov. 30, 1993.

§382. Emergency situations involving weapons of mass destruction

(a) IN GENERAL.—The Secretary of Defense, upon the request of the Attorney General, may provide assistance in support of Department of Justice activities relating to the enforcement of section 175, 229, or 2332a of title 18 during an emergency situation involving a weapon of mass destruction. Department of Defense resources, including personnel of the Department of Defense, may be used to provide such assistance if—

(1) the Secretary of Defense and the Attorney General jointly determine that an emergency situation exists; and

(2) the Secretary of Defense determines that the provision of such assistance will not adversely affect the military preparedness of the United States.

(b) EMERGENCY SITUATIONS COVERED.—In this section, the term “emergency situation involving a weapon of mass destruction” means a circumstance involving a weapon of mass destruction—

(1) that poses a serious threat to the interests of the United States; and

(2) in which—

(A) civilian expertise and capabilities are not readily available to provide the required assistance to counter the threat immediately posed by the weapon involved;

(B) special capabilities and expertise of the Department of Defense are necessary and critical to counter the threat posed by the weapon involved; and

(C) enforcement of section 175, 229, or 2332a of title 18 would be seriously impaired if the Department of Defense assistance were not provided.

(c) FORMS OF ASSISTANCE.—The assistance referred to in subsection (a) includes the operation of equipment (including equipment made available under section 372 of this title) to monitor, contain, disable, or dispose of the weapon involved or elements of the weapon.

(d) REGULATIONS.—(1) The Secretary of Defense and the Attorney General shall jointly prescribe regulations concerning the types of assistance that may be provided under this section. Such regulations shall also describe the actions that Department of Defense personnel may take in circumstances incident to the provision of assistance under this section.

(2)(A) Except as provided in subparagraph (B), the regulations may not authorize the following actions:

(i) Arrest.

(ii) Any direct participation in conducting a search for or seizure of evidence related to a violation of section 175, 229, or 2332a of title 18.

(iii) Any direct participation in the collection of intelligence for law enforcement purposes.

(B) The regulations may authorize an action described in subparagraph (A) to be taken under the following conditions:

(i) The action is considered necessary for the immediate protection of human life, and civilian law enforcement officials are not capable of taking the action.

(ii) The action is otherwise authorized under subsection (c) or under otherwise applicable law.

(e) REIMBURSEMENTS.—The Secretary of Defense shall require reimbursement as a condition for providing assistance under this section to the extent required under section 377 of this title.

(f) DELEGATIONS OF AUTHORITY.—(1) Except to the extent otherwise provided by the Secretary of Defense, the Deputy Secretary of Defense may exercise the authority of the Secretary of Defense under this section. The Secretary of Defense may delegate the Secretary’s authority under this section only to an Under Secretary of Defense or an Assistant Secretary of Defense and only if the Under Secretary or Assistant Secretary to whom delegated has been designated by the Secretary to act for, and to exercise the general powers of, the Secretary.

(2) Except to the extent otherwise provided by the Attorney General, the Deputy Attorney General may exercise the authority of the Attorney General under this section. The Attorney General may delegate that authority only to the Associate Attorney General or an Assistant Attorney General and only if the Associate Attorney General or Assistant Attorney General to

whom delegated has been designated by the Attorney General to act for, and to exercise the general powers of, the Attorney General.

(g) **RELATIONSHIP TO OTHER AUTHORITY.**—Nothing in this section shall be construed to restrict any executive branch authority regarding use of members of the armed forces or equipment of the Department of Defense that was in effect before September 23, 1996.

(Added Pub. L. 104–201, div. A, title XIV, §1416(a)(1), Sept. 23, 1996, 110 Stat. 2721; amended Pub. L. 105–85, div. A, title X, §1073(a)(6), Nov. 18, 1997, 111 Stat. 1900; Pub. L. 111–383, div. A, title X, §1075(b) (10)(A), (B), Jan. 7, 2011, 124 Stat. 4369; Pub. L. 112–81, div. A, title X, §1089, Dec. 31, 2011, 125 Stat. 1603.)

AMENDMENTS

2011—Pub. L. 111–383, §1075(b)(10)(B), struck out “chemical or biological” before “weapons” in section catchline.

Subsec. (a). Pub. L. 112–81 struck out “biological or chemical” before “weapon of mass destruction” in introductory provisions.

Pub. L. 111–383, §1075(b)(10)(A), substituted “section 175, 229, or 2332a” for “section 175 or 2332c.”

Subsec. (b). Pub. L. 112–81 struck out “biological or chemical” before “weapon of mass destruction” in two places in introductory provisions.

Subsecs. (b)(2)(C), (d)(2)(A)(ii). Pub. L. 111–383, §1075(b)(10)(A), substituted “section 175, 229, or 2332a” for “section 175 or 2332c.”

1997—Subsec. (g). Pub. L. 105–85 substituted “September 23, 1996” for “the date of the enactment of the National Defense Authorization Act for Fiscal Year 1997.”

MILITARY ASSISTANCE TO CIVIL AUTHORITIES TO RESPOND TO ACT OR THREAT OF TERRORISM

Pub. L. 106–65, div. A, title X, §1023, Oct. 5, 1999, 113 Stat. 747, authorized the Secretary of Defense, upon the request of the Attorney General, to provide assistance to civil authorities in responding to an act of terrorism or threat of an act of terrorism within the United States, if the Secretary determined that certain conditions were met, subject to reimbursement and limitations on funding and personnel, and provided that this authority applied between Oct. 1, 1999, and Sept. 30, 2004.

References

- California Penal Code, Sections 630–638. As of January 13, 2014:
<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-01000&file=630-638>
- Chairman of the Joint Chiefs of Staff, *DoD Counterdrug Support*, CJCSI 3710.01B, Washington, D.C., January 26, 2007.
- Electronic Privacy Information Center, “Face Recognition,” web page, no date (accessed December 5, 2013). As of January 13, 2014:
<http://epic.org/privacy/facerecognition/>
- Farivar, Cyrus, “Your Car, Tracked: The Rapid Rise of License Plate Readers,” *Ars Technica*, September 27, 2012.
- Felicetti, Gary, and John Luce, “The Posse Comitatus Act: Liberation from Lawyers,” *Parameters, The Army War College Quarterly*, Vol. 34, No. 3, Autumn 2004.
- Goldstein, Joseph, “New York City Police Amassing a Trove of Cellphone Logs,” *New York Times*, November 26, 2012.
- Gonzales, Daniel, Carolyn Wong, Eric Landree, and Leland Joe, *Are Law and Policy Clear and Consistent? Roles and Responsibilities of the Defense Acquisition Executive and the Chief Information Officer*, Santa Monica, Calif.: RAND Corporation, MG-958-NAVY, 2010. As of January 13, 2014:
<http://www.rand.org/pubs/monographs/MG958.html>
- Lichtblau, Eric, “In Secret, Court Vastly Broadens Powers of N.S.A.,” *New York Times*, July 6, 2013.
- McKinsey, William G., *Next Generation Identification, Bigger-Better-Faster*, Federal Bureau of Investigation, Criminal Justice Information Services Division, 2013.
- National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, Washington, D.C.: U.S. Government Printing Office, July 2004.
- N.Y. Penal Law, Article 250, Offenses Against the Right to Privacy, Section 250.05, “Eavesdropping.” As of January 13, 2014:
<http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@SLPEN0P3TN A250+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=03252717+&TARGET=VIEW>
- Perera, David, “Storing and Sharing License Plate Reader Scans Challenges Americans’ Privacy,” *FierceGovernmentIT*, July 17, 2013.
- Public Law 100-456, National Defense Authorization Act 1989, Section 1102, “Lead Agency for Detection,” September 29, 1988.
- Public Law 100-456, National Defense Authorization Act 1989, Section 1103, “Communications Network,” September 29, 1988.
- Public Law 100-456, National Defense Authorization Act 1989, Section 1104, “Enhanced Drug Interdiction and Law Enforcement Support by the Department of Defense,” September 29, 1988.
- Public Law 101-189, National Defense Authorization Act 1990, Section 1202, “Department of Defense as Lead Agency for the Detection and Monitoring of Aerial and Maritime Transit of Illegal Drugs,” November 29, 1989.

Public Law 101-189, National Defense Authorization Act 1990, Section 1205, “Research and Development,” November 29, 1989.

Public Law 101-510, National Defense Authorization Act 1991, Section 1001, “Drug Interdiction and Counter-drug Activities Funding,” November 5, 1990.

Public Law 101-510, National Defense Authorization Act 1991, Section 1004, “Additional Support for Counter-drug Activities,” November 5, 1990.

Public Law 101-510, National Defense Authorization Act 1991, Section 1005, “Transfer of Excess Defense Articles,” November 5, 1990.

Public Law 107-56, USA PATRIOT Act, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, 2001.

Public Law 107-107, National Defense Authorization Act 2002, Section 1004, “Additional Support for Counter-drug Activities,” December 28, 2001.

Public Law 108-136, National Defense Authorization Act 2004, Section 303, “Other Department of Defense Programs,” November 24, 2003.

Public Law 108-136, National Defense Authorization Act 2004, Section 1021, “Expansion and Extension of Authority to Provide Additional Support for Counter-drug Activities,” November 24, 2003.

Public Law 108-136, National Defense Authorization Act 2004, Section 1022, “Authority for Joint Task Forces to Provide Support to Law Enforcement Agencies Conducting Counter-Terrorism Activities,” November 24, 2003.

Public Law 111-383, National Defense Authorization Act 2011, Section 1012, “Extension and Modification of Joint Task Forces Support to Law Enforcement Agencies Conducting Counter-Terrorism Activities,” January 7, 2011.

Public Law 112-81, National Defense Authorization Act 2012, Section 1004, “Extension of Authority for Joint Task Forces to Provide Support to Law Enforcement Agencies Conducting Counter-Terrorism Activities,” December 31, 2011.

Public Law 112-81, National Defense Authorization Act 2012, Section 1005, “Three-Year Extension and Modification of Authority of Department of Defense to Provide Additional Support for Counterdrug Activities of Other Governmental Agencies,” December 31, 2011.

Public Law 112-81, National Defense Authorization Act 2012, Section 1404, “Drug Interdiction and Counter-Drug Activities, Defense-wide,” December 31, 2011.

Public Law 112-239, National Defense Authorization Act 2013, Section 1011, “Extension of Authority for Joint Task Forces to Provide Support to Law Enforcement Agencies Conducting Counter-Terrorism Activities,” January 2, 2013.

Public Law 113-36, U.S. Code, Title 15, Section 404n-2, “Terrorist Identification Classification System,” added November 27, 2002.

“RFI – THUNDERSTORM Technology Demonstration,” FedBizOpps.gov, November 8, 2013. As of December 9, 2013:

https://www.fbo.gov/index?s=opportunity&mode=form&id=7fd00d66d366792fc68fbb3f7b9c0db&tab=core&_cview=0

Schulz, G. W., “DEA Installs License-plate Recognition Devices Near Southwest Border,” *Ars Technica*, July 11, 2012.

Sengupta, Somini, “Warrantless Cellphone Tracking Is Upheld,” *New York Times*, July 30, 2013.

Supreme Court of the United States, *Oliver v. United States*, 466 U.S. 170, 1984.

The White House, *Executive Order 13311: Homeland Security Information Sharing*, Washington, D.C., June 2003. As of September 4, 2013:

<http://ise.gov/executive-order-13311-homeland-security-information-sharing>

———, *National Strategy for Information Sharing and Safeguarding*, Washington, D.C., December 2012.

- U.S. Code, Title 5, Section 552a, "Records Maintained on Individuals" (also referred to as the Privacy Act of 1974), added December 31, 1971.
- U.S. Code, Title 6, Section 485, "Information Sharing," added December 17, 2004.
- U.S. Code, Title 10, Section 124, "Detection and Monitoring of Aerial and Maritime Transit of Illegal Drugs: Department of Defense to be Lead Agency," added November 29, 1989.
- U.S. Code, Title 10, Section 139, "Director of Operational Test and Evaluation," added September 24, 1983.
- U.S. Code, Title 10, Section 2399, "Operational Test and Evaluation of Defense Acquisition Programs," added November 29, 1989.
- U.S. Code, Title 10, Section 332, "Use of Militia and Armed Forces to Enforce Federal Authority," derived from Act July 29, 1861.
- U.S. Code, Title 10, Section 371, "Use of Information Collected During Military Operations," added December 1, 1981.
- U.S. Code, Title 10, Section 372, "Use of Military Equipment and Facilities," added December 1, 1981.
- U.S. Code, Title 10, Section 373, "Training and Advising Civilian Law Enforcement Officials," added December 1, 1981.
- U.S. Code, Title 10, Section 374, "Maintenance and Operation of Equipment," added December 1, 1981.
- U.S. Code, Title 10, Section 375, "Restriction on Direct Participation by Military Personnel," added December 1, 1981.
- U.S. Code, Title 10, Section 376, "Support Not to Affect Adversely Military Preparedness," added December 1, 1981.
- U.S. Code, Title 18, Section 1385, "Use of Army and Air Force as Posse Comitatus" (otherwise referred to as The Posse Comitatus Act), originally passed in 1878.
- U.S. Code, Title 31, Section 1301, "Application," added September 13, 1982.
- U.S. Department of Defense, *Acquisition of Information Concerning Persons and Organizations Not Affiliated with the Department of Defense*, DoDD 5200.27, Washington, D.C., January 7, 1980.
- , *Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order, or Counterintelligence Activities*, DoDD 5210.56, Washington, D.C., April 1, 2011.
- , *Critical Asset Assurance Program (CAAP)*, DoDD 5160.54, Washington, D.C., January 20, 1998.
- , *Defense Emergency Preparedness Liaison Officer (EPLO) Programs*, DoDI 3025.16, Washington, D.C., September 8, 2011.
- , *Defense Support of Civil Authorities (DSCA)*, DoDD 3025.18, Washington, D.C., December 29, 2010.
- , *Defense Support of Civilian Law Enforcement Agencies*, DoDI 3025.21, Washington, D.C., February 27, 2013.
- , *Department of Defense Homeland Defense and Civil Support Joint Operating Concept*, Washington, D.C., October 1, 2007.
- , *DoD Cooperation with Civilian Law Enforcement Officials*, DoDD 5525.5, Washington, D.C., January 15, 1986.
- , *DoD Financial Management Regulation 7000.14-R*, Volume 2B, Budget Formulation and Presentation (Chapters 4–19), Washington, D.C., July 2013.
- , *DoD Financial Management Regulation*, DoD 7000.14-R, Volume 11A, Washington, D.C., July 2013.
- , *DoD Intelligence Activities*, DoDD 5240.01, Washington, D.C., August 27, 2007.
- , *DoD Military Working Dog (MWD) Program*, DoDD 5200.31.E, Washington, D.C., August 10, 2011.
- , *DoD Technology Readiness Assessment (TRA) Deskbook*, Washington, D.C., July 2009.

- , *Manual for Civil Emergencies*, DoD 3025.1-M, Washington, D.C., June 1994.
- , *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons*, DoD 5240.1-R, Washington, D.C., December 1982.
- , *Support and Services for Eligible Organizations and Activities Outside the Department of Defense*, DoDD 1100.20, Washington, D.C., April 12, 2004.
- U.S. Deputy Secretary of Defense, “Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities,” Department of Defense Memorandum, Washington, D.C., October 2, 2003.
- U.S. Government Accountability Office, *Information Sharing: Agencies Could Better Coordinate to Reduce Overlap in Field-Based Activities*, GAO-13-471, Washington, D.C., April 2013.
- , *Information Sharing: DHS Has Demonstrated Leadership and Progress, But Additional Actions Could Help Sustain and Strengthen Efforts*, GAO-12-809, Washington, D.C., September 2012.
- , *Information Sharing Environment: Better Road Map Needed to Guide Implementation and Investments*, GAO-11-455, Washington, D.C., July 2011.
- , *Interagency Collaboration: Key Issues for Congressional Oversight of National Security Strategies, Organizations, Workforce, and Information Sharing*, GAO-09-904SP, Washington, D.C., September 2009.
- , *Principles of Federal Appropriations Law*, Third Edition, Volume I, GAO-04-261SP, Washington, D.C., January 1, 2004.
- , *Principles of Federal Appropriations Law*, Third Edition, Volume II, GAO-06-382SP, Washington, D.C., February 1, 2006.
- , *Principles of Federal Appropriations Law*, Third Edition, Volume III, GAO-08-978SP, Washington, D.C., September 1, 2008.
- , *Principles of Federal Appropriations Law*, Annual Update of the Third Edition, Volumes I, II and III, GAO-12-413SP, Washington, D.C., March 8, 2012.
- , *Principles of Federal Appropriations Law*, Annual Update of the Third Edition, Volumes I, II and III, GAO-13-273SP, Washington, D.C., March 7, 2013.
- U.S. Northern Command, “Joint Task Force North Command Briefing,” El Paso, Tex., October 30, 2012.
- United States Constitution, The Fourth Amendment, 1791.

The Department of Defense (DoD) has developed new sensor technologies to support military forces operating in Iraq and Afghanistan. These new capabilities may be useful in counterdrug (CD) operations along the southern U.S. border. DoD has held technology demonstrations to test and demonstrate new technologies along the southern U.S. border—because the field conditions along the southern U.S. border closely resemble those in current military theaters of operation, the demonstrations can also reveal whether new technologies are useful for counterdrug operations led by domestic law enforcement operations. However, there are legal questions about whether these technology demonstrations fully comply with U.S. law and whether advanced DoD sensors can legally be used in domestic CD operations when they are operated by U.S. military forces.

In this report, the authors examine federal law and DoD policy to answer these questions. Some parts of U.S. law mandate information sharing among federal departments and agencies for national security purposes and direct DoD to play a key role in domestic CD operations in support of U.S. law enforcement agencies, while other parts of the law place restrictions on when the U.S. military may participate in law enforcement operations. Reviewing relevant federal law and DoD policy, the authors conclude that there is no legal reason why a DoD sensor should be excluded from use in an interagency technology demonstration or in an actual CD operation as long as a valid request for support is made by an appropriate law enforcement official and so long as no personally identifiable or private information is collected. The authors recommend DoD policy on domestic CD operations should be formally clarified and that an approval process should be established for technology demonstrations with a CD nexus.



NATIONAL SECURITY RESEARCH DIVISION

www.rand.org

\$27.95

ISBN 978-0-8330-8494-1

