Occupy Wall Street and the U.S. Army's 82nd Airborne Division: A Hypothetical Examination of the Slippery Slope of Military Intervention during Civil Disturbance

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INTRODUCTION

Historically, the use of military forces to respond to domestic events has significantly impacted the rights of U.S. persons.¹ In 1976, following an unprecedented investigation of the Intelligence Community, Congress found that the military had improperly targeted private citizens participating in constitutionally protected activities.² As a result, America’s legislators warned unequivocally that “[u]nless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature.”³ Nonetheless, in post-9/11 America, U.S. policymakers have again lobbied for increased involvement of the military in domestic operations.⁴

¹ The term “U.S. person” is a term of art in the Intelligence Community. It denotes an individual or entity that is subject to heightened protection under the law. The term is defined in multiple intelligence statutes. For the purpose of this discussion, analysis will focus on the definition contained in relevant executive order. This definition will be discussed at length throughout the remainder of the Article.
³ Id.
At the close of 2011, Time Magazine boldly named “the protestor” as the person of the year. The managing editor observed that “[p]rotests have now occurred in countries whose populations total at least three billion people, and the word protest has appeared in newspapers and online exponentially more this past year than at any other time in history.” Notably, “[e]verywhere . . . people have complained about the failure of traditional leadership and the fecklessness of institutions. Politicians cannot look beyond the next election, and they refuse to make hard choices.” Interestingly, while Americans watched events spiral out of control abroad, a new movement was taking shape domestically.

This Article examines the role of the U.S. Army in quelling contemporary civil disturbance. The following discussion is not merely a critique of the current state of the law surrounding domestic operations. It also represents an effort to restore the national discussion to its proper context. Although some might claim that recent events represented a tipping point of global frustration, it is apparent that “America is a nation conceived in protest, and protest is in some ways the source code for democracy—and evidence of the lack of it.”

Putting all personal beliefs about the legitimacy of the Occupy movement aside, the ensuing discussion serves as a vehicle for examining the effects of contemporary military intervention on the rights of U.S. persons. This Article begins with a thorough examination of past intelligence abuses, as revealed through the historical lens of the Church Committee. The discussion then shifts to Executive Order 12333 (E.O. 12333) and the Army’s strategic approach to domestic operations, particularly operations aimed at quelling civil disturbance. Finally, this Article evaluates current Department of Defense implementing guidance for Army intelligence and non-intelligence components.

7 Id.  
9 Stengel, supra note 6.
It is through this analysis that this Article arrives at its central conclusion. By pushing free speech and related protest activities towards the threshold at which domestic law enforcement can no longer maintain order, U.S. persons participating in the Occupy protests may ironically be endangering their own constitutional rights.  

Thus, the primary goal of this Article is to encourage readers to ask themselves one important question: are we in danger of repeating the past?

I. BACKGROUND

Over the course of 2011, the streets of Tunisia, Egypt, Libya, and Syria erupted in unprecedented violence. In front of a shocked and incredulous global audience, Muammar Qaddafi turned to military force to combat growing civil unrest. The result was a ruthless and unflinching campaign of violence directed at the general population. Appalled by the indiscriminate targeting of innocent civilians, the international community decided to intervene.

Multiple commentators credit the Arab Spring with providing inspiration for the Occupy movement. Although this assertion is certainly debatable, the movement has demonstrated significant international flavor. With its domestic genesis in demonstrations such as Occupy Wall Street and Occupy San Francisco, participants espoused a variety of motivations for taking part in civil disturbance. The Occupy movement is a self-described, nonpartisan protest movement.

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10 See infra text accompanying note 242.
targeting economic injustice and social inequality. At its core, however, many domestic protestors also vocally deride the current state of U.S. politics and the government as a whole.

Fueled by social media sites such as Facebook and Twitter, the Occupy movement took on a life of its own, with protests spreading across multiple U.S. cities. Although sometimes difficult to discern a core leadership group or distinct set of strategic objectives, one thing was certain—by the close of 2011, thousands of U.S. persons had marched through the streets of New York, Washington, Oakland, Los Angeles, Berkeley, Boston, Chicago, Seattle, and dozens of other cities across the country. As domestic law enforcement entities struggled to effectively respond to rapidly escalating events, state and local police officers began to adopt "military-style tactics and equipment." Notably, this approach often resulted in violent incidents that were captured on film and broadcast to the public.

In September 2011, a police officer in New York was videotaped spraying mace into the faces of defenseless women who had been detained within a police barricade. In October 2011, an Iraq War veteran suffered a fractured skull in Oakland after protestors clashed

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22 Id.

with police. Finally, in November 2011, hundreds of protesters were arrested after law enforcement entities struggled to oust them from their encampments. In New York, Mayor Michael Bloomberg excluded all journalists from entering the area around Zuccotti Park during a late-night raid, and portions of the air space over Manhattan were closed to news helicopters seeking to film events below.

All of these incidents revealed a domestic law enforcement effort pushed beyond its limits. Many worried that state and local police departments were on the brink of being overwhelmed. As a result, some members of the general public began to discuss an increased role for the U.S. Army in quelling civil disturbance. This Article discusses the various repercussions that could result from introducing federal forces such as the U.S. Army’s 82nd Airborne Division into this already volatile situation. It also examines this scenario through the historical lens of the Church Committee, a Senate select committee that was charged with investigating illegal, improper, or unethical activities conducted by the Intelligence Community.

Interestingly, although National Guard units are thought to have primacy in responding to domestic events, President Bush called upon the paratroopers from the 82nd Airborne Division to restore order in the wake of Hurricane Katrina. Thus, this past mobilization will provide a useful point of comparison for analyzing contemporary operations in response to widespread protest. Notably, introducing federal forces into civil disturbances has one distinct operational advantage: government leaders can leverage the full force and effect of an Army unit with experience utilizing highly functional intelligence support.

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27 See, e.g., Bobby White, Oakland Police Struggle to Serve, Wall St. J., Dec. 15, 2011, http://online.wsj.com/article/SB1000142405270203430404577094572259248412.html (illustrating the fatigue of Oakland police officers who—in response to the Occupy movement—worked weeks of twelve- to fourteen-hour shifts and were unable to respond to emergencies in other parts of the city).
28 S. Res. 21, 94th Cong. (1975) (enacted).
It is particularly thought-provoking that contemporary legal scholarship has not examined this scenario in more detail. Historically, the use of the military to respond to domestic events has significantly impacted the rights of U.S. persons. In 1975, Congress began a detailed examination of the Intelligence Community in response to a series of revelations in the media. The Church Committee, as this investigative committee would come to be known, made a number of alarming findings, including the existence of an Army domestic intelligence program that collected information on U.S. persons while showing little regard for constitutional rights.

II. THE CHURCH COMMITTEE’S FINDINGS ENRAGED THE AMERICAN PUBLIC

On December 22, 1974, the front page of the New York Times declared, “Huge CIA Operation Reported in U.S. Against Antiwar Forces: Files on Citizens.” The headline caught the attention of a public weary of the Vietnam War and Watergate scandal. It also set in motion what would become a lengthy examination of the Intelligence Community by Congress. On January 27, 1975, Congress formed the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. Chaired by Senator Frank Church, the Church Committee brought to light numerous abuses, including Army domestic intelligence gathering operations that improperly targeted U.S. persons purely because of their political beliefs.

Among the findings of the Church Committee, a staff report titled Improper Surveillance of Private Citizens by the Military is par-

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30 See Samuel J. Rascoff, Domesticating Intelligence, 83 S. CAL. L. REV. 575, 597 (2010) (referencing Rascoff’s assertion that “domestic intelligence has been, at different times, effectively out of business or unchecked by law.”).
32 See generally CHURCH COMMITTEE REPORT, supra note 2.
34 See Christopher M. Ford, Intelligence Demands in a Democratic State: Congressional Intelligence Oversight, 81 TUL. L. REV. 721, 736-49 (2007) (detailing the public backlash to the Church Committee’s findings, in the context of the Vietnam War and the Watergate scandal).
35 See id. at 745-49.
36 S. Res. 21, 94th Cong. (1975) (enacted).
37 CHURCH COMMITTEE REPORT, supra note 2, bk. 3, at 788.
ticularly relevant to a discussion of the Army’s ability to collect information on U.S. persons in support of domestic operations. In this report, the Committee goes into great detail regarding the origins and development of the Army’s domestic surveillance program. Throughout the 1960s, the Army was increasingly called upon to respond to civil disturbances during the civil rights movement. In addition, events like the October 1967 March on the Pentagon by anti-war demonstrators and the riots following the 1968 assassination of Dr. Martin Luther King, Jr. further overwhelmed domestic law enforcement personnel. Thus, policymakers in Washington began to rely more heavily on military forces to act in a police capacity.

As domestic military operations increased, commanders tasked intelligence assets with supporting situational awareness and force protection needs. In addition, Army officials felt increased pressure from the White House and the Department of Justice to plan for “potential areas of civil disturbance.” “[T]he Army was preparing for a unique sort of civil disorder, one announced in advance and directed against the military establishment.” Thus, rather than gathering information on threats posed by foreign enemies, intelligence personnel began to view U.S. persons as the main threat to military forces during domestic operations. As a result, the line between what constituted intelligence versus law enforcement information began to blur.

In May of 1968, Army officials distributed a collection plan that greatly expanded the authority to collect information on private indi-

38 See id. at 787.
39 Id. at 794.
40 Id. at 789.
41 See id. at 796, 798.
42 See id. at 798-99.
43 See CHURCH COMMITTEE REPORT, supra note 2, bk. 3, at 796. The term force protection is used to broadly refer to preventive measures taken to mitigate hostile actions against Department of Defense personnel (to include family members), resources, facilities, and critical infrastructure. For additional discussion, see DEP’T OF DEFENSE, JOINT PUBLICATION 1-02, DEP’T OF DEFENSE: DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2010), available at http://tsc.defense.gov/documents/rm/jp1_02.pdf; DEP’T OF DEFENSE, JOINT PUBLICATION 3-0, JOINT OPERATIONS (2011), available at http://www.fas.org/irp/doddir/dod/jp3_0.pdf.
44 Id. at 797 (citing Military Surveillance, Hearings Before the Subcommittee on Constitutional Rights, Committee on the Judiciary, 93d Cong. 289 (1974) (memorandum from Army General Counsel Robert E. Jordan III, for the Secretary of the Army. Subject: Review of Civil Disturbance Intelligence History, undated)).
45 Id. at 796.
46 See id.
As opposed to viewing civil disturbance operations as purely reactive in nature, this plan "directed that information on political activities be gathered in cities where there was a 'potential' for civil disorder." The new strategy, coupled with demands from high ranking officials, combined to create a situation in which "restraints on collection in the civilian community were ignored . . . . Army agents were dispersed into civilian communities across the country and tasked to report on any vestige of political dissent." Notably, viable targets now included antiwar demonstrators, individuals deemed subversive personalities, and those who espoused beliefs contrary to that of the government.

Justification for the domestic intelligence program was rooted in the authority to conduct counterintelligence and foreign intelligence operations despite the fact that U.S. persons participating in demonstrations frequently had no ties to foreign governments. The plan justified collection on U.S. persons on the basis that dissidents were generally determined to be "supporting the stated objectives of foreign elements which are detrimental to the [United States]." As a result, an Army task force "appointed to study the Army's role in civil disturbances, recommended among other things, that 'continuous counterintelligence investigations are required to obtain factual information on the participation of subversive personalities, groups or organizations and their influence on urban populations to cause civil disturbances.'"

As domestic intelligence collection increased, efforts to collect foreign intelligence and information on U.S. persons overseas increased as well. These efforts involved a number of techniques, including: "wiretaps, mail opening, covert operations, photography, and personal surveillances." In all, the Army collected information

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47 Id. at 799.
48 Id.
49 See Church Committee Report, supra note 2, bk. 3, at 799-800.
50 See id. at 797-799.
51 See id. at 798-99.
52 Id. at 797-98 (quoting Federal Data Banks, Computers and the Bill of Rights, Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 92d Cong. 1120 (1971)).
53 Id. at 797 (quoting Military Surveillance, Hearings before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 93d Cong. 289 (1974)).
54 See id. at 819-20.
55 See Church Committee Report, supra note 2, bk. 3, at 819.
on an estimated 100,000 Americans.\textsuperscript{56} Celebrities and political figures were no exception as information was collected on such notable figures as Jesse Jackson, Dr. Benjamin Spock, Arlo Guthrie, and even Senator Adlai Stevenson III.\textsuperscript{57} In addition, information on U.S. persons was frequently disseminated to other federal agencies and domestic law enforcement entities.\textsuperscript{58} Files on private citizens and organizations “were routinely fed to the FBI, the Navy, and the Air Force, and were occasionally circulated to the Central Intelligence Agency and the Defense Intelligence Agency.”\textsuperscript{59}

The findings of the Church Committee enraged both members of the general public and Congress.\textsuperscript{60} The Army terminated its domestic intelligence gathering program in the summer of 1970 when the scope of domestic operations began to make its way into the media.\textsuperscript{61} Committee members concluded that “[t]here is no statute which authorizes military intelligence to collect information on the political activities of private citizens and private organizations, but the Army claimed . . . it needed such information in the late 1960s to enable it to prepare for situations in which it was called upon to put down civil disturbances.”\textsuperscript{62} While the Church Committee noted the lack of legislation regarding domestic military intelligence gathering efforts, Congress did not recommend future legislation in this arena.\textsuperscript{63}

In the years immediately following, Congress would effectively acquiesce to the Executive, and in 1976 President Gerald Ford issued Executive Order 11905 (E.O. 11905), which would serve as the principal regulating document for the Intelligence Community.\textsuperscript{64} E.O. 12333, which President Ronald Reagan issued in 1981, succeeded E.O. 11905 and defined collection authorities for all members of the Intelligence Community.\textsuperscript{65} In its current form, this document operates as the

\textsuperscript{56} Id. at 803.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} See, e.g., David M. Alpern et. al., Inquest on Intelligence, Newsweek, May 10, 1976, at 40.
\textsuperscript{61} CHURCH COMMITTEE REPORT, supra note 2, bk. 3, at 804.
\textsuperscript{62} Id. at 793.
\textsuperscript{63} See generally id.
principal regulating document for intelligence activities and describes special considerations for collection of information on U.S. persons.66

III. THE EXECUTIVE BRANCH FILLED THE VOID LEFT BY CONGRESSIONAL INACTION

As the principal regulating document for the Intelligence Community, E.O. 12333 provides structure and direction for Army intelligence activities while concurrently protecting the rights of U.S. persons.67 Notably, E.O. 12333 and the National Security Act of 1947 share many relevant provisions.68 The preamble of E.O. 12333 discusses the need for collection of “timely, accurate, and insightful information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons, and their agents.”69 The Executive Order, however, recognizes that intelligence activities cannot occur in a vacuum. E.O. 12333 frequently mentions the protection of constitutional rights and the rights of U.S. persons.70

The enunciated collection authorities in E.O. 12333 and corresponding definitions for the terms “counterintelligence” and “foreign intelligence” provide a more rigid framework for collection of information on U.S. persons.71 The definition of “counterintelligence” is limited to activities “conducted for or on behalf of foreign powers, organizations, or persons, or their agents, or international terrorist organizations or activities.”72 Similarly, the definition of “foreign intelligence” is restricted to threats that originate from “foreign governments or elements thereof, foreign organizations, foreign persons, or international terrorists.”73 Thus, by stressing a foreign nexus or threat from entities external to the United States, E.O. 12333 attempts

66 Id.
67 Id.
68 Compare 50 U.S.C. §§ 401-42 (2006), with E.O. 12333, supra note 65 (the National Security Act of 1947 created the modern-day Intelligence Community, and its amended terms codify many of the provisions contained in E.O. 12333).
69 E.O. 12333, supra note 65, at Preamble.
70 Id. §§ 1.1(a)-(b), 1.3(b)(9)(B), 1.3(b)(19), 2.3, 2.4, 2.9.
71 Id. § 3.5.
72 Id. § 3.5(a); see also Michael J. Woods & William King, An Assessment of the Evolution and Oversight of Defense Counterintelligence Activities, 3 J. Nat’l Security L. & Pol’y 169 (2009).
73 E.O. 12333, supra note 65, § 3.5(e).
to limit the authority by which the Army can collect information on U.S. persons.

Section 1.7(f) of E.O. 12333 describes the specific authorities under which Army intelligence elements may collect information.\textsuperscript{74} The intelligence and counterintelligence elements of the Army may collect “defense and defense-related intelligence and counterintelligence to support departmental requirements, and, as appropriate, national requirements.”\textsuperscript{75} In addition, the Executive Order stresses that collection should take into account the rights afforded to U.S. persons.\textsuperscript{76} Part 1 of E.O. 12333 declares, the “United States Government has a solemn obligation . . . to protect fully the legal rights of all United States persons, including freedoms, civil liberties, and privacy rights guaranteed by Federal Law.”\textsuperscript{77} Notably, E.O. 12333 defines “U.S. person” so as to protect a large class of entities including “a United States citizen, an alien known by the intelligence element concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States.”\textsuperscript{78}

On its face, E.O. 12333 makes progress towards limiting the Army’s authority during domestic operations while defining the terms under which it can gather information on U.S. persons.\textsuperscript{79} Nonetheless, there are particular sections of the Executive Order that require additional analysis. While E.O. 12333 defines the terms “foreign intelligence” and “counterintelligence,” there is no corresponding definition for the term “defense and defense-related intelligence.”\textsuperscript{80} The National Security Act similarly lacks a definition for this term.\textsuperscript{81} There is also little explanation as to how the term defense intelligence should be interpreted in the context of domestic operations.\textsuperscript{82} As discussed in the remainder of this Article, this omission could significantly impact the rights of U.S. persons.

Of particular note, E.O. 12333 only references collection efforts of Army intelligence components rather than U.S. Army components

\textsuperscript{74} Id. § 1.7(f).
\textsuperscript{75} Id.
\textsuperscript{76} Id. § 1.1(b).
\textsuperscript{77} Id.
\textsuperscript{78} Id. § 3.5(k).
\textsuperscript{79} See E.O. 12333, supra note 65.
\textsuperscript{80} See \textit{generally id.} § 3.5.
\textsuperscript{82} See \textit{generally E.O. 12333, supra note 65.}
writ large. It seemingly has no force or effect on the collection of information by non-intelligence components of the military such as law enforcement or security forces. Thus, to assess the Army’s contemporary authority to collect information on U.S. persons during civil disturbance operations, it is necessary to examine relevant Department of Defense strategy as well as ascertain how the guidance in E.O. 12333 has been implemented within individual Army components.

IV. POLICYMAKERS FORMULATED A DEFENSE STRATEGY FOR POST-9/11 DOMESTIC OPERATIONS

The primary document outlining the Army’s strategic approach to domestic operations is the Strategy for Homeland Defense and Civil Support, which was promulgated in 2005. Leading up to the twenty-first century, the national security establishment was slowly coming to the realization that geographic isolation was insufficient to protect against an adaptive and resilient enemy. In particular, long-term trends indicated that terrorist entities such as al-Qaeda would forego conventional means of attack and instead choose to “respond asymmetrically by attacking the U.S. homeland.” Unfortunately, the Department of Defense, and particularly the U.S. Army, lacked a unified plan for combating this emerging threat.

Just weeks after the attacks of September 11, 2001, the Senate Committee on Armed Services explored the proper role of the military in safeguarding the homeland. In his opening statement, Senator Carl Levin summarized the many challenges that Americans now faced:

U.S. military aircraft, assisted by NATO AWACS surveillance aircraft, routinely patrol American skies. U.S. warships patrol our shores.

83 Id. §§ 1.7(f) and 2.3.
84 See generally STRATEGY FOR HOMELAND DEFENSE AND CIVIL SUPPORT, supra note 4.
86 See id.
87 See id.
89 See id.
These aircraft and warships are prepared to carry out a once unthinkable mission, if approved by the chain of command: to shoot down hijacked U.S. civilian airliners that threaten Americans on the ground... These are extraordinary responses to an extraordinary threat, and they require a reexamination of the proper role of the U.S. Armed Forces in helping to ensure the security of the American people. That reexamination and reorganization has already begun.90

In the years immediately following Senator Levin’s remarks, many government leaders advocated for what he termed an “unprecedented military role in ensuring the security of the United States and the American people.”91 In the post-9/11 world, lawmakers and policymakers appeared to view every strategic initiative with a heavy counterterrorism bias, and understandably so; the national security landscape had been transformed overnight and with it the overall structure of the U.S. Government.92

As a result of the global threat of terrorism, civilian and military agencies within the federal government underwent an unprecedented reorganization to enhance homeland security.93 In addition, new strategic concepts were articulated that stressed the role of the U.S. military in domestic operations.94 While multiple government agencies were unified within the Department of Homeland Security, the Department of Defense consolidated existing missions into a newly established combatant command called the United States Northern Command (USNORTHCOM).95

As noted in its mission statement, “USNORTHCOM defends America’s homeland—protecting our people, national power, and

90 Id.
91 Id.
94 See generally Strategy for Homeland Defense and Civil Support, supra note 4, at 5.
freedom of action." Its area of responsibility includes "the continental United States, Alaska, Canada, Mexico and the surrounding water out to approximately 500 nautical miles." More importantly for this discussion, USNORTHCOM has also been tasked with operational control of two emerging strategic concepts: homeland defense and defense support of civil authorities (more commonly referred to as civil support).

The Strategy for Homeland Defense and Civil Support provides overall guidance for USNORTHCOM’s approach to its homeland defense and civil support missions. Under the Strategy, the term homeland defense is defined as "the protection of US sovereignty, territory, domestic population, and critical defense infrastructure against external threats and aggression, or other threats as directed by the President." Interestingly, the term civil support is defined as "[Department of Defense] support, including Federal military forces, the Department’s career civilian and contractor personnel, and [Department of Defense] agency and component assets, for domestic emergencies and for designated law enforcement and other activities.

Given the breadth of this latter definition, there is little doubt that civil support includes the exact scenario discussed in this Article—namely, one in which federal military forces are called upon to respond to domestic protests such as those inspired by the Occupy movement. Nonetheless, the term homeland defense seems to be indelibly focused on events with a foreign intelligence or counterintelligence nexus. In essence, this concept calls for renewed vigilance against "external threats" such as those represented by traditional state actors or non-state terrorist entities like al-Qaeda.

Given the lessons of the Church Committee, the Strategy’s simultaneous focus on both foreign and domestic threats is troubling. Similar to the collection plan implemented in May of 1968, government leaders and policymakers have once again created a scenario in which two distinct concepts have been inextricably inter-

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96 Id.
97 Id.
98 Id.
99 See generally STRATEGY FOR HOMELAND DEFENSE AND CIVIL SUPPORT, supra note 4.
100 Id. at 5.
101 Id. at 5-6.
102 Id.
twined. Although aggressive defense policy is certainly logical in the context of protecting the U.S. from external terrorist attack, there is no place for it in the arena of non-violent, First Amendment-protected free speech. Thus, while it would be justifiable to utilize the U.S. Army to combat foreign terrorists who have infiltrated America’s borders, this situation simply cannot be compared to one in which Americans themselves have taken to the streets in lawful protest.

V. THE CURRENT DEFENSE STRATEGY DANGEROUSLY CONFLATES TWO DISTINCT CONCEPTS

In a 1966 essay titled the *Psychology of Science*, Abraham Maslow discussed what has since been termed Maslow’s Law of the Instrument. Specifically, Maslow postulated, “I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.” Put in its simplest terms, this principle has come to stand for the idea that one tool is not suitable to accomplish every task.

Although Maslow explored this axiom in relation to scientific thought, his theory is relevant to contemporary challenges to national security as well. In particular, such an adage is decidedly revealing when analyzed in conjunction with the Strategy for Homeland Defense and Civil Support. Thus, stretching the theory to its full potential, one might fairly say that if peaceful, non-violent protests were Maslow’s proverbial nail, then utilizing federal forces to respond to these activities would be the modern day equivalent of pounding a nail with the force of a twenty pound sledgehammer.

Similarly, when analyzed in its entirety, it is clear that the Strategy for Homeland Defense and Civil Support is fundamentally flawed. While it was written largely in response to the threat of international terrorism, its terms dangerously conflate two separate and distinct concepts. In particular, the concepts of homeland defense and civil support should not be discussed interchangeably as if they are syno-

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103 See generally Church Committee Report, supra note 2, bk. 3, at 799; Strategy for Homeland Defense and Civil Support, supra note 4.


105 Id.

106 See id.

nymns. As the above analysis demonstrates, to do so would be analogous to treating every domestic operation, including those targeting the Occupy movement, as if they are conducted in response to an imminent terrorist attack. Such a response would be both unnecessary and disproportionate to the matter at hand.

To illustrate this point, one need only look to the actual language of the Strategy to determine that its provisions are inadequate. Except for a perfunctory reference to “respect for America’s constitutional principles,” the Strategy fails to provide any concrete policy guidance related to protecting the rights of U.S. persons.108 More importantly, rather than advocating for an approach that balances America’s national security interests against relevant constitutional protections, the Strategy instead promotes an active, layered defense that “applies to the domestic context the key principles that are driving . . . joint expeditionary warfare.”109

As a preliminary matter, policymakers maintain that this approach represents a transformation or fundamental change in defense strategy.110 Unfortunately, they fail to realize that this alleged transformation strongly resembles the flawed strategy of the past.111 For example, the Strategy states that, as a matter of national security, “[t]he Department can no longer think in terms of the ‘home’ game and the ‘away’ game.”112 Rather, there “is only one game,” which requires defense practitioners to focus simultaneously on foreign and domestic threats.113

Furthermore, the Strategy dictates that to achieve success, defense efforts can no longer depend on “passive or reactive defenses” to “safeguard the American way of life and to secure our freedom.”114 Instead, protecting America “against the full-range of 21st century threats requires the U.S. Intelligence Community to restore its human intelligence capabilities [and] reprioritize intelligence collection to address probable homeland defense threats.”115

108 See STRATEGY FOR HOMELAND DEFENSE AND CIVIL SUPPORT, supra note 4, at 1.
109 See id.
110 Id. at 1, 40.
111 See generally CHURCH COMMITTEE REPORT, supra note 2, bk. 3.
112 STRATEGY FOR HOMELAND DEFENSE AND CIVIL SUPPORT, supra note 4, at 40.
113 Id. at 40.
114 Id. at 10.
115 Id. at 20.
This language is decidedly aggressive in the context of domestic operations.

Given the findings of the Church Committee, such terms should seem familiar to the general public. In particular, the U.S. Army relied upon similar justifications to implement its domestic collection program in the late 1960s. Historically, as Army components transferred from a purely reactive model to one that required advanced preparation, commanders slowly began to view U.S. persons as the most significant threat to domestic operations. When past defense planners similarly attempted to combine strategies that focused on both foreign and domestic threats, this approach ultimately resulted in untold intelligence abuses.

Notably, the Strategy for Homeland Defense and Civil Support mentions “ruthless enemies” who will “seek to employ asymmetric means to penetrate our defenses and exploit the openness of our society to their advantage.” It further explains that “[b]y attacking our citizens, our economic institutions, our physical infrastructure, and our social fabric, [these enemies] seek to destroy American democracy.” While it is clear in most sections of the Strategy that its drafters intended the term “ruthless enemies” to be used only in reference to foreign terrorists, such language also has the effect of imputing the motivations of foreign actors onto the actions of U.S. persons.

As a result, the Strategy’s aggressive language now seems overstated in the context of the Occupy movement. Specifically, if federal forces such as the 82nd Airborne Division are called upon to respond to widespread protests by U.S. persons, who would be cast in the role of “ruthless enemies who seek to break our will by exploiting America’s fundamental freedoms?” More importantly, what “direct attack” would the U.S. Army be protecting against when it attempts to root these enemies out of our social fabric? As evidenced by these rather absurd examples, the Strategy for Homeland

116 Church Committee Report, supra note 2, bk. 3, at 799.
117 Id.
118 Id. at 798.
119 Strategy for Homeland Defense and Civil Support, supra note 4, at 1, 40.
120 Id. at 1.
121 Id. at 5.
122 See id. at 40.
123 Id. at 1.
Defense and Civil Support has little relevance when applied to non-violent protest.

The Strategy becomes even more troubling when discussing the means by which defense planners propose to protect the homeland from these “potential threats.”124 As its paramount objective, the Strategy calls for the preemptive collection and exploitation of “all actionable information needed to protect the United States.”125 Interestingly, no specific explanation is given as to what is meant by “all actionable information.”126 In addition, the Strategy advocates for certain “core capabilities” to accomplish this objective, not the least of which are increased intelligence collection, surveillance, and reconnaissance.127

Defense policymakers suggest these enhanced capabilities will enable the Department of Defense to acquire “current and actionable intelligence.”128 Furthermore, this information will better position combat forces to fight “a war whose length and scope may be unprecedented.”129 While the architects of the Strategy correctly note that America is rightfully at war with the international terrorists who perpetrated the attacks of September 11, 2001,130 they fail to appreciate one essential fact: there is no publicly-proclaimed war on the American people.

U.S. persons who have taken part in the Occupy movement should not be viewed as domestic terrorists as some cynical critics may contend; nor does the average protestor espouse radical terrorist beliefs. Should such a nightmare scenario present itself in the future, then surely a military response would be warranted to combat this unprecedented domestic insurgency. Until the tactics of the Occupy movement take a turn for the violent or radical, however, U.S. Government officials are obligated to comply with existing constitutional protections.

Thus, while defense policymakers would likely contend that the Strategy for Homeland Defense and Civil Support represents a transformation or fundamental change in the military’s approach to domes-

124 Id. at 2.
125 STRATEGY FOR HOMELAND DEFENSE AND CIVIL SUPPORT, supra note 4, at 3.
126 Id.
127 Id.
128 Id.
129 Id. at 1.
130 Id. at 7.
tic operations, this Article posits something far different. In essence, it suggests that in the context of modern-day civil disturbance, this Strategy is the metaphorical equivalent of pounding a nail with a sledgehammer. As previously noted, this action would be both unnecessary and disproportionate to the matter at hand.

VI. RELEVANT U.S. ARMY GUIDANCE REVEALS TROUBLING HISTORICAL SIMILARITIES

To ascertain the true nature of the law as it relates to the Army’s ability to collect information on U.S. persons, it is now necessary to move this discussion beyond mere strategy and theory. In fact, the remainder of this Article is dedicated to examining how the restrictions contained in E.O. 12333 have been implemented within individual Army components during civil disturbance operations.

It is initially unclear how military practitioners would justify collection of information on U.S. persons participating in the Occupy movement. Notably, the vast majority of these protestors have thus far abstained from violent or destructive methods of civil disturbance.\(^\text{131}\) As a result, their current activities can best be characterized as First Amendment-protected free speech.\(^\text{132}\) Thus, targeting individual members of the Occupy movement for intelligence collection based purely on free speech would be no less egregious than targeting subversive personalities or political dissidents in the late 1960s because of their constitutionally protected activities.

In essence, the U.S. Army’s current approach to domestic operations justifies collection of information on U.S. persons through a threat-based rationale.\(^\text{133}\) To illustrate this point, the Army Domestic Operational Law Handbook (DOPLAW Handbook) states in part:

> With the ever-increasing number of domestic military missions conducted in the homeland, there has been a concurrent search for the appropriate assets and capabilities to best perform those missions.


Domestic missions are no different than overseas missions in that a key requirement for mission success is situational awareness—the commander must be aware of the situation on the ground and have a complete picture of the “battle space” within which the unit is operating. Overseas, intelligence assets normally provide such a picture. How, then, can these same assets be used in the homeland to support [Department of Defense] missions while at the same time complying with applicable U.S. laws and policies?\textsuperscript{134}

Admittedly, answering the above referenced question is a difficult task for military lawyers. The resulting analysis is situation specific and relies on a host of different operational factors, not the least of which is force protection or the need to protect soldiers carrying out domestic operations.\textsuperscript{135} Nonetheless, throughout the remainder of this discussion, relevant Department of Defense implementing guidance will demonstrate that there is still great potential for the Army to collect information on U.S. persons. Thus, although the Church Committee raised awareness of certain constitutional protections, it is difficult to determine what hard and fast restrictions have actually been implemented during domestic operations.

For example, the DOPLAW Handbook states that “[m]ilitary commanders’ need for information and intelligence within the homeland is on the rise—they expect force protection information and intelligence to be integrated into domestic operations due to a heightened awareness of potential terrorist threats.”\textsuperscript{136} This quote once again emphasizes that all domestic operations seem to be driven by the threat of international terrorism. Furthermore, it highlights one of the key distinctions related to collection of information on U.S. persons: the difference between intelligence and force protection information.\textsuperscript{137}

Unlike the historical approach to information gathering in which collection on U.S. persons was conducted by Army intelligence components, the modern distribution of authority is spread across multiple components of the Army.\textsuperscript{138} Specifically, current collection efforts are bifurcated between intelligence components and non-intelligence

\begin{itemize}
\item[\textsuperscript{134}] Id.
\item[\textsuperscript{135}] See id.
\item[\textsuperscript{136}] Id.
\item[\textsuperscript{137}] See id.
\item[\textsuperscript{138}] See id.
\end{itemize}
components.\(^{139}\) Army intelligence components are composed of traditional intelligence specialists and subject to collection restrictions outlined in E.O. 12333 and relevant implementing guidance.\(^{140}\) Their primary responsibility is to collect “intelligence.”\(^{141}\) Non-intelligence components of the Army, however, are composed of law enforcement and security forces and are subject to less restrictive guidance.\(^{142}\) Rather than collecting intelligence, these components are said to collect what is more innocuously deemed “information.”\(^{143}\)

This particular naming convention is extremely important in the context of domestic operations. Specifically, intelligence collection is subject to a distinct set of rules, such as the restrictions contained in E.O. 12333.\(^{144}\) This framework of law and policy is more commonly referred to as “intelligence oversight.”\(^{145}\) Non-intelligence components, on the other hand, operate with far less restrictions and the provisions related to U.S. persons in E.O. 12333 are not directly applicable to these components. As a result, the DOPLAW Handbook instructs individual Army commanders to direct their needs for information or intelligence “to the right component—the component with the capability and authority to achieve the commander’s intent.”\(^{146}\)

Although some may argue that the *Posse Comitatus Act*, which Congress passed in the wake of the American Civil War, effectively limits federal military personnel from acting in a domestic law enforcement capacity, such an assertion must be dismissed when applied to the topic at issue.\(^{147}\) As the DOPLAW Handbook correctly notes, this aging legal principle does not apply during times of insurrection.\(^{148}\) Thus, the *Posse Comitatus Act* is not a valid concept when discussing federal forces that have been lawfully called upon to assist a state government, to enforce federal authority, or to protect constitutional rights.\(^{149}\) Rather, allowing for certain preconditions, the President is authorized to utilize federal forces, such as the Army’s 82nd

\(^{139}\) DOPLAW Handbook, supra note 133, at 136.

\(^{140}\) Id.

\(^{141}\) Id.

\(^{142}\) Id.

\(^{143}\) Id.

\(^{144}\) E.g., E.O. 12333, supra note 65.

\(^{145}\) DOPLAW Handbook, supra note 133, at 138.

\(^{146}\) Id. at 136.


\(^{148}\) DOPLAW Handbook, supra note 133, at 68 (citing 10 U.S.C. §§ 331-335 (2006)).

\(^{149}\) See id. at 69 (citing 10 U.S.C. §§ 331-335 (2006)).
Airborne Division, to “restore order during times of civil disturbance.”

VII. **Army Intelligence Components Justify Collection on U.S. Persons by Utilizing Multiple Exceptions**

To fully understand the authority by which the Army collects information on U.S. persons during civil disturbance operations, it is essential to examine implementing guidance for both intelligence and non-intelligence components. The principle documents that contribute to a discussion of this topic are Department of Defense Directive (DODD) 5240.01, Department of Defense Regulation (DOD) 5240.1-R, and DODD 5200.27. DODD 5240.01 and DOD 5240.1-R contain guidelines and procedures by which Army intelligence components may collect information on U.S. persons. Similarly, DODD 5200.27 provides structure for the collection of information on persons and organizations by Army non-intelligence components.

It is through an analysis of these disparate yet apparently complimentary sets of authorities that this Article arrives at one of its central conclusions. By pushing free speech and related protest activities towards the threshold at which domestic law enforcement can no longer maintain order, U.S. persons participating in the Occupy protests may ironically be endangering their own constitutional rights.

The Secretary of Defense exerts unparalleled influence over the agencies that comprise the national intelligence enterprise. In all, defense intelligence elements make up “75 to 80 percent of the Intelligence Community.” In light of this realization, it is evident that the Secretary of Defense truly does wield the metaphorical equivalent of a sledgehammer. Moreover, intelligence components from all major combatant commands, including USNORTHCOM, are among the “panoply of agencies” that fall under the Secretary’s purview. As noted in the DOPLAW Hand-

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150 Id. at 68.
151 Id. at 137, 140.
152 Id. at 137.
153 Id. at 140.
154 See infra text accompanying note 242.
156 Id.
157 Id.
book, DODD 5240.01 and DOD 5240.1-R are controlling on intelligence collection activities affecting U.S. persons.\textsuperscript{158} Thus, these provisions govern the activities of military intelligence units supporting USNORTHCOM’s mission as well as units similar to the 313th Military Intelligence Battalion, which historically provided intelligence support to 82nd Airborne Division operations.\textsuperscript{159}

While current Department of Defense implementing guidance attempts to create acceptable structure for the collection of information during domestic operations, it is obvious that both DODD 5240.01 and DOD 5240.1-R have multiple deficiencies. Although DODD 5240.01 initially references the need to protect the rights of U.S. persons, it is often unclear what direct prohibitions have actually been implemented during domestic operations.\textsuperscript{160} In fact, the directive seems to lack detailed analysis and explanation altogether. Rather, it discusses constitutional rights using only aspirational language and vague allusions to “applicable law.”\textsuperscript{161}

A. The Constitutional Implications of DODD 5240.01

DODD 5240.01 acknowledges that “special emphasis shall be given to the protection of the constitutional rights and privacy of U.S. persons.”\textsuperscript{162} The directive also states that in an effort to discourage improper activities, “[u]se of such techniques . . . shall be limited to the least intrusive means feasible.”\textsuperscript{163} Nonetheless, there is no accompanying explanation as to what techniques should be deemed “least intrusive.”\textsuperscript{164} Even more troubling, the directive relies on defense intelligence personnel to self-report potential abuses through their military chain of command.\textsuperscript{165} Thus, Americans are forced to depend on the very same individuals collecting information on U.S. persons to

\textsuperscript{158} DOPLAW HANDBOOK, supra note 133, at 137.


\textsuperscript{161} Id. § 4.1.

\textsuperscript{162} Id.

\textsuperscript{163} Id. § 4.6.

\textsuperscript{164} See id.

\textsuperscript{165} Id. § 4.7.
also document violations of federal law.\textsuperscript{166} To most legal practitioners, this would appear to present a classic conflict of interest scenario.

The directive contains other significant shortcomings as well. As this Article previously discussed, the Army has the authority to collect defense and defense-related intelligence as well as counterintelligence information under E.O. 12333.\textsuperscript{167} The term counterintelligence is defined within the Executive Order and limited to activities with a foreign nexus.\textsuperscript{168} This allegedly reduces the ability of Army intelligence components to collect information on U.S. persons. As noted earlier, however, E.O. 12333 does not contain a corresponding definition for the term defense intelligence.\textsuperscript{169} It is significant then that DODD 5240.01, for the first time, provides a description of what constitutes defense intelligence.\textsuperscript{170}

DODD 5240.01 incorporates an extremely broad definition of defense intelligence that was promulgated in the aftermath of the terrorist attacks of September 11, 2001.\textsuperscript{171} Specifically, the term defense intelligence is defined as:

integrated departmental intelligence that covers the broad aspects of national policy and national security and that intelligence relating to capabilities, intentions, and activities of foreign powers, organizations, or persons, including any foreign military or military-related situation or activity which is significant to Defense policy-making or the planning and conduct of military operations and activities. Defense Intelligence includes Active and Reserve military, strategic, operational, and tactical intelligence.\textsuperscript{172}

As if this definition is not far-reaching enough, DODD 5240.01 further instructs that, as a matter of policy, “Defense Intelligence and [counterintelligence] shall be the all-source information collection, analysis, sharing, and dissemination capability derived from the intelli-

\textsuperscript{166} DODD 5240.01, supra note 160, § 4.7.
\textsuperscript{167} See supra Part II.
\textsuperscript{168} E.O. 12333, supra note 65, § 3.5(a).
\textsuperscript{169} See id.
\textsuperscript{170} See DODD 5240.01, supra note 160, § E2.4.
\textsuperscript{171} Id. The definition of “defense intelligence” found in DODD 5240.01 was incorporated from DODD 5143.01. See U.S. DEP’T OF DEFENSE, DIRECTIVE NO. 5143.01, UNDER SECRETARY OF DEFENSE FOR INTELLIGENCE (USD(I)) (2005) [hereinafter DODD 5143.01], available at http://www.dtic.mil/whs/directives/corres/pdf/514301p.pdf.
\textsuperscript{172} DODD 5143.01, supra note 171, § E2.1.3.
gence and [counterintelligence] activities, operations, and campaign plans, provided to national and defense decision makers and warfighters for military planning and operations.”¹⁷³ This definition and accompanying policy guidance are alarmingly broad in the context of domestic operations. They appear to support collection of information on U.S. persons for almost any purpose. As a result, the Army’s authority to collect intelligence during civil disturbance operations seems almost limitless.

Notably, the definition of defense intelligence mentions themes such as military planning and operations.¹⁷⁴ DODD 5240.01 also states that defense intelligence must “provide accurate and timely warning of threats and of foreign capabilities to allow for the widest range of options.”¹⁷⁵ While operations are sometimes event-driven and reactive, military planning seemingly necessitates a forward-leaning focus on future events. This type of focus has been historically troublesome for domestic operations, and a similar justification resulted in the establishment of the Army’s domestic intelligence gathering program as investigated by the Church Committee.¹⁷⁶

B. The Constitutional Implications of DOD 5240.1-R

Taken as a whole, DODD 5240.01 fails to implement any express restrictions on intelligence activities¹⁷⁷ and serves merely as a short recitation of ambiguous policy objectives. Nonetheless, it does reference a complimentary defense regulation that provides additional guidance on intelligence collection during domestic operations.¹⁷⁸ Thus, analysis now shifts to DOD 5240.1-R, which sets out the procedures, or rules, by which Army intelligence components are authorized to collect information on U.S. persons.¹⁷⁹ Notably, while this regulation

¹⁷³ DODD 5240.01, supra note 160, § 4.3.
¹⁷⁴ DODD 5143.01, supra note 171, § E2.1.3.
¹⁷⁵ DODD 5240.01, supra note 160, § 4.4.
¹⁷⁶ See Church Committee Report, supra note 2, bk. 3, at 797.
¹⁷⁷ See generally DODD 5240.01, supra note 160.
¹⁷⁸ Id. § 4.6 (referring to U.S. Dep’t of Defense, Regulation No. 5240.1-R Procedures Governing The Activities of DOD Intelligence Components that Affect United States Persons (1982)).
may succeed in prohibiting egregious intelligence abuses, its provisions are inadequate in the context of domestic operations.

As a general rule, E.O. 12333 states that “[a]gencies within the Intelligence Community are authorized to collect, retain or disseminate information concerning [U.S.] persons only in accordance with procedures established by the head of the agency concerned and approved by the Attorney General.” Thus, DOD 5240.1-R not only implements DODD 5240.01, it also articulates these general procedures. In particular, Procedure 2 specifies “the kinds of information . . . that may be collected by [Department of Defense] intelligence components and sets forth general criteria governing the means used to collect such information.”

At first glance, it is unclear whether DOD 5240.1-R has adequately kept pace with the evolution of intelligence collection techniques and the advent of new technology. In the thirty years since this regulation was first implemented, defense policymakers have failed to update its provisions. As a result, its terms speak only vaguely of monitoring devices and surveillance equipment, and one must ask whether its drafters envisioned the sprawling technological landscape and operational realities of the twenty-first century. Furthermore, while E.O. 12333 was issued one year earlier, it has been amended on multiple occasions by successive U.S. Presidents. Thus, the executive order has kept pace with developments in the Intelligence Community. Conversely, DOD 5240.1-R is badly in need of modernization.

As a general rule, Procedure 2 provides that the least intrusive means standard requires leveraging non-invasive techniques such as collecting publicly available information or interviewing cooperating sources prior to seeking a warrant or method that requires approval of the Attorney General. Nonetheless, almost all remaining procedures in the regulation address only the most intrusive of techniques discussed by the Church Committee—namely, wiretaps, concealed

180 E.O. 12333, supra note 65, § 2.3.
182 Id. § C2.1.
183 See generally id.
184 See id.
185 See generally E.O. 12333, supra note 65.
186 DOD 5240.1-R, supra note 179, § C2.4.2.
monitoring, physical surveillance, and mail searches.\footnote{See generally DOD 5240.1-R, supra note 179; Church Committee Report, supra note 2, bk. 3, at 819.} As a result, DOD 5240.1-R is a document seemingly stuck between two extremes. Virtually no discussion is reserved for techniques that fall into the gray area between least and most intrusive means.\footnote{See generally DOD 5240.1-R, supra note 179.} This omission ostensibly provides a great deal of operational discretion to intelligence component personnel.

DOD 5240.1-R represents the “sole authority by which [intelligence] components may collect, retain and disseminate information concerning United States persons.”\footnote{DOD 5240.1-R, supra note 179, § C1.1.} Specifically, the regulation states that information identifying a U.S. person may only be collected if “necessary to the conduct of a function assigned [to] the collecting component” and if such information falls under one of thirteen particularized categories.\footnote{Id. § C2.3.} In conducting a cursory examination of these categories, however, it is obvious that the U.S. Army possesses a great deal of latitude to collect information during domestic operations.\footnote{See id.}

Specifically, the regulation states that defense intelligence components may collect information if it falls within one of the following categories:

1. Information obtained with consent
2. Publicly available information
3. Foreign intelligence
4. Counterintelligence
5. Potential sources of assistance to intelligence activities
6. Protection of intelligence sources and methods
7. Physical security
8. Personnel security
9. Communications security
10. Narcotics
11. Threats to safety
12. Overhead reconnaissance
13. Administrative purposes.\footnote{Id.}

On its face, the language in DOD 5240.1-R seems to lack both depth and substance when discussing how such authority may be
invoked by military forces. As a result, these thirteen categories of acceptable collection may have a significant impact on the rights of U.S. persons. Historically, the Army domestic intelligence program primarily relied on foreign intelligence and counterintelligence authorities to justify collection on U.S. persons. Notably, these two justifications are represented in the regulation by numbers 3 and 4, respectively. Nonetheless, DOD 5240.1-R also provides eleven other categories of acceptable collection on U.S. persons. As a result, it is unclear how this regulation restricts defense intelligence activities whatsoever. Rather, it is possible that these additional exceptions create an operational environment that is ripe for abuse.

Of particular interest are the authorities to collect information that is publicly available, related to physical security, or related to threats to safety. It is noteworthy that all of these categories lack detailed description and explanation. For example, in its explication of what constitutes publicly available information, the regulation merely states, “[i]nformation may be collected about a United States person if it is publicly available.” No other guidance is provided. This is troubling in that the advent of the internet has enabled analysts to collect information on U.S. persons by utilizing a prolific array of online research tools. It is unclear if the drafters of this regulation had the foresight to anticipate these vastly expanded, and publicly available, research capabilities.

In addition, conduct aimed at maintaining physical security or protecting against threats to safety has historically justified a variety of collection activities. As highlighted by the Church Committee, both concepts relate directly to the concept of force protection and formed the historical antecedents for past intelligence abuses commit-

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193 See id.
195 DOD 5240.1-R, supra note 179, §§ C2.3.3-C2.3.4.
196 Id. §§ C2.3.1-C2.3.13.
197 Id. §§ C2.3.2, C2.3.7, C2.3.11.
198 Id. § C2.3.2.
199 See id.
201 See Church Committee Report, supra note 2, bk. 3.
ted by the U.S. Army. DOD 5240.1-R ambiguously states that “information may be collected about a [U.S.] person who is reasonably believed to threaten the physical security of [Department of Defense] employees, installations, operations, or official visitors.”

Surely, during civil disturbance operations, protestors could be regarded as potential threats to defense employees and operations, especially in major metropolitan areas such as Washington, D.C. where defense personnel are often situated in various federal buildings and facilities. For instance, the sheer volume of protestors could disrupt building security practices or obstruct building entrances.

Even more troubling in the context of threats to safety, DOD 5240.1-R gives Army intelligence components sweeping discretion to gather information on U.S. persons “to protect the safety of any person or organization.” Alarmingly, no other explanation is provided to further qualify this ambiguous language. While force protection and situational awareness are crucial to the success of domestic operations, it is worrisome that Army commanders are left to interpret these broad mandates and apply them to domestic operations. Notably, in the context of civil disturbances, almost all domestic intelligence collection could be defended as an attempt to protect the safety of “any person or organization.” Thus, this particular category of intelligence collection represents an incredibly low bar to collection of information on U.S. persons.

VIII. THE UNVARNISHED TRUTH: ARMY COMMANDERS LEVERAGE NON-INTELLIGENCE COMPONENTS TO COLLECT ADDITIONAL INFORMATION ON U.S. PERSONS

Taken as a whole, the lack of detailed guidance in DODD 5240.01 and DOD 5240.1-R should be disconcerting to the general public. In an operational scenario, history has proven that it is difficult to determine what, if any, limitations have actually been placed on Army intelligence components with regard to collecting information

202 See id. at 791.
203 DOD 5240.1-R, supra note 179, § C2.3.7.
204 See id. § C2.3.11.
205 See id.
206 Id. (emphasis added).
on U.S. persons.207 This fact becomes especially troubling when coupled with a concurrent analysis of the complimentary collection authorities of Army non-intelligence components. Thus, this Article will now examine Army commanders’ ability to leverage these components to collect additional information on U.S. persons during domestic operations.

As noted in the DOPLAW Handbook, intelligence specialists are only one discreet subset of overall Department of Defense staffing.208 In fact, the vast majority of defense personnel are assigned to occupational specialties separate and distinct from the intelligence discipline.209 As a result, legal practitioners have come to use the term non-intelligence to denote a catchall category that includes “everyone else in [the Department of Defense], including various security and police forces.”210 In particular, Army criminal investigative components are said to “have primary responsibility for gathering and disseminating information about the domestic activities of U.S. persons that threaten [Department of Defense] personnel or property.”211

Non-intelligence components acquire mission-essential information as part of their regular duties, including information needed for “force protection in domestic support operations.”212 Frequently these collection activities result in the acquisition of information on U.S. persons.213 Nonetheless, these entities are not subject to the restrictions contained in E.O. 12333 or intelligence oversight rules imposed by Army regulation.214 Rather, one has to look to DODD 5200.27 for additional guidance.215


208 DOPLAW HANDBOOK, supra note 133, at 136.

209 Id.

210 See id.

211 Id. at 140.

212 Id.

213 Id. at 136.

214 DOPLAW HANDBOOK, supra note 133, at 136.

215 See generally U.S. DEP’T OF DEFENSE, DIRECTIVE NO. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT
**A. The Constitutional Implications of DODD 5200.27**

DODD 5200.27 is the governing document for the collection of “information concerning persons and organizations not affiliated with the Department of Defense.”\(^{216}\) It also establishes “policy, limitations, procedures, and operational guidance” for non-intelligence components and defense investigations.\(^{217}\) As a general matter, DODD 5200.27 prohibits “collecting, reporting, processing, or storing information” on non-affiliated persons.\(^{218}\) In addition, the directive requires that information gathering efforts “shall be subject to overall civilian control, a high level of general supervision, and frequent inspections at the field level.”\(^{219}\)

Such language is initially encouraging in the context of this discussion. Notably, the directive calls for an increased emphasis on the rule of law and a more strict interpretation of E.O. 12333.\(^{220}\) Moreover, it appears to lack the aspirational language of other Department of Defense directives. Nonetheless, there is a major deficiency in DODD 5200.27 that necessitates further discussion. While the directive seemingly integrates language inspired by the findings of the Church Committee, it fails to address any specific restrictions explicitly related to U.S. persons.\(^{221}\) More importantly, the document as a whole lacks any reference to the term “U.S. person.”\(^{222}\) This is curious given that this particular term of art is prevalent in all legal and policy guidance discussed up to this point.

Upon further examination, the underlying explanation for this omission becomes more apparent. DODD 5200.27 is badly in need of modernization. When it was first issued in 1980, both E.O. 12333 and DOD 5240.1-R had not been released.\(^{223}\) Its provisions also preceded the standardized definition for U.S. person contained in E.O. 12333 and widespread use of the phrase throughout the Intelligence Commu-

\(^{216}\) Id.
\(^{217}\) Id. § 1.
\(^{218}\) Id. § 3.1.
\(^{219}\) Id. § 3.2.
\(^{220}\) See generally DODD 5200.27, supra note 216.
\(^{221}\) See generally id.
\(^{222}\) See generally id.
\(^{223}\) Id.
nity. To further emphasize this point, DODD 5200.27 initially references a 1979 Department of Defense directive that has since been rescinded.

When DODD 5200.27 was first promulgated, the most sensational issue facing our country was the hostage standoff in Tehran. President Jimmy Carter had yet to order the disastrous rescue mission that would result in the deaths of eight U.S. soldiers. Moreover, cellular telephones and personal computers had not even been imagined. Thus, one must inevitably question whether this document is relevant to the current national security landscape. A great deal has changed in regard to the contemporary operational realities facing America’s soldiers.

Although DODD 5200.27 begins by announcing a general prohibition on the collection of information on persons not affiliated with the Department of Defense, this declaration also contains three significant exceptions. Specifically, non-intelligence components have authority to collect information if it is essential to protecting Department of Defense functions and property, maintaining personnel security, or conducting operations related to civil disturbance. Notably, all of these exceptions directly relate to the concept of force protection. Thus, even though the directive expressly restricts acquisition of information based solely on a person’s opposition to government policy, all that is required to subsequently target that individual is a commander’s articulable belief that additional information would help protect against threats to military forces, functions, or property.

The first of these exceptions has broad language and a forward-leaning focus. Specifically, under the authority to acquire information related to functions and property, Army commanders are permitted to collect information on U.S. persons who promote “subversion of loyalty, discipline, or morale of [Department of Defense] military or civilian personnel . . . by actively encouraging . . . disruption of

224 Id.; E.O. 12333, supra note 65, § 3.5(k).
225 DODD 5200.27, supra note 215, § 2.3.
228 DODD 5200.27, supra note 215, §§ 3.1, 4.1-4.3.
229 Id.
230 Id. §§ 4.1-4.3, 5.2.
231 See id. § 4.1.
military activities.\textsuperscript{232} Thus, in the context of civil disturbance operations related to the Occupy movement, this exception could significantly impact the rights of U.S. persons. Noticeably, there is no explanation as to what activities may be regarded as compromising defense discipline or morale.\textsuperscript{233} Moreover, there is no discussion of what may constitute disruption of military activities.\textsuperscript{234} Even more troubling, the language “subversion of loyalty” seems eerily similar to terms such as “subversive personalities” or “dissidents,” which were historically used to justify the Army’s domestic intelligence gathering program.\textsuperscript{235}

The exception to collect information related to defense functions and property also allows for collection on U.S. persons when they represent a “direct threat” to “military or civilian personnel in connection with their official duties.”\textsuperscript{236} This language could have profound implications on the rights of U.S. persons. Although the term “direct threat” implies that a particular danger must be imminent, the term itself is not defined in the body of the directive.\textsuperscript{237} In the context of civil disturbance, it is hard to imagine a scenario in which responding defense personnel and equipment are not threatened in some manner. Thus, Army commanders seemingly possess a great deal of discretion to determine when the need for force protection justifies collection on U.S. persons.

Under the exception to collect information necessary to the conduct of civil disturbance operations, DODD 5200.27 acknowledges that the “Attorney General is the chief civilian officer in charge of coordinating all Federal Government activities.”\textsuperscript{238} Nonetheless, the directive declares that “[u]pon specific prior authorization of the Secretary of Defense . . . information may be acquired that is essential to meet operational requirements flowing from the mission assigned to the Department of Defense to assist civil authorities in dealing with civil disturbances.”\textsuperscript{239} This authority can be granted “when there is a distinct threat of a civil disturbance exceeding the law enforcement

\begin{footnotes}
\item[232] Id. \textsection 4.1.1.
\item[233] See id.
\item[234] See DODD 5200.27, supra note 215.
\item[235] Compare id. \textsection 4.1.1 (“subversion of loyalty”), with \textsc{Church Committee Report}, supra note 2, bk. 3, at 797 (“subversive personalities”).
\item[236] DODD 5200.27, supra note 215, \textsection 4.1.5.
\item[237] See id.
\item[238] Id. \textsection 4.3.
\item[239] Id.
\end{footnotes}
capabilities of State and local authorities.” Thus, it is evident that non-intelligence components can be authorized to collect information on U.S. persons while merely planning for future operations. All that is required is a distinct threat that domestic law enforcement forces could be overwhelmed in the future.

B. Legal Guidance Provided to Army Commanders on the Ground

Given the historical lessons of the Church Committee, the American public should be concerned with the current state of the law as it relates to domestic operations. In light of the preceding discussion, it now seems not only possible but probable that flawed legal reasoning could resurface in the context of quelling modern day civil disturbance. In fact, a number of operational preconditions are already in place that could lead to future intelligence abuses. While relevant implementing guidance ostensibly places heightened restrictions on the collection of information on U.S. persons, multiple policy exceptions allow individual Army commanders to exercise a great deal of discretion in determining when such collection is appropriate.

Thus, it is now essential to examine the actual legal guidance provided to Army commanders charged with executing the military’s civil support mission. When analyzing Army collection authorities as a whole, it is often difficult to ascertain whether there are any limitations whatsoever on domestic collection during civil disturbance operations. The combined authorities for intelligence components and non-intelligence components enable Army commanders to collect a wide variety of information on U.S. persons to suit their operational needs. As if to emphasize this point, the DOPLAW Handbook notes:

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240 Id.
241 Id.
242 See DODD 5200.27, supra note 215 (explaining several situations in which military commanders may implement intelligence collection against non-Department of Defense affiliated persons).
243 See id. § 4 (enumerating several exceptions to the ban on intelligence collection against U.S. persons).
244 See generally DOPLAW HANDBOOK, supra note 133, at 135-40 (providing an overview of the authorities by which military commanders collect information on U.S. persons during domestic operations).
It is a very rare situation when relevant information cannot be collected in some form by some entity. If an intelligence component cannot collect information because it is not [foreign intelligence] or [counterintelligence], then it may be possible for a non-intelligence component, such as military police to collect the information. Therefore when analyzing the collection of information concerning [U.S. persons], ensure that you consider both avenues of authorized collection.245

This statement is extraordinary when examined through the historical lens of the Church Committee. In effect, its presence in the DOPLAW Handbook is strong evidence that Army commanders are instructed, if not overtly encouraged, to collect information on U.S. persons by any means at their disposal during domestic operations. Thus, it would seem as if the Army is knowingly circumventing intelligence oversight requirements by instructing commanders to exploit the collection capabilities of non-intelligence components. Notably, in the context of the Occupy protests or related civil disturbance, such a practice could have a profoundly detrimental impact on the rights of U.S. persons.

Many would likely contend that this portion of the DOPLAW Handbook directly contravenes the spirit of multiple U.S. person protections, including those contained in E.O. 12333.246 Moreover, such inflammatory language seems to fly in the face of the lessons of the Church Committee.247 This realization becomes even more troubling when coupled with a fine-line distinction between intelligence and non-intelligence activities raised by Army legal practitioners.

The Handbook notes that when Army intelligence components perform non-intelligence duties, they are treated as if they are law enforcement or security forces.248 Thus, restrictions placed on intelligence components do not apply to “law enforcement activities carried out by the Defense Intelligence Components, or to individuals executing law enforcement missions while assigned to the Defense Intelligence Components.”249 Interestingly, the DOPLAW Handbook states that a non-intelligence activity would be “any activity that is con-

245 Id. at 140.
246 See generally DOPLAW HANDBOOK, supra note 133; E.O. 12333, supra note 65.
247 See generally CHURCH COMMITTEE REPORT, supra note 2, bk. 3.
248 DOPLAW HANDBOOK, supra note 133, at 139.
249 DODD 5240.01, supra note 160, § 2.3.
ducted by or with a [defense] intelligence component asset or capability, but which does not involve [foreign intelligence or counterintelligence].”

Thus, in its simplest form, this section of the Handbook maintains that when intelligence components collect information on U.S. persons with no articulable foreign intelligence or counterintelligence nexus, they are legally deemed to be conducting a non-intelligence activity and relevant intelligence oversight rules do not apply. The operational reality of this statement is that Army commanders can avoid additional restrictions related to the collection of information on U.S. persons merely by using intelligence components in a different capacity. This fine-line legal distinction ultimately seems to violate almost every enunciated finding of the Church Committee.

It is important to note that while personnel from these intelligence components may be functioning in a law enforcement or security capacity during civil disturbance, they are still trained in intelligence tradecraft. Moreover, they are now able to take full advantage of the additional exceptions contained in DODD 5200.27 without being subjected to intelligence oversight requirements. Unfortunately, the resulting impact on the rights of U.S. persons may prove to be disastrous. Thus, now more than ever, it is essential that U.S. policymakers and military leaders reconsider the role of the U.S. Army in civil disturbance operations.

C. A Distinct and Articulable Danger of Repeating the Past

The Church Committee outlined a series of events that contributed to an environment in which uninhibited collection on U.S. persons was not only condoned but encouraged. While Army personnel were actively engaged in a conflict with foreign adversaries in Vietnam, a perceived threat was growing domestically. Civil disturbances were commonplace as large numbers of American citizens took to the streets in protest. Frequently, these demonstrations

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250 DOPLAW HANDBOOK, supra note 133, at 139.
251 See generally id.
252 See DODD 5200.27, supra note 215.
253 See generally CHURCH COMMITTEE REPORT, supra note 2.
254 Id. at 798.
255 Id. at 796, 798.
were met with forceful opposition by military forces seeking to maintain order and civility.\textsuperscript{256}

As the role of the Army increased in domestic operations, the need for information increased as well.\textsuperscript{257} Army commanders sought to use all assets at their disposal to gain situational awareness and to protect military personnel under their command.\textsuperscript{258} Increasingly, they turned to intelligence components to provide the information necessary to support domestic operations.\textsuperscript{259} The result was a domestic intelligence gathering program in which unrestrained collection of information on U.S. persons took precedence over constitutional rights.\textsuperscript{260}

With this historical backdrop in mind, it now seems not only necessary but imperative to answer the question: are we in danger of repeating the past? While the events described in the Church Committee report may be a thing of the past, there are striking similarities between the current state of the law and the events that led to the creation of the Army’s domestic intelligence gathering program. Although E.O. 12333 attempts to limit the collection authorities of the Army during domestic operations, there is still a significant and articulable danger that civil disturbance operations will impact the rights of U.S. persons. This danger seems all the more noteworthy given the legal instruction provided in the DOPLAW Handbook.\textsuperscript{261}

Once again, it appears that Army commanders are being encouraged to collect information on U.S. persons through any means at their disposal. Put in its simplest terms, the issue is rather straightforward. As demonstrated by relevant Army legal doctrine and implementing guidance, the bifurcation of collection responsibilities among multiple Army components creates an environment in which Army commanders can mask the true nature of their activities from the scrutiny of the American public.\textsuperscript{262} By leveraging the collection authorities of both intelligence and non-intelligence components during domestic operations, commanders are seemingly able to gather any type of information they desire.

\textsuperscript{256} Id.
\textsuperscript{257} See id. at 799.
\textsuperscript{258} Id. at 799-800.
\textsuperscript{259} See Church Committee Report, supra note 2, bk. 3, at 797.
\textsuperscript{260} See id.
\textsuperscript{261} See generally DOPLAW Handbook, supra note 133, at 140.
\textsuperscript{262} See id.
As a result, the real question then becomes one of transparency. In the future, government officials may be forced to answer an altogether more difficult question: upon learning of the true nature of domestic information gathering, will the American public be satisfied with fine-line legal distinctions and complex justifications such as those contained in relevant Army literature? This proposition seems doubtful, especially in light of the distaste some are currently exhibiting towards the U.S. Government. Consequently, the stage has been set for a dangerous balancing act that is strikingly similar to events that precipitated the domestic intelligence gathering program investigated by the Church Committee.

As the Occupy protests or other similar civil disturbances grow in intensity, one thing is likely certain—military commanders are preparing in advance for multiple operational contingencies. Moreover, there is a strong probability that these commanders are leveraging the capabilities of all military components at their disposal. Thus, it is imperative that America’s political leaders remember the lessons of the past when deciding whether to utilize military forces to respond to domestic events. In effect, to do otherwise would be to blatantly ignore the slippery slope of military intervention in civil disturbance as well as the enduring lessons of the Church Committee.

**Conclusion**

This Article seeks to restore the national discussion surrounding civil disturbance to its proper context. It does not argue that the Occupy movement is a just cause nor does it endorse the particular motivations of individual protestors. Rather, it explores the current state of the law as it relates to Army domestic operations. America is not at war with the American people. Thus, in the context of quelling civil disturbance, there needs to be a renewed focus on the concepts of necessity and proportionality. There also must be a reemphasis of the constitutional protections afforded to U.S. persons.

Although detractors of government efforts frequently have great success pointing out the inherent shortcomings of a particular program or operation, few scholars offer achievable and creative strate-

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263 See Gautney, supra note 18.
264 See supra Parts III-IV.
gies for improving government operations. Thus, this discussion proposes that the current legal regime surrounding Army domestic operations is in significant need of reform. Defense policymakers must recognize that the current path risks repeating many of the abuses of the past. In effect, this Article serves as a call for progress in the way that government officials and military practitioners view peaceful, non-violent protest.

Defense strategy should clearly delineate between foreign threats and events that are purely domestic in nature. There needs to be articulable and persuasive guidelines for domestic operations aimed at civil disturbance. Policymakers must recognize that the terms civil support and homeland defense are not synonyms. Similarly, non-violent protests do not equate with the deadly threat of foreign terrorist attack. The topics of civil support and homeland defense deserve separate and distinct defense strategies that articulate military authority while avoiding troubling ambiguities.

Defense planners should not focus on a strategy that aims to quash First Amendment-protected activities with the same methods utilized by the U.S. Army to respond to a ruthless terrorist enemy. Rather, they should instead devote maximum effort to ensuring that the current strategy advocates for proportionality of force. If domestic protests should cross the threshold into violent means or radical beliefs, then surely a more forceful response would be warranted. Until that occurs, however, government officials and military practitioners are obligated to respect applicable federal law.

In addition, relevant Department of Defense implementing guidance is in dire need of modernization. It is imperative that defense policymakers reformulate the specific procedures that govern collection of information on U.S. persons. Thus, DOD 5240.1-R and DODD 5200.27 must be brought up to date. In their current form, it is unclear whether these provisions are adequate to balance the national security concerns faced by senior government officials with the considerable protections afforded to U.S. persons. In effect, the

265 See supra Part VIII.
266 See Church Committee Report, supra note 2.
267 See supra Part VIII.
268 Id.
269 See supra text accompanying notes 183.
270 Id.
country is fighting a war on terrorism and safeguarding the rights of U.S. persons with aging guidance from the Cold War.

While defense policymakers should work to improve current implementing guidance, military lawyers should also labor to make domestic collection authorities more transparent. In particular, the U.S. Army’s approach to domestic collection is in considerable need of clarification. The instruction provided to military commanders in the DOPLAW Handbook seems to be directly contrary to the historical findings of the Church Committee. Thus, it is essential that the Army’s bifurcated collection method be scrutinized to ensure that it adequately protects the rights of U.S. persons.

In conclusion, this Article advocates for a rethinking of the role of the military in domestic operations. While America’s warfighters are indispensable in defending America’s shores against the threat of foreign terrorist attack, these same entities are ill-suited to respond to non-violent events that are purely domestic in origin. As a result, it is imperative that America’s leaders view federal forces, such as the Army’s 82nd Airborne Division, only as a last resort.

Government officials and the American public need to be reminded that combating civil disturbance should be predominantly the domain of domestic law enforcement. These various agencies, departments, and precincts are the right tool for the job when it comes to maintaining order and civility during trying times in our national history. Thus, renewed emphasis should be placed on federal investigative agencies as well as state and local law enforcement to provide effective and proportionate response to domestic events.

Finally, the military is meant to be an offensive weapon. It is intended to combat enemies overseas. It should also be used when necessary to defend the homeland against impending attack by foreign terrorists or when civilian law enforcement has truly been overwhelmed. It should never be regarded as the favored method for responding to ongoing civil disturbance.

Thus, by arguing for a more proportionate approach to domestic events, this Article advocates for something far more significant—a return to the values that make us uniquely American. For it is only through continued respect for our Constitution and the rights of our

271 See supra Part VIII.B.
citizens that America can effectively demonstrate that it is a modern-day paragon of democratic values. Right now, the eyes of the world are watching.