

CHAPTER 6

INTELLIGENCE LAW AND INTERROGATION OPERATIONS

REFERENCES

1. National Security Act of 1947, 50 U.S.C. §§ 401-441d.
2. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1885c.
3. Classified Information Procedures Act of 1980, 18 U.S.C. App. 3 §§ 1-13.
4. Congressional Oversight Act, 50 U.S.C. § 413.
5. Executive Order No. 12333, United States Intelligence Activities, 46 FR 59941 (4 Dec. 1981), as amended by Executive Order 13284 (2003), Executive Order 13355 (2004) and Executive Order 13470 (2008).
6. Intelligence Reform and Terrorism Prevention Act of 2004 (codified in scattered sections of 50 U.S.C.).
7. Detainee Treatment Act of 2005, Pub. L. 109-148, Div. A, Title X, SEC. 1002-1006; and 42 U.S.C. § 2000dd-2000dd-1.
8. DEP'T OF DEFENSE, DIR. 2310.01E, DO DETAINEE PROGRAM (19 Aug. 2014).
9. DEP'T OF DEFENSE, DIR. 2311.01E, DO D LAW OF WAR PROGRAM (9 May 2006, incorporating Change 1, 15 Nov. 2010).
10. DEP'T OF DEFENSE, DIR. 3115.09, DO D INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING (11 Oct. 2012)
11. JOINT CHIEFS OF STAFF, JOINT PUB. 3-62, DETAINEE OPERATIONS (13 Nov. 2014).
12. U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (3 May 2007).
13. U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006).
14. U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, DETAINEE OPERATIONS (28 Apr. 2014).
15. U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006).
16. Executive Order No. 13491, Ensuring Lawful Interrogations (22 Jan. 2009).
17. U.S. DEPT' OF DEF., INSTR. 1100.22, POLICY AND PROCEDURES FOR DETERMINING WORK FORCE MIX (12 Apr. 2010).

I. INTRODUCTION

A. **Overview.** Intelligence is information and knowledge about an adversary obtained through observation, investigation, analysis, or understanding. Information superiority is essential to a commander in conducting operations and in accomplishing his or her mission. Intelligence collection activities, to include intelligence interrogations, have become a sophisticated and essential element of mission command. Intelligence collection activities involve the collection of military and military-related foreign intelligence and counterintelligence, based on collection requirements. Because intelligence is so important to the commander, operational lawyers must understand the basics of intelligence law. The importance of the role of intelligence in current operations worldwide cannot be overstated, particularly with respect to counterinsurgency (COIN) and counterterrorism (CT) operations, where—as discussed in detail in chapter 3 of FM 3-24 (Counterinsurgency)—interrogation operations and HUMINT are essential.

B. **Intelligence in General.** Intelligence can be either strategic or tactical. *Strategic intelligence* is information required for the formation of policy and military plans at the national and international levels. This intelligence is normally nonperishable and is collected and analyzed for the consumer on a long-term basis. *Tactical intelligence*, on the other hand, is information required for the planning and conduct of tactical operations. It is usually perishable and temporary in nature. In all, there are seven primary intelligence disciplines: human intelligence (HUMINT); imagery intelligence (IMINT); signals intelligence (SIGINT); measurement and signature intelligence (MASINT); open-source intelligence (OSINT); geospatial intelligence (GEOINT); and counterintelligence (CI).

C. **Legal Basis.** The statutory and policy authorities for intelligence law are listed under References above.

D. **The Intelligence Community.** The U.S. intelligence community is made up of 16 intelligence agencies. The Department of Defense (DoD) has eight of these intelligence agencies: Defense Intelligence Agency (DIA); National Security Agency (NSA); National Geospatial-Intelligence Agency (NGA); National Reconnaissance Office (NRO); and the intelligence commands of the Army, Navy, Air Force, and Marine Corps. In December 2004, the Intelligence Reform and Terrorism Prevention Act separated the head of the U.S. intelligence community from the head of the Central Intelligence Agency. Today, the head of the U.S. intelligence community and principal advisor to the President on all foreign and domestic intelligence matters is the Director of National Intelligence (DNI). In addition to creating the DNI and its corresponding office (ODNI), the 2004 legislation also reprioritized national intelligence collection efforts. Rather than collecting intelligence based upon geographic regions, ODNI coordinates collection efforts based upon the type of threat, such as terrorism or nuclear proliferation. Various centers within ODNI coordinate and prioritize national collection efforts within the established threat areas. Intelligence activities within DoD include responding to collection taskings from the ODNI as well as: collecting, producing, and disseminating military and military-related foreign intelligence and counterintelligence; and protecting DoD installations, activities, and employees.

II. OPERATIONAL ISSUES

A. **Scope.** Aspects of intelligence law exist in all operations. It is imperative that operational lawyers consider intelligence law when planning and reviewing both operations in general and intelligence operations in particular. The Adaptive Planning and Execution (APEX) Planning Formats and Guidance format puts the intelligence section at Annex B of the operations plan (OPLAN) / concept plan (CONPLAN). (See this Handbook's chapter on Military Decision Making Process and OPLANs, which includes the APEX format and each annex and appendix.) Annex B is the starting point for the Judge Advocate (JA) to participate in the intelligence aspects of operational development.

B. **Intelligence collection.** The authority for and restrictions on collection of intelligence against U.S. persons stems from Executive Order (E.O.) 12333, as amended, which requires all government agencies to implement guidance consistent with the Order. The Department of Defense's implementation of E.O. 12333 is contained in DoDD 5240.1 and its accompanying regulation, DoD 5240.1-R. Each service has issued complementary guidance, though they are all based on the text of DoD 5240.1-R. Army Regulation (AR) 381-10 is the Army guidance. It is important to recognize that portions of AR 381-10 apply to intelligence activities relating to non-U.S. persons.

1. DoD 5240.1-R sets forth procedures governing the collection, retention, and dissemination of information concerning U.S. persons by DoD Intelligence Components. Most importantly, this Regulation requires that information identifying a U.S. person be collected by a DoD intelligence component only if it is necessary in the conduct of a function assigned to the collecting component. Army Regulation 381-10 further refines this requirement by mandating that a military intelligence element may only collect information concerning U.S. persons if it has the mission and authority to conduct an intelligence activity, and there is a sufficient link between the U.S. person information to be collected and the element's assigned mission and function.

2. Two threshold questions regarding intelligence collection must be addressed. The first of these questions involves whether information has been "collected." Information is collected when it has been received, in intelligible form (as opposed to raw data), for use by an employee of an intelligence component in the course of his or her official duties.¹ The second question involves whether the information collected is about a "U.S. person." A "U.S. person" is generally defined as a U.S. citizen; permanent resident alien; a corporation incorporated in the U.S.; or an association substantially composed of U.S. citizens or permanent resident aliens. A person or organization outside the United States and aliens inside the United States shall be presumed not to be a U.S. person unless specific information to the contrary is obtained. However, if it cannot be established whether an individual in the United States is a U.S. person or alien, then the individual will be presumed to be a U.S. person. Military intelligence elements must exercise great caution in using the non-U.S. person presumption. Any information that indicates an individual who appears to be an alien might possess U.S. citizenship (or be a permanent resident alien) should be resolved prior to relying on the presumption in making a collection decision.

¹ Army Regulation 381-10 adds to this threshold question. See U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (3 May 2007). According to AR 381-10, for information to be collected it must also be "intended for intelligence use." *Id.* However, Judge Advocates must keep in mind that when there is a conflict between DoD 5240.1-R and AR 381-10, the DoD regulation controls.

3. **Collection.** Once it has been determined that a collection will be against a U.S. person, the analysis then turns to whether the information may be properly collected. Procedure 2² of DoD 5240.1-R governs this area. Thus, the intelligence component must have a mission to collect the information, the information must fit within one of thirteen categories presented in Procedure 2, and the information must be collected by the least intrusive means.³

4. **Retention.** Once collected, the component should determine whether the information may be retained (Procedure 3 of DoD 5240.1-R). In short, properly collected information may be retained. If the information was incidentally collected (that is, collected without a Procedure 2 analysis), it may be retained if post-collection analysis indicates that it could have been properly collected. Information may be temporarily retained for up to ninety days solely for the purpose of determining its proper retainability.

5. **Dissemination.** Procedure 4 of DoD 5240.1-R governs dissemination of U.S. person information outside of the intelligence component that collected and retained it. In general, there must be a reasonable belief the recipient agency or organization has a need to receive such information to perform a lawful government function. However, if disseminating to another intelligence component, this determination need not be made by the disseminating military intelligence element, because the recipient component is required to do so.

C. **Special Collection Techniques.** DoD 5240.1-R addresses special means of collecting intelligence in subsequent Procedures. These Procedures describe the permissible techniques, the permissible targets, and the approval authority for special collection techniques. The JA confronting any of these techniques must consult the detailed provisions of DoD 5240.1-R and AR 381-10, and should seek clarifying guidance from the Operational Law Branch of the Office of the Staff Judge Advocate, U.S. Army Intelligence and Security Command (INSCOM).

1. Electronic Surveillance – Procedure 5.
2. Concealed Monitoring – Procedure 6.
3. Physical Searches – Procedure 7.
4. Searches and Examinations of Mail – Procedure 8.
5. Physical Surveillance – Procedure 9.
6. Undisclosed Participation in Organizations – Procedure 10.

According to AR 381-10, paragraph 1-6(a), a legal advisor must review all activities conducted pursuant to Procedures 5-13. Both INSCOM and the U.S. Army Intelligence Center (USAIC) offer assistance with conducting these legal reviews as well as training in special collection techniques. The OTJAG International and Operational Law Division may also be contacted for assistance in interpretations of DoD 5240.1-R and AR 381-10, as well as questions concerning legal reviews of intelligence operations.

D. **Counterintelligence.** Counterintelligence is information that is gathered or activities conducted to protect against espionage and other intelligence activities, as well as international terrorism. Such intelligence activities are conducted in connection with foreign powers, hostile organizations, or international terrorists. Counterintelligence is concerned with identifying and counteracting threats to our national security.

1. Within the United States, the FBI has primary responsibility for conducting counterintelligence and coordinating the counterintelligence efforts of all other U.S. government agencies.⁴ Coordination with the FBI will be in accordance with the *Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation*, between the Attorney General and the Secretary of Defense, April 5, 1979, as supplemented by later agreements.

² The chapters of DoD 5240.1-R are referred to as procedures. Executive 12333 states, “Elements of the Intelligence Community are authorized to collect, retain or disseminate...only in accordance with *procedures* established by [the Secretary of Defense].” Emphasis added.

³ Again, consider AR 381-10, *supra* note 1, para. 1-5.a., which requires Army elements to have a mission and authority outside of AR 381-10.

⁴ E.O. 12333, ¶ 1.14(a).

2. Outside the United States, the CIA has primary responsibility for conducting counterintelligence and coordinating the counterintelligence efforts of all other U.S. government agencies.⁵ Procedures for coordinating counterintelligence efforts are found in various Intelligence Community Directives (ICD).

3. The Department of Defense has primary responsibility for conducting military-related counterintelligence worldwide.⁶ These activities are typically carried out by Service counterintelligence units. Coordination of effort with the FBI or CIA is still required in most cases.

E. **Military Source Operations (MSO).** MSO refer to the collection of foreign military and military-related intelligence by humans from humans. MSO is but one aspect of HUMINT. Only specially trained and qualified personnel may conduct MSO. Field Manual 2-22.3, chapter 5, discusses MSO in general. Typically, MSO authorities and operations are classified, but help with providing necessary legal support is available from INSCOM, OTJAG, and USAIC. Key considerations for the Judge Advocate include knowing the different types of source operations, knowing what training is required to conduct those operations and knowing the necessary approval authorities.

F. **Support Issues Concerning Intelligence Operations.** Sound fiscal law principles apply to the support of intelligence operations. Money and property must be accounted for, and goods and services must be procured using appropriate federal acquisition regulations. Judge Advocates dealing with expenditures in support of intelligence operations should be familiar with the regulations regarding contingency funding, property accountability, secure environment contracting, and the annual intelligence appropriations acts. Intelligence Contingency Funds (ICF) are appropriated funds to be used for intelligence activities when the use of other funds is not applicable or would either jeopardize or impede the mission of the intelligence unit. Most publications concerning ICF are classified; however, AFI 14-101⁷ is an unclassified publication that provides a basic understanding of ICF.

G. **Intelligence Oversight.** A critical aspect of all intelligence operations and activities is overseeing their proper execution, particularly when they relate to collection of intelligence against U.S. persons. A JA may be called upon to advise an intelligence oversight officer of an intelligence unit. Executive Order 12333, the Intelligence Oversight Act (50 U.S.C. § 413), DoD 5240.1-R, and AR 381-10 provide the proper statutory, Presidential directive, or regulatory guidance regarding intelligence oversight, to include detailed requirements for reporting violations of intelligence procedures.

III. HUMAN INTELLIGENCE COLLECTOR OPERATIONS [ARMY FIELD MANUAL (FM) 2-22.3]

A. Army Field Manual (FM) 2-22.3 is a September 2006 manual that provides doctrinal guidance, techniques, and procedures for interrogators⁸ to support a commander's intelligence needs. Field Manual 2-22.3 was effectively incorporated into federal law through the **Detainee Treatment Act of 2005 (DTA 2005)**. Operational JAs working with units involved in HUMINT collection, particularly interrogations, must be familiar with DTA 2005; Chapters 5 and 8, and Appendices K and M, of FM 2-22.3; Department of Defense Directive (DoDD) 3115.09, Department of Defense Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, dated 3 November 2005; and DoDD 2310.01E, DoD Detainee Program, dated 5 September 2006, which requires that all detainees be treated humanely. All persons subject to the directive shall apply "the standards articulated in Common Article 3 to the Geneva Conventions of 1949."

1. **Interrogation.** Defined by FM 2-22.3 as "the systematic effort to procure information to answer specific collection requirements by direct and indirect questioning techniques of a person who is in the custody of the forces conducting the questioning." The **ONLY** personnel who may conduct interrogations are trained and certified interrogators. There are specific courses that train and certify interrogators. These courses are run exclusively by USAIC or the Navy-Marine Corps Intelligence Training Center, and are approved by DIA.

2. **Tactical Interrogation at Brigade and Below.** Tactical Interrogations are interrogations conducted at the point of capture. Such interrogations are only authorized pursuant to theater specific requirements and approvals. As with interrogations conducted at a fixed interrogation facility, only trained and certified interrogators

⁵ E.O. 12333, ¶ 1.8(c) and (d).

⁶ E.O. 12333, ¶ 1.11(b).

⁷ U.S. DEP'T OF AIR FORCE, INSTR. 14-101, Intelligence Contingency Funds (30 Apr. 2009).

⁸ In this chapter, the term interrogator is used generically, but the reader should realize that there are HUMINT collectors and interrogators. A trained and certified interrogator may conduct interrogations, but may not conduct other HUMINT collector tasks, whereas a trained and certified HUMINT collector may conduct all HUMINT collector tasks including interrogations.

may conduct tactical **interrogations**. DoD personnel not trained and certified to interrogate may only conduct “tactical questioning.”

3. **Tactical Questioning.** According to FM 2-22.3, tactical questioning (often times referred to as “TQ”) is “the expedient initial questioning for information of immediate tactical value.” DoDD 3115.09 defines TQ as “direct questioning by any DoD personnel of a captured or detained person to obtain time-sensitive tactical intelligence, at or near the point of capture or detention.” This is the only type of questioning that a non-trained, non-certified person may conduct with a detainee (note that DoDD 3115.09 requires “DoD personnel who conduct, support, or participate in tactical questioning shall be trained, at a minimum in the law of war and humane treatment standards”).

4. **Detainee Treatment Act of 2005** (DTA of 2005) (part of the 2006 Department of Defense Appropriations Act, Pub. Law No. 109-163 and PL 109-148).

a. § 1002(a): No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

b. § 1003(a): No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

c. § 1005: Includes provisions for status review of detainees outside the U.S.

d. Based on enactment of the DTA of 2005, only those approach techniques contained in Chapter 8 and Appendix M of FM 2-22.3 are legal. Unlike most doctrine, this is not merely a recommendation for how to conduct operations; rather, FM 2-22.3 literally defines the legal limits of interrogation operations.

e. The DTA of 2005 applies to all DoD personnel, both military and civilian, at all times, in all locations, and to all others conducting interrogation operations in DoD facilities.

5. **Field Manual 2-22.3** offers two tests that an interrogator should consider before submitting an interrogation plan for approval:

a. If the proposed approach technique were used by the enemy against one of your fellow Soldiers, would you believe the Soldier had been abused?

b. Could your conduct in carrying out the proposed technique violate a law or regulation? Keep in mind that even if you personally would not consider your actions to constitute abuse, the law may be more restrictive.

c. If you answer yes to either of these tests, the contemplated action should not be conducted.

B. Training provides interrogators with the basic standards for interrogations in detainee operations. This is the “**THINK**” model:

1. **Treat all detainees with the same standard.**

a. DoDD 2311.01E, DoD Law of War Program, 9 May 2006 (incorporating Change 1 of November 15, 2010): DoD personnel will “comply with the Law of War during all armed conflicts, however such conflicts are characterized, and in all other military operations.”

b. DoDD 2310.01E, DoD Detainee Program, 5 September 2006: “All detainees shall be treated humanely, and in accordance with U.S. Law, the Law of War, and applicable U.S. policy.”

c. From an interrogator’s perspective, status may matter in the following situations:

(1) Use of the separation approach technique: not authorized for use against individuals protected by GC III (POW’s)⁹; and

⁹ FM 2-22.3 authorizes separation against “unlawful enemy combatants”. However, that term has been replaced by “unprivileged enemy belligerents” in official references. Regardless of the term used, the key legal principle is that the separation approach is not an authorized approach against individuals protected by GC III.

(2) Use of the incentive approach: may not deny the detainee anything entitled by law (there is a difference in entitlements between a civilian internee, lawful enemy combatant, unlawful enemy combatant, and a retained person).

2. **Humane treatment is the standard.** Enclosure 4 of DoDD 2310.01E is called the detainee treatment policy. It provides the minimum standards of humane treatment for all detainees and applies to detainees from the point of capture on. This policy requires that:

a. Adequate food, drinking water, shelter, clothing, and medical treatment be given;

b. Free exercise of religion, consistent with the requirements for detention, be allowed;

c. All detainees be respected as human beings. They will be protected against threats or acts of violence including rape, forced prostitution, assault, theft, public curiosity, bodily injury, and reprisals. They will not be subjected to medical or scientific experiments. They will not be subjected to sensory deprivation. This list is not exclusive.

3. **Interrogators interrogate.**

a. Pursuant to DoDD 3115.09:

(1) Only trained and certified interrogators may interrogate;

(2) Non-interrogators and non-trained/non-certified interrogators may only ask direct questions, may not use any other approach/technique, and may not “set the conditions” for an interrogation.

b. Non-interrogators and non-trained/certified interrogators may provide passively obtained information to trained and certified interrogators for use during interrogations. For example, an MP may tell the interrogator about leaders in the facility, habits of a detainee, groups that have formed in the facility, and other information that the MP has observed during the normal performance of his/her duties.

4. **Need to report abuses.**

a. Pursuant to DoDD 3115.09, all DoD personnel (including contractors) must report any “suspected or alleged violation of DoD policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings or tactical questioning, for which there is credible information.”

b. FM 2-22.3 requires “all persons who have knowledge of suspected or alleged violations of the Geneva Conventions . . . to report such matters.”

c. Reports should be made to the chain of command unless the chain of command is involved, in which case the report should be made to one of the following: SJA, IG, Chaplain, or Provost Marshal.

d. Failure to report may be a UCMJ violation (either Article 92, dereliction of duty, or Article 134, misprision of a serious offense).

e. Individuals must report violations by anyone, including, but not limited to: another interrogator, interpreter, host nation personnel, coalition personnel, or representatives of other government agencies (OGAs).

5. **Know the approved techniques.** Only those techniques listed in Chapter 8 (and appendix M) of FM 2-22.3 are approved, and therefore lawful, techniques pursuant to the Detainee Treatment Act of 2005.

a. **Approved Techniques.**

(1) *Direct Approach.* Interrogator asks direct questions, which are basic questions generally beginning with an interrogative (who, what, where, when, how, or why) and requiring a narrative answer. These questions are brief, concise, and simply worded to avoid confusion.

(2) *Incentive Approach.* Interrogator trades something that the detainee wants in exchange for information. Incentives do not include anything to which a detainee is already entitled by law or policy.

(3) *Emotional Love Approach.* In this approach, the interrogator focuses on the anxiety felt by the detainee about the circumstances in which he finds himself, his isolation from those he loves, and his feelings of helplessness. The interrogator directs that love towards the appropriate object, focusing the detainee on what he can

do to help himself, such as being able to see his family sooner, helping his comrades, helping his ethnic group, or helping his country.

(4) *Emotional Hate Approach*. The emotional hate approach focuses on any genuine hate, or possibly a desire for revenge, the detainee may feel.

(5) *Emotional Fear-Up Approach*. In the fear-up approach, the interrogator identifies a preexisting fear or creates a fear within the detainee. He then links the elimination or reduction of the fear to cooperation on the part of the detainee.

(6) *Emotional Fear-Down Approach*. In the fear-down approach, the interrogator mitigates existing fear in exchange for cooperation on the part of the detainee.

(7) *Emotional-Pride and Ego-Up Approach*. This approach exploits a detainee's low self-esteem. The detainee is flattered into providing certain information in order to gain credit and build his ego.

(8) *Emotional-Pride and Ego-Down Approach*. The emotional pride and ego-down approach is based on attacking the detainee's ego or self-image. The detainee, in defending his ego, reveals information to justify or rationalize his actions.

(9) *Emotional-Futility*. In the emotional-futility approach, the interrogator convinces the detainee that resistance to questioning is futile. This engenders a feeling of hopelessness and helplessness on the part of the detainee.

(10) *We Know All*. With this technique, the interrogator subtly convinces the detainee that his questioning of the detainee is perfunctory because any information that the detainee has is already known. When the detainee hesitates, refuses to answer, or provides an incorrect or incomplete reply, the interrogator provides the detailed answer himself. When the detainee begins to give accurate and complete information, the interrogator interjects pertinent questions.

(11) *File and Dossier*. In this approach, the interrogator prepares a dossier containing all available information concerning the detainee or his organization. The information is carefully arranged within a file to give the illusion that it contains more data than is actually there. The interrogator proceeds as in the "we know all" approach, referring to the dossier from time to time for answers. As the detainee becomes convinced that all the information that he knows is contained within the dossier, the interrogator proceeds to topics on which he in fact has little or no information.

(12) *Establish Your Identity*. Using this technique, the interrogator insists the detainee has been correctly identified as an infamous individual wanted by higher authorities on serious charges, and that the detainee is not the person he purports to be. In an effort to clear himself of this allegation, the detainee makes a genuine and detailed effort to establish or substantiate his true identity.

(13) *Repetition*. The repetition approach is used to induce cooperation from a hostile detainee. In one variation of this approach, the interrogator listens carefully to a detainee's answer to a question, and then repeats the question and answer several times. The interrogator does this with each succeeding question until the detainee becomes so thoroughly bored with the procedure that he answers questions fully and candidly to satisfy the interrogator and gain relief from the monotony of this method.

(14) *Rapid Fire Approach*. In this approach, the interrogator asks a series of questions in such a manner that the detainee does not have time to answer a question completely before the next one is asked. This confuses the detainee, who will tend to contradict himself as he has little time to formulate his answers. The interrogator then confronts the detainee with the inconsistencies, causing further contradictions. More than one interrogator may be used for this approach.

(15) *Silent*. The silent technique may be successful when used against either a nervous or confident detainee. When employing this technique the interrogator says nothing to the detainee, but looks him squarely in the eye, preferably with a slight smile on his face. It is important for the interrogator to not look away from the detainee but, rather, force the detainee to break eye contact first.

(16) *Change of Scenery*. Using this technique, the interrogator removes the detainee from an intimidating atmosphere such as an "interrogation" room type of setting and places him in a setting where he feels more comfortable speaking. Change of scenery is not environmental manipulation.

(17) *Mutt and Jeff*. This technique is also known as “Good Cop, Bad Cop.” The goal of this technique is to make the detainee identify with one of the interrogators and thereby establish rapport and cooperation with that individual. Use of this technique requires two experienced interrogators who are convincing actors. The two interrogators will display opposing personalities and attitudes toward the detainee. NOTE:

- (a) This technique must be approved by first O-6 in chain of command.
- (b) No violence, threats, or impermissible or unlawful physical contact are allowed.
- (c) No threatening the removal of protections afforded by law is allowed.
- (d) This technique requires regular monitoring.

(18) *False Flag*. The goal of this technique is to convince the detainee that individuals from a country other than the U.S. are interrogating him, thus tricking the detainee into cooperating with U.S. forces. NOTE:

(a) This technique must be coordinated with the SJA and C/J/G/S-2X (primary staff advisor on Human Intelligence and Counterintelligence, subordinate to C/J/G/S-2).

(b) This technique must be approved by first O-6 in chain of command.

(c) Interrogator must identify the country to be used in the interrogation plan.

(d) Interrogator may not imply or explicitly threaten that non-compliance will result in harsh interrogation by non-U.S. entities.

(e) Interrogator cannot pose or portray one’s self as a protected person (i.e., doctor, chaplain, etc.).

b. Restricted Techniques.

(1) *Separation*. This is an approved technique, but the use is restricted by limitations outlined in Appendix M, FM 2-22.3. The purpose of separation is to deny the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story and/or decrease the detainee’s resistance to interrogation. NOTE:

(a) Combatant Commander must approve (after SJA review) the use of the separation technique in the theater.

(b) First General Officer/Flag Officer (GO/FO) in the chain of command must approve each specific use of separation.

(c) Interrogation plan shall have an SJA review before submitting to the first GO/FO in the chain of command.

(d) This technique may only be used on unlawful combatants (unprivileged enemy belligerents). According to FM 2-22.3, an unlawful enemy combatant is a person not entitled to combatant immunity, who engages in acts against the U.S. or its coalition partners in violation of the laws and customs of war during an armed conflict. For the purposes of the war on terrorism, the term “unlawful enemy combatant” is defined to include, but is not limited to, an individual who was part of, or supported, the Taliban, al Qaeda forces, or associated forces that are engaged in hostilities against the U.S. or its coalition partners. Such an individual may also be referred to as an “unprivileged enemy belligerent.”

(e) Applied on a case-by-case approach when the detainee may possess important intelligence and other techniques are insufficient.

(f) Only DoD interrogators trained and certified on separation may use this technique.

(g) Sensory deprivation is prohibited, even for field expedient separation.¹⁰

¹⁰ When physical separation is not feasible, goggles or blindfolds and earmuffs may be utilized as a field expedient method to generate a perception of separation (see FM 2-22.3, Appendix M, para. M-27). However, JAs must realize that use of other methods such as tape over the eyes, ears, nose, or mouth, or the use of burlap bags over a detainee’s head, may be considered inhumane and pose a danger to the detainee.

(h) There is a thirty-day limit on use of this technique (12 hours if field-expedient use). This time limit may only be extended with SJA review and GO/FO approval.

(i) Separation must not be confused with quarantine, confinement, or segregation:

(i) Separation is an interrogation technique, subject to the limitations described above.

(ii) Quarantine is directed by medical personnel in response to a detainee with a contagious medical condition, such as tuberculosis or HIV.

(iii) Confinement is punishment, generally for offenses against camp rules, directed by the camp commander following some sort of due process proceeding.

(iv) Segregation is an administrative and security provision. Segregation is part of the “5 Ss and T” (search, silence, safeguard, segregate, speed to the rear, and tag) technique that capturing units must use to aid in controlling, sorting, and securing detainees at the point of capture. Military Police or guards also practice segregation in detention facilities when dealing with detainees who represent an increased security risk or who need additional oversight beyond that applied to detainees in the general population. An interrogator cannot request segregation in order to “set the conditions” for an interrogation.

C. Recent Developments.

1. **Department of Defense Directive 3115.09, (DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning)** was updated and released on 11 Oct. 2012. This update of the 2008 version incorporates the requirements for videotaping strategic level interrogations previously directed through DTM 09-031. The updated DoD Directive also incorporates the guidance prohibiting the use of contractor interrogators contained in DODI 1100.22 (Policy and Procedures for Determining Work Force Mix) and provides methods and approval processes for exceptions to the Instruction.

2. **Executive Order (E.O.) 13491 (Ensuring Lawful Interrogations)**. This E.O., issued by President Obama on 22 January 2009, extends the requirement to follow FM 2-22.3 to *all U.S. Government agencies* (not just DoD). Further, the E.O. reiterates Common Article 3 as the minimum standard for treatment of individuals under the effective control of the U.S. Government, and requires all CIA detention facilities to be closed expeditiously and not operated in the future.

3. **Department of Defense Instruction 1100.22 (Policy and Procedures for Determining Work Force Mix)**. This DoDI, published on 12 April, 2010 places significant restrictions on the use of contractors as interrogators. In general, the use of contractors to conduct interrogations is prohibited without a Secretary of Defense level approved waiver for reasons vital to national security.

4. **Directive-Type Memorandum (DTM) 09-031 (Videotaping of Interrogations of Persons in DoD Custody)**. This DTM, Change 2, dated December 2011, establishes procedures for the videotaping of interrogations, as required by the FY-10 National Defense Authorization Act (NDAA). The DTM specifically requires all strategic-level interrogations (those occurring at Theater Internment Facility (TIF)-level or higher) to be recorded and preserved. NOTE: The DTM does not require videotaping by individuals “engaged in direct combat operations” or by those DoD personnel conducting Tactical Questioning.

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