



U.S. Department of Justice

Criminal Division

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Subject: **Airbridge Denial Program Investigation**

**I. Background**

The CIA involvement in the Air Bridge Denial Program (ABDP) was first initiated in 1992-1993 with the arrival of CIA controlled aircraft in Peru. DoD, Customs and DEA also provided support to the ABDP. In early 1994, DoD pulled out of the program due to a concern that U.S. government personnel could be held criminally liable under 18 U.S.C. §32 for providing real time intelligence to the Peruvian Air Force (FAP) that was used to shoot down a civil aircraft. In May 1994, DOJ issued a formal opinion that U.S. personnel who provided assistance or information that was used by the FAP to shootdown or destroy a civil aircraft could indeed be held criminally liable under U.S. law. As a result, an order to halt USG support to the ABDP was issued.

To enable U.S. support to the ABDP to be resumed, Congress, with the support of the administration, enacted 22 U.S.C. §2291-4 in the fall of 1994. That statute provides immunity for U.S. employees and agents who provide assistance for the interdiction of aircraft by foreign countries, provided certain conditions are met. Those statutory conditions are: (1) that the aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking; and (2) the President of the United States, before the interdiction, has determined that (a) interdiction is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of the foreign country, and (b) the foreign country "has appropriate procedures in place to protect against innocent loss of life in the air or on the ground in connection with interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force directed against the aircraft. President Clinton issued the requisite "determination" regarding Peru, Presidential Determination 95-9 (PD 95-9), on December 8, 1994 (Attachment

1).

## Program History post 1994

The ABDP restarted in earnest in March 1995. Since then, the Peruvians, with the assistance of U.S. personnel and assets, have shot down 14 suspected narco planes, forced down five, strafed at least three, and seized eight on the ground. Most of that activity occurred from 1995 through 1997. From the end of 1997 until July, 2000, there were no "endgames" in Peru. Since July 2000 there have been four "endgames" – shootdowns on July 17, 2000 and April 20, 2001, a forcedown on December 18, 2000, and an aircraft destroyed on the ground by drug traffickers on January 21, 2001 (Attachment 2). The program, from a counter-narcotics viewpoint, has been a huge success.

## II. Legal requirements/obligations for U.S. personnel involved in ABDP:

PD 95-9 set forth the procedural requirements for the ABDP and the legal obligations or duty of U.S. personnel involved in the program. These procedures, promulgated pursuant to the requirements of 22 U.S.C. 2291-4, were developed on the basis of negotiations between the U.S. and Peru. The U.S. acceded to the viability of the program only after the Peruvian government confirmed that it would operate the ABDP in accordance with the required safety procedures.

In relevant part, PD 95-9 states that:

[t]he [Government of Peru] GOP has established rigorous procedures to ensure adequate protection against the loss of innocent life. The procedures for identifying and communicating with intercepted aircraft are based on ICAO procedures, and are contained in classified GOP plans and orders, as well as in the civil aviation law 24882. The procedures are summarized below:

..... the use of weapons against [narco-trafficking] aircraft in flight by the Peruvian Air Force may be authorized under very strict conditions after all attempts to identify innocent aircraft and to persuade suspected aircraft to land at a controlled airfield have been exhausted.

PD 95-9 then goes on to describe Peru's air interdiction procedures in detail, including the requirement for visual communication procedures:

[i]f radio contact is not possible, the PAF pilot must use a series of internationally recognized procedures to make visual contact with the suspect aircraft and to direct the aircraft to follow the intercepting aircraft to a secure airfield for inspection.

Use of weapons: If the aircraft continues to ignore the internationally recognized instructions to land, the PAF pilot -- only after gaining the permission of the Commanding General of the VI RAT or in his absence the Chief of Staff -- may



fire warning shots in accordance with specified PAF procedures.

The remaining procedures for the actual shoot down of aircraft follow in the same paragraph, and also require the authorization from the VI RAT Commander or his Chief of Staff. The section on the GOP procedures concludes with the following statement:

The final decision to use force against civil aircraft in flight – **once all other steps have been exhausted** – requires authorization from the VI RAT Commander – or in his absence his Chief of Staff – who will verify that all appropriate procedures have been fulfilled.

PD 95-9 then goes on to discuss the obligations of both the GOP and USG personnel involved in the program. Regarding the GOP, PD 95-9 states that:

[a]ny decision to fire on civil aircraft, and the procedures and events leading to it, will subsequently be reviewed by the GOP pursuant to legal provisions and sanctions available to it against any GOP official who deviates from established procedures.

As to the obligations on USG personnel, PD 95-9 states that:

[a]s part of their standard operating instructions, all official USG personnel in jointly manned facilities and platforms will regularly monitor compliance with agreed procedures and immediately report any irregularities through their chain of command. **Should there be evidence suggesting that procedures are not being followed, the USG will reevaluate whether Peru has appropriate procedures to protect against innocent life.**

It should be noted that a Presidential Determination and accompanying Memorandum of Justification should be considered to “constitute a Presidential directive having the force and effect of law’ notwithstanding its . . . form.” (See OLC opinion, “Legal Effectiveness of a Presidential Directive, As Compared to an Executive Order,” dated January 29, 2000 (Attachment 2).)

### III. Theory of the Case:

(b)(5)

**WITHHOLD IN FULL**

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(b)(5)

Portions (6), (7)(c)