DOMESTIC OPERATIONAL LAW

2018 Handbook
for Judge Advocates

Center for Law and Military Operations (CLAMO)
The Judge Advocate General's Legal Center and School
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A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES

EDITORS and CONTRIBUTING AUTHORS

LTC Ted Martin, USA
MAJ Corey E. Thomas, ARNGUS

2018 CONTRIBUTING AUTHORS

COL Pat Butler
LTC Bayne Johnston
LTC Stephen Faherty
LTC Benjamin Currier
CDR Michael Gesele
MAJ Ryan Kerwin
LCDR James Zoll
CPT Charles W. VanDerMiller
Mr. Robert Goodin
Mr. Robert Gonzales
LTC Richard Sudder
LTC Michael McCann
LTC Robert Kavanaugh
LTC Thomas Forrest
MAJ Sean Rogers
Maj Dimple Nolly
LCDR Jonathan Perry
Mr. Kevin Kapitan
Mr. Jonathan Russell

As well as numerous past editors and contributors to the Domestic Operational Law Handbook.

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The Judge Advocate General's Legal Center & School

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Hurricanes

Hurricane Irma rips through Puerto Rico. (September 7, 2017) (Photo courtesy Joshua Hoyos and Mi.I. Nestel ABC News)

Domestic Imagery/Incident Awarness and Assessment

Workers prepare an MQ-1C Gray Eagle drone at Michael Army Airfield, Dugway Proving Ground in Utah September 15, 2011. Reuters/U.S. Army/Spc. Latoya Wiggins/Handout

Chemica/Biological/Radiological/Nuclear/Environmental

Staff Sgt. Hector Pena, 48th Chemical Bde., participates in a situational training lanes exercise during the 20th CBRN Command Best Warrior Competition July 23, 2014 at Aberdeen Proving Ground, Md. (Photo courtesy Laurena Bell, 20TH CBRN COMMAND)

Floods

Livestock stranded on high ground surrounding a house under construction during the 2016 flood in Louisiana. (Photo courtesy Bossier Parish Sheriff's Office)

Counterdrug

Arkansas Guard members help State Police remove marijuana plants from a Guard helicopter during a recent eradication mission in support of the National Guard's Counterdrug Program. (September 3, 2008) (Photo courtesy Staff Sgt. Chris A. Durney)

Insurrection

Federalized Soldiers from the Arkansas Army National Guard and the 101st Airborne Division providing support to local law enforcement in accordance with President Dwight Eisenhower's Insurrection Act authority. (September 26, 1957) (Photo courtesy Richard Austin of theclio.com)

National Special Security Events

The 2017 Presidential Inauguration (Photo courtesy Elijah Crawford, 2017)

Wildfires

In 2000, this wildfire burned just north of Sula, Montana. (Photo courtesy John McColgan, Bureau of Land Management)

EDITOR'S NOTE

The Domestic Operational Law (DOPLAW) Handbook for judge advocates is a product of the Center for Law and Military Operations (CLAMO). The content is derived from statutes, Executive Orders and Directives, national policy, DoD Directives and Instructions, joint publications, service regulations, field manuals, as well as lessons learned by judge advocates and other practitioners throughout Federal and State government. This edition includes substantial revisions. It incorporates new guidance set forth in Department of Defense Directive 3025.18 (Defense Support of Civil Authorities), Department of Defense Instruction 3025.21 (Defense Support of Civilian Law Enforcement Agencies), numerous new National Planning Framework documents, and many other recently updated publications. It provides amplifying information on wildfire response, emergency mutual assistance compacts, the role of the National Guard and Army units in domestic response, and provides valuable lessons learned from major disasters such as Hurricanes Harvey, Irma, and Maria.

The Handbook is designed to serve as a working reference and training tool for judge advocates; however, it is not a substitute for independent research. With the exception of footnoted doctrinal material, the information contained in this Handbook is not doctrine. Judge advocates advising in this area of the law should monitor developments in domestic operations closely as the landscape continues to evolve. Further, the information and examples provided in this Handbook are advisory only. The term "State" is frequently used throughout this Handbook, and collectively refers to the 50 States, Guam, Puerto Rico, U.S. Virgin Islands, and the District of Columbia. The same is often referred to as "the 54 States and territories." Finally, the content and opinions expressed in this Handbook do not represent the official position of the U.S. Army or the other services, the National Guard Bureau, the Office of The Judge Advocate General, The Judge Advocate General's Legal Center and School, or any other government agency.

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CHAPTER 1

OVERVIEW OF CIVIL SUPPORT OPERATIONS

A. Background

The core task of the U.S. military is "to defend our Nation and win its wars."[1] However, since the terrorist attacks of September 11, 2001, the Department of Defense's (DoD) highest priority has been the protection of the United States from direct attack;[2] however, terrorism does not represent the only source of threats to the homeland. The extraordinary destruction wrought by Hurricanes Harvey, Irma, and Maria in 2017 remind us that threats to the nation do not always originate from the acts of man.[3]

Since September 11, 2001, the Federal government has taken aggressive and wide-ranging steps to better address both the threat of direct attacks on the United States and the challenges of natural or manmade disasters. Through the Homeland Security Act of 2002,[4] Congress created the Department of Homeland Security (DHS)—an executive agency that consolidated the functions and responsibilities of more than a dozen Federal agencies and departments, including the U.S. Coast Guard (USCG), the Federal Emergency Management Agency (FEMA), the Immigration and Naturalization Service (INS), the Transportation Security Administration (TSA), and the U.S. Secret Service (USSS), among others.[5] On February 28, 2003, President George W. Bush signed Homeland Security Policy Directive 5 (HSPD-5), "*Management of Domestic Incidents*." The purpose of HSPD-5 was "[t]o enhance the ability of the United States to manage domestic incidents by establishing a single, comprehensive national incident management system [NIMS]."[6] In paragraph 14 of HSPD-5, President Bush tasked the Secretary of Homeland Security with development and administration of the NIMS.[7] On December 3, 2003, President Bush signed Homeland Security Policy Directive 8 (HSPD-8), "*National Preparedness*." HSPD-8 is a companion to HSPD-5 and "describes the way Federal departments and agencies will prepare for"

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[1] JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 8 (2011), *available at* https://www.defense.gov/Portals/1/Documents/pubs/2011-National-Military-Strategy.pdf [hereinafter 2011 National Military Strategy].

[2] *See* DEPARTMENT OF DEFENSE, STRATEGY FOR HOMELAND DEFENSE AND DEFENSE SUPPORT OF CIVIL AUTHORITIES 1 (Feb. 2013), *available at* http://www.defense.gov/news/Homelanddefensestrategy.pdf [hereinafter STRATEGY FOR HOMELAND DEFENSE AND DSCA].

[3] Federal analysis indicates that the direct toll in lives and financial costs from natural disasters in recent decades far outweighs that from terrorist attacks. *See* Rawle O. King, *Financing Recovery from Large-Scale Natural Disasters*, CONGRESSIONAL RESEARCH SERVICE (9 Feb. 2009); *See also 9/11 Terrorism: Economic Global Costs*, CONGRESSIONAL RESEARCH SERVICE (5 Oct. 2004).

[4] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified primarily at 6 U.S.C. §§ 101–557) [hereinafter HSA 2002].

[5] *Id.*

[6] DEP'T OF HOMELAND SECURITY, HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 5 [hereinafter HSPD-5], *available at* https://www.dhs.gov/publication/homeland-security-presidential-directive-5 (last visited June 26, 2018).

[7] *Id.* at para. 14.

incident response.[8] "To help ensure the preparedness of the Nation to prevent, respond to, and recover from threatened and actual domestic terrorist attacks, major disasters, and other emergencies," President Bush tasked the Secretary of Homeland Security to, "in coordination with the heads of other appropriate Federal departments and agencies and in consultation with State and local governments, . . . develop a national domestic all-hazards preparedness goal.[9] As a result, The National Response Framework (NRF) was published in January 2008, most recently updated in June 2016.[10]

On October 1, 2002, the United States Northern Command (USNORTHCOM) was established which "marked the first time a single military commander has been charged with protecting the U.S. homeland since the days of George Washington."[11] USNORTHCOM has direct responsibility for the defense, protection, and security of the continental United States, Alaska, and its territorial waters including the Gulf of Mexico and the Straits of Florida. With the establishment of USNORTHCOM, DoD now has Combatant Commands whose combined geographic responsibilities cover all States and territories of the United States.[12] On September 11, 2003, USNORTHCOM reached full operational capability. USNORTHCOM's current mission statement is:

"USNORTHCOM partners to conduct homeland defense, civil support and security cooperation to defend and secure the United States and its interests."[13]

This mission statement recognizes the unique dual roles for USNORTHCOM in Homeland Defense (HD) Defense Support of Civil Authorities (DSCA), Security Cooperation (SC), in addition to standard Geographic Combatant Commander-assigned responsibilities.[14] As discussed below, HD and SC authorities and capabilities are generally beyond the scope of this handbook. However, understanding how DoD and its organizations (such as USNORTHCOM) fit in the larger emergency and disaster response framework allows for better comprehension of DoD's ability to provide support to civil authorities. Because of USNORTHCOM's responsibility for operations in

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[8] GOVERNMENT PUBLISHING ONLINE, HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 8, DECEMBER 2003 [hereinafter HSPD-8], available at https://www.gpo.gov/fdsys/pkg/PPP-2003-book2/pdf/PPP-2003-book2-doc-pg1745.pdf.

[9] The December 2003 version of HSPD-8 was replaced by Presidential Policy Directive 8 [hereinafter PPD-8] signed by President Barack Obama on March 20, 2011, https://www.dhs.gov/xlibrary/assets/presidential-policy-directive-8-national-preparedness.pdf.

[10] DEP'T OF HOMELAND SECURITY, NATIONAL RESPONSE FRAMEWORK, June 2016 [hereinafter NRF], *available at* https://www.fema.gov/media-library-data/1466014682982-9bcf8245ba4c60c120aa915abe74e15d/National_Response_Framework3rd.pdf. The NRF superseded the National Response Plan (NRP) published in 2005.

[11] *A Short History of United States Northern Command*, U.S. NORTHERN COMMAND OFFICE OF HISTORY (December 31, 2012), http://www.northcom.mil/Portals/28/Documents/Supporting%20documents/Historical/NORTHCOM%20History.pdf.

[12] The other Combatant Command with responsibility for the United States is U.S. Pacific Command (USPACOM), with responsibility over Hawaii, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

[13] *About USNORTHCOM*, UNITED STATES NORTHERN COMMAND, http://www.northcom.mil/AboutUSNORTHCOM.aspx (last visited June 26, 2018). The geographic area of responsibility for USNORTHCOM also contains Mexico, Canada, Bermuda, and portions of the Caribbean. *Id*. The exact dimensions of this geographic area are contained in the Unified Command Plan.

[14] Duties and assignments for Combatant Commanders are contained in the Unified Command Plan.

the homeland, it is engaged in nearly constant liaison with our national leadership and with the Federal agencies that would lead civil support operations.

B. Purpose of This Handbook

In February 2013, DoD published a new Strategy for Homeland Defense and Defense Support of Civil Authorities which updated DoD's Domestic Support Strategy for the first time since 2005, and set out DoD's vision for transforming homeland defense and support to civil authorities.[15]

DoD has identified two priority missions for its activities in the homeland for 2012 through 2020: 1) to defend U.S. territory from direct attack by State and non-State actors, and 2) to provide assistance to domestic civil authorities in the event of natural or manmade disasters.[16]

This handbook focuses on the latter of the two missions - providing assistance to domestic civil authorities, also known as Defense Support of Civil Authorities (DSCA). Circumstances involving the exercise of HD authority and capabilities, i.e. "countering air and maritime attacks and preventing terrorist attacks on the homeland,"[17] are beyond the scope of this handbook. The same holds true for SC. Nonetheless, it should be kept in mind that actions taken within the HD function may directly impact DoD's DSCA mission once an event has occurred. Likewise, for ongoing events or continuing attacks, DSCA actions may contribute immediately to HD capabilities.

C. DoD's Role in Civil Support

Federal military support provided to civil authorities is neither new nor unique to a single service. The Federal military has a history of providing assistance to the States and territories in times of major disaster or emergency.[18] During the Reconstruction after the Civil War, U.S. Marshalls called on the Federal military to assist with maintaining order in the southern States.[19] In the late Nineteenth Century, the Army played a direct role in many disaster relief operations including the great Chicago fire, the Johnstown Flood, and the Charleston, South Carolina earthquake. When called on today, and under the proper authority, DoD will continue to fulfill its role in providing support to civil authorities when necessary and authorized.

Under the control of their State Governor and The Adjutant General (TAG),[20] National Guard units are the primary military responders in all civil support operations. The use of Federal forces to support State and local governments was, and remains, the exception rather than the rule. Federal forces are generally used only after State and local resources are exhausted or overwhelmed and Federal assistance has been requested, normally in writing, by the State's Governor or delegated official.

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[15] *See* STRATEGY FOR HOMELAND DEFENSE AND DSCA, *supra* note 2.

[16] *Id.* at 1.

[17] *Id*. at 9.

[18] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (October 2008) [hereinafter FM 3-07].

[19] *Id.*, para 1-1.

[20] In "State status" National Guard personnel are under the control of the particular Governor and The Adjutant General (TAG) of their particular State. In this context, "State status" includes "State Active Duty (SAD)" and the status maintained by members of the National Guard under Title 32 of the United States Code. *See infra* Chapter 3 for further discussion of National Guard status.

Even though the core task of the DoD is to "defend our Nation and win its wars,"[21] DoD has capabilities and resources uniquely suited to provide support to civil authorities if necessary. Like the National Guard, DoD consists of trained and disciplined personnel and organizations capable of rapidly responding on short notice to a broad spectrum of emergencies. Although organized to conduct combat operations abroad, Federal military personnel and equipment can be effectively employed in domestic disaster relief operations.[22] In these instances, DoD's role is one of support - civilian authorities retain primary responsibility for domestic operations.[23] Civil authorities may request Federal assistance, including DoD support, once it becomes clear that their capabilities will be insufficient or have been exceeded.[24]

U.S. domestic law, Presidential Decision Directives (PDDs),[25] National Security Presidential Directives (NSPD), Homeland Security Presidential Directives (HSPDs), [26] Presidential Policy Directives (PPDs),[27] Executive Orders (EOs), and DoD regulations provide the framework for, and set limits on, the use of Federal military forces to support civil authorities. While the types of domestic support operations may vary widely, two forms of statutory restrictions as well as policy concerns limit the scope of Federal support provided. Statutorily, judge advocates must carefully consider fiscal law constraints[28] as well and the Posse Comitatus Act.[29] From a DoD policy perspective, the "3025 series" of DoD Manuals, Instructions, and Directives are applicable.

The National Guard, while in State Active Duty (SAD) status, has primary responsibility for providing civil support to State and local Governments.[30] When Federal forces respond in a support role, they operate under the direction of a designated Lead Federal Agency (LFA). Federal laws recognize the importance of interdepartmental and interagency coordination and planning in this area. For example, the *National Response Framework* (NRF) is designed to maximize unity of effort when Federal agencies work together to respond to domestic emergencies. [31]

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[21] *See* 2011 NATIONAL MILITARY STRATEGY, *supra* note 1.

[22] U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (29 Dec. 2010) (C2, 19 March 2018) [hereinafter DoDD 3025.18].

[23] *See* STRATEGY FOR HOMELAND DEFENSE AND DSCA, *supra* note 3, at 9, 14. *See also* U.S. DEP'T OF DEFENSE, INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES Encl. 4 (27 Feb. 2013) [hereinafter DoDI 3025.21] (noting "[t]he primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in State and local [G]overnments.").

[24] *See* STRATEGY FOR HOMELAND DEFENSE AND DSCA, *supra* note 3, at 15.

[25] The Presidential Decision Directive (PDD) series was the mechanism used by the Clinton Administration to promulgate Presidential decisions on national security matters.

[26] In the George W. Bush administration, the directives used to promulgate Presidential decisions on national security matters are designated National Security Presidential Directives (NSPDs) and those on homeland security matters are designated Homeland Security Presidential Directives (HSPDs). Unless otherwise indicated, past directives of previous administrations remain in effect until superseded.

[27] The Presidential Policy Directive (PPD) series is a mechanism that the Obama administration uses to promulgate Presidential decisions on national security matters.

[28] *See infra* Chapter 14.

[29] 18 U.S.C. § 1385 (2012). *See infra* Chapter 4.

[30] DoDI 3025.21, *supra* note 18, at 27.

[31] NRF, *supra* note 7.

In summary, DoD provides Federal military assistance only when civil resources are insufficient, when requested to do so by appropriate civil authorities, and when properly ordered to do so by DoD officials. In domestic operations, National Guard units and personnel, in non-Federal status and under the command of their respective Governors, have primary responsibility for providing civil support to local Governments. Unless otherwise authorized by law, the Federal Government may provide support to civil authorities only in response to a valid request for assistance after State and local Government resources have been exhausted or overwhelmed.

Practice Scenario: It is October 1st and Category 4 Hurricane XYZ has just made landfall in the Virginia Tidewater Region (Norfolk/Virginia Beach). There is significant damage throughout the area. The region is home to several DoD units including Norfolk Naval Station, Naval Air Station Oceana, Langley Air Force Base, and Fort Eustis, among others. What are the DoD's responsibilities to assist in the community initially in this scenario?

Answer: None. The responsibility to respond first to a disaster lies with the affected municipalities, counties, and States. There is no general Constitutional power nor statutory requirement for the Federal Government to engage in disaster response within a sovereign State without a request for assistance from a civil authority or a declaration from the President of the United States (POTUS).* Disaster response is a tiered effort from the bottom up which means that the first responders are at the local level. Once the resources at the local level are exhausted, they may request assistance from the State. Once the State's resources are exhausted, the State may request assistance from the Federal Government.

* There are, however, certain Constitutional powers and Federal statutes that grant POTUS the authority to take certain action within the States absent a request for assistance (see, e.g. Article IV, Section 4 of the U.S. Constitution, and the Insurrection Act, 10 U.S.C. § 251-255).

D. Defense Support of Civil Authorities (DSCA)

The primary reference for all DoD support to provided to civil authorities during domestic operations is DoD Directive (DoDD) 3025.18, Defense Support of Civil Authorities.[32] DoDD 3025.18 was promulgated with changes on March 19, 2018. It incorporates and cancels DoDD 3025.1 (Military Support to Civil Authorities) and DoDD 3025.15 (Military Assistance to Civil Authorities). Notably, DoDD 3025.18 states that DSCA plans shall be compatible with the National Incident Management System (NIMS) and will consider command and control options that emphasize "unity of effort."[33]

DoDD 3025.18 provides criteria against which all requests for support must be evaluated. These criteria are known as the "CARRLL" factors.[34] Commanders at all levels should be cognizant of these factors when forwarding a recommendation for Federal military support through the chain of command.

The criteria are:

- **C**ost – Who pays and the impact on DoD budget.
- **A**ppropriateness – Whether it is in the interest of DoD to provide the requested support.
- **R**eadiness – Impact on DoD's ability to perform its primary mission.
- **R**isk – Safety of DoD forces.
- **L**egality – Compliance with the law.
- **L**ethality – Potential use of lethal force by or against DoD forces.

DoDD 3025.18 also outlines the roles and responsibilities of each DoD component and establishes request procedures and approval authorities for each type of domestic support operation. The Secretary of Defense has reserved approval authority of DoD support for civil disturbances and for responses to acts of terrorism. The various types of domestic support authorities are covered in more detail in specific DoD Directives and Instructions set out in the respective chapters of this Handbook.

E. Handbook Organization

This Handbook specifically addresses the DoD and National Guard civil support missions and their role in emergency response operations within the United States. It additionally provides an understanding of the overall Federal Government approach to preparing for and responding to major disasters and emergencies. In the majority of domestic emergency and disaster response operations, DHS will serve as the LFA to which DoD lends its support. Thus, a working knowledge of how DHS addresses emergency and disaster response is vital to fully appreciate the various DoD and National Guard authorities and policies in this area. This Handbook, therefore, begins with a

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[32] DoDD 3025.18, *supra* note 22.

[33] *Id.* at 4.

[34] *Id*.

discussion on the role of the DHS and the National Preparedness System and Incident Management doctrines that permeate all emergency and disaster responses.

This Handbook then examines the roles, responsibilities and authorities of the National Guard and DoD related to specific domestic support operations including Chemical, Biological, Radiological, and Nuclear (CBRN)[35] incident management, support to civilian law enforcement, civil disturbance support, counterdrug operations, and other miscellaneous operations. This Handbook concludes with chapters that impact all domestic operations: intelligence law, rules for the use of force, fiscal law, and cyber. Each chapter is best understood when considered in light of other chapters. However, each chapter also stands on its own and can be used by judge advocates to develop an understanding of the capabilities and limitations applicable to civil support.

[35] Previously referred to as CBRNE – see Chapter 6, *infra*, for a discussion on the change from CBRNE to CBRN in policy.

CHAPTER 2

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

KEY REFERENCES:

- Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) as amended.
- Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 42 U.S.C. § 5121, *et seq*., as amended.
- Post-Katrina Emergency Management Reform Act of 2006 (PKEMRA), Pub. L. No. 109-295, 120 Stat. 1394 (2006).
- The Federal Water Pollution Control Act (Clean Water Act) , 33 U.S.C. § 1251 *et. seq*. (1972), as amended, and the Oil Pollution Act of 1990 (OPA 90) (1991), as amended.
- Executive Order 12241 – National Contingency Plan (1980), as amended.
- Executive Order 12472 – Assignment of National Security and Emergency Preparedness Telecommunications Functions (1984), as amended.
- Executive Order 12580 – Superfund Implementation (1987), as amended.
- Executive Order 12656 – Assignment of Emergency Preparedness Responsibilities, (1988), as amended.
- Executive Order 12657 – Federal Emergency Management Agency Assistance in Emergency Preparedness Planning at Commercial Nuclear Power Plants (1988), as amended.
- Executive Order 12777 – Implementation of Section 311 of the Federal Water Pollution Control Act.
- Executive Order 13228 – Establishing the Office of Homeland Security and the Homeland Security Council.
- Executive Order 13286 – Amendment of Executive Orders, and Other Actions, in Connection with the Transfer of Certain Functions to the Secretary of Homeland Security (2003).
- HSPD 15/NSPD 46 – U.S. Strategy and Policy in the War on Terror (classified directive), March 6, 2006.
- PDD 63 – Critical Infrastructure Protection, May 22, 1998.[1]
- HSPD 5 – Management of Domestic Incidents, February 28, 2003.
- HSPD 7 – Critical Infrastructure Identification, Prioritization, and Protection, December 17, 2003.
- HSPD 8 – National Preparedness, December 17, 2003 and HSPD 8, Annex I – National Planning.[2]
- PPD 8 – National Preparedness, March 30, 2011.
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9605 – 9675 (2011).
- Defense Production Act of 1950, 50 U.S.C. § 2061, *et seq*.

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[1] Recommended for historical reference. President Bush promulgated HSPD 7 to update and supersede the pre-9/11 PDD-63 dealing with the protection of critical infrastructure.

[2] Recommended for historical reference. President Obama promulgated PPD-8 to update and supersede HSPD 8 and HSPD 8, Annex I, with the exception of paragraph 44 of HSPD-8 Annex I, which remains in effect. Individual plans developed under HSPD-8 and HSPD-8 Annex I remain in effect unless otherwise replaced or rescinded.

- DoDD 3025.18, Defense Support of Civil Authorities (DSCA), September 21, 2012.
- DoDI 3025.22, The Use of the National guard for DSCA, July 26, 2013.[3]
- Chief National Guard Bureau Instruction (CNGBI) 3000.04, National Guard Bureau Domestic Operations, January 24, 2018.
- National Response Framework (NRF), June 2016.
- National Mitigation Framework (NMF), June 2016.
- National Prevention Framework (NPF), June 2016.
- National Disaster Recovery Framework, (NDRF), June 2016.
- National Incident Management System (NIMS), October 2017.
- National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.
- ADP 3-28, Defense Support of Civil Authorities, July 2012.

A. The Federal Response Structure

In the 25 years since 1988, when President George H.W. Bush promulgated Executive Order (EO) 12656, the Federal Government has significantly changed its approach to preventing, preparing for, and responding to major domestic incidents. This chapter addresses the Federal Government's current system for domestic all-hazards incident management, including the latest significant changes to the National Preparedness System promulgated in 2013, as well as the vital role of the Stafford Act as the primary authority for the use of Federal resources to assist State and local governments during major disasters and emergencies.

1. Executive Order 12656: Emergency Preparedness and Response Responsibilities

Executive Order 12656, as amended, assigns national security emergency preparedness responsibilities to Federal departments and agencies, delegating to the Department of Homeland Security primary responsibility for coordinating the efforts of, among other things, Federal emergency assistance.[4]

This Executive Order identifies several departments/agencies (*e.g.*, Defense, Energy, Health and Human Services) that have active, and potentially overlapping, roles regarding nuclear, biological, and chemical assessment and response. It also identifies primary and support functions to be performed during any national security emergency of the United States, development of plans for performing these functions, and development of the capability to execute those plans. As part of preparedness, EO 12656 mandates that the heads of Federal agencies plan for continuity of government in the event of a national security emergency and plan for the mobilization of agency alternative resources. In assigning areas of responsibility for domestic preparedness, EO 12656 provides the foundation for the former Federal Response Plan (FRP), now superseded by the NRF under the National Preparedness System (NPS).

Executive Order 13228, establishing the Office of Homeland Security[5], amended EO 12656 to account for the responsibilities of the new office within the functional and legal structure of

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[3] Incorporating Change 1, May 15, 2017.

[4] Exec. Order No. 12656, 3 C.F.R. 585 (1988)*; see also* Exec. Order No. 12148, 3 C.F.R. 412 (1979), which transferred to FEMA responsibility for coordinating Federal response to civil emergencies at the regional and national levels.

[5] Exec. Order No. 13228, 66 Fed. Reg. 51812 (Oct. 10, 2001).

emergency preparedness. This Executive Order identifies primary and support functions to be performed during any national security emergency of the United States, directs the development of plans for performing these functions as well as development of the capability to execute those plans. Table 2-1 highlights some of the major areas of responsibility for several of the agencies identified in EO 12656, as amended by EO 13286.[6]

AGENCY	LIST OF SELECT AGENCY ROLES AND RESPONSIBILITIES
Department of Agriculture	**Lead Responsibilities**: Ensure continuation of agricultural production, food processing, storage, and distribution; Oversee use and handling of agricultural commodities and land exposed to or affected by hazardous agents. **Support Responsibilities**: Assist Secretary of Defense in formulating and carrying out plans for stockpiling strategic and critical agricultural materials.
Department of Defense	**Lead Responsibilities**: Ensure military preparedness and readiness to respond to national security emergencies ; Develop and maintain, in cooperation with the heads of other departments and agencies, national security emergency plans, programs, and mechanisms to ensure effective mutual support between and among the military, civil government, and the private sector; Develop and maintain damage assessment capabilities and assist the Director of the Federal Emergency Management Agency and the heads of other departments and agencies in developing and maintaining capabilities to assess attack damage and to estimate the effects of potential attack on the Nation; In consultation with the Secretaries of State and Energy, the Director of the Federal Emergency Management Agency, and others, as required, develop plans and capabilities for identifying, analyzing, mitigating, and responding to hazards related to nuclear weapons, materials, and devices. **Support Responsibilities**: Development of plans and programs to support national mobilization; Planning for the protection, evacuation, and repatriation of United States citizens in threatened areas overseas; Coordinate with the Director of the Federal Emergency Management Agency the development of plans for mutual civil-military support during national security emergencies. .
Department of Energy	**Lead Responsibilities**: Identify, analyze, assess, and mitigate hazards from nuclear weapons, materials, and devices; All emergency response activities pertaining to DOE nuclear facilities, to include recapture of special nuclear materials. **Support Responsibilities**: Advise, assist, and assess the radiological impact associated with national security emergencies.
Department of Health and Human Services	**Lead Responsibilities**: Mobilize health industry and allocate resources to provide health, mental health, and medical services to civilian and military claimants; reduce or eliminate adverse health and mental health effects produced by hazardous agents; Provide emergency services, e.g. social services, family reunification, mortuary services. **Support Responsibilities**: Support Secretary of Agriculture in development of plans related to national security agricultural health services.
Department of Homeland Security	**Lead Responsibilities**: Advise National Security Council on issues of national security emergency preparedness, including mobilization preparedness, civil defense, continuity of government, and technological disasters; Coordinate with the other agencies and State and local governments to implement national security emergency preparedness policies. **Support Responsibilities**: Prepare plans and programs, to include plans and capabilities related to nuclear emergencies; Promote programs for Federal buildings and installations.

[6] Exec. Order No. 13286, 68 Fed. Reg. 10619 (Mar. 5, 2003) transferred key functions of FEMA to DHS. Note that Exec. Order No. 13603, 77 Fed. Reg. 16651 (Mar. 16, 2012) revoked Sections 401(3)-(4) of Exec. Order No. 12656.

Department of Justice	**Lead Responsibilities**: Interdict and respond to terrorism incidents; advise the President regarding national security emergency powers, plans, and authorities; Coordinate domestic law enforcement activities related to national security emergency preparedness, respond to civil disturbances that may result in a national security emergency. **Support Responsibilities**: Support the intelligence community in the planning of its counter-intelligence and counter-terrorism programs.
Department of Transportation	**Lead Responsibilities**: Meet essential transportation needs; Provide direction to all modes of civil transportation; Coordinate with State and local agencies in the management of all publicly-owned highways, roads, bridges, tunnels; assist with maritime and port control. **Support Responsibilities**: Assist Secretary of Energy in the transportation of energy materials.

Table 2-1. Partial List of Agency Roles and Responsibilities during a National-Level Emergency

2. The Homeland Security Act

The Homeland Security Act of 2002 represented a watershed moment in the manner in which the Federal government organizes to respond to national level incidents.[7] The Act established the DHS, and consolidated the consequence management missions, assets, and personnel of numerous Federal departments and agencies into a single department.[8] The primary missions of DHS include: preventing terrorist attacks within the United States, reducing the vulnerability of the United States to terrorism, and minimizing the damage and assisting in the recovery from terrorist attacks that occur within the United States.[9] DHS is comprised of various directorates and components including the U.S. Coast Guard, Customs and Border Protection, U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, U.S. Secret Service, the Federal Emergency Management Agency (FEMA), the Transportation Security Administration, and the Federal Law Enforcement Training Center.

FEMA maintains responsibility for "[h]elping people before, during, and after disasters."[10] Activities pursuant to this responsibility include managing responses; directing the strategic response assets that were transferred to DHS; overseeing the Metropolitan Medical Response System; and coordinating other Federal response resources in the event of a terrorist attack or major disaster. The Homeland Security Act also directed the development of a National Incident Management System (NIMS) to integrate the Federal, State, and local government response to terrorist attacks, and consolidate existing Federal government emergency response plans into a single, coordinated National Response Plan (NRP).[11]

In sum, the Homeland Security Act served as the foundation for the Government to reorganize and consolidate incident management functions, assets and personnel under a single Department.

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[7] The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) as amended [hereinafter HSA].

[8] *Id.* § 101. The Act also established the Department of Homeland Security as the *focal point* for "natural and manmade crises and emergency planning. See§ 101(b)(1)(D).

[9] *Id.* § 101(b).

[10] FEMA mission as stated on the FEMA website located at http://www.fema.gov/about/index (last visited on Jul. 10, 2018).

[11] HSA, *supra* note 7, § 502. As explained below, the NRP was superseded by the National Response Framework, which is now part of the National Preparedness System.

Further, it served as the legal impetus for a revised approach to incident management, later set forth in Homeland Security Presidential Directive 5 (HSPD-5), which is discussed below.

3. HSPD-5

Homeland Security Presidential Directive 5 (HSPD-5), "Management of Domestic Incidents," established a new paradigm for Federal emergency management.[12] It centers on the need for all levels of government across the nation to have a single, unified approach toward managing domestic incidents. Pursuant to the Homeland Security Act of 2002, HSPD-5 tasked the Secretary of Homeland Security to develop and administer a National Response Plan (now replaced by the (NRF)) that would integrate Federal government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all-hazards plan. It also tasked the Secretary of Homeland Security to develop and administer a National Incident Management System (NIMS) that would unify Federal, State, and local government efforts to prepare for, respond to, and recover from domestic events regardless of cause, size, or complexity. The intent of the NRF and NIMS is to provide the structure and mechanisms for establishing national level policy and operational direction regarding Federal support to State and local incident managers.

HSPD-5 also reaffirmed the Secretary of Homeland Security's responsibility as the Principal Federal Official (PFO) for domestic incident management. HSPD-5 tasked the Secretary of Homeland Security with coordinating the Federal government's resources in response to, or recovery from, terrorist attacks, major disasters, or other emergencies. This coordination responsibility exists when any one of the following four conditions applies: (1) a Federal department or agency acting under its own authority has requested the assistance of the Secretary; (2) the resources of State and local authorities are overwhelmed and Federal assistance has been requested by the appropriate State and local authorities; (3) more than one Federal department or agency has become substantially involved in responding to the incident; or (4) the Secretary has been directed by the President to assume responsibility for managing the domestic incident.[13] Table 2-2 summarizes the roles and responsibilities established by HSPD-5.

HSPD-5 also eliminates the previous distinction, established in Presidential Decision Directive 39, between crisis management and consequence management, treating the two "as a single, integrated function, rather than as two separate functions."[14] Whereas under the old FRP the Attorney General was the lead Federal official for the Government's response until the crisis management phase of a response was over; now, under the NRF, the Secretary of Homeland Security remains the lead Federal official for the duration of the period involving Federal assistance. Despite the fact that HSPD-5 erased the distinction between crisis management and consequence management, it reaffirms the Attorney General's authority as the lead official for conducting criminal investigation of terrorist acts or terrorist threats.[15]

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[12] Homeland Security Presidential Directive 5, Management of Domestic Incidents (Feb. 28, 2003) [hereinafter HSPD-5], *available at* http://www.gpo.gov/fdsys/pkg/PPP-2003-book1/pdf/PPP-2003-book1-doc-pg229.pdf.

[13] *Id.*

[14] *Id.*

[15] *Id.*

Departments & Agencies	Roles and Responsibilities Established by HSDP-5
Federal Government	Sec. 3. Declares that U.S. Government policy is to treat crisis management and consequence management as a single, integrated function, rather than as two separate functions.
Secretary of Homeland Security	Sec. 4. Assigns Secretary of Homeland Security responsibility for coordinating Federal operations within the U.S. to prepare for, respond to, and recover from terrorist attacks, major disasters, and other emergencies. Sec. 15. Tasks the Secretary of Homeland Security to develop and administer a National Incident Management System (NIMS). Sec. 16. Tasks the Secretary of Homeland Security to develop and administer a National Response Plan, or NRP (now the NRF).
Attorney General	Sec. 8. Reaffirms the Attorney General's role as having lead responsibility for criminal investigations of terrorist acts or terrorist threats.

Table 2-2. Roles and Responsibilities Established by HSPD-5

4. Presidential Policy Directive 8 (PPD-8)

On March 30, 2011, President Obama issued PPD-8 to update and replace HSPD-8 and HSPD-8, Annex I, National Planning, which was originally issued in 2007, to "further enhance the preparedness of the United States by formally establishing a standard and comprehensive approach to national planning."[16] PPD-8 complements HSPD-5—which remains in effect. The goal of PPD-8 is:

> "strengthening the security and resilience of the United States through systematic preparation for the threats that pose the greatest risk to the security of the Nation, including acts of terrorism, cyber attacks, pandemics, and catastrophic natural disasters. Our national preparedness is the shared responsibility of all levels of government, the private and nonprofit sectors, and individual citizens."[17]

PPD-8 specifies that the Secretary of Homeland Security is responsible for developing the National Preparedness Goal (discussed below) and coordinating the domestic all-hazards preparedness efforts of all executive departments and agencies, in consultation with State, local, tribal, and territorial governments, non-governmental organizations, private-sector partners, and the general public. The directive further states that the heads of all executive departments and agencies with roles in prevention, protection, mitigation, response, and recovery are responsible for national preparedness efforts, including department-specific operational plans, as needed, consistent with their statutory roles and responsibilities. PPD-8 also specifies that nothing in the directive shall limit the authority of the Secretary of Defense with regard to the command and control, planning,

[16] HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 8 ANNEX I, Purpose (2007) [hereinafter HSPD-8 Annex I], *available at* https://www.dhs.gov/hspd-8-annex-1.

[17] PRESIDENTIAL POLICY DIRECTIVE 8, NATIONAL PREPAREDNESS (Mar. 30, 2011) [hereinafter PPD-8], *available at* http://www.dhs.gov/presidential-policy-directive-8-national-preparedness.

organization, equipment, training, exercises, employment, or other activities of DoD forces, or the allocation of DoD resources.[18]

HSPD-8, Annex I required the development of National Planning Scenarios.[19] Consequently, the Homeland Security Council developed fifteen scenarios depicting "a diverse set of high-consequence threat scenarios of both potential terrorist attacks and natural disasters."[20] USNORTHCOM subsequently developed CONPLANs that address each of the scenarios where DoD support is necessary. These CONPLANs can be accessed with permission of USNORTHCOM.[21] These and other individual plans developed under HSPD-8 and Annex I remain in effect until rescinded or otherwise replaced.

5. PPD-8 and the National Preparedness System (NPS)

PPD-8 specifically directed the development of a National Preparedness Goal (NPG) that identifies core capabilities necessary for preparedness, and the development of a National Preparedness System (NPS) to guide activities that will enable the Nation to achieve the NPG.[22] PPD-8 states that NPS shall include guidance for planning, organization, equipment, training, and exercises to build and maintain domestic capabilities, and shall provide a whole nation approach for building and sustaining a cycle of preparedness activities over time. PPD-8 states that the NPS shall include five integrated National Planning Frameworks covering the mission areas of Prevention, Protection, Mitigation, Response, and Recovery. These frameworks set the strategy and doctrine for delivering the 31 core capabilities identified in the NPG document that apply to these five mission areas.[23] PPD-8 further directed the frameworks shall be built upon scalable, flexible, and adaptable coordinating structures to align key roles and responsibilities to deliver the necessary capabilities.[24]

6. National Response Framework (NRF) History and Organization

The NRF predates the current NPS five-framework system. On March 22, 2008, the first NRF became effective and superseded the National Response Plan. It established a comprehensive, national, all-hazards approach to domestic incident management across a spectrum of activities. The NRF was updated in 2013, implements the new requirements and terminology of PPD-8, yet reiterates the concepts utilized in the 2008 version.[25]

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[18] *Id*.

[19] HSPD-8 Annex I, *supra* note 16, para. 34.

[20] *National Preparedness Guidelines*, DHS.GOV (last visited Jul. 8, 2013).

[21] USNORTHCOM CONPLANs remain in force and effect until rescinded or replaced as specified in PDD-8.

[22] The National Preparedness Goal (NPG) is summarized as "A secure and resilient Nation with the capabilities required across the whole community to prevent, protect against, mitigate, respond to, and recover from the threats and hazards that pose the greatest risk." The NPG document identifies several core capabilities necessary to achieving the goal. The core capabilities are grouped into the five mission areas of prevention, protection, mitigation, response, and recovery. DHS, NATIONAL PREPAREDNESS GOAL (Sept. 2011), *available at* http://www.fema.gov/national-preparedness-goal.

[23] DHS, OVERVIEW OF THE NATIONAL PLANNING FRAMEWORKS (June 2016) 1, *available at* https://www.fema.gov/national-planning-frameworks.

[24] PPD-8, *supra* note 17.

[25] DHS, NATIONAL RESPONSE FRAMEWORK, Third Edition (June 2016) 3, [hereinafter NRF], *available at* https://www.fema.gov/media-library/assets/documents/117791.

The NRF organizes governmental response to natural and manmade disasters and incidents occurring in the United States, the District of Columbia, and U.S. territories and possessions. It builds upon and complements the NIMS,[26] and is designed to be used by the whole community, since engaging the whole community is essential for the Nation's success in maintaining resilience and preparedness. The NRF is always in effect, and portions of it can be implemented at any time. Selective implementation of NRF structures allows for a scaled response and an appropriate level of coordination for each incident.[27]

The NRF is comprised of the base document, Emergency Support Functions (ESFs), Support Annexes, and Incident Annexes.

- ***Base Document.*** The Base Document contains background on the scope of the NRF, describes roles and responsibilities of both public and private entities at the local, State, and Federal level, and specifies authorities and best practices for managing incidents and coordinating response entities.[28]

- ***Emergency Support Function (ESF) Annexes.*** The ESF Annexes are Federal coordinating structures that group resources and capabilities into functional areas that are most frequently needed in a national response.[29] There are fourteen ESFs in the NRF (see Table 2-3).

- ***Support Annexes.*** The Support Annexes describe how Federal, local, State, tribal, territorial, insular area, private sector, and non-governmental organizations (NGOs) coordinate and execute common processes and requirements necessary to ensuring effective incident management.[30] The support annex topics are: critical infrastructure and key resources, financial management, international coordination, private-sector coordination, public affairs, tribal relations, volunteer and donations management, and worker safety and health.[31]

- ***Incident Annexes.*** The incident annexes describe the unique response aspects of incident categories. They describe specialized response teams and resources, incident specific responsibilities, and other considerations specific to a particular scenario. The address the following events: Biological Incident, Catastrophic Incident, Cyber Incident, Food and Agriculture Incident, Mass Evacuation Incident, Nuclear/Radiological Incident, and Terrorism Incident Law

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[26] DHS, NATIONAL INCIDENT MANAGEMENT SYSTEM (Oct. 2017), *available at* https://www.fema.gov/national-incident-management-system [hereinafter NIMS] . The NIMS is a nationwide template enabling government and nongovernmental responders to respond to all domestic incidents. NIMS provides the structure and mechanisms for national-level policy and operational coordination for domestic incident management. NIMS does not alter or impede the ability of Federal, State, local, or tribal departments and agencies to carry out their specific authorities. NIMS assumes that incidents are typically managed at the lowest possible jurisdictional and organizational levels, and in the smallest geographical areas feasible. There is further discussion on NIMS below.

[27] NRF, *supra* note 26, at 4-5.

[28] NRF, *supra* note 26.

[29] *Id*. at 4.

[30] *Support Annexes: Introduction*, FEMA (May 2013), https://www.fema.gov/media-library/assets/documents/32270 (last visited Jul. 10, 2018).

[31] *Id*. The eight support annexes are available at http://www.fema.gov/national-preparedness-resource-library.

Enforcement and Investigation. These documents can now be found as annexes to the Response Federal Interagency Operational Plans (FIOP) rather than as supplements to the NRF.[32]

a. NRF Roles and Responsibilities

The NRF specifies the roles and responsibilities of the following parties:

- Individuals, Families, Households, and Communities
- Non-governmental Organizations
- Private Sector Entities
- Local Governments including the Chief Elected Official, Emergency Manager, and Department or Agency Heads
- State Governments including the Governor, State Homeland Security Advisor, State Emergency Management Director, and National Guard
- Tribal/Territorial/Insular Area Leaders
- Secretary of Homeland Security
- FEMA Administrator
- Attorney General
- Secretary of Defense
- Secretary of State
- Director of National Intelligence

b. Response Mission Area Core Capabilities

Of the 31 core capabilities determined necessary to achieve the NPG, the response mission area includes 14 core capabilities (11 that are specific to response, and three that are common to all mission areas). The 14 response core capabilities are: Planning, Public Information and Warning, Operational Coordination, Critical Transportation, Environmental Response/Health and Safety, Fatality Management Services, Infrastructure Systems, Care Services, Mass Search and Rescue Operations, On-Scene Security and Protection, Operational Communications, Public and Private Services and Resources, Public Health and Medical Services, and Situational Assessment. The NRF summarizes each core capability and the critical tasks needed to achieve their objectives.[33]

c. NRF Coordinating Structures and Integration

Coordinating structures are used to aid preparedness and response at all governmental levels and among the private sector, communities, and non-governmental entities. The structures help organize and measure response community capabilities, establish and improve relationships, and foster coordination prior to and following an incident. Examples of local coordinating structures include local emergency planning committees (LEPCs) and community emergency response teams (CERTs). State coordinating structures leverage capabilities and resources across the State. Examples include State Emergency Response Commissions (SERCs), which manage State LEPCs, and State Disaster Planning Advisory Committees. Private sector coordinating structures include

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[32] DHS, RESPONSE FEDERAL INTERAGENCY OPERATIONAL PLAN, Second Edition (August 2016) 3, [hereinafter FIOP], *available at* https://www.fema.gov/media-library-data/1471452095112-507e23ad4d85449ff131c2b025743101/Response_FIOP_2nd.pdf.

NGOs and industry trade groups, such as the American Pilots' Association (a national association of maritime pilots of commercial vessels). These entities often serve as a conduit to government coordinating structures.[34]

(1) Federal Coordinating Structures

- **The National Security Council (NSC)**

The NSC is the principal policy body for national security policy issues requiring Presidential determination, and it advises and assists the President in integrating all aspects of national security policy as it affects the United States. Along with its subordinate committees, the NSC is the President's primary method for coordinating Executive Branch departments and agencies in the development and implementation of national security policy.[35]

- **Emergency Support Functions (ESFs)**

Federal and State governments organize their response resources and capabilities under the ESF construct. ESFs are groups of organizations that work together to support a response. The Federal ESFs are the primary (but not exclusive) Federal coordinating structures for building, sustaining, and delivering the 14 response core capabilities. Table 2-3 lists the ESFs and the designated lead Federal agencies for each function.[36]

ESF #	ESF	ESF Coordinator
1	Transportation	Department of Transportation
2	Communications	Department of Homeland Security/National Communications System
3	Public Works and Engineering	Department of Defense/U.S. Army Corps of Engineers
4	Firefighting	Department of Agriculture/U.S. Forest Service/U.S. Fire Administration (DHS/FEMA)
5	Information and Planning	Department of Homeland Security/FEMA
6	Mass Care, Emergency Assistance, Temporary Housing, and Human Services	Department of Homeland Security/FEMA
7	Logistics	General Services Administration and DHS/FEMA
8	Public Health and Medical Services	Department of Health and Human Services
9	Search and Rescue	Department of Homeland Security/FEMA
10	Oil and Hazardous Materials Response	Environmental Protection Agency
11	Agriculture and Natural Resources	Department of Agriculture
12	Energy	Department of Energy

[33] *Id*. at 20.

[34] *Id*. at 30-31.

[35] *Id*. at 31.

[36] There were previously 15 ESFs, however ESF #14 (Long Term Community Recovery and Mitigation) has been superseded by the National Disaster Recovery Framework. *Id*. at 35.

13	Public Safety and Security	Department of Justice/ATF
14	*Superseded by National Disaster Recovery Framework*	
15	External Affairs	Department of Homeland Security

Table 2-3. Emergency Support Functions Specified in the NRF

ESF coordinators oversee the preparedness activities for a particular ESF. Specific responsibilities include maintaining contact with ESF primary and support agencies through meetings and other interactions, ensuring the ESF is engaged in appropriate planning and preparedness activities, and coordinating efforts with corresponding NGOs, private entities, and local, State, and Federal partners.[37]

ESFs also have primary and support agencies. *Primary agencies* have numerous ESF responsibilities including (but not limited to) orchestrating support within their functional areas for the appropriate response core capabilities, obtaining assistance from support agencies, managing Stafford Act mission assignments and coordinating resources needed for mission assignments, planning for incident management, maintaining trained personnel to support interagency response teams, and coordinating resources resulting from mission assignments. *Support agency* responsibilities include (but are not limited to) providing input to periodic readiness assessments, participating in planning for incident management, and coordinating resources needed for mission assignments.[38]

ESF activation can be selectively accomplished by FEMA or as directed by the Secretary of Homeland Security to support response activities for both Stafford Act and non-Stafford Act events. Note, however, that not all incidents needing Federal support require ESF activation. When departments or agencies are activated as part of ESF activation, they may assign resources at the headquarters, regional, or incident level. Through the Stafford Act and in accordance with 6 U.S.C. § 741(4) and § 753(c), FEMA may issue mission assignments at all levels and across the ESFs to obtain resources from Federal entities.

Mission assignments represent the practical and operational application of ESFs, through the FEMA organizational structure, to executive branch departments and agencies. A mission assignment is by definition a "[w]ork order issued to a Federal agency by the Regional Administrator, Assistant Administrator for the Disaster Operations Directorate, or Administrator, directing completion by that agency of a specified task and citing funding, other managerial controls, and guidance."[39] FEMA uses mission assignments to task other Federal departments and agencies to provide direct assistance during emergencies and disasters. Mission assignments are used to reimburse Federal entities as well. The mission assignment process has been expanded to include Pre-Scripted Mission Assignments (PSMAs), which are prepared in advance to facilitate a more rapid response

[37] NRF, *supra* note 26.

[38] *Id*. at 36.

[39] 44 C.F.R. § 206.2(a)(18) (2017). "Administrator" refers to FEMA Administrators. See 44 C.F.R. § 206.2(a)(18) (2017).

and standardize the process of developing mission assignments.[40] Mission assignments can be issued from three FEMA-managed entities: Joint Field Offices (JFOs), Regional Response Coordination Centers (RRCCs), and the National Response Coordination Center (NRCC).[41]

Practice Scenario: You are the base SJA at Naval Station Norfolk. It has now been three days since Hurricane XYZ made landfall in Norfolk. Federal military personnel and small boats from Naval Station Norfolk are assisting with removing large sections of debris from the Elizabeth River to ensure emergency service crews and supplies can move by water safely (assume there is a imminent threat to life and safety if the work is not performed and that a civil authority contacted the Commanding Officer to request assistance). FEMA has not issued a mission assignment to any of the units at Naval Station Norfolk but the Naval Station Commanding Officer tells you that he knows a mission assignment from FEMA is forthcoming, so the Navy will be reimbursed for this work under the Stafford Act. Is he correct in his assumption?

Answer: No. Without a Stafford Act Declaration, the Navy in this scenario is working under Immediate Response Authority (IRA) pursuant to DoDD 3025.18. Until there is a Stafford Act Declaration and an executed mission assignment, there can be no reimbursement under the Stafford Act. Federal reimbursement for assistance provided pursuant to IRA is a possibility (but not required). In an immediate response situation, the Federal unit should first request reimbursement from the civil authority prior to providing assistance. However, support may not be denied in the event that the civil authority cannot provide reimbursement. Under the Stafford Act, FEMA has reimbursed retroactively in some past disasters when a declaration was made after a Federal military unit had already begun providing support at the request of a civil authority. Never the less, this method of reimbursement is not a guarantee in every case. The bottom line is, in the transitionary period between provision of support to State and local entities under IRA and later the Stafford Act system, until mission assignments are issued, there is no guarantee of reimbursement to the unit.

[40] FEMA, PRE-SCRIPTED MISSION ASSIGNMENTS: FACT SHEET (2009), *available at* http://www.fema.gov/txt/media/factsheets/2009/dod_pmsa.txt.

[41] U.S. COAST GUARD, COMMANDANT INSTRUCTION 3006.1, FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) MISSION ASSIGNMENTS: OPERATIONAL ACCEPTANCE AND EXECUTION para. 6.a(1) (13 Aug. 2012).

Practice Scenario: The President of the United States has declared major disaster as a result of the damage from Hurricane XYZ. Army staff with dump trucks have deployed from Fort Eustis to assist with debris removal, pursuant to a mission assignment issued by FEMA. You are the Region III Defense Coordinating Officer (DCO). As the DCO, you must verify the appropriate Emergency Support Function (ESF) to use for this mission. Which ESF applies? Additionally, the Fort Eustis personnel have asked whether they should remove hazardous material, and debris soaked in oil while also removing the other debris under the same ESF.

Answer: ESF #3 governs debris removal. The FEMA mission assignment form (currently FEMA Form 010-0-8) should reference the correct ESF in block III.

Hurricanes will typically leave both contaminated and uncontaminated debris. When assigned to conduct ESF #3 debris removal, personnel should be advised to leave any contaminated debris. ESF # 3 specifically states that contaminated debris should be addressed under ESF #10. Therefore, the removal of contaminated debris will require a separate mission assignment.

(2) Federal Response Operational Coordinating Structures/Personnel and State Response Entities

The following are several of the key NRF operational coordinating structures and personnel used to manage emergencies and disasters. Several of these terms are derived from NIMS, which is discussed further below.

- **Local/State Emergency Operations Center (EOC)**

The location at which an effected municipal or State government coordinates the information and resources necessary to support the local or State incident management activities.[42]

- **Incident Command Post (ICP)**

The field location at which the primary tactical-level, scene incident command functions are performed. The ICP may be co-located with the incident base or other incident facilities.[43] The Incident Commander or Unified Command (in the event of a multi-agency or multi-jurisdictional response) is located at the ICP.

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[42] NRF, *supra* note 26, at 41.

[43] FEMA, INCIDENT COMMAND SYSTEM TRAINING: ICS GLOSSARY, *available at*: https://training.fema.gov/emiweb/is/icsresource/glossary.htm#I (last visited Jul. 16, 2018).

- **Area Command (Unified Area Command)**

An organization established to oversee the management of multiple incidents that are being handled by separate ICPs, or to oversee the management of a complex incident dispersed over a large area, and to broker critical resources. The Area Command does not have operational responsibility; that authority resides with the Incident Commander. The Area Command can become a Unified Area Command when incidents are multi-jurisdictional or involve multiple agencies.[44]

- **National Operations Center (NOC)**

In the event of a major disaster or emergency declaration, the NOC acts as the principal operations center for DHS, coordinating and integrating information from NOC components to provide situational awareness for the Federal Government. Additionally, the NOC serves as the national fusion center, collecting information on threats and hazards across the entire integrated national preparedness system.[45]

- **National Response Coordination Center (NRCC)**

The NRCC is a multiagency coordination center located at FEMA headquarters. When activated, its staff coordinates overall Federal support for major disasters and emergencies. FEMA maintains the NRCC as a component of the NOC for incident support operations.[46]

- **National Infrastructure Coordinating Center (NICC)**

The NICC monitors the Nation's critical infrastructure and key resources on an ongoing basis. During an incident, the NICC provides a coordinating forum to share information across infrastructure and key resource sectors. It is both an operational component of the DHS National Protection and Programs Directorate and a watch operations element of the NOC.[47]

- **Strategic Information and Operations Center (SIOC)**

The SIOC is the FBI's worldwide EOC. It maintains situational awareness over threats and provides FBI headquarters, field offices, and overseas legal attaches with timely notification of strategic information. It shares information with EOCs at all other levels of government. It provides command, control, and communications connectivity and a common operating picture for managing FBI responses worldwide. In the event of an incident, the SIOC establishes the headquarters command post and develops connectivity to field command posts and Joint Operations Centers (discussed further below). [48]

- **Joint Field Office (JFO)**

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[44] *Id*.

[45] NRF, *supra* note 26, at 44.

[46] *Id*.

[47] *National Infrastructure Coordinating Center*, DHS.GOV, http://www.dhs.gov/national-infrastructure-coordinating-center (last visited Jul. 16, 2018).

[48] NRF, *supra* note 26, at 45.

The JFO is the primary Federal incident management field structure. It is a temporary facility established locally to coordinate Federal, State, tribal, and local governments, as well as private sector and non-governmental organizations, with primary responsibility for response and recovery. The JFO is organized and managed in a manner consistent with NIMS principles. The JFO uses the Incident Command System (ICS) structure but does not manage on-scene operations. Instead, the JFO provides support to on-scene efforts and conducts broader support operations that extend beyond the incident site.[49]

- **Unified Coordination Group (UCG)**

This group is comprised of senior leaders from Federal and State interests, and in certain circumstances tribal governments, local jurisdictions, and the private sector. UCG members must have significant jurisdictional authority and responsibility over the response at issue. The composition will vary depending on the type and scope of incident. The UCG focuses on the JFO mission – not on managing on-scene operations, but providing support to those operations. When incidents affect multiple jurisdictions or the entire nation, multiple JFOs and UCGs may be established.[50]

- **Unified Coordination Staff (UCS)**

The UCS is led by the UCG. Personnel from State and Federal departments and agencies and other entities (including the private sector and non-governmental organizations) make up the UCS and may be assigned to work at various facilities (the JFO, staging areas, field offices, etc.).[51]

- **Joint Operations Center (JOC)**

The JOC is the focal point for all investigative law enforcement activities during a terrorist or other significant criminal incident. The JOC is managed by the FBI Special Agent in Charge (SAC) (also known as the SFLEO in an incident, as described below). It becomes a component of the JFO when the JFO is established.[52]

- **Regional Response Coordination Center (RRCC)**

FEMA maintains an RRCC in each of its 10 regional offices (the regional offices coincide with the 10 FEMA Regions). When activated, RRCC's are multi-agency coordination centers staffed in anticipation of or in response to an incident. They operate under the direction of the FEMA Regional Administrator. The RRCC staff coordinates response efforts and maintains connectivity with FEMA headquarters, State EOCs, and other Federal and State coordination centers. The UCG

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[49] NIMS, *supra* note 26, at 65.

[50] NRF, *supra* note 26, at 42.

[51] *Id*.

[52] DHS, JOINT FIELD OFFICE ACTIVATION AND OPERATIONS: INTERAGENCY INTEGRATED STANDARD OPERATING PROCEDURE, VERSION 8.3 (April 2006) 10 [hereinafter JFO SOP], *available at*: http://www.fema.gov/pdf/emergency/nrf/NRP_JFO_SOP.pdf.

will assume responsibility for coordinating Federal response activities at the incident level once established, freeing the RRCC to address other incidents.[53]

- **Principal Federal Official (PFO)**

By Federal law and by Presidential directive, the Secretary of Homeland Security is the PFO for coordination of all domestic incidents requiring multiagency Federal response. The Secretary may elect to designate a single field representative to serve as his or her primary representative to ensure consistency of Federal support and the overall effectiveness of the Federal incident management.[54]

- **Federal Coordinating Officer (FCO)**

The FCO is a senior FEMA official who manages and coordinates Federal resource support activities related to Stafford Act disasters and emergencies.[55] The President appoints an FCO after a recommendation by the FEMA Administrator and the Secretary of Homeland Security. The FCO executes Stafford Act authorities, including committing FEMA resources and giving mission assignments to other Federal departments and agencies. The role of the FCO in a Stafford Act response is discussed further below.

- **Senior Federal Law Enforcement Official (SFLEO)**

The SFLEO is the senior law enforcement official from the agency with primary jurisdictional responsibility as directed by statute, Presidential directive, existing Federal policies, and/or the Attorney General. The SFLEO directs the intelligence and investigative law enforcement operations related to the incident and supports the law enforcement component of the on-scene Unified Command. In the event of a terrorist incident, this official will normally be the FBI Senior Agent-in-Charge (SAC).[56]

- **Federal Resource Coordinator (FRC)**

The FRC manages Federal resource support activities related to non-Stafford Act incidents when Federal-to-Federal support is requested from DHS by another Federal agency. The FRC is responsible for coordinating the timely delivery of resources to the requesting agency. Requesting agencies will appoint a senior official to work in coordination with the FRC as part of the UCG.[57]

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[53] NRF, *supra* note 26, at 43.

[54] Congress limited the Secretary of Homeland Security's ability to designate a "field representative" during a Stafford Act declared major disaster or emergency by barring such an appointment absent a specific waiver. The Secretary of Homeland Security may designate a person to operate in the field that is not titled "Principal Federal Official." The position must report through the Federal Coordinating Officer (FCO). The Secretary of Homeland Security must notify Congress if she/he appoints someone to function as a field representative. 2010 DHS Appropriations Act, § 522.

[55] "DISASTER MANAGEMENT ROLES AND RESPONSIBILITIES," *available* at https://training.fema.gov/emiweb/downloads/is208sdmunit1.pdf (last visited Jul. 19, 2018).

[56] JFO SOP, *supra* note 52, at 15.

[57] FEMA, OVERVIEW OF FEDERAL TO FEDERAL SUPPORT IN NON-STAFFORD ACT SITUATIONS, *available at* https://www.fema.gov/pdf/emergency/nrf/nrf-fedtofed.pdf (last visited Ju1. 16, 2018).

- **Governor's Authorized Representative (GAR)**

The GAR, who is in most cases also the State Coordinating Officer (SCO) under a Stafford Act response, represents the Governor of the State. The GAR/SCO is most often a senior leader in the State's emergency response organization, and is a member of the UCG.[58]

- **Defense Coordinating Officer (DCO)**

Appointed by DoD, the DCO serves as DoD's single point of contact at the JFO for the UCG. With few exceptions, DSCA requests originating at the JFO will be coordinated with and processed through the DCO. The DCO may have a Defense Coordinating Element (DCE) consisting of a staff and military liaison officers in order to facilitate coordination and support to activated Emergency Support Functions (ESFs). Specific responsibilities of the DCO (subject to modification based on the situation) include processing requirements for military support, forwarding mission assignments to the appropriate military organizations through DoD-designated channels, and assigning military liaisons, as appropriate, to activated ESFs. Currently, DoD has assigned DCOs at each of the ten Department of Homeland Security/FEMA regions. (See Figure 2-1 below).

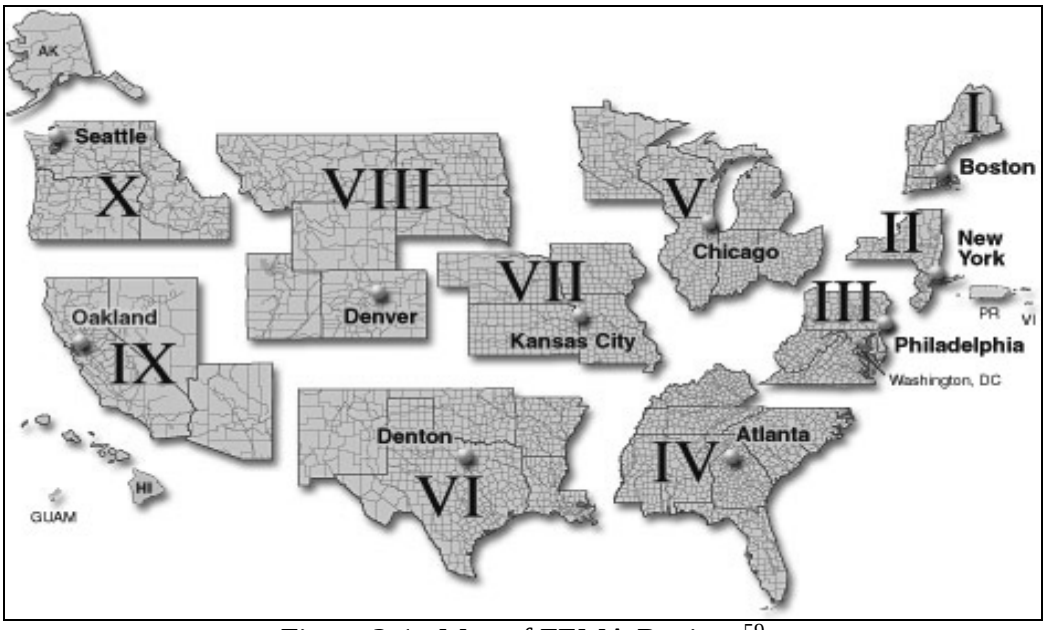

Figure 2-1. Map of FEMA Regions[59]

- **Joint Task Force (JTF) Commander**

Based on the size and type an incident a combatant commander may utilize a Joint Task Force (JTF) to command Federal (Title 10) forces responding to the event. If a JTF is established, its command and control element will be co-located with the PFO at the JFO to ensure coordination and unity of effort. A

[58] JFO SOP, *supra* note 52, at 15.

[59] *FEMA Regional Offices*, FEMA.GOV, https://www.fema.gov/about-agency (last visited Jul. 16, 2018).

JTF commander exercises operational control of all allocated DoD resources (excluding USACE resources, National Guard personnel in State Active Duty or Title 32 status, and, in some circumstances, DoD personnel in support of the FBI). The use of the JTF command and control element does not replace the requirement for a DCO/DCE at the JFO interfaced with the UCG. Requests for DoD assistance must still be coordinated through the DCO. The JTF command element will work with UCG members to ensure a clear understanding of the Federal military roles and responsibilities during the operation.[60]

- **Dual Status Commander**

A Dual Status Commander maintains a commission in both a Title 10 and Title 32 capacity which helps to unify the effort of the Federal and National Guard personnel involved in the response to a major disaster or emergency. The National Defense Authorization Act for 2012[61] stated that when Federal forces and the National Guard are employed simultaneously in support of civil authorities, appointment of a Dual Status Commander should be the usual and customary command and control arrangement.[62] This includes Stafford Act major disaster and emergency response missions. The use of Dual Status Commanders is becoming more common for incident response, and they have been used for planned and special events since 2004. Dual Status Commanders receive orders from both the State and Federal chains of command, and thus serve as a vital link between the two. Dual Status Commanders can be appointed in one of two ways. First, under 32 U.S.C. § 315, an active duty Army or Air Force officer may be detailed to the Army or Air National Guard of a State. Second, under 32 U.S.C. § 325, a member of a State's Army or Air National Guard may be ordered to active duty. Regardless of method of appointment, the Secretary of Defense must authorize the dual status, and the Governor of the effected State must consent.[63]

The figure below outlines the interplay between these entities and organizations.

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[60] JFO SOP, *supra* note 52, at 20.

[61] National Defense Authorization Act of 2012, Pub. L. No. 112-81, § 515, 125 Stat. 1298 (2011). *See also* 32 U.S.C. §§ 315, 325 (2012 & Supp. IV 2017).

[62] National Defense Authorization Act of 2012, Pub. L. No. 112-81, § 515(c), 125 Stat. 1395 (2011), 32 U.S.C. § 317, note. Despite a Dual Status Commander being the usual and customary arrangement, this language "does not limit, in any way, the authorities of the President, the Secretary of Defense, or the Governor of any State to direct, control, and prescribe command and control arrangements for forces under their command." *Id.*

[63] See 32 U.S.C. §§ 315, 325 (2012 & Supp. IV 2017); and U.S. Gov't Accountability Office, DoD Needs to Address Gaps in Homeland Defense and Civil Support Guidance, GAO-13-128 (Oct. 2012).

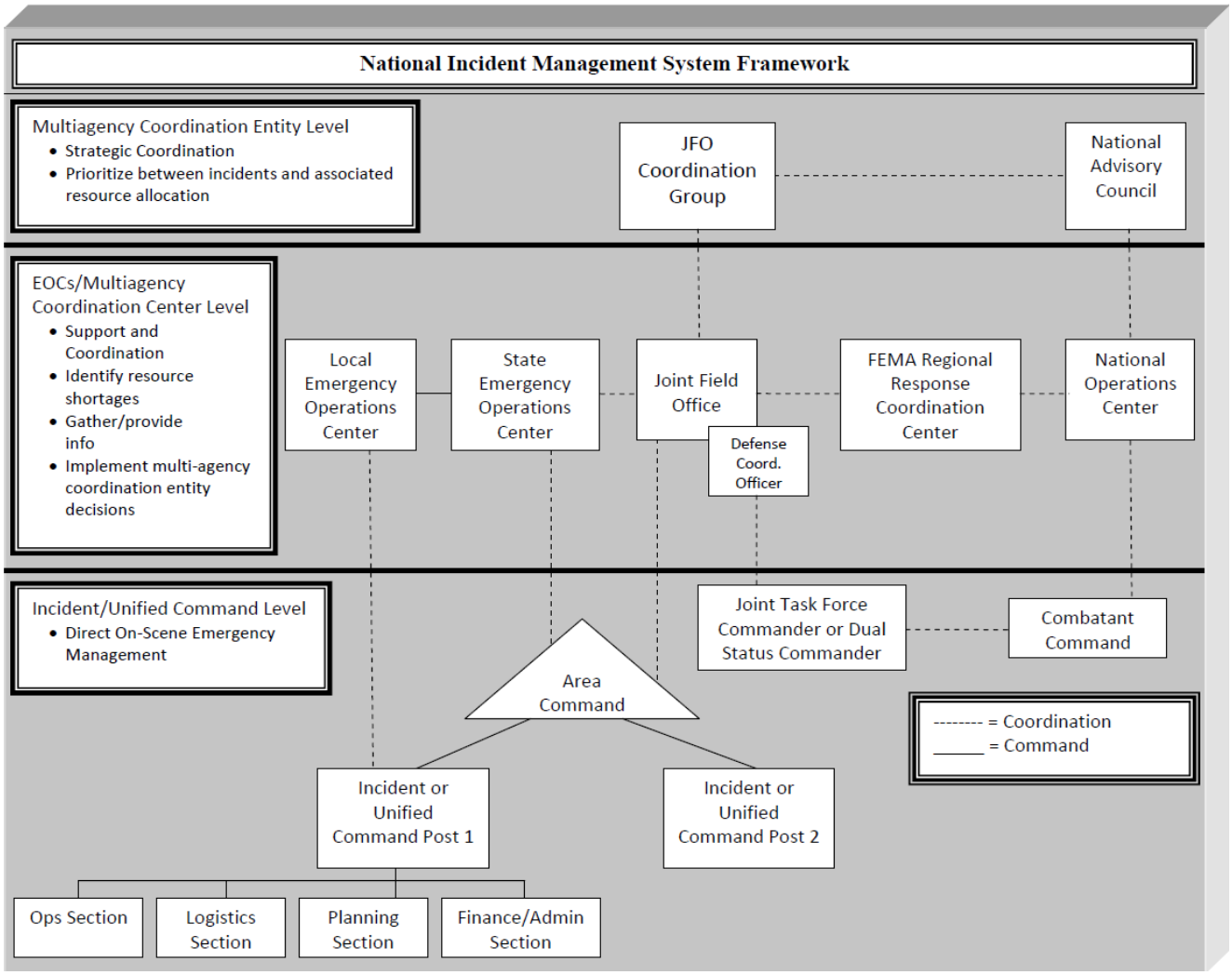

Figure 2-2[64]

7. National Prevention Framework (NPF)

The NPF provides guidance to leaders and practitioners at all levels of government, private- and non-profit sector partners, and individuals, on how to prevent or stop a threatened or actual act of terrorism.[65] It helps achieve the National Preparedness Goal of a secure and resilient Nation that is optimally prepared to prevent an imminent terrorist attack within the United States by:

- Describing the core capabilities needed to prevent an imminent act of terrorism
- Aligning key roles and responsibilities to deliver Prevention capabilities in time-sensitive

[64] See JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, CIVIL SUPPORT (14 Sept. 2007). This publication has been updated to a 2013 version, the diagram is based on one first seen in JP 3-28 and not in the new version. It has been updated by the authors to reflect changes since original publication.

[65] For example, the Prevention framework describes the process through which the public is warned regarding credible terrorist threats through National Terrorism Advisory System (NTAS) alerts. DHS, NATIONAL PREVENTION FRAMEWORK 15 (June 2016), *available at*: https://www.fema.gov/media-library-data/1466017209279-83b72d5959787995794c0874095500b1/National_Prevention_Framework2nd.pdf.

situations
- Describing coordinating structures that enable all stakeholders to work together
- Laying the foundation for further operational coordination and planning that will synchronize Prevention efforts within the whole community and across the Protection, Mitigation, Response, and Recovery mission areas.

As mentioned above, thirty-two core capabilities were developed and published in conjunction with the National Preparedness Goal (NPG). Of the thirty-two, the seven Prevention core capabilities are: Planning, Public Information and Warning, Operational Coordination, Forensics and Attribution, Intelligence and Information Sharing, Interdiction and Disruption, and Screening, Search, and Detection.

As with other frameworks, there are multiple coordinating structures for Prevention (some are shared with the other mission areas). Departments or agencies, as well as private and nonprofit entities with unique missions in Prevention, bring additional capabilities to bear through these structures. Coordinating structures can function on multiple levels, to include national-level coordinating structures such as the DHS National Operations Center (NOC), the Federal Bureau of Investigation (FBI) Strategic Information and Operations Center (SIOC), the Office of the Director of National Intelligence (ODNI) National Counterterrorism Center (NCTC), the DoD National Military Command Center (NMCC), the FBI National Joint Terrorism Task Force (NJTTF), and others. Field coordinating structures, such as the FBI JTTFs and Field Intelligence Groups (FIGs), State and major urban area fusion centers, State and local counterterrorism and intelligence units, and other entities, also play a critical role as coordinating structures in preventing imminent acts of terrorism.[66]

8. National Mitigation Framework (NMF)

The NMF establishes a common forum for coordinating and addressing how the Nation manages risk through mitigation capabilities.[67] It describes mitigation roles for government, NGOs, and private entities. The NMF also addresses how the Nation will develop, employ, and coordinate mitigation core capabilities to reduce loss of life and property due to disasters. Building on a wealth of evidence-based knowledge and community experience, the NMF seeks to increase risk awareness and leverage mitigation products, services, and assets across the whole community.

The NMF is designed to advance operational planning throughout the whole preparedness community by offering a comprehensive approach to reducing the impact of disasters through the development, implementation, and coordination of seven mitigation core capabilities.

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[66] DHS, OVERVIEW OF THE NATIONAL PLANNING FRAMEWORKS 3 (June 2016), *available at* https://www.fema.gov/national-planning-frameworks.

[67] Under PPD-8, mitigation capabilities "include, but are not limited to, community-wide risk reduction projects; efforts to improve the resilience of critical infrastructure and key resource lifelines; risk reduction for specific vulnerabilities from natural hazards or acts of terrorism; and initiatives to reduce future risks after a disaster has occurred." *See* PPD-8, *supra* note 17.

The NMF seven core capabilities are: Planning, Public Information and Warning, Operational Coordination, Community Resilience, Long-term Vulnerability Reduction, Risk and Disaster Resilience Assessment, and Threats and Hazard Identification.[68]

As with the NRF and other mission area frameworks, the mitigation mission area and NRF refer to the multiple levels of coordinating structures already discussed. Numerous existing coordinating structures already support the mitigation mission area, such as the National Security Council (NSC).[69] The Mitigation Framework Leadership Group (MitFLG) is a coordinating structure established to coordinate mitigation efforts across the Federal Government and to assess the effectiveness of mitigation capabilities as they are developed and deployed across the Nation. The MitFLG includes relevant local, State, tribal, and Federal organizations. It is chaired by FEMA in consultation with Department of Homeland Security (DHS) leadership. Consistent with PPD 1 (Organization of the National Security Council System), the MitFLG coordinates with the relevant National Security Council Interagency Policy Committees.[70]

9. National Disaster Recovery Framework (NDRF)

The NDRF was published in September 2011 as a guide to promote effective recovery from incidents. It provides guidance that enables effective recovery support to disaster-impacted States, tribes, and local jurisdictions. The NDRF also provides a flexible structure that enables disaster recovery managers to operate in a unified manner. Last, the NDRF focuses on how best to restore, redevelop, and revitalize the health, social, economic, natural, and environmental fabric of the community after an incident.

The NDRF defines:

- Core recovery principles
- Roles and responsibilities of recovery coordinators and other stakeholders
- A coordinating structure that facilitates communication and collaboration among all stakeholders
- Guidance for pre- and post-disaster recovery planning
- The overall process by which communities can capitalize on opportunities to rebuild stronger, smarter, and safer.

As with the other frameworks, the NDRF discusses the development and implementation of core capabilities. The eight core capabilities[71] for the NDRF are:

- Planning
- Public Information and Warning

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[68] DHS, NATIONAL MITIGATION FRAMEWORK ii, 15 (June 2016), *available at* https://www.fema.gov/media-library/assets/documents/117787 [hereinafter NMF].

[69] *Id*. at 33.

[70] *Id*. at 34.

[71] DHS, OVERVIEW OF THE NATIONAL PLANNING FRAMEWORKS 8 (June 2016), *available at*: https://www.fema.gov/media-library-data/1466016288879-63f68f6dced909f08cf8687deaa8e718/Overview_of_National_Planning_Frameworks.pdf.

- Operational Coordination
- Economic Recovery
- Health and Social Services
- Housing
- Infrastructure Systems
- Natural and Cultural Resources

The NDRF introduces four new concepts and terms: Federal Disaster Recovery Coordinator (FDRC), State or Tribal Disaster Recovery Coordinators (SDRCs or TDRCs), Local Disaster Recovery Managers (LDRMs), and Recovery Support Functions (RSFs). The six new RSFs provide a structure to facilitate problem solving, improve access to resources, and foster coordination. The RSFs are similar in concept to ESFs in that each RSF has coordinating and primary Federal agencies as well as supporting organizations that operate together with local, State and Tribal government officials, non-governmental organizations (NGOs) and private sector partners. As with the ESFs, RSFs can be selectively activated as needed.[72] The FDRC, SDRC/TDRC, and LDRM are three new positions that provide focal points for incorporating recovery considerations into the decision making process and monitoring the need for adjustments in assistance where necessary and feasible throughout the recovery process.[73]

10. National Protection Framework

The National Protection Framework was published in July 2014 and describes what the whole community—from community members to senior government leaders—should do to safeguard against acts of terrorism, natural disasters, and other threats or hazards.[74] This Framework helps achieve the NPG of a secure and resilient Nation that is prepared to protect against the greatest risks in a manner that allows American interests, aspirations, and way of life to thrive.[75] This Framework provides guidance to leaders and practitioners at all levels of government; the private and nonprofit sectors; and individuals by:

- Describing the core capabilities needed to achieve the Protection mission area and end-state of "creating conditions for a safer, more secure, and more resilient Nation"
- Aligning key roles and responsibilities to deliver Protection capabilities
- Describing coordinating structures that enable all stakeholders to work together
- Laying the foundation for further operational coordination and planning that will synchronize Protection efforts within the whole community and across the Prevention, Mitigation, Response, and Recovery mission areas.[76]

The NPG identifies 11 core capabilities for the Protection mission area: Planning; Public Information and Warning; Operational Coordination; Intelligence and Information Sharing; Interdiction and Disruption; Screening, Search, and Detection; Access Control and Identity Verification; Cybersecurity; Physical Protective Measures; Risk Management for Protection Programs and Activities; and Supply Chain Integrity and Security. The first three core

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[72] DHS, NATIONAL DISASTER RECOVERY FRAMEWORK 2 (June 2016), *available at* https://www.fema.gov/media-library-data/1466014998123-4bec8550930f774269e0c5968b120ba2/National_Disaster_Recovery_Framework2nd.pdf.

[73] *Id.*

capabilities—Planning, Public Information and Warning, and Operational Coordination—are common to all five Frameworks. The Protection and Prevention mission areas share three core capabilities: Intelligence and Information Sharing; Interdiction and Disruption; and Screening, Search, and Detection. The Protection Framework provides detailed descriptions of each core capability and the relationships to the other mission areas.[77]

Similar to the other NPS Frameworks, the Protection Framework describes coordinating structures that provide the mechanisms to develop and deliver the core capabilities. In the context of the National Protection Framework, coordinating structures support protection program implementation and strenthen the Nation's ability to increase the protective posture when required to augment operations that take place during temporary periods of heightened alert, during periods of incident response, or in support of planned events. The coordinating structures are used to conduct planning, implement training and exercise programs, promote information sharing, shape research and development priorities and technical requirements, address common vulnerabilities, align resources, and promote the delivery of Protection capabilities.

11. National Incident Management System (NIMS)

HSPD-5 directed the Secretary of Homeland Security coordinate with other Federal department and agencies along with State, local, and tribal governments to develop a NIMS. The Secretary of Homeland Security remains responsible for administration of the NIMS. First published in 2004, NIMS provided a consistent nationwide template to enable Federal, State, tribal, and local governments as well as non-governmental organizations and private entities to work together to prevent, protect against, respond to, recover from, and mitigate the effects of incidents. Since then, NIMS has been revised to reflect input from a broad variety of stakeholders. In addition, lessons learned from recent incidents were considered in the latest version. NIMS is not an operational management plan. Instead, it is a core set of doctrine, concepts, terminology, and organizational processes intended to enable efficient and collaborative management of incidents.[78]

As with the Stafford Act, NIMS is based on the premise that most incidents begin and end locally and are managed on a daily basis at the lowest possible geographical, organizational, and jurisdictional level.[79]

NIMS is comprised of three major components:

- **Preparedness.** NIMS focuses on the following elements of preparedness: planning; procedures and protocols; training and exercises; personnel qualifications and certification; and, equipment certification.[80] NIMS also stresses a unified approach to management and response activities, and

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[74] DHS, NATIONAL PROTECTION FRAMEWORK 1 (Jul. 2014), *available at* http://www.fema.gov/media-library/assets/documents/97350.

[75] *Id.*

[76] *Id.* at 1-2.

[77] *Id.* at 10-11.

[78] NIMS, *supra* note 26, at 4.

[79] *Id*. at 10.

[80] *Id.* at 50.

that all levels of governments and organizations must identify their capabilities before incidents occur.

- **Communications and Information Management.** NIMS emphasizes that well-planned, established, and utilized communications are critical for enabling the dissemination of information during an incident.[81] Common plans, standards and communication architecture help to facilitate interoperability and maintain a constant flow of information during an incident.[82] As with incident response in general, communication systems should be flexible and scalable to effectively manage any situation.

- **Resource Management.** According to NIMS, resource management is divided into three sections:[83]

  - Resource Management Preparedness
  - Resource Management During an Incident
  - Mutual Aid

- **Command and Coordination.** NIMS incorporates the existing Incident Command System (ICS) and Multi-Agency Coordination Systems (MACS) as the command structure for response to all hazards at all levels of government.[84] The ICS works at the tactical level, organizing the on-scene operations.[85] In comparison, MACS coordinate activities above the field level and can be either informal or formal. Formal coordination addresses issues before an incident occurs and is the preferred process.[86]

- **Ongoing Management and Maintenance.** HPSD-5 authorized the Secretary of Homeland Security to establish a mechanism to ensure the ongoing management and maintenance of NIMS. The National Integration Center (NIC) was established to assist government and private sectors in implementing NIMS and to provide for its refinement.[87] As part of this process, NIMS notes the continued development of science and technology as playing a critical role in improving response capabilities.

12. Other Significant Response Plans, Authorities, and Policies Related to the National Preparedness Framework

When DHS initiates the response mechanisms of the NRF, including the ESFs, Support Annexes, and Incident Annexes, existing interagency plans that address incident management are incorporated as supporting plans and/or operational supplements to the NRF. For incidents not led by DHS, other Federal agency response plans provide the primary Federal response protocol. Common interagency plans responders may encounter during such incidents include the National

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[81] *Id.*

[82] *Id.*

[83] *Id.* at 6-11.

[84] *Id.* at 3.

[85] *Id.* at 24.

[86] *Id.* at 19.

[87] *Id.* at iii.

Oil and Hazardous Substances Pollution Contingency Plan, more commonly called the National Contingency Plan (NCP), and the National Emergency Communications Plan (NECP). Agencies should note the NRF may modify their responsibilities in the event of a major disaster or emergency.

a. The National Contingency Plan (NCP)

The NCP[88] was developed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and the Federal Water Pollution Control Act or Clean Water Act of (1972). It sets out procedures for preventing and responding to oil discharges into navigable waters and releases of hazardous substances, pollutants, and contaminants into the environment. The NCP provides that a predesignated on-scene coordinator (OSC) shall direct response efforts at the scene of a discharge or release. Inland, the Environmental Protection Agency (EPA) is the lead response agency and provides OSCs for responses. In coastal areas, the U.S. Coast Guard is the lead response agency for coordinating the Federal response. Executive Order 12580 authorizes the establishment of the National Response Team (NRT) for planning and preparing for response actions; designates the EPA and the Coast Guard as co-chairs; and designates responsibilities of other agencies on the NRT and on Regional Response Teams.[89] Generally, DoD or Department of Energy (DOE) will provide the OSC and have the lead for responding to the release of hazardous substances, pollutants, or contaminants when the incident is on or comes from a facility or vessel under the control, custody, or jurisdiction of DoD or DOE, respectively.[90] Whether or not the NRF is activated, the OSCs apply NIMS and Incident Command principles during a response.

ESF #10 governs the response to oil and hazardous materials. Although the EPA is the ESF #10 coordinator under the NRF, either the EPA or DHS/Coast Guard will serve as the primary agency for ESF #10 response actions, depending on whether the incident is in the inland or coastal zone (the role of primary agencies under the ESFs are discussed above). The NCP is considered an operational supplement to the NRF. If the NRF or ESF #10 is activated for an oil discharge or hazardous material release, the NCP will serve as the basis for actions taken in support of the NRF.[91]

b. The National Emergency Communications Plan (NECP)

Congress directed the Department of Homeland Security's (DHS) Office of Emergency Communications (OEC) to develop the first National Emergency Communications Plan (NECP). Title XVIII of the Homeland Security Act of 2002,[92] as amended, calls for the NECP to be developed in coordination with stakeholders from all government levels and with members from the

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[88] 40 C.F.R. § 300 (2017). The NCP is required by section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9605, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub.L. 99–499, and by section 311(d) of the Clean Water Act (CWA), 33 U.S.C. 1321(d), as amended by the Oil Pollution Act of 1990 (OPA 90), Pub.L. 101–380. *See* 40 C.F.R. § 300.2 (2017). Executive Orders 12580 and 12777 delegated to the EPA responsibility to amend the NCP as necessary.

[89] Exec. Order No. 12580, 52 F.R. 2923, (23 Jan. 1987).

[90] 40 C.F.R. § 300 (2017).

[91] FEMA, EMERGENCY SUPPORT FUNCTION #10 – OIL AND HAZARDOUS MATERIALS RESPONSE ANNEX, (Jun. 2016), *available at* https://www.fema.gov/media-library/assets/documents/25512.

[92] HSA, *supra* note 7.

private sector. DHS worked with stakeholders from Federal, State, local, and tribal agencies to develop this strategic plan establishing a national vision for the future state of emergency communications. The desired future state is that emergency responders can communicate "[a]s needed, on demand, and as authorized, at all levels of government, across all disciplines."[93] Emergency Support Function 2 of the NRF, Communications, supplements the NECP and sets out procedures for coordinating the provision of temporary national security and emergency preparedness telecommunications support in areas impacted by a major disaster or emergency.

c. Nuclear/Radiological Incidents

The Nuclear/Radiological Incident Annex (NRIA) of the NRF supersedes the Federal Radiological Emergency Response Plan (FRERP) of 1996. The NRIA describes the policies, situations, concepts of operations, and responsibilities of the Federal departments and agencies governing the immediate response and short-term recovery activities for incidents involving release of radioactive materials. The incidents may result from inadvertent or deliberate acts. Pursuant to the incident annex paradigm, when DHS exercises domestic incident management functions, it is supported by other Federal agencies that are either "coordinating" or "cooperating" agencies.[94]

"Coordinating agencies" provide the leadership, expertise, and authorities to implement critical and specific nuclear/radiological aspects of the response, and facilitate nuclear/radiological aspects of the response in accordance with those authorities and capabilities. The coordinating agencies are those Federal agencies that own, have custody of, authorize, regulate, or are otherwise assigned responsibility for the nuclear/radioactive material, facility, or activity involved in the incident. "Cooperating agencies" include other Federal agencies that provide additional technical and resource support specific to nuclear/radiological incidents to DHS and the coordinating agencies.[95]

When DHS is not exercising domestic incident management responsibilities, the coordinating agency, as determined by their authorities, will be the responsible agency. DoD is the coordinating agency for incidents involving nuclear facilities owned or operated by DoD, materials shipped by or for DoD, nuclear weapons, and DoD satellites containing radioactive materials that impact within the United States.[96]

d. National Security Presidential Directive 46 (NSPD-46) and Homeland Security Presidential Directive 15 (HSPD-15)

NSPD-46/HSPD-15[97] detail the policy of the United States for combating terrorism and reaffirm the lead agencies for the management of various aspects of the counterterrorism effort. They recognize

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[93] DHS, NATIONAL EMERGENCY COMMUNICATIONS PLAN, DHS (2014) ES-1, *available at* https://www.dhs.gov/sites/default/files/publications/2014%20National%20Emergency%20Communications%20Plan_October%2029%202014.pdf.

[94] FEMA, NUCLEAR/RADIOLOGICAL INCIDENT ANNEX, (Oct. 2016) 1,4,7, *available at* https://www.fema.gov/media-library-data/1488825883577-fb52b6b7fd784dfb64aaee1fd886393a/NRIA_FINAL_110216.pdf.

[95] *Id*. at 22.

[96] *Id*. at 26.

[97] NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 46/HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 15, "U.S. STRATEGY AND POLICY IN THE WAR ON TERROR" (classified), March 6, 2006.

that States have primary responsibility in responding to terrorist incidents, including actual events, and the Federal Government provides assistance as required.

e. The Defense Against Weapons of Mass Destruction Act[98]

Title 50 of Chapter 40 of the U.S. Code concerns the U.S. Government's response to the proliferation of and use or threat to use nuclear, chemical, or biological WMD or related materials and technologies.[99] Title 50 U.S.C. § 2313 directs the Secretary of Defense to designate an official within the DoD as Executive Agent to coordinate DoD assistance with Federal, State, and local entities when responding to incidents involving such materials. The Secretary of Defense has appointed the Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD (HD&ASA)) as Executive Agent. The Department of Energy (DOE) was directed to designate an Executive Agent for its nuclear, chemical, and biological response, and the DoD and DOE Executive Agents are responsible for coordinating assistance with Federal, State, and local officials when responding to threats involving nuclear, chemical, and biological weapons.[100]

B. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)

The Stafford Act provides for assistance from the Federal government to States in the event of emergencies or natural and other disasters.[101] The Stafford Act is the primary legal authority for Federal emergency and disaster assistance to State and local governments. Congress' intent in passing the Stafford Act was to provide for an "orderly and continuing means of assistance by the Federal government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters."[102] The Stafford Act sought, among other things, to broaden the scope of disaster relief programs, encourage the development of comprehensive disaster preparedness and assistance plans, programs, and capabilities of State and local governments, and provide Federal assistance programs for both public and private losses sustained in disasters.

Through the Stafford Act, Congress delegated to the President emergency powers that may be exercised in the event of a *declared major disaster* or *emergency*. Generally, Federal Stafford Act assistance is given upon request from a State Governor[103] provided certain conditions are met; primarily that the Governor certifies that the State lacks the resources and capabilities to manage the

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[98] The Defense Against Weapons of Mass Destruction Act, Public Law: 104-201, 1996, codified at 50 U.S.C. §§ 2301–2371 (2012 & Supp. IV 2017).

[99] 10 U.S.C. § 12304 (2012 & Supp. IV 2017) provides the Federal authority for the mobilization of Reserve Components in response to the use or threatened use of a weapon of mass destruction.

[100] 50 U.S.C. §§ 2301–2371 (2012 & Supp. IV 2017).

[101] The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.*, as amended by the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295 (2007), and the Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2 (2013) [hereinafter The Stafford Act].

[102] 42 U.S.C. § 5121 (2012 & Supp. IV 2017).

[103] An example where a request is not required is in the case of an *emergency* in an area where the Federal government is determined to have primary responsibility, as discussed below. *See* 42 U.S.C. § 5191(a) (2012 & Supp. IV 2017). Additionally, 42 U.S.C. § 5170a(5) states that in a major disaster, the President may provide accelerated Federal assistance in the absence of a request where necessary to save lives, prevent human suffering, or mitigate severe damage as long as prompt coordination with the State occurs. Use of this authority may impede the ability of the Federal government to implement the cost-share process.

consequences of an event without Federal assistance. The Stafford Act lists the roles and responsibilities of Federal agencies and departments when providing both major disaster and emergency assistance, and it outlines the types of assistance that affected State(s) may receive from the Federal government. (See Table 2-4 below).

The Stafford Act applies in the event of a major disaster or emergency. It details the emergency functions of the President, which are delegated as per Executive Order 12656 and other directives.	
DEPARTMENTS & AGENCIES	**ROLES AND RESPONSIBILITIES**
Executive Office of the President (President or as delegated)	Major Disaster Assistance—upon request of a State Governor. Provide specified essential services; coordinate disaster relief activities; direct Federal agency assistance to States and localities; take other action as consistent with the Act and within delegated authority.
	Emergency Assistance, upon request of a State Governor or *sua sponte*: Direct Federal agencies to provide resources and technical and advisory assistance; provide essential services; coordinate all disaster relief assistance.
Federal Coordinating Officer	Major Disaster and Emergency Assistance: Establish field offices; coordinate relief efforts; take other necessary actions within authority.
Emergency Support Teams	Assist the Federal Coordinating Officer in carrying out his or her responsibilities in a major disaster or emergency.
State Governor(s)	Request declaration by the President that a major disaster or emergency exists.
Federal Agencies	Provide, consistent with appropriate authorities and upon request from the President: Personnel for the Emergency Support Teams; and, assistance in meeting immediate threats to life and property resulting from a major disaster or emergency.
FEMA	Prepare, sponsor, and direct Federal response plans and programs for emergency preparedness**;** provide hazard mitigation assistance in the form of property acquisition & relocation assistance.
Department of Defense	Upon President's direction, provide "emergency work" to protect life and property prior to declaration of major disaster or emergency.
American National Red Cross and other relief organizations	Major Disaster: As a condition of receiving assistance, comply with regulations relating to non-discrimination and other regulations as deemed necessary by the President for effective coordination of relief efforts.

Table 2-4. Stafford Act Roles and Responsibilities

FEMA operates under the Stafford Act and is the lead Federal agency for Stafford Act responses, focusing its efforts on managing the consequences of disasters and emergencies. FEMA's actions under the Stafford Act are generally driven by requests from State and local governments. Figure 2-3, provides an overview of the process of providing Federal support to States under the Stafford Act.

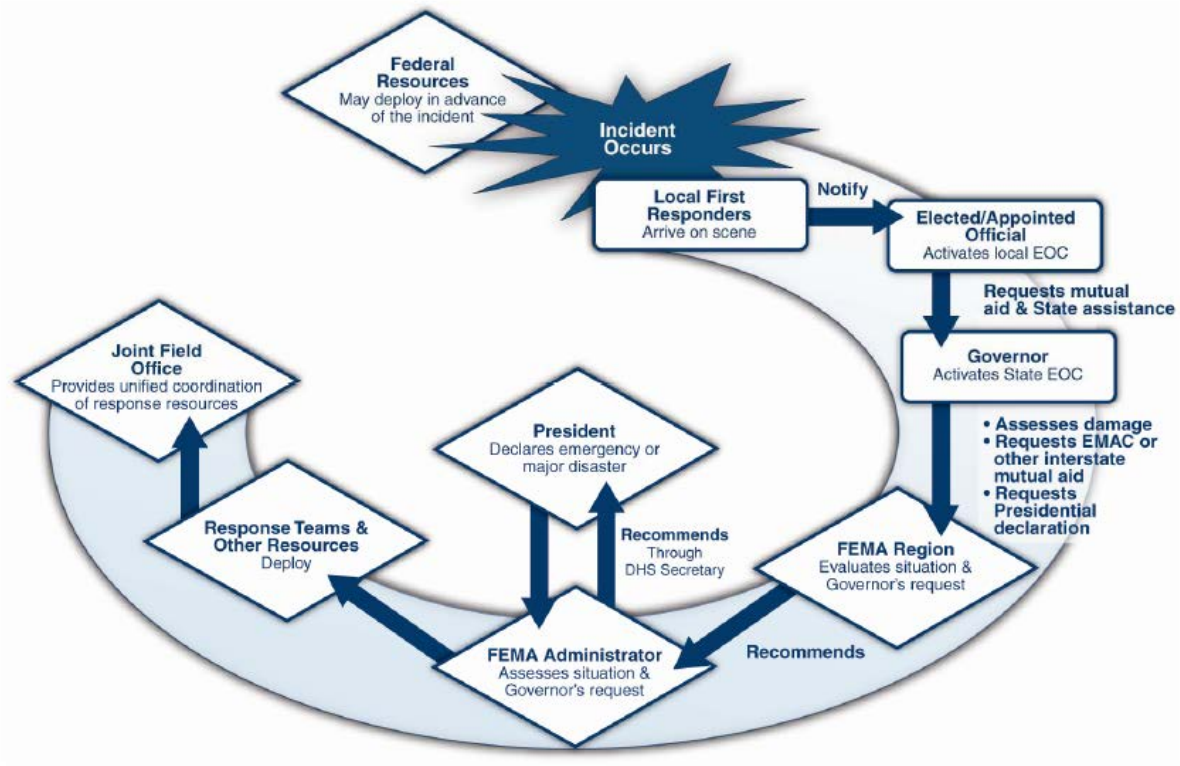

Figure 2-3.[104]

To coordinate the relief efforts of all Federal agencies in both major disasters and emergencies, the Stafford Act authorizes the President to appoint a Federal Coordinating Officer (FCO) immediately after declaring a major disaster or emergency. The Stafford Act also requires the President to request that a Governor seeking Federal assistance designate a State Coordinating Officer (SCO) to coordinate State and local disaster assistance efforts with those of the Federal government.[105]

The FCO may utilize relief organizations, such as State relief organizations and the American National Red Cross (ANRC), in the distribution of emergency supplies, such as food and medicine, and in reconstruction or restoration of essential services such as housing. The FCO may coordinate all relief efforts. However, States, localities, and relief organizations must agree with the courses of action. The President is authorized to form Emergency Support Teams (EST) of Federal personnel to be deployed to the area of the disaster or emergency.[106] By delegation, the FCO may activate ESTs composed of Federal program and support personnel, to be deployed into an area affected by

[104] *Overview of Stafford Act Support to States*, FEMA.GOV, http://www.fema.gov/pdf/emergency/nrf/nrf-stafford.pdf (last visited Jul. 19, 2018).

[105] 42 U.S.C. § 5143 (2012 & Supp. IV 2017).

[106] 42 U.S.C. § 5144 (2012 & Supp. IV 2017).

a major disaster or emergency.[107] The EST is the principal interagency group that supports the FCO in coordinating the overall Federal disaster assistance.

1. Requests for Emergency or Major Disaster Declarations

Under the Stafford Act, the Governor of an affected State may request the declaration of a major disaster or emergency, and must demonstrate, as a prerequisite for receiving assistance, both that the State's response plans have been activated and that State and local capabilities are inadequate for an effective response.[108] The Stafford Act's definitions of "emergency" and "major disaster" are referenced in many of the legal documents related to incident management and are used consistently throughout this chapter.

a. Major Disasters

A "major disaster" is defined as follows:

> [A]ny natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.[109]

A major disaster encompasses fires, floods, and explosions, regardless of cause, when such acts cause damage of sufficient severity to warrant Federal disaster assistance, as determined by the President. A WMD event involving fire or explosion, including the detonation of a high-yield explosive, would likely meet this threshold. Following the letter of the law strictly, a chemical, radiological, or biological WMD event in the United States would qualify as a major disaster only if it results in a fire, flood, or explosion. A WMD event of catastrophic proportions could warrant treatment as both a major disaster and an emergency.

Major disaster assistance is a more comprehensive grant of Federal aid for long-term consequence management. In a major disaster, the President has broad authority to assist States and localities. To receive Federal assistance, a Governor must not only indicate to the President that the State does not have the capacity or resources to mount an effective response, but he or she must also furnish information on the measures that have been or will be taken at the State and local levels to mitigate the effects of the disaster. In addition, the Governor must certify that State and local government obligations and expenditures will comply with all applicable cost-sharing requirements of the Stafford Act.[110]

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[107] 44 C.F.R. § 206.43 (2017). These teams may also be called emergency response teams.

[108] The specific requirements for a request for an emergency declaration are set forth in 44 C.F.R. § 206.35 (2017). The specific requirements for a request for a major disaster declaration are set forth in 44 C.F.R. § 206.36 (2017).

[109] 42 U.S.C. § 5122(2) (2012).

[110] 42 U.S.C. § 5170 (2012).

The President's powers after the declaration of a major disaster include (but are not limited to) the authority to provide the following assistance to States and localities: specified technical and advisory assistance; temporary communications services; food; relocation assistance; legal services; crisis counseling assistance and training; unemployment assistance; emergency public transportation in the affected area; and fire management assistance on public or privately-owned forest or grassland.[111] In addition, the President is authorized to direct Federal agencies to provide equipment, supplies and facilities to State and local governments; distribute food and medicine to victims; and perform work and services (such as search and rescue) necessary to save lives and protect property.[112]

b. Emergencies

The Stafford Act defines "emergency" as follows:

> [A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.[113]

An emergency is, more broadly, any situation in which Federal assistance is required to save lives, protect health and property, or mitigate or avert a catastrophe. Generally, the existence or threat of each type of WMD–chemical, biological, radiological, nuclear, and high-yield explosive - likely would be deemed an "emergency" if the event or threat overwhelms State and local authorities and warrants the assistance of the Federal government.

Emergency authority granted to the President is similar to that authorized for handling major disasters, but it is not as extensive. Emergency assistance is more limited in scope and in time than assistance under a major disaster declaration, and total assistance may not exceed $5 million for a single emergency, unless the President determines there is a continuing and immediate risk to lives, property, public health or safety, and necessary assistance will not otherwise be provided on a timely basis.[114] The Stafford Act authorizes the President to declare an emergency, but not a major disaster, *sua sponte* with respect to an emergency that "involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority."[115]

In any emergency, the President may direct any Federal agency, with or without reimbursement, to use the authorities and resources granted to it under Federal law in support of State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe.[116] The President may coordinate all emergency relief assistance and provide technical and advisory assistance to affected State and local governments for the:

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[111] 42 U.S.C. §§ 5171–5189 (2012 & Supp. IV 2017).

[112] *See id.* § 5170b.

[113] *See id.* § 5122(1).

[114] *See id.* § 5193.

[115] *See id.* § 5191(a).

[116] *See id.* § 5192.

performance of essential community services; issuance of hazard and risk warnings; broadcast of public health and safety information; and management, control and reduction of immediate threats to public safety. The President may also direct Federal agencies to provide emergency assistance; remove debris pursuant to 42 U.S.C. § 5173; provide temporary housing assistance in accordance with 42 U.S.C. § 5174; and assist State and local governments in the distribution of food, medicine, and other consumable supplies.[117]

The Stafford Act also authorizes the President, upon request from the Governor of an affected State, to provide "emergency work" essential for the preservation of life and property, by DoD for a maximum of ten days before the declaration of either an emergency or a major disaster.[118]

2. Liability under the Stafford Act

The Stafford Act specifically provides for immunity from liability for certain actions taken by Federal agencies or employees of the Federal government pursuant to the Act. 42 U.S.C. § 5148 of the Stafford Act provides:

> The Federal government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal government in carrying out the provisions of this chapter.[119]

3. Categories of Agency Support Under the Stafford Act[120]

Once an emergency or major disaster is declared, it means a State(s) has/have requested assistance from the Federal government (except in the case of the limited exception discussed above). The assistance given will typically take one of two forms: Direct Federal Assistance or Federal Operations Support.

Direct Federal Assistance is assistance where one or more Federal departments or agencies provide goods and services to State and/or local governments when the affected jurisdiction lacks the capability needed to perform or to contract for eligible emergency work during a major disaster or emergency. Direct Federal Assistance is authorized and reimbursed by FEMA, and is subject to Federal-State cost sharing.

Federal Operations Support is assistance where one or more Federal departments or agencies provide goods or services to FEMA and/or other Federal agencies to enable them to provide direct Federal assistance or other supplemental Federal assistance. Federal operations support is requested by FEMA or another Federal department or agency. Federal operations support is authorized and reimbursed by FEMA, and is not subject to Federal-State cost sharing.

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[117] 42 U.S.C. § 5192(a) (2012 & Supp. IV 2017).

[118] *See id.* § 5170b(c).

[119] *See id.* § 5148.

[120] U.S. COAST GUARD, COMDTINST 3006.1 (series), FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) MISSION ASSIGNMENTS: OPERATIONAL ACCEPTANCE AND EXECUTION (Aug. 13 2012).

4. Interplay Between the Stafford Act and National Preparedness System (NPS)[121]

The following is a summary of how Stafford Act assistance typically occurs, with reference to relevant NPS concepts.

As the DHS NOC monitors for potential major disasters or emergencies, it will receive advance warning of an incident, at which time DHS may deploy representatives to State EOCs for situational assessment. Regional Response Coordination Centers (RRCCs) and other coordinating structures discussed above may be activated.

Immediately after the incident, local emergency personnel assess the situation. They may seek additional resources through mutual aid agreements or the State. State officials will mobilize State resources and may use mutual aid processes such as the Emergency Management Assistance Compact (EMAC) to augment their resources. The Governor will activate the State emergency operations plan, declare a state of emergency, and may request a State/DHS joint Preliminary Damage Assessment (PDA). State and Federal officials conduct the PDA in coordination with tribal/local officials as required and determine if the event warrants a request for a Presidential declaration of a major disaster or emergency.

After a major disaster or emergency declaration, an RRCC coordinates initial activities until a JFO is established. If regional resources are overwhelmed or if it appears that the event may result in particularly significant consequences, DHS may deploy a national-level Incident Management Assistance Team (IMAT). Depending on the scope and impact of the event, the NRCC carries out initial activations and mission assignments and supports the RRCC. The Governor appoints a State Coordinating Officer (SCO) to oversee State response and recovery efforts. A Federal Coordinating Officer (FCO), appointed by the President in a Stafford Act declaration, coordinates Federal activities in support of the State.

A JFO may be established locally to provide a central point for Federal, State, tribal, and local executives to coordinate their support. The UCG leads the JFO. The UCG may need to meet initially via conference calls to develop objectives and an initial action plan.

The UCG coordinates field operations from the JFO. In coordination with State, tribal, and/or local agencies, ESFs are activated to assess the situation and identify response requirements. Federal agencies provide resources under DHS/FEMA mission assignments or their own authorities.

As immediate response priorities are met, recovery activities begin. The Stafford Act Public Assistance program provides disaster assistance to States, tribes, local governments, and certain private nonprofit organizations. As the need for full-time interagency coordination at the JFO decreases, the UCG plans for selective release of Federal resources and demobilization.

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[121] Example provided by *Overview of Stafford Act Support to States*, FEMA.GOV, http://www.fema.gov/pdf/emergency/nrf/nrf-stafford.pdf (last visited Jul. 17, 2018).

C. Immediate Response Authority

1. Federal Military Commanders

Federal military commanders, heads of DoD Components, and/or responsible DOD civilian officials have "Immediate Response Authority" under DoDD 3025.18. In response to a request for assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DoD officials may provide an immediate response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States, its territories, or the District of Columbia.[122] "The civil authority's request for immediate response should be directed to the installation commander or other appropriate DoD official responsible for the installation . . . ."[123] The DoD official must exercise judgement in determining the maximum allowable distance from the installation that the immediate response may take place and should also, unless otherwise directed by a higher authority, prioritize DoD resources and requirements before addressing the civil authority's request.[124]

- Immediate Response Authority does not allow for actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory (for a detailed discussion, see the Chapters within on Military Support to Civilian Law Enforcement and Civil Disturbance Operations).

- Separately, per DoDD 3025.18., paragraph 4.i.4, any decision by an Immediate Response Authority to temporarily deploy resources requires notification to the National Joint Operations and Intelligence Center (NJOIC).

- Commanders may not normally continue support under immediate response authority beyond 72 hours. When using this authority DoD commanders shall reassess whether there remains a continued need for a DoD response as soon as practicable, *but no later than 72 hours* after the request for assistance was received.

As noted in Chapter 1, all such requests from civil authorities for assistance must be evaluated for:

- **C**ost – Who pays and the impact on DoD budget.
- **A**ppropriateness – Whether it is in the interest of DoD to provide the requested support.
- **R**eadiness – Impact on DoD's ability to perform its primary mission.
- **R**isk – Safety of DoD forces.
- **L**egality – Compliance with the law.
- **L**ethality – Potential use of lethal force by or against DoD forces.

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[122] U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 4.i. (29 Dec. 2010) (C2, 19 Mar. 2018) [hereinafter DoDD 3025.18].

[123] *Id.* at 5.

[124] *Id.*

2. State Governors

As the principle authority during State emergencies, Governors may direct an immediate response using National Guard personnel under State command and control (including personnel in a Title 32 status).[125] However, National Guard personnel will not be placed in or extended in Title 32 status to conduct State immediate response activities.[126] Additionally, State leadership must coordinate with the Chief of the National Guard Bureau to approve the continued use of personnel in a Title 32 status responding in accordance with immediate response authority in excess of seventy-two hours.

D. Conclusion

The NPS and NIMS represent a significant shift from the pre-9/11 and pre-Hurricane Katrina approach of the Federal government to domestic incident management. Although the Stafford Act remains the primary mechanism for Federal support to State and local authorities, and State requests for assistance still formally initiate the Federal response, the manner in which the Federal government provides the assistance is changing. Consolidation, unification, anticipation, and systemization are the unifying themes of these key changes. It is possible that DoD personnel[127] or assets could be among first responders to an emergency or disaster (e.g., an event in close proximity to a DoD installation). In such a case, DoD personnel and assets might be employed pursuant to immediate response authority per DoDD 3025.18 before a larger Federal response is orchestrated under the NRF. Figure 2-4 below illustrates the process by which local requests for assistance would be handled following a Stafford Act declaration and under immediate response authority. Judge advocates should be familiar with and prepared to advise on the various authorities under which DoD may provide assistance to non-Federal entities.

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[125] CHIEF NATIONAL GUARD BUREAU, INST. 3000.04, NATIONAL GUARD BUREAU DOMESTIC OPERATIONS (Jan. 24, 2018) para. 4.a. [hereinafter CNGBI 3000.04].

[126] DoDD 3025.18, *supra* note 122, at para. 4.j.

[127] Under 10 U.S.C. § 12304a, the Secretary of Defense may involuntarily order military reserve members and units to active duty to support a Governor's request for assistance in response to an emergency or major disaster under the Stafford Act.

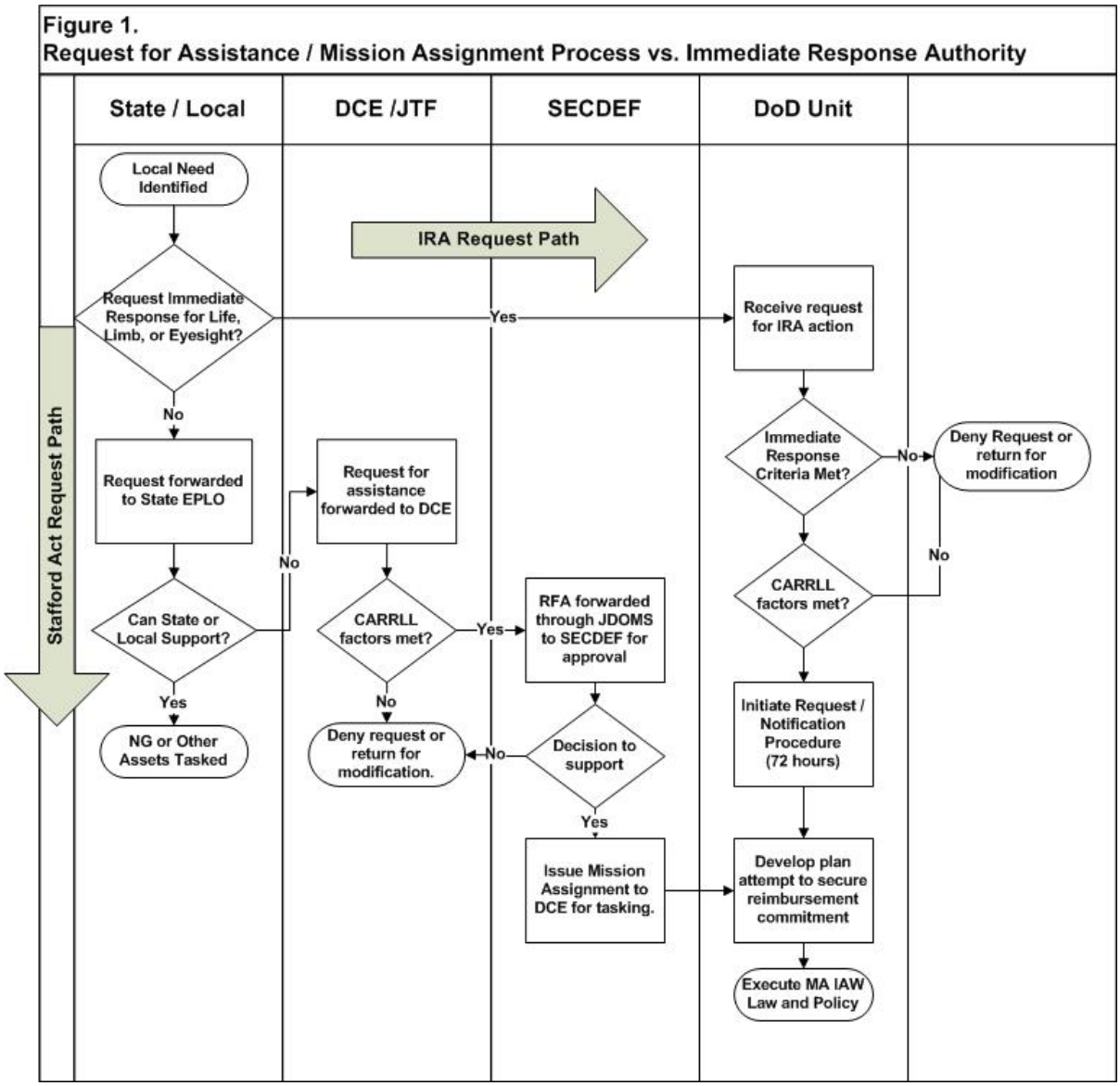
Figure 1.
Request for Assistance / Mission Assignment Process vs. Immediate Response Authority
State / Local
DCE /JTF
SECDEF
DoD Unit
Stafford Act Request Path
Local Need Identified
IRA Request Path
Request Immediate Response for Life, Limb, or Eyesight?
Yes
No
Receive request for IRA action
Request forwarded to State EPLO
Request for assistance forwarded to DCE
Immediate Response Criteria Met?
No
Deny Request or return for modification
No
Can State or Local Support?
No
CARRLL factors met?
Yes
RFA forwarded through JDOMS to SECDEF for approval
CARRLL factors met?
Yes
No
NG or Other Assets Tasked
Deny request or return for modification.
No
Decision to support
Initiate Request / Notification Procedure (72 hours)
Yes
Issue Mission Assignment to DCE for tasking.
Develop plan attempt to secure reimbursement commitment
Execute MA IAW Law and Policy

Figure 2-4

CHAPTER 3

STATUS AND RELATIONSHIPS BETWEEN COMPONENTS RESPONDING TO DOMESTIC INCIDENTS

KEY REFERENCES:

- DoDI 1235.12 - Accessing the Reserve Component, June 7, 2016, incorporating Change 1, February 28, 2017.
- DoDD 5125.01 - Assistant Secretary of Defense for Reserve Affairs, December 27, 2006, incorporating Change 1, June 4, 2008.
- DoDI 6025.13 - Medical Quality Assurance (MQA) and Clinical Quality Management in the Military Health System (MHS), February 17, 2011.
- DoDI 1215.13 - Reserve Component (RC) Member Participation Policy, May 11, 2009.
- DoDI 1215.06 - Uniform Reserve, Training and Retirement Categories for the Reserve Component, March 11, 2014, incorporating Change 1, May 19, 2005.
- DoDD 1200.17 - Managing the Reserve Components as an Operational Force, October 29, 2008.

A. Introduction

This chapter discusses various service components and the importance of their designated status to the missions they perform. The Reserve Component (RC), which is comprised of the reserve of the various services and the National Guard of the several States, plays a significant role in domestic support operations. The purpose of the RC is to provide trained and qualified persons available for active duty in time of war, national emergency, or at other times that national security may require.[1] The RC has unique personnel/duty categories that are important to understand because they not only determine what benefits (e.g. medical and retirement) and protections (e.g. Federal Tort Claims Act or similar liability rules) RC members have, but they also determine the different types of duties that the service-member may perform. The Assistant Secretary of Defense for Reserve Affairs (ASD (RA)) is responsible for overall supervision of all RC affairs in DoD, and establishes the directives that provide guidance on RC activation, mobilization, and training.[2]

Judge advocates practicing domestic operational law should also be familiar with the structure and roles of U.S. Coast Guard, the National Guard in a non-Federal status, and the Civil Air Patrol, because these entities have unique roles in domestic operations and will often work jointly with DoD during domestic civil support missions. For example, in addition to being a branch of the U.S. Armed Forces, the Coast Guard is also a Federal law enforcement agency and has the responsibility to act as a lead agency for numerous domestic missions including environmental response, maritime search and rescue, and maritime migrant interdiction.[3] Also, while in a non-Federal status, the Air and Army National Guard have different authorities and capabilities in domestic missions. Finally, the Civil Air Patrol, a nonprofit corporation, also serves as an auxiliary to the United States Air

[1] 10 U.S.C. § 10102 (2012 & Supp. IV 2017).

[2] U.S. DEP'T OF DEFENSE, DIR 5125.01, ASSISTANT SECRETARY OF DEFENSE FOR RESERVE AFFAIRS (27 Dec. 2006, incorporating change 1, 4 Jun. 2008) [hereinafter DoDD 5125.01].

[3] 14 U.S.C. §§ 2, 3 (2012 & Supp. IV 2017).

Force.[4] Understanding the roles of these entities ahead of time will assist judge advocates during future joint operations.

B. Reserve Component

The RC consists of the Army National Guard of the United States (ARNGUS), the Army Reserve, the Naval Reserve, the Marine Corps Reserve, the Air National Guard of the United States (ANGUS), the Air Force Reserve, and the Coast Guard Reserve.[5] Members of the RC are a true reflection and extension of civilian society. The defense of the United States has been based in large part on the contributions of these citizens who prepare for active service during peacetime and enter active duty during times of national emergency.

1. U.S. Army Reserve (USAR)[6]

The USAR's mission is to meet Department of the Army contingency operations and mobilization requirements.[7] The Army Reserve makes up 20% of the Army's organized units, but provides half of the Army's combat support, and 25% of the Army's mobilization base expansion capability.[8]

2. U.S. Air Force Reserve (USAFR)[9]

The USAFR is composed of thirty-six wings that report to one of three Numbered Air Forces (NAFs).[10] With just over ten percent of the Air Force's manpower, the USAFR performs more than thirty percent of all Air Force missions.[11] Like all of the other RCs, the role of the USAFR is to provide trained and ready forces to support its parent service. Yet the USAFR also has several unique missions. For example, the 731st Airlift Squadron, assigned to the 302nd Airlift Wing,

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[4] 10 U.S.C. § 9442 (2012 & Supp. IV 2017).

[5] 10 U.S.C. § 10101 (2012 & Supp. IV 2017).

[6] U.S. DEPT' OF ARMY, REG. 140-1, MISSION, ORGANIZATION, AND TRAINING (20 Jan. 2004) [hereinafter AR 140-1]; U.S. DEP'T OF ARMY, REG. 140-10, ASSIGNMENTS, ATTACHMENTS, DETAILS, AND TRANSFERS (15 Aug. 2005); U.S. DEP'T OF ARMY, REG. 140-30, ACTIVE DUTY IN SUPPORT OF THE UNITED STATES ARMY RESERVE (USAR) AND ACTIVE GUARD RESERVE (AGR) MANAGEMENT PROGRAM (1 Sept. 1994).

[7] AR 140-1, *supra* note 6, para. 1-8.

[8] *America's Army Reserve*, ARMY RESERVE, http://www.usar.army.mil/About-Us/ (last visited Jul. 19, 2018).

[9] U.S. DEP'T OF AIR FORCE, INSTR. 36-2132, FULL-TIME SUPPORT (FTS) TO THE AIR FORCE RESERVE (23 Mar. 2012); U.S. DEP'T OF AIR FORCE, INSTR. 36-2619, MILITARY PERSONNEL APPROPRIATION (MPA) MAN-DAY PROGRAM (22 Jul. 1994); U.S. DEP'T OF AIR FORCE, MANUAL, 36-8001 RESERVE PERSONNEL PARTICIPATION AND TRAINING PROCEDURES (22 Jan. 2004).

[10] *Structure*, U.S. AIR FORCE RESERVE, https://www.afreserve.com/about (last visited Jul. 19, 2018).

[11] The unit program of the USAFR is called the "Category A" program. Personnel perform a minimum of one weekend of inactive duty training every month, referred to as a unit training assembly (UTA), and two weeks of active duty (annual training) for pay and points each fiscal year. The "Category B" program is the individual mobilization augmentee (IMA) program consisting of individual reservists assigned to major commands, field operating agencies, joint organizations, direct reporting units and outside agencies. Although some commands allow training with other units in the member's local area, this decision is made on a case-by-case basis by the individual command. Inactive duty training periods for pay and points, are usually performed during the week in increments of 4 IDTs per quarter. A day is worth two IDT points. Members also perform a 12-14 day paid active duty training tour annually with one point awarded for each day. In the "Category E" program, personnel do not earn pay for their service, but they do earn retirement points. Examples of this are service with the Civil Air Patrol Assistance Program and the Chaplain reinforcement designees.

Peterson Air Force Base, Colorado, is trained in the use of modular airborne firefighting systems that support local, State, and Federal agencies during wildland fire response.[12] Additionally, the 53rd Weather Reconnaissance Squadron at Keesler Air Force Base, Mississippi, performs hurricane reconnaissance exercises over the Atlantic, Pacific, Caribbean, and Gulf of Mexico and is the only DoD unit tasked to perform weather reconnaissance in support of the Department of Commerce.[13]

3. U.S. Naval Reserve (USNR)[14]

The Naval Reserve is composed of both commissioned units (self-contained, deployable assets with both personnel and mission equipment) and augmentation units (non-hardware units that provide trained manpower to active Navy units). Typically, members of the Naval Reserve serve one weekend a month, and an additional two weeks per year. However, members may also serve fulltime as Navy Full-Time Support or Navy Individual Augmentees. USNR unique missions include operation of a Mine Countermeasure Ship, Mobile Inshore Undersea Warfare Units, and Helicopter Warfare Support Squadrons.[15]

4. U.S. Marine Corps Reserve (USMCR)[16]

The Marine Corps Reserve is composed of one Marine division, one Marine air wing, one service support group, and a Marine Corps Reserve support command. Marine Forces Reserve is the headquarters command for roughly 100,000 members of the USMCR.[17] Unique units in this reserve branch include Civil Affairs Groups and Air-Naval Gunfire Liaison Companies.

5. U.S. Coast Guard Reserve (USCGR)[18]

The USCGR, like its active duty counterpart, is an agency within the Department of Homeland Security. Under Title 14 and Title 10 of the United States Code, the Coast Guard is at all times an armed force, as well as a law enforcement agency. As an armed force, the Coast Guard is required to maintain a state of readiness to function as a specialized service in the Navy in time of war or upon Presidential declaration. The Coast Guard, discussed more below, is a unique member of Joint Forces involved in civil support missions because of its mix of military, civil law enforcement, and regulatory authorities that allow it to respond to a wide variety of threats at home and abroad.

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[12] *Modular Airborne Fire Fighting System (MAFFS)*, 302ND AIRLIFT WING, http://www.302aw.afrc.af.mil/About-Us/Fact-Sheets/Display/Article/627167/modular-airborne-fire-fighting-system-maffs/ (last visited Jul. 19, 2018).

[13] *53rd Weather Reconnaissance Squadron Hurricane Hunters*, 403RD WING, http://www.403wg.afrc.af.mil/About/Fact-Sheets/Display/Article/192529/53rd-weather-reconnaissance-squadron-hurricane-hunters/ (last visited Jul. 19, 2018).

[14] U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPS, INSTR. 1001.20C, STANDARDIZED POLICY AND PROCEDURE FOR ACTIVE DUTY FOR SPECIAL WORKS (ADSW) (4 Mar. 2008).

[15] *About the Reserve*, NAVY RESERVE, http://www.navyreserve.com/about/mission.html (last visited Jul. 19, 2018).

[16] U.S. MARINE CORPS, Order 1001.52J, ACTIVE RESERVE SUPPORT TO THE RESERVE COMPONENT (RC) (6 Jun 2011); U.S. MARINE CORPS, ORDER 1001.59, ACTIVE DUTY FOR SPECIAL WORK IN SUPPORT OF THE TOTAL FORCE (22 Oct. 2001).

[17] *MARFORRES Media Information*, U.S. MARINE CORPS FORCES RESERVE, https://www.marforres.marines.mil/About/Media-Info/ (last visited Jul. 30, 2018)

[18] U.S. COAST GUARD, COMDTINST M1001.28A, RESERVE POLICY MANUAL, (18 May 2003).

Coast Guard reservists may be called in response to serious natural or man-made disasters, accidents, or catastrophes such as hurricanes, earthquakes, tornadoes, or floods. The Secretary of Homeland Security is authorized to order members of the Coast Guard Ready Reserve to active duty without their consent in a domestic emergency.[19] They may be used for not more than 60 days in any four-month period and not more than 120 days in any two-year period to augment the Regular Coast Guard. Coast Guard reservists perform unique missions as well. Among the most important is the staffing of Guard Port Security Units (PSUs) - specialized deployable security units that have served both domestically and abroad during times of war.[20] Additionally, under 10 U.S.C. § 12302, the USCGR provided key support to Operation Iraqi Freedom and Operation Enduring Freedom.[21]

6. National Guard of the United States (NGUS)

a. Overview

The terms Army National Guard of the United States (ARNGUS) and Air National Guard of the United States (ANGUS) refer to the National Guard as a RC of their respective service.[22] The terms "Federal service" and "Federalized" are applied to National Guard members and units when ordered to active duty in their RC status or called into Federal service in their militia status under various sections of Title 10 of the U.S. Code.[23]

The terms "Army National Guard"(ARNG) and "Air National Guard" (ANG) refer to the Federally-recognized (and usually Federally trained and funded under Title 32, U.S. Code) organized militia of the various States, in other words, members of the National Guard in a "State status" pursuant to Article I, Section 8, Clause 16 of the Constitution.[24] The ARNG and ANG train for their Federal military missions according to Congressionally-established disciplines under Title 32, United Stated Code, under State control. ARNG/ANG members also take oaths to obey their respective Governors and abide by State law.[25] As discussed section 6(c) below, upon enlistment/commissioning in the Army and Air National Guard, members simultaneously become members of the ARNGUS or ANGUS respectively, and thus may be called into Federal service.

Determining whether a National Guard member is in a State or Federal status can be critical to defining their roles and responsibilities. Status is also the primary factor for determining the applicability of law for such issues as benefits, protections, and liabilities. For instance, members of

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[19] 14 U.S.C. § 712 (2012 & Supp. IV 2017).

[20] PORT SECURITY UNIT 309, http://www.uscg.mil/lantarea/psu309/ (last visited Jul. 19, 2018).

[21] The Center for Naval Analyses (CNA), upon request of the U.S. Coast Guard Historian, compiled a summary of Coast Guard operations in Operation Iraqi Freedom. *See* BASIL TRIPSAS, ET AL., COAST GUARD OPERATIONS DURING OPERATION IRAQI FREEDOM (Center for Naval Analyses 2004), *available at* https://media.defense.gov/2017/Jul/01/2001772261/-1/-1/0/OIF_D0010862.PDF (last visited Jul. 19, 2018).

[22] 10 U.S.C. §§ 101(c), 10101 (2012 & Supp. IV 2017). Per 10 U.S.C. §§ 10105 and 10111 (2012 & Supp. IV 2017), the Army National Guard of the United States (ARNGUS) and Air National Guard of the United States (ANGUS) specifically consist of (1) Federally recognized units and organizations of the ARNG/ANG, and (2) members of the ARNG/ANG who are also members of the Army/Air Force Reserves.

[23] *See* 10 U.S.C. chs. 13 and 1211 (2012 & Supp. IV 2017).

[24] *See* 10 U.S.C. § 101 (2012 & Supp. IV 2017); 32 U.S.C. §§ 301, 307 (2012 & Supp. IV 2017).

[25] 32 U.S.C. §§ 304, 312 (2012 & Supp. IV 2017).

the National Guard only become subject to the Uniform Code of Military Justice (UCMJ) when Federalized (serving on active duty under Title 10); while in a State status they are subject to their respective State codes of military justice. Additionally, some laws, such as the Posse Comitatus Act (PCA) only apply to the National Guard when they are in a Title 10 status. National Guard members are usually relieved from duty in the National Guard when on Federal active duty as a member of the NGUS under 32 U.S.C. § 325. However, per the National Defense Appropriations Act for Fiscal Year 2004, 32 U.S.C. § 325 was amended to allow Federalized National Guard officers to retain command authority over State forces with the approval of POTUS and the consent of the Governor (*see* the discussion in section 6(a) of this chapter on Dual Status Commanders, and in Chapter 2 *infra*).

Guard personnel in Title 10 and Title 32 (discussed under National Guard of the Several States section) status receive Federal pay and are covered under the Federal Torts Claims Act.[26] Title 10 personnel always receive Federal military retirement credit for the performance of duty. It is helpful to keep in mind that the determination of whether the National Guard is in Federal or State service does not rest on the entity that funds the activity, but rather which entity has command and control.

b. History

In 1903, the organized militia (*i.e.*, the National Guard) was created.[27] The National Defense Act of 1916 further strengthened the organization and training of the National Guard.[28] Because members of the National Guard had to be drafted as individuals for service in World War I, Congress in 1933 amended the National Defense Act of 1916 to establish the dual status of the National Guard by creating the "two overlapping but distinct organizations," *i.e.*, the National Guard of the various States and the National Guard of the United States.[29] Although members of the National Guard were relieved from their militia status while on Federal status, at the conclusion of that service, they reverted to their State status. In other words, this statute created the "dual enlistment" requirement that we know today.[30]

c. Federal Missions

Like the other RCs, ARNGUS/ANGUS[31] members and units are integrated with the Active Component as part of a total force capability for responding to a wide-range of national defense

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[26] See 32 C.F.R. § 536.97 (2012).

[27] Military Act of 1903 (also known as the "Dick Act"), 57 Pub. L. No. 33, 32 Stat. 775; *see also* Perpich v. Department of Defense, 496 U.S. 334, 342 (1990).

[28] National Defense Act of 1916, 64 Pub. L. 85; *see also* Perpich, 496 U.S. 334, 343–44.

[29] National Guard Act of 1933, 73 Pub. L. 64, § 18: *see also* Perpich, 496 U.S. 334, 345–46.

[30] This is a system that the *Perpich* Court recognized as a statutory creation, causing a member of the militia to be relieved from State status for the "entire period of Federal service." Perpich, 496 U.S. 334, 345–346.

[31] When ANG members enter Title 10 active duty, they are transferred from their ANG units and assigned to the Air National Guard Readiness Center (ANGRC), either directly or to a detachment of the ANGRC created for the purpose of deploying forces in support of an active duty mission. The ANGRC is a Field Operating Agency (FOA) of HQ USAF that executes NGB policy for the ANG and ANGUS and exercises elements of command and control over ANGUS units and members. It is a Title 10 organization with a 32 U.S.C. § 104 commander appointed on G-series orders. The ANGRC commander, currently a brigadier general, also serves as the Deputy Director of the ANG Directorate and is on Title 10 orders. *See* U.S. DEP'T OF AIR FORCE, INSTR. 10-402, MOBILIZATION PLANNING, para 2.2

missions. To become an ARNGUS or ANGUS member, the service-member or service-member's unit must be "Federally recognized."[32] To be Federally recognized, the service-member or service-member's unit must meet prescribed Federal standards.[33] NG units or members may be ordered to Federal active duty in one of two basic ways. One way is to order NG members or units to active Federal duty under various provisions of Title 10 (e.g. partial mobilization; volunteer duty; or pre-planned Combatant Commander support),[34] as members of the ARNGUS or ANGUS.[35] The other way is pursuant to the power of Congress to call out the militia to enforce Federal law, suppress insurrections, or repel invasions; under this authority the NG is "called" to duty as part of the militia of the United States.[36] Congress has given the President the authority to call the NG to active duty for these purposes.[37] As discussed in section G(2) of this chapter, the National Guard can also be utilized for "Federal missions" in a Title 32 status under certain conditions. Authorized duty under 32 USC 502(f) includes support of operations at the request of the President or Secretary of Defense, for example, natural disaster response and assistance to the Department of Homeland Security on the Southwest border.

d. Other Title 10 Duty

In addition to duties performed when Federalized under the aforementioned authorities, members of the National Guard serve in a full-time Title 10 status in other ways. Members in this category include: Members of the National Guard Bureau (NGB); U.S. Property and Fiscal Officers (USPFO) in each State serving the National Guard;[38] any other National Guard members serving a tour of duty under Title 10 in support of NGB, Major Commands, or other "seats of government" tours.

(1) National Guard Bureau (NGB)

The NGB is designated under Title 10 as a "joint activity" of DoD, serving as the National Guard channel of communications between the Army and Air Force and the fifty-four States and territories.[39] While the NGB serves as the coordination, administrative, policy, and logistical center for the ARNG and the ANG, NGB does not command and control either the Army or Air National Guard. Pursuant to its charter, NGB is responsible for, among other things, implementing Army

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(1 May 2012)) [hereinafter AFI 10-402]; NATIONAL GUARD BUREAU, MEMORANDUM 10-5/38-101, ORGANIZATIONS AND FUNCTIONS OF THE NATIONAL GUARD BUREAU, ch. 4 (1 Jul. 2003).

[32] 10 U.S.C. §§ 10105, 10111, 10503(7), 12201, 12211, 12212 (2012 & Supp. IV 2017); 32 U.S.C. § 105(b) (2012 & Supp. IV 2017).

[33] *See* NATIONAL GUARD BUREAU, REG. 10-1, ORGANIZATION AND FEDERAL RECOGNITION OF ARMY NATIONAL GUARD UNITS (22 NOV. 2002); U.S. DEP'T OF AIR FORCE, INSTR. 38-101, AIR FORCE ORGANIZATION (16 Mar. 2011).

[34] 10 U.S.C §§ 12302, 12304b (2012 & Supp. IV 2017); *see also* DODI 1215.06 Appendix to Enclosure 4.

[35] U.S. CONST. art. 1, § 8, cl. 12; Perpich, 496 U.S. at 334; 10 U.S.C. §§ 12301–12304 (2012 & Supp. IV 2017).

[36] U.S. CONST. art. I, § 8, cl. 15; 10 U.S.C. Chapter 13 (these statutes also include the use of the Armed Forces of which the NGUS is part); 10 U.S.C. § 12406 (2012 & Supp. IV 2017). Although these statutes are in Title 10 of the U.S. Code, members "called up" under these provisions retain their militia status.

[37] 10 U.S.C. Ch. 13 (2012 & Supp. IV 2017).

[38] 32 U.S.C. § 708 (2012 & Supp. IV 2017).

[39] 10 U.S.C. § 10501 (2012 & Supp. IV 2017); The "54," as they are often called, include the fifty States, Puerto Rico, Guam, U.S. Virgin Islands, and the District of Columbia.

and Air Force guidance, prescribing and monitoring training discipline and requirements, and supervising and administering the budgets of the ARNG and ANG.[40]

Through the 2012 National Defense Authorization Act, the Chief, NGB (CNGB), a four-star general, became a member of the Joint Chiefs of Staff with responsibilities advising the President, the National Security Council, Homeland Security Council, and the Secretary of Defense.[41] As a member of the Joint Chiefs, CNGB was also given the additional specific responsibility of addressing matters involving non-Federalized National Guard forces in support of homeland defense and civil support missions.[42] CNGB also serves as the principal advisor on all NG matters to the Secretaries of the Army and Air Force and to the Army and Air Force Chiefs of Staff.[43] CNGB has executive agent responsibility for planning and coordinating the execution of NG military support operations. The Director, ARNG, and the Director, ANG, are responsible to the CNGB and assist in executing the functions of NGB as they relate to their respective branches. The Chief Counsel's office at NGB provides legal advice and assistance to the CNGB, the Directors of the Army and Air National Guards, and to the full-time judge advocates at the State level. The Chief Counsel's office normally employs a joint staff of military and civilian attorneys in a wide variety of disciplines, including administrative law, contract and fiscal law, international and operational law, environmental law, legislation, labor law, and litigation.

(2) U.S. Property and Fiscal Officers (USPFO)

Each State and territory has a USPFO. As Title 10 officers assigned to the NGB, a USPFO is detailed for duty to a State or territory and is accountable for all Federal funds and property provided to the NG of each State.[44] The USPFO and his staff also perform functions relating to supply, transportation, internal review, data processing, contracting, and financial support for the State NG. [45] When required, the USPFO staff can support AC or other RC forces on a reimbursable basis.

e. Other NG Authorities for Duty

Members of the National Guard perform Inactive Duty Training (IDT) and Annual Training (AT) in a Title 32 status. They can also perform Active Duty for Operational Support (ADOS) in a Title 10 status to support the ANG and ARNG at Federal headquarters levels.[46] As noted above, some

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[40] DEP'T OF DEFENSE, DIR. 5105.77, NATIONAL GUARD BUREAU (NGB) (21 May 2008).

[41] 10 U.S.C. § 151 (2012 & Supp. IV 2017).

[42] 10 U.S.C. § 10502 (2012 & Supp. IV 2017).

[43] *Id.*

[44] 32 U.S.C. 708 (2012 & Supp. IV 2017).

[45] NATIONAL GUARD BUREAU REG. 130-6/AIR NATIONAL GUARD INSTRUCTION 36-2, UNITED STATES PROPERTY AND FISCAL OFFICER APPOINTMENT, DUTIES, AND RESPONSIBILITIES (1 Jul. 2007).

[46] S*ee* U.S. DEP'T OF ARMY, REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS, ch. 6 (30 Jun. 1999).

"AGR" tours are also in a Title 10 status. They also perform ADOS in a Title 10 status to support Active Component requirements; this duty is paid by Army and Air Force appropriations.[47]

C. Reserve Component Categories

There are three Reserve categories: Ready Reserve, Standby Reserve, and Retired Reserve. Each member of the National Guard and Reserve is assigned within one of these categories. All members of the Army National Guard and Air National Guard, including those in the Inactive National Guard (ING), are in the Ready Reserve or Retired Reserve.[48]

1. Ready Reserve

The Ready Reserve consists of three subgroups: the Selected Reserve, the Individual Ready Reserve, and the Inactive National Guard. These are units and individuals subject to order to active duty to augment the Active Forces during a time of war or national emergency.[49] This chapter will primarily address the Selected Reserve.

a. Selected Reserve

The Selected Reserve consists of Soldiers assigned to Reserve Component units, Individual Mobilization Augmentation (IMA) Program, Drilling Individual Mobilization Augmentation (DIMA) Program, and the Active Guard Reserve (AGR) Program. These individuals and units are considered essential to wartime missions and have priority for training and equipment over other RC categories.

(1) Drilling Unit Reservists

Sometimes called Troop Program Units (TPU), these units consist of soldiers assigned to Tables of Organization and Equipment or Tables of Distribution and Allowances who normally perform at least 48 inactive duty training (IDT) assemblies and not less than 15 days, exclusive of travel time, of annual training (AT) each year. In the alternative, they may perform Active Duty for Training (ADT) for no more than 30 days each year, unless otherwise specifically prescribed by the Secretary of Defense.[50]

(2) Individual Mobilization Augmentees and Drilling Individual Mobilization Augmentees

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[47] *See id.* Note that ch. 2, sec. 521 of the FY 2001 National Defense Authorization Act, exempts reserve officers on the reserve active-status list (RASL) serving on active duty for three years or less from placement on the active-duty list (ADL). Previously, these soldiers were added to the ADL for promotion.

[48] U.S. DEP'T OF DEFENSE, INST. 1215.06, UNIFORM RESERVE TRAINING AND RETIREMENT CATEGORIES, para. E5.1 (7 Feb. 2007, incorporating Change 2, 24 Dec. 2008) [hereinafter DoDI 1215.06].

[49] *Id.* para. E.5.1.1. These individuals and units may be involuntarily ordered to active duty during war or national emergency under the authority of 10 U.S.C. §§ 12301, 12302 (2012 & Supp. IV 2017) and 14 U.S.C. § 712 (2012 & Supp. IV 2017).

[50] U.S. DEP'T OF DEFENSE, INST. 1215.13, RESERVE COMPONENT MEMBER PARTICIPATION POLICY, Encl. 2, para. 1.a.(2) (11 May 2009).

IMAs and DIMAs are RC members in a Selected Reserve status and not attached to an organized Reserve unit. The IMA Program function is to provide qualified soldiers to fill pre-designated mobilization required positions. IMAs are assigned to Active Component organizations or Selective Service System positions that must be filled to support mobilization requirements, contingency operations, operations other than war, or other specialized or technical requirements. Drilling IMA positions are identified as critical elements for mobilization during a Presidential Reserve Call-up (PRC) requiring an incumbent to maintain an even higher level of proficiency than a regular IMA Soldier. Soldiers assigned to these positions are authorized to perform 48 paid IDT periods per year. All IMAs must perform a minimum of 12 days of AT each year.[51]

(3) Active Guard and Reserve (AGR) Program

The AGR Program consists of Soldiers performing active duty or full-time National Guard duty (FTNGD) for 180 days or more for the purpose of organizing, administering, recruiting, instructing, or training the Reserves.

b. Individual Ready Reserve (IRR)

The IRR is a pool of pre-trained individuals who have already served in Active Component units or in the Selected Reserve and have some part of their Military Service Obligation (MSO) remaining. Some members volunteer to remain in the IRR beyond their MSO or contractual obligation and participate in programs providing a variety of professional assignments and opportunities for earning retirement points and military benefits.[52] IRR members are subject to involuntary active duty and fulfillment of mobilization requirements.

c. The Inactive National Guard (ING)

The ING consists of National Guard enlisted personnel in an inactive status in the Ready Reserve, not in the Selected Reserve, and attached to a specific National Guard unit. These individuals must muster once a year with their unit, but they do not participate in training activities. They may not train for points or pay and are not eligible for promotion.[53]

2. Standby Reserve

The Standby Reserve consists of personnel who are maintaining their military affiliation without being in the Ready Reserve, but have been designated key civilian employees, or have a temporary hardship or disability. They are not required to perform training and are not part of units. The

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[51] DoDI 1215.06; *supra* note 48, para. E. 5.1.1.1.3. The Army National Guard and the Air National Guard do not have IMA programs.

[52] *Id.* para. E.5.1.1.2. The IRR also may include personnel participating in officer training programs, including Merchant Marine Academy cadets, enlisted members awaiting IADT (except for those in the National Guard) who are not authorized to perform IDT, and members of the Delayed Entry Program. *Id.*

[53] *Id.* para. E.5.1.1.3. The Air National Guard does not have an inactive status. Officers may not be transferred to the ING (*see* 32 USC §303).

Standby Reserve is a pool of trained individuals who may be mobilized as needed to fill manpower needs in specific skills.[54]

3. Retired Reserve

This category consists of all Reserve personnel transferred to the Retired Reserve. These individuals may voluntarily train with or without pay.[55] All members retired for having completed the requisite years of active duty service (Regular or Reserve), may be ordered to active duty when required by the Secretary of the Military Department concerned.[56]

D. Reserve Component Training and Support

The Service Secretaries and the Commandant of the Coast Guard are required to ensure trained and qualified RC units and individuals are available for AD throughout the entire spectrum of requirements, including war or national emergency, contingency operations, military operations other than war, operational support, humanitarian operations, and at such other times as the national security may require.[57] Each military department has its own regulations and instructions that implement these training and support duties.[58]

1. Training

All RC members receive training according to their assignment and required readiness levels. This training may be conducted in Active Duty, Inactive Duty for Training, or Full-Time National Guard status.

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[54] *Id.* para. E.5.1.2. The Standby Reserve consists of the active status list and the inactive status list categories. Members designated as key employees and personnel not having fulfilled their statutory military service obligation, or temporarily assigned for hardship reasons intending to return to the Ready Reserve, are on the active status list. Those members who are not required to remain in an active program, but who retain Reserve affiliation in a non-participating status and whose skill may be of future use to the Armed Force are on the inactive status list. These members cannot participate in prescribed training and are not eligible for pay or promotion and do not accrue credit for years of service. The Army National Guard and Air National Guard do not have a Standby Reserve.

[55] *Id.* para. E.5.1.3. The Retired Reserve consists of the following retired categories: (1) Reserve members who have completed the requisite qualifying years creditable for non-regular retired pay and are receiving retired pay (at, or after, age 60); (2) those who have completed the requisite qualifying years creditable for non-regular retired pay and are not yet 60 years of age, or are age 60 and have not applied for non-regular retirement pay; (3) those members retired for physical disability; (4) members who have completed 20 years of service creditable for regular retired pay, or are 30-percent or more disabled and otherwise qualified; (5) Reserve members who have completed the requisite years of active service and are receiving regular retired or retainer pay (regular enlisted personnel of the Navy and Marine Corps with 20 to 30 years of active Military Service who are transferred to the Fleet Naval Reserve or the Fleet Marine Corps Reserve on retirement, until they have completed 30 years of total active and retired or retainer service, are not included in this category); and (6) Reserve members drawing retired pay for other than age, service requirements, or physical disability.

[56] 10 U.S.C. § 688 (2012 & Supp. IV 2017).

[57] DoDI 1215.06, *supra* note 48, para. 5.2.2. Combatant commanders have oversight responsibility for the training and readiness of assigned guard and reserve forces.

[58] *Id.*

a. Active Duty

Active Duty for Training (ADT) consists of structured individual and unit training, including on-the-job training, or educational courses to RC members. It includes Initial Active Duty training (IADT),[59] Annual Training (AT), and Other Training Duty (OTD). Initial ADT includes basic military training and technical skill training required for all enlisted accessions. AT is the minimum period of active duty training that RC members must perform each year to satisfy the training requirements associated with their RC assignment. By DoD policy, members of the Selected Reserve must perform AT. For all members of Selected Reserve units, except for those in the National Guard, that training is not less than 14 days, and not less than 12 days for the Coast Guard Reserve. IMAs and DIMAs must perform 12 days of AT each year and National Guard units must perform full-time military training for at least 15 days each year. OTD is used to provide all other structured training, including on-the-job training and attendance at schools. ADT is funded by the RC, but may support active component operational requirements and missions.[60]

b. Inactive Duty for Training (IDT)

This training is used to provide structured individual and unit training, or educational courses to RC members. It includes regularly scheduled training periods, additional training periods,[61] and equivalent training. It is funded by the Reserve Component.[62]

c. Full-time National Guard Duty (FTNGD)

The National Guard performs their Federal training in a Title 32 status. Thus, while the various terms used above also apply to the National Guard, there are variations. Full time National Guard duty (FTNGD) is training or other duty (including support), other than inactive duty, performed by a member of the National Guard in a member's status as a member of the National Guard of a State, territory under 32 U.S.C§§ 316, 502, 503, 504, 505. It is considered "active service" pursuant to 10 U.S.C § 101(d)(3), but it is not considered "active duty" under Title 10. However, members on FTNGD generally receive the same pay and benefits as those on active duty in accordance with 10 USC §12602, subject to some exceptions.[63] (For other reserve components, some of the categories above are considered "active duty.")

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[59] *Id*., para. 6.6.4.1.4.

[60] DoDI 1215.06, *supra* note 48, para. 6.1.4.1.

[61] Additional IDT periods are for the use of drilling Reservists who are not military Technicians. They include additional training periods (ATPs) for units, components of units, and individuals for accomplishing additional required training; additional flying and flight training periods (AFTPs) for primary aircrew members for conducting aircrew training and combat crew qualification training; and Readiness management periods (RMPs) to support the following functions in preparing units for training: the ongoing day-to-day operation of the unit, accomplishing unit administration, training preparation, support activities, and maintenance functions. *Id*., para. 6.1.2.

[62] *Id*., para. 6.1.2.1. Paid IDT periods cannot be under 4 hours. No more than two IDT periods may be performed in any calendar day. In addition, IDT for points only (without pay) cannot be less than 2 hours with a maximum of two points authorized in any one calendar day. Further, one retirement point in any one calendar day can be granted for attendance at a professional or trade convention, with a minimum of four hours.

[63] Some benefits statutes specifically exclude FTNGD, except when it meets certain conditions. See also 37 USC 101 which defines active duty for purposes of that title as including FTNGD.

In 2006, as a result of the increasing use of the National Guard for domestic missions of national importance, such as the response to Hurricane Katrina, Congress amended 32 U.S.C. § 502(f) to expressly authorize the use of the National Guard for "Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense."[64]

2. Support

RC members may be placed on Active Duty Other than for Training (ADOT), which includes the categories of active duty for operational support (ADOS), Active Guard and Reserve (AGR) duty, and involuntary AD. Support may also be provided during FTNGD, discussed above.[65]

a. Active Duty for Operational Support (ADOS)

The purpose of ADOS is to temporarily provide the necessary skilled manpower assets to support existing or emerging requirements. Accordingly, total cumulative ADOS (and FTNGD) time per service-member is limited to 1,095 days within the previous 1,460 days before that service-member is counted against active duty end strength.[66] ADOS may be funded by the Active Component to support AC functions (ADOS-AC) or funded by the RC to support RC functions (ADOS-RC).[67]

b. Active Guard/Reserve (AGR)

This duty is funded by the RC and performed by an RC member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or FTNGD performed by a member of the NG under an order to active duty or FTNGD for a period of 180 days or more. Unless a statutory exception exists, the scope of duty for AGRs is generally limited to organizing, administering, recruiting, instructing, or training the reserve components.[68]

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[64] 32 U.S.C. § 502(f)(2) (2012 & Supp. IV 2017).

[65] DoDI 1215.06, *supra* note 48, para. 6.1.5.3.

[66] *Id*., para. 6.1.4.2.1.7. It is important to note the so called "1095 Rule" is not a restriction preventing members who are on ADOS orders from remaining on active duty for more than three years in a four year period. As explained in DoDI 1215.06, the 1095 Rule is only a strength accounting and reporting requirement – not a limit that precludes the performance of duty. Specifically, para 6.9.1 of DoDI 1215.06 states that, "Neither law nor DoD policy requires any RC member to leave voluntary active duty under section 12301(d) (Operational Support Duty)…after 1,095 days. However, consideration is to be given to documenting long-term tours as full-time requirement billets (AC, AGR, or Civilian)."

[67] For additional information on Army ADOS and FTNGD for Operational Support within the Army, as well as relevant DoD-references, see ASSISTANT SECRETARY OF THE ARMY MEMORANDUM TO DEPUTY OF CHIEF OF STAFF G-1, POLICY FOR MANAGEMENT OF RESERVE COMPONENT SOLDIERS ON ACTIVE DUTY FOR OPERATIONAL SUPPORT AND FULL-TIME NATIONAL GUARD DUTY FOR OPERATIONAL SUPPORT, (21 Feb. 2008) *available at*: https://www.armyg1.army.mil/MilitaryPersonnel/Hyperlinks/Adobe%20Files/ASAMRA%20Memo%20dtd%2020080221.pdf.

[68] 10 U.S.C. §§ 101(d)(6)(A) and 12310 (2012 & Supp. IV 2017) .

c. Involuntary Active Duty (IAD)

IAD is used in support of military operations when the President or the Congress determines that RC forces are required to augment the Active Component (AC). IAD is funded by the AC.[69]

3. Military Technicians (Dual Status) (MT)[70]

Military Technicians are Federal civilian employees under 5 U.S.C. § 3101 or 32 U.S.C. § 709(b) who are required to maintain military membership in the Selected Reserve. These individuals also perform administration and training for that Selected Reserve unit or maintenance and repair of supplies or equipment issued to that unit. Military and civilian positions must be compatible. Military Technician involvement with the National Guard is discussed further in section G(4)(b) of this chapter.

E. Mobilization/Activation of Reserve Component and Calling Up the Militia

The RC provides a full-spectrum operational capability in support of the national defense strategy.[71] Various authorities exist to order RC members to active/full-time duty to meet varied operational requirements. Such activations may be voluntary or involuntary. For major regional conflicts, national emergencies and other crises, access to RC units and individuals through an order to AD without their consent is assumed. When RC members are involuntarily Federalized, they will be kept on AD "no longer than operationally necessary," subject to limitations imposed by the authorizing statute (e.g. under 12302, no more than 24 continuous months).[72]

Although the terms "Federalization" and "mobilization" are sometimes used interchangeably to describe the process that "Federalizes" members of the RC, the terms have different meanings. Activation is an order to active duty, for units and individuals, (other than for training) in the Federal service pursuant to statutory authority granted to the President, Congress, or the service secretaries.[73] Reservists can be "Federalized" involuntarily or voluntarily with their consent (members of the National Guard also need the consent of their respective Governors). Mobilization is the process of bringing all national resources to a state of readiness for war or national emergency; it includes activating the RC.[74] Levels of mobilization include selective mobilization, partial mobilization, full mobilization, and total mobilization. Therefore it is more helpful to use the term "Federalize" when referring to placing a member of the RC on AD rather than using the more encompassing term "mobilize." The statutes below provide authority for activating reservists, calling the militia into Federal service, and ordering reservists to active duty voluntarily.[75]

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[69] DoDI 1215.06, *supra* note 48, para. E.3.1.1.2.3; *see also* 10 U.S.C. §§ 12301, 12302, 12304 (2012 & Supp. IV 2017), and 14 U.S.C. § 712 (2012 & Supp. IV 2017).

[70] 10 U.S.C. § 10216 (2012 & Supp. IV 2017).

[71] U.S. DEP'T OF DEFENSE, INST. 1235.12, ACTIVATION, MOBILIZATION, AND DEMOBILIZATION OF THE READY RESERVE, para. 4.1. (26 Nov. 2008, Incorporating Change 1, 21 Sep. 2011) [hereinafter DoDI 1235.12].

[72] *Id*.

[73] *See generally id.*; JOINT CHIEFS OF STAFF, JOINT PUB. 4-05, JOINT MOBILIZATION PLANNING (22 Mar. 2010).

[74] DoDI 1235.12, *supra* note 71.

[75] Occasionally older cases, regulations, and instructions will reference former versions of these statutes and it is helpful to know the previous citations: In Title 10 of the U.S. Code, § 672(a) is now codified at § 12301(a); § 672(b) is

1. Full Mobilization (10 U.S.C.. § 12301(a))

A full mobilization occurs through the duration of a war or emergency (plus six months). This section may only be invoked when there is a Congressional declaration of national emergency or war, or other authorization in law.

2. Partial Mobilization (10 U.S.C § 12302(a))

A presidential declaration of national emergency or "when otherwise authorized by law" allows the involuntary partial mobilization of up to 1,000,000 members of the Ready Reserve for up to two years. Applies to units, and any member not assigned to a unit organized to serve as a unit.

3. Presidential Reserve Call-up (PRC) (10 U.S.C§ 12304)

Involuntary activation of up to 200,000 Selected Reserves members for up to 365 days (these troops are excluded from active duty end strength calculations) by the President. Such service must be for other than training and may not exceed 365 days. This statute authorizes ordering members of the RC to active duty without their consent, and without declaration of war or national emergency, for operations other than domestic disasters with exceptions. The exceptions to the "other than domestic disasters" clause are those operations involving a use or threatened use of a weapon of mass destruction, a terrorist attack or threatened terrorist attack in the United States that results, or could result, in significant loss of life or property.

4. Invasions and Rebellions (10 U.S.C. § 12406)

If the United States or any U.S. State or territory is invaded, or when invasion is threatened by a foreign nation, there is a rebellion or danger of rebellion against the U.S. Government, or the President is unable to execute U.S. laws without active forces, the President can call the National Guard into Federal service (*i.e.* Federalize the National Guard). Any orders for these purposes are to be issued through the Governors of the States, or, in the case of the District of Columbia National Guard, the Commanding General.

5. Insurrection Act (10 U.S.C. § 251-255)

a. 10 U.S.C. § 251

If there is an insurrection in a State, the President, at the request of the State's legislature, or Governor if the legislature cannot be convened, may call National Guards of other States into Federal service as well as use the Federal military to suppress the insurrection.

b. 10 U.S.C. § 252

Whenever the President considers that unlawful obstructions, combinations, or assemblages or rebellion against authority of United States makes it impracticable to enforce the law of the United States in any State or territory by judicial proceedings, the President may call into Federal service

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now codified at § 12301(b); § 672(d) is now codified at § 12301(d); § 673 is now codified at § 12302; § 673(b) is now codified at § 12304; and § 3500 and § 8500 are now codified at § 12406.

the militia of any State and use the Federal military to enforce the laws or suppress the rebellion. (Such authority was exercised in Arkansas in 1957; Mississippi in 1962; and Alabama in 1963).

c. 10 U.S.C. § 253

The President can use the National Guard and/or the Federal military to suppress insurrection, domestic violence, unlawful combination or conspiracy if: (a) it so hinders the execution of law of that State and of the United States and it deprives citizens of constitutional rights (e.g. due process); or (b) it opposes or obstructs the execution of laws or impedes the course of justice. In the event of the deprivation of rights, the State is deemed to have denied its citizens equal protection of laws.

6. 15-Day Involuntary Federal Active Duty (10 U.S.C. § 12301(b))

The Service Secretaries may order "units and any member not assigned to a unit organized to serve as a unit" to a period of duty not to exceed 15 days (with the consent of the State's Governor, or, in the case of the District of Columbia National Guard, the Commanding General).

7. Voluntary Federal Active Duty (10 U.S.C. A. § 12301(d))

An individual can be ordered (by an authority designated by the Secretary concerned) to active duty with the consent of the individual (and, for members of the National Guard, with the consent of the State's Governor or, in the case of the District of Columbia, the Commanding General) for an unlimited period of time.

8. Medical Care (10 U.S.C. § 12301(h) and 12322)

Reservists may be ordered to AD for medical care, evaluation, or to complete a health care study.

9. Reservists Recalled for Domestic Events (10 USC §12304(a))

Section 515(a) of the 2012 National Defense Authorization Act included a provision that amended Title 10 and allowed the SECDEF to order Army Reservists, Navy Reservists, Marine Corps Reservists, or Air Force Reservists, without their consent, onto active duty for no more than 120 days to respond to a major disaster or emergency under the Stafford Act.[76]

10. Active Duty for Preplanned Missions in Support of the Combatant Commands (10 U.S.C. 12304(b))

The 2012 National Defense Authorization Act (NDAA) added a provision permitting the Service Secretaries to order members of the "Selected Reserve" (including National Guard), without their

[76] The full text states:

> "(a) Authority- When a Governor requests Federal assistance in responding to a major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), the Secretary of Defense may, without the consent of the member affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the Governor's request." 10 U.S.C. § 12304a (2012 & Supp. IV 2017).

consent, onto active duty for no more than 365 days to "augment the active forces for a preplanned mission in support of a combatant command."

F. United States Coast Guard[77]

Per 14 U.S.C. § 1, 14 U.S.C. § 2, and 10 U.S.C. § 101(a)(4), the United States Coast Guard is designated as both an armed force and a Federal law enforcement agency. The Coast Guard is a principal Federal agency responsible for maritime safety, security, and stewardship. As such, the Coast Guard protects vital economic and security interests of the United States, including the safety and security of the maritime public, natural and economic resources, the global maritime transportation system, and the integrity of U.S. maritime borders. The Coast Guard has eleven statutory missions divided into two categories, homeland security and non-homeland security, pursuant to section 888 of the Homeland Security Act of 2002, Pub. L. 107-296 (6 U.S.C. § 468).

The homeland security missions are: (1) port, waterways and coastal security; (2) drug interdiction; (3) migrant interdiction; (4) defense readiness; and (5) other law enforcement.

The non-homeland security missions include: (1) marine safety; (2) search and rescue; (3) aids to navigation; (4) living marine resources; (5) marine environmental protection; and (6) ice operations.

Due to the multi-mission nature of the Coast Guard, a member of the Coast Guard performing a non-homeland security function, such as a recreational boating safety inspection, could have to perform a homeland security function, such as drug interdiction, during the same mission.

Commonly referred to as "America's maritime first responder,"[78] the Coast Guard operates as part of the Department of Homeland Security.[79] Presently, approximately 41,000 personnel serve on active duty in the Coast Guard. [80] Under Section 3 of Title 14 of the United States Code, upon a declaration of war, if Congress so directs in the declaration or when directed by the President, the Coast Guard will operate as a service in the Navy. When operating as a service in the Navy, the Coast Guard is subject to the orders of the Secretary of the Navy who may order changes in Coast Guard operations to render them uniform with Navy operations.[81] The Coast Guard operated as a component of the Navy in World War I and World War II. Both the Coast Guard and Navy are authorized to exchange resources and information at all times. The Coast Guard receives equipment, armament, and training support from the Navy while providing the Navy vessels, personnel, and equipment for Naval vessel security and other Navy operations.

Occasionally, some are confused about the Coast Guard's authority to operate as an armed force. Some observers have assumed that the Coast Guard must switch from a Title 14 status to a Title 10 status when acting as an armed force of the United States, similar to the National Guard change from a State to a Federal status depending on the mission. The Coast Guard is at all times both an

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[77] Additional details about the history, unique missions, capabilities, and authorities of the Coast Guard are available in UNITED STATES COAST GUARD, COAST GUARD PUBLICATION 1 (1 May 2009).

[78] UNITED STATES COAST GUARD, https://www.uscg.mil/ (last visited Jul. 30, 2018).

[79] 6 U.S.C. § 468 (2012 & Supp. IV 2017).

[80] *Total Active Duty*, U.S. COAST GUARD, https://www.overview.uscg.mil/Workforce/ (last visited Jul. 19, 2018) [hereinafter CG Statistics].

[81] 14 U.S.C. § 3 (2012 & Supp. IV 2017).

"armed force" under Title 10 and a "law enforcement agency" under Title 14. Said another way, the Coast Guard does not switch "hats" between a serving as part of the armed forces and serving as a law enforcement agency. Instead, the Coast Guard performs both functions simultaneously.

As discussed earlier in this chapter, the Coast Guard has a reserve component. Presently, approximately 7,000 members of the Coast Guard comprise the total Coast Guard Ready Reserve.[82]

Finally, the Coast Guard Auxiliary is a civilian volunteer service, but one that is specifically authorized to "assist the Coast Guard, as authorized by the Commandant, in performing any Coast Guard function, power, duty, role, mission, or operation authorized by law.[83] The Coast Guard Auxiliary assists both the active duty and the reserve components of the Coast Guard in search and rescue assistance missions, environmental protection, marine safety, boater safety education programs, and patrolling/regulating regattas and marine events.[84]

Unique to the Coast Guard as an armed force, the Coast Guard is authorized by 14 U.S.C. § 141 to use its personnel and equipment to assist any Federal or State agency, to include DoD, when the Coast Guard assistance sought is of the type that the Coast Guard personnel or facilities are especially qualified to provide.[85] Thus, Coast Guard units can be attached to DoD without the entire Coast Guard being fully absorbed into the Navy under 14 U.S.C. § 3. In addition, 14 U.S.C. § 141 allows the Coast Guard to accept the assistance of any Federal agency in the performance of any Coast Guard function. This unique assistance authority makes the Coast Guard a powerful partner in domestic contingency operations.

Because the Coast Guard is at all times a Federal law enforcement agency and an armed force of the United States, the Coast Guard has legal authority to conduct both Maritime Homeland Security Law Enforcement (MHS) and Maritime Homeland Defense (MHD), depending on the circumstances.[86] Coast Guard units conducting MHS operations may find themselves in an MHD situation in a matter of minutes. The ability to handle evolving scenarios as a Federal law enforcement agency or as an armed force offers tremendous flexibility to the Coast Guard.

MHS is a Federal law enforcement mission carried out by domestic law enforcement authorities, including the Coast Guard.[87] The mission is to protect the U.S. Maritime Domain and the U.S.

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[82] CG Statistics, *supra* note 80.

[83] 14 U.S.C. § 822 (2012 & Supp. IV 2017).

[84] It is important to note Coast Guard Auxiliary members do not have law enforcement authority. Thus, they may not directly issue letters of warning, notices of violation, or other civil penalties, nor may they participate in law enforcement boardings. Operators supervising Auxiliary must ensure any assistance given is in accordance with the U.S. COAST GUARD, COMDTINST 16798.3 (series), AUXILIARY OPERATIONS POLICY MANUAL. Despite this limitation, the Auxiliary can and do provide tremendous assistance to the Coast Guard active component. During a domestic emergency or disaster, Auxiliary members may be particularly helpful in staffing an incident or unified command post, as many of them are extensively trained in National Incident Management System (NIMS) procedures.

[85] 14 U.S.C. § 141 (2012 & Supp. IV 2017). The Coast Guard may provide such assistance with or without the requirement of reimbursement. *See* 14 U.S.C. § 141(a) (2012 & Supp. IV 2017).

[86] In the event of a threat or incident requiring the exercise of national self-defense, DoD, acting through U.S. Northern Command (USNORTHCOM) and supported by other agencies, would take the lead in carrying out MHD operations, which involves the protection of U.S. territory, domestic population, and critical infrastructure.

[87] The Coast Guard is required to perform Maritime Homeland Security law enforcement duties in support of the Ports and Waterways Safety Act, the Espionage Act of 1917, the Magnuson Act of 1950, 33 C.F.R. § 6, Homeland Security

Marine Transportation System (MTS) and deny their use and exploitation by terrorists as a means for attacks on U.S. territory, population, and critical infrastructure. As the lead Federal agency for MHS, the Coast Guard engages in maritime surveillance, reconnaissance, tracking, and interdiction of threats to the security of the United States, and responds to the consequences of such threats. Armed and uniformed Coast Guard law enforcement operations ashore are limited to activities at waterfront facilities, public and commercial structures adjacent to the marine environment, and, to the extent necessary to protect life and property, in transit ashore between such facilities or structures.[88]

G. National Guard of the Several States (ANG, ARNG)

1. Overview

Militia are authorized by the code and/or constitution of each State or territory within the United States. The definition of "militia" in the United States Code includes both the organized and the unorganized militia; the National Guard, along with the Naval Militia, is considered the organized militia.[89] In the Constitution, the President of the United States (POTUS) is the Commander in Chief of the militia only when it is "called into actual service of the United States."[90] This section discusses the National Guard when it is under the control of the Governor or in "State status," *i.e.*, Title 32 status or State Active Duty (SAD). In a State status, members of the National Guard are subject to the military code of the respective State to which they belong.[91]

Each of the States and territories has an Adjutant General (TAG) or equivalent (*e.g.*, Commanding General for the District of Columbia), a State officer whose rank may or may not be Federally recognized.[92] The Governor of the State or Territory or the TAG/ (depending on State law) is the Commander in Chief of the State military unless it is Federalized under Title 10 of the United States Code. In this instance, POTUS serves as the Commander in Chief of the State National Guard.[93] Throughout the fifty States, District of Columbia, U.S. Virgin Islands, Guam, and Puerto Rico (the "54"), there are roughly 107,000 members of the Air National Guard employed across 90 Air Wings.[94] In like fashion, there are roughly 343,000 members of the Army National Guard employed across 8 division headquarters, 27 brigade combat teams, 55 functional support brigades, 42 multifunctional brigades, 8 combat aviation brigades, and 2 Special Forces Groups.[95]

Presidential Directive 5 (HSPD-5), the National Security Strategy of the United States of America, the National Strategy for Homeland Security, and The Coast Guard Maritime Strategy for Homeland Security.

[88] *See* 33 C.F.R. § 6 (2017).

[89] 10 U.S.C. § 311 (2012 & Supp. IV 2017).

[90] U.S. CONST. art. II, § 2, cl. 1.

[91] Pursuant to 32 U.S.C. § 327 (2012 & Supp. IV 2017), the President or active duty commanders may convene State courts-martial. In 2003, Congress ordered the preparation of a model State code of military justice.

[92] The U.S. President is the Commander in Chief of the National Guard of the District of Columbia. *See* Exec. Order No. 11485, 34 Fed, Reg. 15411, (1 Oct. 1969) and Title 49, District of Columbia Code.

[93] 32 U.S.C. §§ 314, 325 (2012 & Supp. IV 2017).

[94] *2019 National Guard Bureau Posture Statement* at 14, http://www.nationalguard.mil/portals/31/Documents/PostureStatements/2019-National-Guard-Bureau-Posture-Statement.pdf. [hereinafter NGB Posture Statement 2019]

[95] *Id.* at 14.

Currently, each State has a joint force headquarters (State JFHQs) to provide command and control to its ANG and ARNG, a concept approved by Chief, NGB in October 2003.[96] The Joint HQs replaced the State Area Commands (STARCs) and ANG Headquarters in each State and any other joint headquarters existing in the States.

2. Title 32 Status

When performing duty pursuant to Title 32, U.S. Code, a National Guard member is under the command and control of the State but paid with Federal funds. The majority of NG members perform weekend drills of inactive duty training (IDT) once per month and annual training (AT) two weeks per year. These traditional members of the National Guard are commonly referred to as "M-Day (Mobilization Day)." Each year, M-Day Soldiers are required to perform 48 IDT drills and 15 days of AT.[97] The operations of NG units in Title 32 status are controlled by the individual States, and supplemented by funding from Federal sources pursuant to Federal regulations.[98] Federal recognition of NG units and associated funding is conditioned upon the unit continuing to meet applicable Federal standards.[99] ARNG and ANG Soldiers performing duty in Title 32 status have Federal Tort Claims Act (FTCA) coverage as long as they are acting within the scope of their Federal employment.

There are many instances of the National Guard performing operations (as opposed to training) in a Title 32 status (*e.g.*, post 9-11 airport security duty, Hurricane Katrina, Southwest Border operations, counter-drug operations, and WMD-CST teams). The use of Title 32 duty for operational missions must be based on statutory authority (for example, counter drug authority at 32 U.S.C. § 112) or upon the request of the President or SecDef (see 32 U.S.C. § 502(f)(2)(A)). Ultimately, the performance of many Homeland Security (HLS) missions in a Title 32 status, instead of a Title 10 status, may be preferable because the Posse Comitatus Act (PCA) does not apply, National Guard troops can respond more rapidly because they are in the local area, National Guard troops typically have more situational awareness in local, domestic areas than their active duty counterparts. Furthermore, HLS missions can enhance National Guard training through "training by doing." The benefits of allowing operations under Title 32 instead of Title 10 have continually been raised by studies. Moreover, various legislative proposals have been advanced to modify Title 32 to improve this capability.[100]

Ordinarily, NG personnel in a Title 32 status should not provide civil support to a State, such as disaster assistance, unless such missions are otherwise authorized by law and receive funding. Accordingly, National Guard members are often in a State Active Duty (SAD) status (funded by the State) when providing civil support. If TAGs use NG members in a Title 32 status to perform civil support without appropriate authority, the State may be required to reimburse the Federal Government for the amount of Federal funds expended during the operation.

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[96] U.S. DEP'T OF DEFENSE, DIR. 5105.83, NATIONAL GUARD JOINT FORCE HEADQUARTERS – STATE (NG JFHQS-STATE), Jan 5, 2011, Incorporating Change 1, Sep. 30, 2014.

[97] 32 U.S.C. § 502(a) (2012 & Supp. IV 2017).

[98] *See* Illinois National Guard v. Federal Labor Relations Authority, 854 F.2d 1396, 1398 (D.C. Cir. 1988).

[99] 32 U.S.C. §§ 107–109 (2012 & Supp. IV 2017).

[100] For example, H.R. 2073/S. 215, called "Guaranteeing a United and Resolute Defense Act of 2003," set forth a mechanism that allows centralized Federal funding and decentralized execution of National Guard homeland security missions.

3. State Active Duty

Of the Armed Forces of the United States, only the National Guard has a status entitled State Active Duty (SAD); such duty is performed pursuant to State constitutions and statutes.[101] SAD status has no relationship to USAR/USAFR or Active Duty (AD). In a SAD status, NG personnel are controlled by their individual State, subject to the command and control of the respective Governor and Adjutant General. National Guard units perform duties authorized by State law, such as responding to emergencies or natural disasters (floods, hurricanes, fires), and are paid with State funds. Because National Guard units are subject to State control unless Federalized under Title 10 of the United States Code, they are the primary military force that will respond to local disasters and emergencies. For these types of operations, the Governor may declare an emergency and call any State National Guard unit into SAD status. Federal funds are not obligated for any personnel or units performing SAD. However, if the President declares a major disaster or an emergency after a Governor's request for assistance under the Stafford Act, then the State military department may be reimbursed through FEMA for the SAD pay and allowances it has expended.[102]

4. ANG/ARNG Personnel Categories

On any given day in a particular State, members of the National Guard serve in a variety of duty types such as Active Guard/Reserve (AGR), Active Duty Operational Support (ADOS), Fulltime National Guard Duty (FTNGD), Inactive Duty Training (IDT), and Annual Training (AT).

a. T-32 AGR

Every State National Guard has members of the T-32 AGR program serving under 32 U.S.C. § 502(f). 10 U.S.C. § 101(d)(6)(a) defines "active Guard and Reserve duty" as "active duty" or "full-time National Guard duty" for a period of 180 consecutive days or more for the purpose of "organizing, administering, recruiting, instructing, or training the reserve components."[103] Members of the T-32 AGR program receive essentially the same benefits and pay as their active duty counterparts of the same rank. Although they are required to perform drills with their units, they do not receive additional pay to do so. These service-members may also be "Federalized" and placed in a Title 10 status under appropriate sections of the Code.[104] There is a material difference between the AGR program under T-32 and the AGR program under T-10. Members of the National Guard participating in the T-10 AGR program (ARNGUS, ANGUS) are performing in the service of the United States whereas those in the T-32 AGR program (ARNG, ANG) are performing in the service of their State. Service in the T-10 AGR program is discussed further in section B(6) of this chapter.

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[101] For example, Arizona Constitution, art. 5, sec. 3; A.R.S. § 26-101 (Governor as commander-in-chief of State military forces when not in Federal service), A.R.S. § 26-121 (composition of militia); A.R.S. § 26-172 (mobilization of militia for emergencies and when necessary to protect life and property).

[102] 42 U.S.C. § 5121 (2012 & Supp. IV 2017).

[103] *See also* U.S. DEP'T OF ARMY, REG. 135-18, THE ACTIVE GUARD RESERVE (AGR) PROGRAM (10 Dec. 2003); NATIONAL GUARD BUREAU, REG. 600-5, THE ACTIVE GUARD/RESERVE PROGRAM, TITLE 32 FULL-TIME NATIONAL GUARD DUTY (FTNGD) (30 Feb. 1990); and AIR FORCE NATIONAL GUARD, INSTR. 36-101, THE ACTIVE GUARD/RESERVE PROGRAM (3 May 2002).

[104] For a good discussion of FTNGD status, see United States ex rel. Karr v. Castle, 746 F. Supp. 1231, 1237 (Del. 1990).

b. NG Federal Technicians (32 U.S.C. § 709)

Each State National Guard may employ persons as Technicians.[105] Technicians are Federal civilian employees under the exclusive control of a State official, the Adjutant General who hires, fires, and supervises them. In terms of their civilian employment pursuant to 32 U.S.C. § 709, they are military Technicians ("excepted service" civilian employees) as defined in 10 U.S.C. § 10216 during the normal workweek.[106] They must also maintain membership in a State NG and maintain Federal recognition in the military grade associated with their Technician position.[107] Loss of NG membership terminates the full-time Technician position.[108]

In some States, NG Technicians are members of collective bargaining agreements. Their civilian job positions are tied to their military rank and they wear military uniforms to work. When they perform drills and other training, they are in a Title 32 status just like traditional members of the National Guard. These members are also subject to "Federalization" under Title 10 and can also be called to serve in a SAD status.

In their civilian "excepted service" capacity, NG Technicians are responsible for organizing, administering, instructing, or training the NG and for the maintenance and repair of supplies issued to the NG or the Federal military. They are covered under the Federal Tort Claims Act. In their civilian capacity, their participation in civil support operations is limited because any participation must fall within the scope of their position as a NG Technician. To perform out of scope activities, the NG Technician may be placed in a leave status and placed on SAD orders.

NG Technicians also have the responsibility to train and perform general military duties with their unit and to be available to enter active Federal service when their units are Federalized. In many cases, State headquarters principal staff officers also serve as Technicians. Because their Technician and NG roles are very similar, these staff officers play extremely important leadership roles in civil support operations in their non-Technician status.[109]

c. Full Time National Guard Duty - Operational Support (FTNGD-OS)[110]

If funding is available, NG units can place members of the National Guard (whether M-Day or Federal Technicians) on FTNGD-OS orders (for as little as a day to as much as a year) to perform particular functions necessary to support the NG. These orders should not be confused with the requirements of members of the National Guard to perform "training." Most members of the National Guard that participate in the counter-drug program are on Full Time National Guard Duty – Counter Drug (FTNGD-CD) orders under 32 U.S.C. § 502(f). FTNGD-CD is similar to FTNGD-OS but given a separate moniker because it is aligned against a specific statutory program (*i.e.* 32

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[105] 32 U.S.C § 709 (2012 & Supp. IV 2017).

[106] *See* Lopez v. Louisiana National Guard, 733 F. Supp. 1059, 1065 (E.D. La. 1990).

[107] 10 U.S.C. § 101(c)(3), (5) (2012 & Supp. IV 2017).

[108] NATIONAL GUARD BUREAU, REG. 635-100, TERMINATION OF APPOINTMENT AND WITHDRAWAL OF FEDERAL RECOGNITION, ch. 6 (8 Sep. 1978).

[109] 32 U.S.C. § 709 (2012 & Supp. IV 2017).

[110] Similar to Full Time National Guard Duty previously described in Section D.1.c., above, but here specifically for "operational support."

U.S.C. § 112). These members are also subject to "Federalization" under Title 10 and can also be called to serve in SAD status.

d. State Civilian Employees

In addition to Federal Technicians, the State NG units employ civilians pursuant to Master Cooperative Agreements (MCAs). These personnel are authorized to use vehicles, property, and equipment provided to the ARNG by the Federal government to accomplish their duties under the master cooperative agreement. Many guard units employ State employees in security and in civil engineering. These employees may or may not be members of the National Guard of that State. In other words, membership in the National Guard is not a condition of their employment as it is for Federal Technicians.

e. "Traditional" National Guard Members

The majority of the members of the National Guard within a State are "traditional" members. In other words, they hold civilian jobs in the community and are only in a military status when performing drill, training, or other military duty. These members may also be called to serve in two other statuses: 1) "Federalized" status under Title 10, and 2) SAD status under State law. Each member of the National Guard can be placed into different personnel categories, one at a time. These categories are important when determining matters such as command authority, benefits, discipline, and immunities.

5. Personnel with Unique HLS/HLD Missions

a. Weapons of Mass Destruction (WMD)/Civil Support Teams (CST)

Pursuant to 10 U.S.C. § 12310(c), WMD-CSTs support emergency preparedness programs to prepare for or to respond to any emergency involving the use of a weapon of mass destruction. These DoD-certified teams are State controlled because they perform duty pursuant to 32 U.S.C. § 502(f), although their missions are Congressionally mandated. WMD-CSTs are trained to support (they are not first responders) civil authorities at a Chemical, Biological, Radiological, or Nuclear (CBRN) incident site by identifying the agents/substances, advising on responses, and otherwise assisting with requests for State support. Currently there are 57 full-time teams: at least one in every U.S. State, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands. By Federal statute, the WMD/CST teams may not operate outside of the continental United States (OCONUS). WMD-CSTs are discussed in greater depth in Chapter 6 of this Handbook.

b. National Guard Enhanced Response Force Package (NG-CERFP)

The initial establishment of CERFPs placed at least one in each FEMA Region. There are currently 17 validated CERFPs.[111] NG-CERFPs typically use M-Day Soldiers to provide Governors or a combatant commander with the capabilities to locate and extract victims from a contaminated area, provide patient and casualty decontamination, and perform medical triage and treatment. These

[111] *Homeland Response Force*, National Guard, http://www.nationalguard.mil/Portals/31/Resources/Fact%20Sheets/Homeland%20Response%20Force%20Fact%20Sheet%20(Dec.%202017).pdf (last visited Jul. 19, 2018).

response forces may provide support to civilian first responders within the first 6 to 72 hours after a CBRN event. NG-CERFPs may operate in SAD, Title 32, and Title 10 statuses. It is important for the judge advocate to know the deployed status of these forces if required to provide them legal advice. CERFPs are also briefly discussed in Chapter 6 of this Handbook.

6. Miscellaneous Areas of Caution

a. Command and Control – Dual Status Commanders

Pursuant to the Constitution, the militia is under the exclusive command and control of the Governor unless and until "called into Federal service" or otherwise Federalized as a Reserve Component. Thus, Federal status military officers cannot normally exercise command and control over State status National Guard members nor can State status National Guard members exercise command and control over Federal troops.[112] Under strictly prescribed circumstances, two statutes authorize one officer to exercise command and control over Federal and State status service-members even though such authority is exercised in a mutually exclusive manner.[113] The dual status command option provides unity of effort and facilitates the maintenance of a common operating picture for both the Federal and State military chains of command.

The first statute, 10 U.S.C. § 315, allows regular a commissioned officer in the Army and Air Force, with the permission of the President and the consent of the State's Governor, to accept a National Guard commission and be detailed to duty with the State's National Guard.[114] Although it has also been argued that 32 U.S.C. § 104(d) allows the President to detail commissioned officers of the National Guard, the Regular Army, or Regular Air Force to command Title 32 troops, this detailing would not give the officer the ability to issue direct orders to those troops unless the commanding officer was also commissioned in that State's National Guard.[115] The second statute, 32 U.S.C. § 325, as amended by the FY04 National Defense Authorization Act,[116] allows a commissioned

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[112] *See also* Perpich, 496 U.S. 334, 348 (1990).

[113] Though not true military "command and control," *coordinating authority* has been used by the USAF to allow a Federal status officer to control Federal and State forces. The concept works because one commander tells his forces to obey the orders of the other commander or risk discipline. The concept has been used while fighting wildfires and it has recently been accepted as Air Force doctrine as a method of promoting "unity of effort between Active, Federalized Air National Guard, Reserve, civilian, contract and Auxiliary Air Force personnel operating under Title 10 U.S. Code, and non-Federalized Air National Guard forces operating under Title 32 U.S. Code or [S]tate [A]ctive [D]uty." It must be noted that others contend that coordinating authority cannot be used during operations but only for planning, referencing the definition of coordinating authority in JOINT CHIEFS OF STAFF, JP 1- 02, DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (8 Nov. 2010). Many contend that a State status officer cannot use coordinating authority to supervise Federal troops because of Federal supremacy.

[114] A legal opinion of the OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE, OpJAGAF 1998/20, (19 Feb. 1998), notes that State law will determine whether a Title 10 officer who accepts such a commission may be placed in command of a non-Federalized unit. The legal opinion also notes that such a determination is not necessary for Federalized National Guard members serving in their own State. It also states that active duty officers, or guard officers in a Title 10 status, placed in command of non-Federalized Guard units will be subject to "two simultaneous chains of command," a "situation that is neither legally precluded nor unusual."

[115] 32 U.S.C. § 104(d) does not allow such an action if it would "displace" a "commanding officer of a unit organized wholly with a [S]tate or territory." OpJAGAF 1998/20, *supra* note 114, opines that there would not be a displacement if the Governor, or other State authority, of the affected State concurred with the detailing of the Regular Air Force officer.

[116] Title 32 U.S.C. § 325 currently reads as follows (amendments are underlined):

officer in a State's National Guard to also accept a commission in the Federal military, and serve in dual command, so long as the President grants the authority and the State's Governor consents (in the case of the District of Columbia National Guard, Commanding General). On 14 April 2011, President Obama delegated the Presidential functions and authority under both Title 32 U.S.C. §§ 325 and 315 to the Secretary of Defense.

A request to establish a Dual Status Commander under 32 U.S.C. § 325 could come from either DoD or the TAG of a particular State. Required implementation documents would be the Presidential authorization, Gubernatorial consent, and a Memorandum of Understanding (MOU) between the two mutually exclusive Federal and State military commands outlining the responsibilities and authority of the Dual Status Commander.[117] While the Dual Status Commander may receive orders from two chains of command, those chains of command must recognize and respect that the Dual Status Commander exercises all authority in a completely mutually exclusive manner, *i.e.*, either in a Federal or State status but never in both statuses at the same time. In a State status, this Dual Status Commander takes orders from the Governor through the Adjutant General of the State and may issue orders to National Guard forces serving in a State status. As a Federal officer activated under Title 10, the Dual Status Commander takes orders from the President or those Federal officers the President and Secretary of Defense have ordered to act on their behalf. When acting pursuant to their Federal commission, Dual Status Commanders may issue orders only to Federal forces. The same holds true for the National Guard when the Dual Status Commander is acting pursuant to their State National Guard commission under Title 32.

Because a Dual Status Commander holds a commission under Title 32 as well as Title 10, the officer is subject to the Posse Comitatus Act, the Federal Tort Claims Act, the Uniform Code of Military Justice and Federal pay and entitlements. When commanding Soldiers in a non-Federal status, the Dual Status Commander receives legal advice from a State legal advisor. Conversely, when commanding Soldiers in a Federal status, the Dual Status Commander receives legal advice from a Federal legal advisor.

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32 U.S.C. § 325. Relief from National Guard duty when ordered to Active Duty
(a) Relief required.
(1) Except as provided in paragraph (2), each member of the Army National Guard of the United States or the Air National Guard of the United States who is ordered to active duty is relieved from duty in the National Guard of his State or Territory, or of Puerto Rico, or the District of Columbia, as the case may be, from the effective date of his order to active duty until he is relieved from that duty.
(2) An officer of the Army National Guard of the United States or the Air National Guard of the United States is not relieved from duty in the National Guard of his State or Territory, or of Puerto_Rico or the District of Columbia, under paragraph (1) while serving on active duty in command of a National Guard unit if—
(A) the President authorizes such service in both duty statuses; and
(B) the Governor of his State or Territory or Puerto Rico, or the Commanding General of the District of Columbia National Guard, as the case may be, consents to such service in both duty statuses.
(b) Return to State status. So far as practicable, members, organizations, and units of the Army National Guard of the United States or the Air National Guard of the United States ordered to active duty shall be returned to their National Guard status upon relief from that duty.

[117] Pre -coordinated Memorandums of Understanding between all States and the Department of Defense covering the appointment and use of qualified and vetted National Guard Dual Status Commanders have been executed and are available through the National Guard Bureau.

This "dual status" commander concept under 32 U.S.C. § 325 has been used several times since October 2003, first with the G8 Summit at Sea Island, GA, in June 2004; followed by the Republican and Democratic National Conventions in the summer of 2004; Operation Winter Freeze in Vermont during the winter of 2004-05; for the brigade and battalion commanders of the Ground Base Missile Defense system in Colorado in Alaska, respectively, in 2006; the Republican and Democratic National Conventions in the summer of 2008; the G20 Summit in Pittsburgh, PA, in 2009. Dual Status Commanders were also used for Hurricane Irene in 2011, the 2012 NATO Summit in Chicago, IL, the Colorado wildfires in 2012, the 2012 Republican and Democratic National Conventions, Tropical Storm Isaac in 2012, Hurricane Sandy in 2012, and Hurricanes Harvey, Irma, and Maria in 2017.

Section 515(c) (1) and (2) of the National Defense Authorization Act, for FY12 provided guidance on when a dual status arrangement should be used. It states when the Armed Forces and the National Guard are employed simultaneously in support of civil authorities in the United States, appointment of a Dual Status Commander should be the "usual and customary" command and control arrangement, including for missions involving a major disaster or emergency as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5122).[118] Additionally, when a major disaster or emergency occurs in any area subject to the laws of any State, Territory, or the District of Columbia, the Governor of the State affected should be the principle civil authority supported by the lead Federal agency and its supporting Federal entities. The Adjutant General of the State military, or the appropriate person with delegated authority, should be the principal military authority supported by the Dual Status Commander when acting in his or her State capacity.

b. State law

State law provides the legal basis for the National Guard of each State and territorial entity. Moreover, State law provides the authority to perform missions, the basis for pay and benefits, rules for the use of force, liability and immunity rules, and military justice, just to name a few areas. Duty performed in a Title 32 status must also comply with Federal laws and policies. Personnel in a Title 32 status also receive protections such as the Federal Tort Claims Act (FTCA) and other Federal benefits.[119] Additionally, Congress consented to the Emergency Management Assistance Compact (EMAC) in 1996.[120] Each State, territory, and the District of Columbia has ratified EMAC.[121]

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[118] It is important to note that despite a Dual Status Commander being the "usual" arrangement in such situations, this language "does not limit, in any way, the authorities of the President, the Secretary of Defense, or the Governor of any State to direct, control, and prescribe command and control arrangements for forces under their command." National Defense Authorization Act of 2012, Pub. L. No. 112-81, § 515(c), 125 Stat. 1395 (2011), 32 U.S.C. § 317, note.

[119] 28 U.S.C. § 2671 (2012 & Supp. IV 2017). Members of the National Guard in a Title 32 status are also provided limited administrative remedies under the National Guard Claims Act, 32 U.S.C. § 715 (2012 & Supp. IV 2017).

[120] The Emergency Management Assistance Compact (EMAC) was ratified by Congress in October of 1996, *see* Pub. L. No. 104-321, Stat. 3877 (1996) [hereinafter EMAC]; EMERGENCY MGMT. ASSISTANCE COMPACT http://www.emacweb.org/ (last visited Jul. 31, 2018).

[121] A Congressionally sanctioned interstate compact is a Federal law subject to Federal construction. New York v. Hill, 528 U.S. 110, 111 (2000). Chapter 11, *infra*, contains a discussion on the impacts of the EMAC on rules for the Use of Force for the National Guard.

Matters become more complicated when National Guard personnel cross State borders in a State status. It is then important to remember to examine the law of both the "originating State" and "receiving State." For example, some State codes of military justice apply even when members of a State's National Guard are performing duty in another State.[122] Moreover, State law may dictate if and when non-Federalized National Guard units may enter or leave a State for duty. For example, some States do not allow armed National Guard units to enter their State without permission from the Governor or legislature.[123] Some States have specific authority that allows their militias to leave the State to perform duty.[124]

Another very important issue to consider is that of professional licensing. Military health professionals in a Title 10 status (physicians, dentists, clinical psychologists, nurses or others providing direct patient care), properly licensed pursuant to 10 U.SC. § 1094, can practice in any DoD facility, any civilian facility affiliated with DoD, or "any other location authorized by the Secretary of Defense" to include practice in a State, D.C., or commonwealth, territory, or possession of the United States regardless of where actually licensed.[125] Arguably, this also applies to members of the National Guard who are in a Title 32 status. However, the service-members in a Title 32 status must also be acting within the scope of their employment to receive FTCA protections. Thus, an analysis of their authority to accomplish assigned tasks or duty is necessary. For example, Federal law and directives allow Title 10 personnel to provide medical treatment to civilians (not otherwise entitled to military medical care) during emergency situations.[126] The Stafford Act does not provide that same authority to members of the National Guard in a State Active Duty status. While National Guard personnel do receive FTCA protections while operating in their Title 32 status, the activities performed, including medical treatment. Further, under Article VI of the EMAC, out of state practitioners are considered "agents of the requesting State for tort liability and immunity purposes; and no part State or its officers or employees rendering aid in another State pursuant to this compact shall be liable on account of any act or omission in good faith."[127] Willful misconduct, gross negligence, or recklessness are outside the scope of the coverage offered under EMAC. EMAC is further discussed in Chapter 11 of this Handbook. The Good Samaritan Laws of each State, listed in Table 3-1 below, may also provide insight on the additional protections that an out-of-State healthcare professional may have in another State.

State	**Good Samaritan Legislation**
Alabama	Ala. Code §§ 6-5-332 to 332.4
Alaska	Alaska Stat. §§ 09.65.090-191
Arizona	Ariz. Rev. Stat. § 32-1471

[122] *See e.g.*, 44 OKL. ST. § 229.

[123] *See e.g.*, KY CONST. § 225; MON. CONST., art. II, § 33; IDAHO CODE § 46-110; KAN. STAT.ANN. § 48-203.

[124] *See e.g.*, CONN. GEN. STAT. § 27-16; MISS. CODE ANN. § 33-7-7; NY CLS MIL § 22.

[125] DoDI 6025.13 MEDICAL QUALITY ASSURANCE (MQA) AND CLINICAL QUALITY MANAGEMENT IN THE MILITARY HEALTH SYSTEM (MHS) (17 Feb. 2011).

[126] *E.g.*, 42 U.S.C. § 5121 (2012 & Supp. IV 2017) *et seq.*

[127] EMAC, *supra* note 120.

Arkansas	Ark. Code § 17-95-101
California	Cal. Health and Safety Code § 1799.102; Cal. Gov't Code § 50086
Colorado	Colo. Rev. Stat. § 13-21-108
Connecticut	D.C. Code §§ 7-401 to 402
Delaware	Del. Code tit. 16, §§ 6801-6802
District of Columbia	D.C. Code §§ 7-401 to 402
Florida	Fla. Stat. § 768.13
Georgia	Ga. Code §§ 51-1-29 to 29.2
Guam	7 Guam Code §§ 16101-16107
Hawaii	Haw. Rev. Stat. § 663-1.5
Idaho	Idaho Code § 5-330
Illinois	745 Ill. Comp. Stat. 49
Indiana	Ind. Code §§ 34-30-12, 13.5
Iowa	Iowa Code § 613.17
Kansas	Kan. Stat. §§ 65-2891, 2891b
Kentucky	Ky. Rev. Stat. §§ 411.148, 311.668
Louisiana	La. Stat. § 9:2793-2793.9
Maine	Me. Rev. Stat. tit. 14, §164
Maryland	Md. Code, Cts. & Jud. Proc § 5-603
Massachusetts	Mass. Gen. Laws ch. 112, § 12v
Michigan	Mich. Comp. Laws §§ 41.711a, 691.1501-1507
Minnesota	Minn. Stat. §§ 604A.01-.05
Mississippi	Miss. Code § 73-25-37

Missouri	Mo. Rev. Stat. § 537.037
Montana	Mont. Code § 27-1-714
Nebraska	Neb. Rev. Stat. § 25-21, 186
Nevada	Nev. Rev. Stat. § 41.500
New Hampshire	N.H. Rev. Stat. §§ 508:12, 508.12c
New Jersey	N.J. Stat § 2A:62A-1
New Mexico	N.M. Stat. § 24-10-3
New York	N.Y. Pub. Health Law § 3000-a, 3013
North Carolina	N.C. Gen. Stat. § 90-21.14
North Dakota	N.D. Cent. Code § 90-21.14
Ohio	Ohio Rev. Code § 2305.23
Oklahoma	Okla. Stat. tit. 76, § 5, 5.1, 5.9
Oregon	Or. Rev. Stat. § 30.800
Pennsylvania	42 Pa. Cons. Stat §§ 8331, 8332
Puerto Rico	2009 P.R. Laws S.B. 1091
Rhode Island	9 R.I. Gen. Laws § 9-1-27.1
South Carolina	S.C. Code §15-1-310
South Dakota	S.D. Codified Laws §§ 20-9-4 to 4.4, 20-9-3, 36-4A-26.3
Tennessee	Tenn. Code § 63-6-218
Texas	Tex. Civ. Prac. & Rem. Code §§ 74.151-154
Utah	Utah Code §§ 26-8a-601, 58-13-12 , 78b-4-501
Vermont	Vt. Stat. tit. 12, § 519

Virgin Islands	V.I. Code tit. 27, § 42
Virginia	Va. Code §§ 8.01-225 to 225.02, 8.01-225.3
Washington	Wash. Rev. Code §§ 4.24.300-310
West Virginia	W. Va. Code § 55-7-15
Wisconsin	Wis. Stat. §§ 448.03, 895.48
Wyoming	Wyo. Stat. § 1-1-120

Table 3-1. State Good Samaritan Legislation

c. The District of Columbia National Guard

In 1802, the Congress of the United States enacted legislation officially establishing the District of Columbia (D.C.) Militia, which today is known as the D.C. National Guard (DCNG).[128] The modern DCNG is comprised of a Joint Force Headquarters Army National Guard (DCARNG) and Air (DCANG) components. The overall mission of the DCNG is to "provide mission-ready personnel and units for active duty in the armed services in the time of war or national emergency."[129] In addition to the general civil support activities performed by the National Guards of other States and territories, the DCNG also "retains the mission as protector of the District of Columbia,"[130] which is not a State and has no Governor.

In accordance with D.C. Code § 49-409 passed by Congress, the President of the United States is at all times the Commander-in-Chief of the DCNG.[131] Executive Order (E.O.) 11485 delegated Presidential authority to command, supervise, administer, and control the DCNG in a militia status to the Secretary of Defense (SecDef).[132] By memorandum, the SecDef further delegated this authority, as it pertains to the DCARNG to the Secretary of the Army, and as it pertains to the DCANG to the Secretary of the Air Force.[133] The Secretaries exercise this authority through the Commanding General of the DCNG. Both Secretaries may, but have not, further delegate this authority to their Assistant Secretary for Manpower and Reserve Affairs. Last, and in accordance with the October 10, 1969 memorandum from SecDef to the Secretaries of the Army and Air Force, whenever the DCARNG or DCANG are used in militia status to support civil authorities, the Secretary of the Army, through the Commanding General, exercises operational command over the Army and Air National Guard elements.

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[128] U.S. Statutes at Large, 2:215, https://www.loc.gov/law/help/statutes-at-large/6th-congress/c6.pdf.

[129] D.C. National Guard, Mission Statement, *available at* https://dc.ng.mil/Welcome/Pages/default.aspx.

[130] *Id.*

[131] D.C. CODE § 49-409 (2018), https://code.dccouncil.us/dc/council/code/.

[132] Exec. Order No. 11485, 34 Fed. Reg. 15411 (1 Oct. 1969).

[133] SEC'Y OF DEFENSE MEM., SUPERVISION AND CONTROL OF THE NATIONAL GUARD OF THE DISTRICT OF COLUMBIA (10 Oct. 1969).

In accordance with E.O. 11485 and D.C. Code § 49-301, command of DCNG military operations is exercised through the Commanding General of the DCNG rather than through an Adjutant General as is the practice in all of the States and territories. The Commanding General of the DCNG is appointed by the President.[134] An officer appointed to serve as the Commanding General must be Federally recognized by the Senate in a general officer grade. Last, in accordance with D.C. Code § 49-304, an Adjutant General may also be assigned by the President. The Adjutant General is subordinate to and subject to the orders of the Commanding General.

The Mayor of the District of Columbia has no formal command authority over the DCNG. As a matter of practice, whenever the Mayor desires civil support from the DCNG, the Mayor submits a request to the Commanding General of the DCNG, who notifies the Secretary of the Army. Pursuant to E.O. 11485, the law enforcement policies to be used by DCNG military forces when aiding the civil authority of the District are established by consultation between the Department of Defense and the Attorney General.

In his advice to the SecDef and the Secretary of the Army regarding employment of the DCNG in support of civil authority, the Attorney General routinely refers to D.C. Code § 49-404, as authority for the DCNG to aid civil authority in its status as a subset of the enrolled militia as defined by the D.C. Code.

The DCNG performs missions in either a Title 10 or Title 32 status. Currently, the DCNG does not have a State, or "District" Active Duty status. Title 49 of the D.C. Code implements the District of Columbia Militia Act of 1889.[135] It authorizes the Mayor, the U.S. Marshal for the District of Columbia, or the National Capital Service Director, to request that the Commander-in-Chief order out the militia to aid the civil authorities in suppressing a public disturbance.[136] When the DCNG is mobilized under these circumstances, it acts in a "militia status" on behalf of the District.

Historically, the DCNG always provided civil support to the District in a Title 32 training status. The Secretary of the Army has broad authority to determine what constitutes appropriate "training" for credit and compensation under 32 U.S.C. § 502(d)(3). The Comptroller General of the United States has also opined that, in view of the Secretary's broad discretion in this regard, there would be no objection should the Secretary consider a State's use of the National Guard for disaster relief as annual training under Title 32.[137] The Secretary of the Army requested a decision as to whether appropriated funds for annual training are available for disaster relief, whereby it was determined the disaster relief duty constituted proper and adequate annual training. Provided the Secretaries concerned first determine that the duty in question (i.e. disaster relief) constitutes proper and adequate training for the units involved, the execution of such duties in a Title 32 status and the payment of participating National Guard personnel from Title 32 appropriated funds, is appropriate. Consequently, the fact that the performance of such a "training" mission produces a collateral "operational" benefit does not render the mission objectionable.

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[134] D.C. CODE § 49-301 (2018), https://code.dccouncil.us/dc/council/code/.

[135] D.C. CODE, Title 49 (2018), https://code.dccouncil.us/dc/council/code/.

[136] D.C. CODE § 49-103 (2018), https://code.dccouncil.us/dc/council/code/.

[137] B-176491, 52 Comp. Gen. 35 (1972), Natinal Guard—Pay, Etc., Entitlement—Disaster Relief Duty by State.

Whenever service in a Title 32 status in support of the District of Columbia civil authorities may involve the exercise of law enforcement-like functions, the Secretary of the Army and the Attorney General must consent to the provision of such support. Consent to the provision is subject to the Mayor's designation of members of the DCNG as special police (or "special privates") pursuant to D.C. Code § 5-129.03. This provision of the law allows the Mayor, upon "any emergency of riot, pestilence, invasion, insurrection, or during any day of public election, ceremony, or celebration" to appoint from among the citizens "special privates without pay," who while so serving possess the powers and privileges, and perform the duties of a District of Columbia Metropolitan Police Officer.[138] Historically, this special status has been conferred upon DCNG and other National Guard personnel in support of Presidential Inaugurations. When performing such duties, DCNG personnel wear an emblem authorized by the Mayor. Title 32 orders issued to DCNG personnel include authority to act under the provisions of Title 5 of the D.C. Code. Although they have "special private" status, DCNG personnel remain under the command and control of their superior military officers at all times. The Commanding General of the DCNG and the Chief of the District of Columbia Metropolitan Police Department coordinate their respective command structures and personnel with a view towards maximizing unity of effort.

Although the chain-of-command of the DCNG runs through the Department of Defense to the President, the applicability of the proscriptions of the Posse Comitatus Act (PCA), 18 U.S.C. § 1385, bears comment. Applicability of the PCA depends on the status of the service-member. For instance the service-member is serving in a Title 10 status, then the member is considered part of the active component Army or Air Force for PCA purposes and therefore subject to the PCA's prohibition on participation in the execution of civil laws. On the other hand, if the service-member is in a Title 32 status, the member is not considered part of the active component Army or Air Force and thus not subject to PCA restrictions. Whether in a Title 10 or Title 32 status, all members of the DCNG must comply with all applicable Department of Defense directives and instructions.

Historically, the DCNG has been mobilized in a Federalized status on limited occasions. Pursuant to 10 U.S.C. § 12301, the DCNG has been Federalized in support of operations such as Operations Desert Storm, Desert Shield, Enduring Freedom, Iraqi Freedom, and Noble Eagle. In addition, the Insurrection Act was employed to order the DCNG into active Federal service to complement Federal forces deployed to quell the disorder associated with the rioting that ensued after the death of Dr. Martin Luther King in April 1968.

d. "Hip-Pocket" Activation

Pursuant to 10 U.S.C. § 12301(d), 1st Air Force (1st AF, a numbered Air Force in Air Combat Command) developed a process to instantaneously "Federalize" Air National Guard (ANG) members who, upon the occurrence of a specified event, are called upon to perform North American Aerospace Defense Command (NORAD) missions. This process automatically converts consenting members of the Air National Guard into a Title 10 status upon the occurrence of a "triggering" event, known by 1st AF as an "air sovereignty event."[139] On 11 June 2003, authority "to order into

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[138] D.C. CODE § 5-129.03 (2018), https://code.dccouncil.us/dc/council/code/.

[139] *See* for example 11th Air Force Instruction (AFI) 38-101. This AFI outlines the status conversion process and defines an "air sovereignty event" as "any event that involves the Federal mission of aerospace warning and control, and includes but is not limited to, the surveillance of the assigned airspace, the identification of unknown aircraft, the

Federal service . . . those members of the Air National Guard who have volunteered to perform Federal active service in furtherance of the Federal mission" was delegated to the Chief of Staff of the Air Force, who has the authority to re-delegate this authority to a MAJCOM Commander who can also re-delegate his authority.[140] This "hip pocket" process is now used for other Air Force missions. This process has been examined as a model for some ARNG missions, but at present is not utilized for any ARNG missions. Instead, ARNG missions such as Ground-based Mid-course Defense (GMD) have used a paradigm where Title 32 AGR members convert to Title 10 status upon arrival at the duty location for that day's duty and revert to Title 32 status when released from that duty by their commander.

e. Rules for the Use of Force (RUF)

State law will govern the rules for the use of force for members of the National Guard in a State status. Thus, State law must be followed when the rules for the use of force are drafted. In some States, National Guard forces have the same authority as peace officers, meaning that certain National Guard forces in their home State may follow RUF established for peace officers within the State. A more detailed discussion of the RUF may be found in Chapters 10 and 11, *infra*.

H. Civil Air Patrol (CAP)

The CAP, a volunteer organization, is a Federally chartered nonprofit corporation under 36 U.S.C. § 40301. It also functions as an auxiliary of the USAF in accordance with 10 U.S.C. § 9442.[141] Although the CAP is not a military organization, as the USAF auxiliary it performs non-combat missions on behalf of DoD pursuant to statute and a Cooperative Agreement. The USAF provides policy and oversight of the CAP in its auxiliary status and can also provide personnel, logistical, and financial support and assistance. CAP missions are limited by internal and FAA regulations as well as by those statutes that restrict activities of military organizations (*e.g.* PCA). Missions accomplished by CAP in its auxiliary role normally include disaster relief, search and rescue and counter-drug, although changes to statutes, doctrine and policy are contemplated to better incorporate the CAP into the USNORTHCOM Military Assistance for Civil Authorities (MACA) force structure and thereby allow the CAP to become more active in a broader range of homeland security missions.

The CAP is organized into eight geographical regions and performs three primary programs: Emergency Services (assisting Federal, State, and local agencies), aerospace education, and cadet education. Although the USAF has overall responsibility for the CAP when it performs search and rescue missions, the Army provides oversight for disaster relief missions. Last, Civil Air Patrol-

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initiation and authorization of an active air scramble, and the control of aircraft engaged in an active air scramble or North American Aerospace Defense Command (NORAD) mission."

[140] 10 U.S.C. § 12301(d) (2012 & Supp. IV 2017); MEMORANDUM: SECRETARY OF AIR FORCE DELEGATION OF AIR NATIONAL GUARD RE-CALL AUTHORITY, dated 11 June 2003

[141] *See also* U.S. DEP'T OF AIR FORCE, INSTR. 10-2701, ORGANIZATION AND FUNCTION OF THE CIVIL AIR PATROL (29 Jul. 2005, with Chg. 1, 29 Sep. 2006); U.S. DEP'T OF AIR FORCE, INSTR. 10-2702, BOARD OF GOVERNORS OF THE CIVIL AIR PATROL (27 Feb. 2001), U.S. DEP'T OF AIR FORCE, PD 10-27, CIVIL AIR PATROL (27 Feb. 2001). CIVIL AIR PATROL-UNITED STATES AIR FORCE, INSTRUCTION 10-2701, CIVIL AIR PATROL OPERATIONS AND TRAINING (3 Aug. 2007, Incorporating Interim Change 1, 13 Jun. 2008).

United States Air Force (CAP-USAF) is located at Maxwell AFB in Montgomery, Alabama; an Air Force JA provides legal support to the Commander of CAP-USAF.

CHAPTER 4

MILITARY SUPPORT TO CIVILIAN LAW ENFORCEMENT

KEY REFERENCES:

- 10 U.S.C. §§ 271 - 284 - Military Support for Civilian Law Enforcement.
- 18 U.S.C. § 1385 - The Posse Comitatus Act (PCA).
- DoDI 3025.21 - Defense Support of Civilian Law Enforcement Agencies, February 27, 2013.
- DoDD 3025.18 - Defense Support of Civil Authorities, March 19, 2018.
- DoDD 5200.27 - Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense, January 7, 1980.
- DoDD 5240.01 - DoD Intelligence Activities, August 27, 2007.
- AFI 10-801 - Defense Support of Civil Authorities (DSCA), September 19, 2012.
- SECNAVINST 5820.7C - Cooperation with Civilian Law Enforcement Officials, January 26, 2006.

A. Introduction

U.S. military resources include specialized personnel, equipment, facilities, and training that may be useful to civilian law enforcement agencies. The provision of DoD resources, however, must be consistent with the limits Congress placed on military support to civilian law enforcement through the Posse Comitatus Act and other laws. Judge advocates must also weigh and advise on the political sensitivity of employing U.S. military forces in law enforcement roles involving U.S. civilians.

This chapter begins with a discussion of the Posse Comitatus Act. It then discusses the applicable provisions of the U.S. Code addressing military support to civilian law enforcement and the DoD regulations that implement this guidance. As it is a large DoD mission, separate information relating specifically to counterdrug support in this context is discussed in the Chapter 7, *infra*.

B. The Posse Comitatus Act

The primary statute restricting military support to civilian law enforcement is the Posse Comitatus Act (PCA).[1] The PCA states:

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

[1] Posse Comitatus Act, 18 U.S.C. § 1385 (2011). The phrase "posse comitatus" is literally translated from Latin as the "power of the county" and is defined in common law to refer to all those over the age of 15 upon whom a sheriff could call for assistance in preventing any type of civil disorder. *See* United States v. Hartley, 796 F.2d 112, 114, n.3 (5th Cir. 1986).

The PCA was enacted in 1878, primarily as a result of the military presence in the South during Reconstruction following the Civil War.[2] This military presence increased during the bitter presidential election of 1876, when the Republican candidate, Rutherford B. Hayes, defeated the Democratic candidate, Samuel J. Tilden, by one electoral vote. Many historians attribute Hayes' victory to President Grant's decision to send Federal troops for use by U.S. Marshals at polling places in the States of South Carolina, Louisiana, and Florida. Hayes won the electoral votes of these hotly contested States, possibly as a result of President Grant's actions.[3] The use of the military in this manner by a President led Congress to enact the PCA in 1878.[4]

The intent of the PCA was to limit direct military involvement with civilian law enforcement, absent congressional or constitutional authorization. The PCA is a criminal statute and violators are subject to fine and/or imprisonment.[5] The PCA does not, however, prohibit all military involvement with civilian law enforcement. A considerable amount of military participation with civilian law enforcement is permissible, either as indirect support or under one of the numerous PCA exceptions.

10 U.S.C. Chapter 15 (§§ 271-284 of Title 10 U.S.C.), 32 C.F.R. § 182, and DoDI 3025.21 (Defense Support of Civilian Law Enforcement Agencies),[6] discussed below, provide guidance regarding restrictions the PCA places on the military when supporting civilian law enforcement agencies.[7]

1. To Whom Does the PCA Apply?

On its face, the PCA only applies to active duty members of the Army and the Air Force. Accordingly, Federal courts have consistently read the plain language of the PCA to limit its application to these two services.[8] 10 U.S.C. § 375 (now section § 275) directed the Secretary of Defense to promulgate regulations that prohibit "direct participation by a member of the Army,

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[2] *See, e.g.*, MATTHEW C. HAMMOND, The Posse Comitatus Act: A Principle in Need of Renewal, 75 WASH. U. L.Q. 953, 954 (1997) [hereinafter HAMMOND]; H.W.C. Furman, Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act, 27 MIL. L. REV. 85, 94-95 (1960).

[3] HAMMOND, *supra* note 2, at 954. The states of South Carolina, Louisiana, and Florida sent in double returns. The electoral boards of these three states, which were dominated by Republicans, certified that the states had voted for Hayes even though it was widely believed that each state had a majority of Democrats. The Democrats sent in their own returns which showed that Tilden won each of the three states. Congress, which held a Republican majority, eventually appointed an electoral commission to recount the entire vote. Hayes was declared the winner by one electoral vote. Tilden won the popular vote with 51% over Hayes' 48%.

[4] *Id.*

[5] Although there are harsh penalties for violators of the PCA, courts have not yet found reason to allow for the exclusion of evidence seized during a PCA violation. Courts have not found PCA violations pervasive enough to necessitate the application of this sanction. See U.S. v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979); U.S. v. Al-Talib, 55 F.3d 923, 930 (4th Cir 1995); U.S. v. Griley, 814 F.2d 967, 976 (4th Cir. 1987).

[6] U.S. DEP'T OF DEFENSE, INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (27 Feb. 2013) [hereinafter DoDI 3025.21].

[7] U.S. DEP'T OF NAVY, SEC'Y NAVY INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (26 Jan. 2006) [hereinafter SECNAVINST 5820.7C]; and U.S. DEP'T OF AIR FORCE, INSTR. 10-801, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (19 Sept. 2012) [hereinafter AFI 10-801] implement DoDI 3025.21.

[8] *See* United States v. Yunis, 924 F.2d 1086, 1093 (D.C. Cir. 1991) (citing congressional record that earlier version of measure expressly extended PCA to the Navy but final version deleted any mention of application to the Navy); United States v. Roberts, 779 F. 2d 565 (9th Cir. 1986), *cert. denied*, 479 U.S. 839 (1986).

Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law."[9] The Secretary of Defense promulgated DoDD 5525.5, DoD Cooperation with Civilian Law Enforcement Officials (Jan. 15, 1986) to comply with this requirement. This directive, along with DoDD 3025.12, Military Assistance for Civil Disturbances (MACDIS), has been superseded by DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies (27 Feb. 2013),[10] In accordance with DoDI 3025.21, the restrictions placed on Army and Air Force activities through the PCA apply to the Navy and Marine Corps.[11] While the PCA does not apply to the Coast Guard, its activities may align with the Navy when attached during time of war.[12]

The PCA also applies to Reserve[13] members of the Army, Navy, Air Force, and Marine Corps who are on active duty, active duty for training, or inactive duty training in a Title 10 duty status. Members of the National Guard performing operational support duties,[14] active duty for training, or inactive duty training in a Title 32 duty status are not subject to the PCA. Only when members of the National Guard are in a Title 10 duty status (Federal status) are they subject to the PCA. Members of the National Guard may also perform duties in a State Active Duty (SAD) status and are not subject to PCA in that capacity.[15] Civilian employees of DoD are only subject to the prohibitions of the PCA and DODI 3025.21 if they are under the direct command and control of a military officer.[16]

Finally, the PCA does not apply to a member of the active component Army, Navy, Air Force, or Marine Corps when they are off-duty and acting in their private capacity. A service-member is not in a private capacity if assistance is rendered to civilian law enforcement officials under the direction or control of DoD authorities.[17]

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[9] *See* 32 C.F.R. § 182.6 (2017); *See also* Hayes v. Hawes, 921 F.2d 100, 102–103 (10 U.S.C. § 375 makes the proscriptions of 18 U.S.C. § 1385 applicable to the Navy). *See also* Yunis, 924 F.2d at 1094 ("Regulations issued under 10 U.S.C. § 375 require Navy compliance with the restrictions of the Posse Comitatus Act . . . ."). Exceptions to this prohibition as it applies to the Navy or Marine Corps may be granted by the Secretary of Defense or the Secretary of Navy on a case-by-case basis. *See* DoDI 3025.21, *supra* note 6, Encl. 3, para.3.

[10] *See* DoDI 3025.21, *supra* note 6.

[11] *See* DoDI 3025.21, *supra* note 6, Encl. 1; *see also* SECNAVINST 5820.7C, *supra* note 7, para. 8(b).

[12] *See* 14 U.S.C. §§2, 89 (2012) which describe the Coast Guard's role as a domestic law enforcement agency. More information on the specific authorities of the Coast Guard can be found *infra* in Chapter 3, Reserve Components, Civil Air Patrol, U.S. Coast Guard – Status and Relationships.

[13] The Reserve includes Ready Reserve, Standby Reserve, and Retired Reserve. The Ready Reserve is units or individuals liable for active duty as provided in 10 U.S.C. §§ 12301-12302. The Ready Reserve consists of: (1) the Selected Reserve, including unit members assigned to Reserve organizations and performing drill periods and annual training, Individual Mobilization Augmentees (IMA) performing drills and annual training assigned to Active component organizations, and active guard and reserve (AGR) on full time active duty or full time National Guard duty in Reserve organizations; (2) the Individual Ready Reserve (IRR); and (3) the inactive National Guard (ING). All members of the Selected Reserve are in an active status. 10 U.S.C. §§ 10142-10144. *See also* U.S. DEP'T OF DEFENSE, DIR. 1215.06, UNIFORM RESERVE, TRAINING, AND RETIREMENT CATEGORIES FOR THE RESERVE COMPONENTS (11 Mar. 2014).

[14] As per 32 U.S.C. § 502(f) (2011).

[15] *See infra* Chapter 3, Reserve Components, Civil Air Patrol, U.S. Coast Guard – Status and Relationships for a detailed discussion of National Guard and Reserve status.

[16] DoDI 3025.21, *supra* note 6, Encl. 3, para. 2.

[17] *Id.*

2. Where Does the PCA Apply?

a. What the Law Says

There is no definitive statement of the scope of the Posse Comitatus Act.[18] Federal courts have generally held that the PCA places no restrictions on the use of the armed forces to enforce the law abroad.[19] The courts, noting that Congress intended to preclude military involvement in domestic law enforcement activities, have been unwilling to apply the PCA extraterritorially.[20] In addition, a 1989 Department of Justice Office of Legal Counsel Opinion concluded that the PCA and the restrictions in 10 U.S.C. §§ 271–284 have no extraterritorial application.[21]

b. What Policy Says

Nevertheless, DoD implementing policy contained in DoDI 3025.21 states that the prohibitions on direct civilian law enforcement assistance apply to all actions of DoD personnel worldwide.[22] Therefore, PCA restrictions must be considered even when contemplating military assistance in law enforcement overseas. In cases of compelling or extraordinary circumstances, the Secretary of Defense may consider exceptions to the prohibition against direct military assistance to law enforcement outside the territorial jurisdiction of the United States.[23]

3. When Does the PCA Apply?

10 U.S.C. §§ 371 - 375 outline the restrictions of the PCA as they apply to participation by the military in civilian law enforcement activities. Under these statutes, regulation of military activity is divided into three major categories: (1) use of information, (2) use of military equipment and facilities, and (3) use of military personnel.

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[18] United States v. Kahn, 35 F.3d 426, 431 n.6 (9th Cir. 1994)

[19] *See, e.g.*, Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); D'Aquino v. United States, 192 F.2d 338, 351 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952). Commentators agree. *See* H.W.C. Furman, Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act, 7 MIL L. REV. 85, 107 (1960).

[20] *Id.* at 936 (The PCA was "the type of criminal statute which is properly presumed to have no extraterritorial application in the absence of statutory language indicating a contrary intent.").

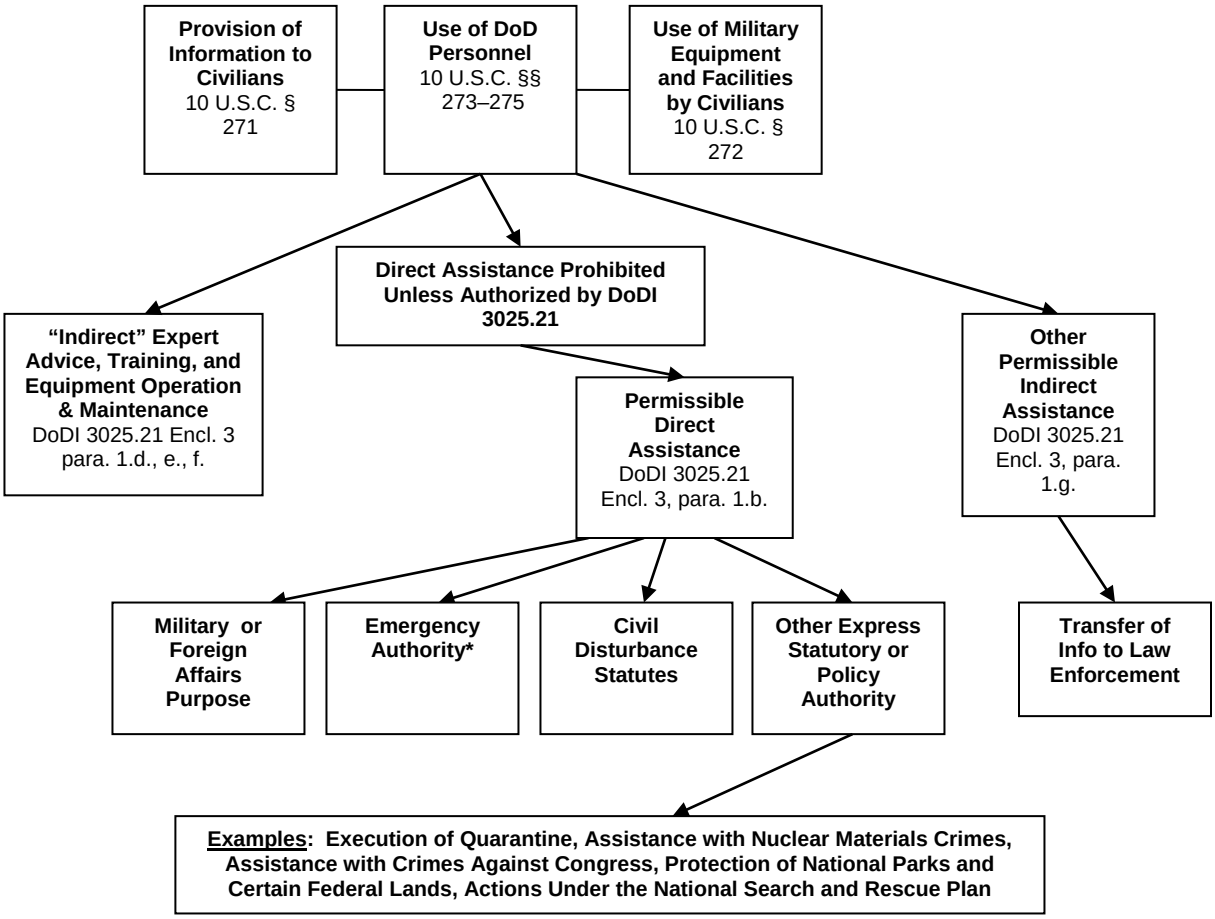
[21] Memorandum from Office of the Assistant Attorney General to General Brent Scowcroft, Extraterritorial Effect of the Posse Comitatus Act (3 Nov. 1989). *But see* United States v. Kahn, 35 F.3d 426, 431 n.6 (9th Cir. 1994). The *Kahn* court cites 10 U.S.C. § 374(b)(2)(F) (mentioning "law enforcement operations outside of the land area of the United States"), § 379(a) (mentioning "naval vessels at sea"), and § 379(d) (mentioning "area outside the land area of the United States") as evidence of limitations placed on the use of the armed forces abroad. While recognizing that several courts held the PCA only applies within the territory of the United States, the *Kahn* court maintained that the law contained evidence of PCA restrictions applying outside the United States. The court in *Kahn* ultimately held there was no PCA violation because the Navy only provided indirect assistance to the Coast Guard during the operation leading to the arrest of the defendant. Thus, Navy involvement in Coast Guard drug interdiction operations is an area for PCA challenges. *See* United States v. Rasheed, 802 F.Supp. 312 (D. Hawai'i 1992) as another example of this type of challenge. Although this is an area for potential challenge, Congress has explicitly authorized the Navy to assist in the enforcement of the Maritime Drug Law Enforcement Act (46 U.S.C. Chapter 705) and these operations are conducted frequently.

[22] DoDI 3025.21, *supra* note 6, at 3.

[23] *Id.* (note that only the Secretary of Defense or Deputy Secretary of Defense may grant such exceptions).

DoDI 3025.21 contains several enclosures discussing areas of permissible DoD activity, including: Participation in Law Enforcement (Enclosure 3), Support of Civil Disturbance Operations (Enclosure 4), Domestic EOD Support for Law Enforcement (Enclosure 5), Domestic Terrorism Incident Support, Use of Information Collected During Military Operations (Enclosure 7), and the Use of DoD Equipment and Facilities (Enclosure 8).[24] Figure 4.1 summarizes PCA restrictions in 10 U.S.C. §§ 371-375 and major areas of guidance from DoDI 3025.21:

Figure 4-1



******See* DoDD 3025.18 (U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (C2, 19 Mar. 2018) to distinguish Emergency Authority from Immediate Response Authority.

In addition to the above categories, 10 U.S.C. §§ 276–277 provide further limitations on the provision of military support to civilian law enforcement. 10 U.S.C. § 276 provides an overarching restriction in the event "such support will adversely affect the military preparedness of the United

[24] DoDI 3025.21, *supra* note 6.

States."[25] 10 U.S.C. § 277 requires civilian law enforcement agencies to reimburse DoD for support provided as required by the Economy Act[26] or other applicable law. Civilian law enforcement agencies do not have to provide reimbursement for support under this statute if the support: (1) is provided in the normal course of military training or operations, or (2) results in a benefit to DoD that is substantially equivalent to that which would otherwise be obtained through military training or operations.[27] Waiver authority for reimbursement not required by law resides with the Assistant Secretary of Defense (Force Management and Personnel). This authority may be delegated to the Secretaries of the Military Departments and the Directors of the Defense Agencies (or designees) on matters within their approval authority.[28]

For a brief overview of PCA scenarios and the applicability of the PCA to each scenario, see Figure 4-2 on the next page. Please note that Figure 4-2 is merely a beginning point in any potential legal analysis of DoD support to civilian law enforcement.

[25] 10 U.S.C. § 276 (2012). This statute reflects congressional concern over the potential dilution of military readiness and capabilities by complying with requests for assistance from civilian law enforcement agencies.

[26] 31 U.S.C. § 1535 (2012).

[27] 10 U.S.C. § 277 (2012).

[28] *See, e.g.* SECNAVINST 5820.7C, *supra* note 7, para. 9; AFI 10-801, *supra* note 7, ch. 5.

US ARMY & AIR FORCE, TITLE 10	APPLICABILITY OF THE PCA
Normal Status	PCA applies. Title 10 personnel in normal status may not engage in direct law enforcement activities to include: Interdiction of vehicles, vessels or aircraft; search or seizure of civilian personnel and effects; arrest or detention of civilians; or as undercover investigators or to conduct surveillance for law enforcement purposes.
In execution of a Military Purpose	The PCA does not apply. This is a narrowly construed exception to the PCA that exempts activity conducted to further a military interest.
Detailed to another Federal agency subject to receiving agencies control (for example: Special Assistant United States Attorney; Special Deputy U.S. Marshal)	PCA does not apply as these personnel are not considered part of the Army or Air Force for PCA purposes.
Protection of Federal property	Constitutional exception to the PCA.[29]
Response pursuant to the Insurrection Act	Statutory exception to PCA.
Support to other Federal, State and local entities that are engaged in direct law enforcement activities	The PCA prohibits engaging in direct law enforcement activities. Subject to DoD regulations and approvals, technical, and logistical assistance may be rendered.
Response to a CBRN attack or threat	Subject to Presidential directives, DoD regulations and approvals, constitutional, or statutory exceptions to the PCA exist.
Transfer of information regarding potential criminal activity obtained during military operations.	PCA does not apply, but the dissemination of information must be conducted in accordance with applicable regulations.
Off-duty Title 10 personnel	PCA does not apply unless acting under the direction of DoD authorities.
Homeland Defense Operations	PCA does not apply to Homeland Defense operations.
NATIONAL GUARD	**APPLICABILITY OF THE PCA**
State Active Duty (SAD)	The PCA does not apply.
Title 32 Status	The PCA does not apply.
Title 10 Status ("Federalized")	PCA applies (see 10 U.S.C. § 12405).
OTHER UNIFORMED SERVICES	**APPLICABILITY OF THE PCA**
United States Navy	PCA does not apply by statute, but by DoD policy.
United States Marine Corps	PCA does not apply by statute, but by DoD policy.
United States Coast Guard	PCA does not apply (but see 14 U.S.C. § 3).
United States Public Health Service	PCA does not apply.
National Oceanic & Atmospheric Administration	PCA does not apply.

Figure 4-2

[29] See 32 C.F.R. § 215.4 (2017) for background on this Constitutional exception.

4. Statutory Categories of PCA Application and Policy Implementation

a. Use of DoD Information Collected During Military Operations

10 U.S.C. § 271 regulates the use of information collected during military operations. For DoD, the requirements of 10 U.S.C. § 271 are implemented by the Secretary of Defense in Enclosure 7 of DoDI 3025.21. Under 10 U.S.C. § 271, the Secretary of Defense may provide information collected during the normal course of military operations to Federal, State, and local law enforcement agencies if the information is relevant to a violation of Federal or State law within the jurisdiction of these officials. Under 10 U.S.C. § 271(b), the Secretary of Defense is required, to the maximum extent practicable, take into account the needs of civilian law enforcement officials for information when planning and executing military training and operations. Lastly, 10 U.S.C. § 271(c) provides that the Secretary of Defense shall ensure, to the extent consistent with national security, that intelligence information held by DoD and relevant to drug interdiction and other civilian law enforcement matters is promptly provided to the appropriate civilian law enforcement officials.[30]

Enclosure 7 of DoDI 3025.21 implements 10 U.S.C. § 271 with some additional restrictions. Military departments and defense agencies are generally encouraged to provide law enforcement officials any information collected during the normal course of military operations that may be relevant to a violation of the law. Information may not be transferred if its acquisition violated applicable law protecting privacy or constitutional rights, or if it would have been illegal for the civilian agency to obtain the information or use the procedures employed by DoD to obtain the information.[31] While the Secretary of Defense shall take into account the needs of civilian law enforcement officials to obtain intelligence when planning and executing military training and operations in accordance with 10 U.S.C. § 271, the planning or creation of missions or training for the primary purpose of aiding civilian law enforcement official intelligence-gathering efforts is prohibited.[32] Law enforcement officials may accompany regularly scheduled training flights as observers, but point-to-point transportation and training flights for civilian law enforcement officials are not authorized.[33] Additionally, the handling of all such information must comply with DoDD 5240.01, DoD Intelligence Activities;[34] DoDD 5200.27, Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense;[35] DoD 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons,[36] and DoDD 5400.11-R, Department of Defense Privacy Program[37] (for additional

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[30] 10 U.S.C. § 271 (2012).

[31] See DODI 3025.21, *supra* note 6, Encl. 3, para. 1.g.(2).

[32] *See id*., Encl. 7, para. 1.e. Training or missions for the purpose of routinely collecting information about U.S. citizens is prohibited as well. *Id*.

[33] *See* U.S. DEP'T OF DEFENSE, REG. 4515.13-R, AIR TRANSPORTATION ELIGIBILITY (1 Nov. 1994) for guidance on this type of assistance. Flights related to counter-drug operations are allowed and are covered by this regulation. *See infra* Chapter 7, Counterdrug Operations.

[34] U.S. DEP'T OF DEFENSE, DIR. 5240.01, DOD INTELLIGENCE ACTIVITIES (27 Aug. 2007) [hereinafter DoDD 5240.01].

[35] U.S. DEP'T OF DEFENSE, DIR. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE (7 Jan. 1980).

[36] U.S. DEP'T OF DEFENSE, REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (1 Dec. 1982) [hereinafter DoDD 5240.1-R]. (As of August 2014 DoDD 5240.1-R is undergoing revision; consequently, practitioners citing this reference should first ensure DoDD 5240.1-R is still in effect.).

information concerning the use of DoD information collected during domestic operations, see Intelligence Oversight and Information Handling During Domestic Support Operations, Chapter 9 *infra*).

b. Use of DoD Military Equipment and Facilities

10 U.S.C. § 272 and Enclosure 8 of DoDI 3025.21 address the use of military equipment and facilities by civilian law enforcement authorities (not to be confused with the separate provisions under Enclosure 3 regarding the use of DOD *personnel* to operate or maintain equipment discussed below). Section 272(a) allows the Secretary of Defense to make available equipment (including associated supplies and spare parts), base facilities, and research facilities of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes. The provision of equipment and facilities must be made in accordance with all other applicable law. Enclosure 8 of DoDI 3025.21 implements this statute and allows military departments and defense agencies to make equipment, base facilities, or research facilities available to Federal, State, or local law enforcement authorities if the assistance does not adversely affect military preparedness.[38]

Approval authority under DoDI 3025.21 varies based on the type of equipment requested, the reason for the request, and whether the equipment will be loaned[39] or leased.[40] The following is a list of the approval authorities for various types of equipment and facilities:[41]

- Requests for equipment or facilities outside the U.S. (other than arms, ammunition, combat vehicles, vessels and aircraft) shall be in accordance with procedures established by the applicable DoD component
- Requests from other Federal agencies to purchase equipment may be submitted directly to the DoD component at issue
- Requests for training, expert advice, and personnel to operate and maintain equipment shall be made in accordance with Enclosure 3 of DoDI 3025.21
- For loans pursuant to Reference 31 U.S.C. § 1535 (the Economy Act) or 31 U.S.C. §§ 6501-6508 (the Intergovernmental Cooperation Act), which are limited to agencies of the Federal Government, and for leases pursuant to 10 U.S.C. § 2667, which may be made to entities outside the Federal Government, this guidance applies:

  - Requests for arms, ammunition, combat vehicles, vessels, and aircraft shall be submitted to the Secretary of Defense for approval.

  - Requests for loan or lease or other use of equipment or facilities are subject to approval by the heads of the DoD Components, unless approval by a higher official is required by statute or DoD issuance applicable to the particular disposition.[42]

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[37] U.S. DEP'T OF DEFENSE, REG. 5400.11, DOD PRIVACY PROGRAM (1 Sept. 2011) [hereinafter DoD 5400.11].

[38] DoDI 3025.21, *supra* note 6, Encl. 8, para. 3.

[39] Transfers under the Economy Act, 31 U.S.C. § 1535, are limited to executive branch agencies of the Federal government. The Economy Act does not govern loans.

[40] Leases under 10 U.S.C. § 2667 (2012) may be made to entities outside the Federal Government.

[41] DoDI 3025.21, *supra* note 6, Encl. 8.

Judge advocates must be aware that other policies and statutes overlap with DoDI 3025.21 and 10 U.S.C. §§ 271-275 with regard to authorities and approvals in this area. For example, DoDD 3025.18 also discusses the approval authority of the Secretary of Defense for the assistance with assets with potential lethality, e.g. arms, vessels or aircraft, or ammunition.[43] As discussed, approval authority for assistance from DoD intelligence components is governed by DoDD 5240.01 and other relevant authorities discussed above. 10 U.S.C. § 282 provides additional authority for the provision of certain types of equipment; it states DoD may provide resources to the Department of Justice in a weapons of mass destruction situation.[44] Further, E.O. 13527 Establishing Federal Capability for the Timely Provision of Medical Countermeasures Following a Biological Attack provides additional authority for DoD integration into plans to support the delivery of "medical countermeasures" as part of a response to a biological attack.[45]

Aside from authorities and approvals, the provision of military equipment to civilians is further complicated by specific procedures needed to accomplish the transfer. The Army Regulation on point is AR 700-131.[46] In non-emergency situations, AFI 23-119, Exchange, Sale, or Temporary Custody of Non-Excess Personal Property and AFI 32-9003, Granting Temporary Use of Air Force Real Property set forth the Air Force process in this area.[47] Judge advocates will not only need to ensure that the proper authority has approved the transaction, but that the proper service-specific procedures are followed to effect the transaction.

c. Participation of DoD Personnel in Civilian Law Enforcement Activities

The Federal courts have enunciated three tests to determine whether the use of military personnel violates the PCA.[48] If any one of these three tests is met, the assistance may be considered a violation of the PCA.[49]

- The first test is whether the actions of military personnel are "active" or "passive." Only the active, or direct, use of military personnel to enforce the laws is a violation of the PCA.[50]

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[42] This authority of the Secretaries of the Military Departments and the Directors of the Defense Agencies may be delegated. *See, e.g* SECNAVINST 5820.7C, *supra* note 7, para. 6(b); AFI 10-801, *supra* note 7, ch.3.

[43] U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (29 DEC. 2010) (C2, 19 Mar. 2018) [hereinafter DoDD 3025.18].

[44] 10 U.S.C. § 282 (2012).

[45] Exec. Order No. 13257, 75 Fed. Reg. 737 (Jan. 6, 2010). E.O. 13527 provides that the Secretaries of Homeland Security, Defense, and Health and Human Services shall develop a plan to support the U.S. Postal Service in its distribution of efforts, to include a "plan for supplementing local law enforcement personnel, as necessary and appropriate, with local Federal law enforcement, as well as other appropriate personnel, to escort U.S. Postal workers delivering medical countermeasures."

[46] U.S. DEP'T OF ARMY, REG. 700-131, LOAN, LEASE, AND DONATION OF ARMY MATERIEL (23 Aug. 2004). Since many of the applicable military regulations predate their corresponding DoD Directives, judge advocates must exercise care in applying their procedures.

[47] AFI 10-801, *supra* note 7.

[48] United States v. Yunis, 924 F.2d 1086, 1093 (D.C. Cir. 1991).

[49] United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994).

[50] United States v. Rasheed, 802 F. Supp. 312, 324–25, (D. Hawai'i. 1992) (finding that the Navy's providing of aerial reconnaissance and intercepting ship, as well as providing back-up security while the ship was searched and defendants arrested, was passive involvement, and consequently did not violate PCA); United States v. Red Feather, 392 F. Supp.

- The second test is whether the use of military personnel pervades the activities of civilian law enforcement officials. Under this test, military personnel must fully subsume the role of civilian law enforcement officials.[51]

- The third test is whether the military personnel subjected citizens to the exercise of military power that was regulatory, proscriptive, or compulsory in nature. A power "regulatory in nature" is one which controls or directs. A power "proscriptive in nature" is one that prohibits or condemns. A power "compulsory in nature" is one that exerts some coercive force.[52] Note that under DoDD 3025.21, Immediate Response Authority may not be used when it may subject civilians to military power that is "regulatory, prescriptive, proscriptive, or compulsory." Thus, Immediate Response Authority may not be used to circumvent the PCA.[53]

In implementing the guidance contained in 10 U.S.C. Chapter 15 (§§ 271-284), DoDI 3025.21 divides the PCA regulation of the use of military personnel to assist civilian law enforcement into five categories: (1) permissible direct assistance; (2) use of DoD personnel to operate or maintain equipment; (3) expert advice; (4) training; and (5) other permissible assistance.

DoD personnel involvement in support to civilian law enforcement will often be subject to intense scrutiny, for example: the 3d U.S. Army and the 82d Airborne Division's support in the aftermath of Hurricane Katrina, and the National Guard and the Special Forces assistance provided to the Bureau of Alcohol, Tobacco, and Firearms during its standoff with the Branch Davidians in Waco, Texas were both scrutinized heavily. When advising commanders on the permissible use of

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916, 925 (W.D.S.D. 1975) (Activities which constitute active role in law enforcement by military are: arrest, seizure of evidence, search of a person, search of a building, investigation of crime, interviewing witnesses, pursuit of an escaped prisoner, search of an area for a suspect, and other like activities. Activities which constitute a passive role are: mere presence of military personnel under orders to report on necessity for military intervention, preparation of contingency plans to be used if military intervention is ordered, advice or recommendations given to civilian law enforcement officials regarding tactics or logistics, presence of military personnel to deliver military equipment and supplies, training civilian law enforcement officials on the use and maintenance of equipment, aerial reconnaissance flights, and similar activities).

[51] *Kahn*, 35 F.3d at 431–432 (holding that Navy's involvement in apprehension, arrest, and detention of defendant in international waters was passive and thus did not violate PCA because the FBI was in charge of operation at all times, and Navy merely provided necessary support services); Hayes v. Hawes, 921 F.2d 100, 103–104 (7th Cir. 1990) (actions of undercover NIS agent in acting as a drug buyer and signaling civilian law enforcement officers when the transaction was complete, was not so pervasive as to violate the PCA since the NIS agent did not become involved in the arrest and search of the defendant or the seizure and transportation of evidence); United States v. Hartley, 796 F.2d 112, 115 (5th Cir. 1986) (Air Force allowing a U.S. Customs Service officer to ride aboard an AWACS aircraft, tracking defendant's aircraft, and reporting its location to U.S. Customs Service agents on the ground was not so pervasive as to violate the PCA. The court further noted that these actions are specifically allowed by 10 U.S.C. §§ 271, 274(b)).

[52] *Yunis*, 924 F.2d at 895–96 (The Navy's involvement in apprehension, arrest, and transportation of defendant was not regulatory, proscriptive, or compulsory use of military power because defendant was under exclusive custody and control of FBI at all times); United States v. Casper, 541 F.2d 1275, 1278 (8th Cir. 1976) (holding that the use of military equipment by civilian law enforcement officers, presence of military personnel ordered there to observe and report whether Federal military intervention would be required, drafting of contingency plans by military personnel for intervention of military, and aerial reconnaissance by military aircraft, was not regulatory, proscriptive, or compulsory use of military power which would result in violation of PCA).

[53] DoDD 3025.18, *supra* note 43, para. 4.

military personnel in support of civilian law enforcement activities, judge advocates must not only consider possible legal ramifications of PCA violations, but also potential negative public perception that may result from certain types of legal, but controversial assistance.

(1) Direct Assistance

(a) Prohibited Direct Assistance

The first category of PCA regulation of military activity with civilian law enforcement agencies addresses direct assistance. Direct assistance and participation by military personnel in the execution and enforcement of the law is the heart of the prohibition of the PCA.[54] The restrictions on direct assistance by military personnel in civilian law enforcement activities is codified in 10 U.S.C. § 275 and is implemented as DoD policy by DoDI 3025.21, Enclosure 3.[55] Direct assistance is prohibited (unless authorized in enclosure 3 or 4 of DoDI 3025.21) as follows:

- Interdiction of a vehicle, vessel, aircraft, or other similar activity
- A search or seizure
- An arrest, apprehension, stop and frisk, interview, interrogation, canvassing, questioning potential witnesses, or similar activities
- Using force violence, brandishing or using a weapon, or threatening to discharge or use a weapon (except in self-defense, in defense of other DoD persons in the vicinity, or in defense of non-DoD persons, including civilian law enforcement personnel in the vicinity when directly related to an assigned activity or mission)
- Evidence collection, security functions, crowd and traffic control, and operating, manning, or staffing checkpoints.
- Surveillance or pursuit of individuals, vehicles, items, transactions, or physical locations, or acting as undercover agents, informants, investigators, or interrogators.
- Forensic investigations or other testing of evidence obtained from a suspect for use in a civilian law enforcement investigation in the United States unless there is a DoD nexus or the responsible civilian law enforcement official requesting such testing declares in writing that the evidence to be examined was obtained by consent. SECDEF may authorize exceptions to this policy.

(b) Permissible Direct Assistance

(i) Military Purpose Doctrine

There are several forms of direct assistance by military personnel that are permitted under the PCA. The first type of permitted direct assistance is action taken for the primary purpose of furthering a military or foreign affairs function of the United States.[56] This category is often referred to as the "Military Purpose Doctrine" and covers actions the primary purpose of which is to further a military interest. While civilian agencies can receive an incidental benefit, this section should be construed

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[54] *Red Feather*, 392 F. Supp. at 923 (W.D.S.D. 1975) ("It is clear from the legislative history that Congress intended 18 U.S.C. § 1385 to prevent the direct, active use of Federal troops to execute the laws.").

[55] DoDI 3025.21, *supra* note 6, Encl. 3, para 1.c.

[56] *Id.*, Encl. 3.

narrowly and cannot be used as a subterfuge for getting around the PCA. For example, the scheduling of a military exercise for the sole purpose of benefiting a civilian law enforcement agency is contrary to the intent of the military purpose doctrine. Military actions under the military purpose doctrine include:

- Investigations and other actions related to enforcement of the Uniform Code of Military Justice (UCMJ)
- Investigations and other actions that are likely to result in administrative proceedings by DoD, regardless of whether there is a related civil or criminal proceeding
- Investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility
- Protection of classified military information or equipment or controlled unclassified information
- Protection of DoD personnel, DoD equipment, and official guests of the DoD
- Such other actions that are undertaken primarily for a military or foreign affairs purpose[57]

It is important to note that use of military forces in the national defense of the United States is not support to civilian law enforcement agencies. Rather, it is homeland defense under the President's authority as Commander in Chief under Article II of the Constitution. The use of military forces in a national defense role is not subject to the PCA and other restrictions on military participation in law enforcement.

(ii) Emergency Authority

A second type of direct assistance that may be permitted is action that falls under the "emergency authority" of the United States.[58] These actions are taken pursuant to the inherent authority of the Federal government under the Constitution. Actions permitted in accordance with this authority are those necessary to preserve public order and to carry out governmental operations within U.S. territorial limits, or otherwise in accordance with applicable law. In such circumstances, force may be used if necessary.

"Emergency authority" is reserved for extremely unusual circumstances. When authorized under the provisions of DoDD 3025.18, Federal military commanders have the authority, in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because:

- Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or,

- When duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions. Federal action,

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[57] *Id.*

[58] *See* 32 C.F.R. § 215.4 (2017), which notes the Constitution authorizes "prompt and vigorous Federal action, including use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situations."

including the use of Federal military forces, is authorized when necessary to protect Federal property or functions.[59]

Presidential approval for quelling civil disturbances is not a prerequisite to the use of military forces in these two limited circumstances.[60]

(iii) Civil Disturbance Statutes

The third type of permitted direct assistance by military forces to civilian law enforcement is action taken pursuant to DoD responsibilities under the Insurrection Act, 10 U.S.C. §§ 251-255. This statute contains express exceptions to the Posse Comitatus Act that allow for the use of military forces to repel insurgency, domestic violence, or conspiracy that hinders the execution of State or Federal law in specified circumstances. Actions under this authority are governed by DoDD 3025.21. The Insurrection Act permits the President to use the armed forces to enforce the law when:

- There is an insurrection within a State, and the State legislature (or Governor if the legislature cannot be convened) requests assistance from the President;[61]
- A rebellion makes it impracticable to enforce the Federal law through ordinary judicial proceedings;[62] or
- An insurrection or domestic violence opposes or obstructs Federal law, or so hinders the enforcement of Federal or State laws that residents of that State are deprived of their constitutional rights and the State is unable or unwilling to protect these rights.[63]

10 U.S.C. § 254 requires the President to issue a proclamation ordering the insurgents to disperse within a certain time before use of the military to enforce the laws. The President issued such a proclamation during the Los Angeles riots in 1992.

(iv) Other Authority

There are several statutes and authorities, other than the Insurrection Act, that allow for *direct* DoD participation in civil law enforcement.[64] They permit direct military participation in civilian law enforcement, subject to the limitations within each respective statute. This section does not contain detailed guidance; therefore, specific statutes and other references must be consulted before determining whether military participation is permissible. A brief listing of these statutes includes:

- Prohibited transactions involving nuclear material (18 U.S.C. § 831)

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[59] DoDI 3025.21, *supra* note 6, Encl. 3, para. 1.b.(3).

[60] DoDD 3025.18, *supra* note 43, para. 4 (which provides specific guidance on when emergency authority may be used).

[61] 10 U.S.C. § 251 (2012).

[62] 10 U.S.C. § 252 (2012).

[63] 10 U.S.C. § 253 (2012).

[64] DoDI 3025.21, *supra* note 6, Encl. 3, para. 1.b.(5).

- Emergency situations involving chemical or biological weapons of mass destruction (10 U.S.C. § 282) (see also 10 U.S.C. §§ 175a, 229E and 233E which authorizes the Attorney General or other DOJ official to request SECDEF to provide assistance under 10 U.S.C. § 282)
- Assistance in the case of crimes against foreign officials, official guests of the United States, and other internationally protected persons (18 U.S.C. §§ 112, 1116)
- Protection of the President, Vice President, and other designated dignitaries (18 U.S.C. § 1751 and the Presidential Protection Assistance Act of 1976)
- Assistance in the case of crimes against members of Congress (18 U.S.C. § 351)
- Execution of quarantine and certain health laws (42 U.S.C. § 97)
- Protection of national parks and certain other Federal lands (16 U.S.C. §§ 23, 78, 593)
- Enforcement of the Magnuson-Stevens Fishery and Conservation Management Act (16 U.S.C. § 1861(a))
- Actions taken in support of the neutrality laws (22 U.S.C. §§ 408, 461–462)
- Removal of persons unlawfully present on Indian lands (25 U.S.C. § 180)
- Execution of certain warrants relating to enforcement of specified civil rights laws (42 U.S.C. § 1989)
- Removal of unlawful enclosures from public lands (43 U.S.C. § 1065)
- Protection of the rights of a discoverer of a guano island (48 U.S.C. § 1418)
- Support of territorial Governors if a civil disorder occurs (48 U.S.C. §§ 1422, 1591)
- Actions in support of certain customs laws (50 U.S.C. § 220)
- Actions taken to provide search and rescue support domestically under the authorities provided in the National Search and Rescue Plan

(2) Training

The second main category of regulation on DoD personnel assistance to civilian law enforcement involves training. 10 U.S.C. § 273 permits the Secretary of Defense to make DoD personnel available for the training of Federal, State, and local civilian law enforcement personnel in the operation and maintenance of equipment, including equipment provided to civilian law enforcement by DoD under 10 U.S.C. § 272. The Secretary of Defense has authorized the use of this authority in DoDI 3025.21, Enclosure 3.[65]

DoDI 3025.21 allows the military departments and defense agencies to provide training that is not "large scale or elaborate" and does not result in a direct or regular involvement of military personnel in activities that are traditionally civilian law enforcement operations. Training assistance is limited to situations where the use of non-DoD personnel would be unfeasible or impractical because of time or cost. Training assistance cannot involve military personnel in a direct role in a law enforcement operation, unless otherwise authorized by law, and this assistance will only be rendered at locations where law enforcement confrontations are not reasonably likely.[66]

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[65] DoDI 3025.21, *supra* note 6, Encl. 3, para. 1.f.

[66] *Id*.

DoD is prohibited from providing advanced military training to civilian law enforcement agencies.[67] "Advanced" military training is defined as high intensity training which focuses on the tactics, techniques, and procedures required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for violent confrontation exists. Examples of advanced military training include: advanced marksmanship and sniper training, military operations in urbanized terrain (MOUT), close quarters battle/close quarters combat (CQB/CQC) training, and other similar training. Advanced military training does not include basic military skills such as basic marksmanship, patrolling, mission planning, medical, and survival skills.[68]

A single general exception to the above policy is provided to the U.S. Army Military Police School which is authorized to train civilian law enforcement agencies in the Counterdrug Special Reaction Team Course, the Counterdrug Tactical Police Operations Course, and the Counterdrug Marksman/Observer Course. Additionally, the Commander, U.S. Special Operations Command (USSOCOM) may approve similar training by special operations forces on an exceptional basis.[69]

(3) Expert Advice

The third main category of regulation on DoD personnel assistance to civilian law enforcement is the provision of expert advice. 10 U.S.C. § 273 allows the Secretary of Defense to make DoD personnel available to provide civilian law enforcement agencies with expert advice relevant to the purposes of 10 U.S.C., Chapter 18. This does not permit direct assistance with activities that are fundamentally civilian law enforcement operations, except as otherwise authorized in DoDI 3025.21.[70]

(4) Use of DoD Personnel to Operate or Maintain Equipment

10 U.S.C. § 374 and DoDI 3025.21, Enclosure 3, address the use of DoD personnel for the operation or maintenance of equipment, including but not limited to equipment provided under § 272 and DoDI 3025.21 Enclosure 8, for Federal, State, or local law enforcement officials. DoDI 3025.21 largely mirrors 10 U.S.C. § 274, with a few additional restrictions and differences that will be highlighted as the statute provisions are set forth below.[71]

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[67] DoD Training Support to U.S. Civilian Law Enforcement Agencies, June 29, 1996, (available from the Office of the Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD(HD&ASA)), room 3D247, 2600 Defense Pentagon, Washington D.C. 20301) [hereinafter Training Memorandum].

[68] DoD may allow local police organizations and other civic organizations to use military ranges. *See* 10 U.S.C. § 4309 (1998).

[69] Training Memorandum, *supra* note 67.

[70] DoDI 3025.21, *supra* note 6, Encl. 3, para. 1.d.

[71] The operation or maintenance of equipment for a civilian agency, or the assistance in operating or maintaining such equipment, is subject to the following general restrictions from DoDI 3025.21: The use of DoD personnel to operate or maintain, or to assist in the operation or maintenance of equipment, will be limited to situations where it would be impractical or unfeasible to use non-DoD personnel for this purpose. The use of DoD personnel under these provisions must not compromise military preparedness. The assistance cannot involve DoD personnel in a direct law enforcement role unless otherwise authorized, and the assistance should be provided at a location where there is not a reasonable likelihood of a law enforcement confrontation. Lastly, military aircraft for point-to-point transportation and training flights for civilian law enforcement personnel may only be provided in accordance with DoD 4515.13-R.

10 U.S.C. § 274(a) allows the Secretary of Defense to make DoD personnel available for the maintenance of equipment for Federal, State, and local civilian law enforcement officials, including equipment made available under 10 U.S.C. § 272.[72] The statute does not specify who a request for maintenance must come from. Request specifics for maintenance and operation under DoDI 3025.21 are discussed further below.

10 U.S.C. § 274(b)(1) allows the Secretary of Defense, upon request from the head of a Federal law enforcement agency, to make DoD personnel available to operate equipment under certain laws and operations as follows:

- A criminal violation of certain specified laws;[73]
- Assistance that such agency is authorized to provide to a State, local, or foreign government involved with enforcement of a similar law;
- A foreign or domestic counter-terrorism operation; or
- A rendition of a suspected terrorist from a foreign country to the United States to stand trial.

These categories are best understood as "areas" the DoD can operate in with respect to 10 U.S.C. § 274. DoDI 3025.21 repeats these areas almost verbatim, with minor changes or additions.[74]

10 U.S.C. § 274(b)(2) states that DoD personnel made available under 10 U.S.C. § 274(b) may operate equipment for the certain purposes. This is best understood as what functions DoD personnel can perform when operating under the areas above. The following purposes are authorized under the statute:[75]

- Detection, monitoring, and communication of the movement of air and sea traffic;
- Detection, monitoring, and communication of the movement of surface traffic outside of the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary;
- Aerial reconnaissance;
- Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with such vessels and aircraft to direct such vessels and aircraft to go to a location designated by appropriate civilian officials;
- Operation of equipment to facilitate communications in connection with law enforcement programs specified in 10 U.S.C. § 274(a)(4)(1);

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[72] DoDI 3025.21, *supra* note 6, Encl. 3, para. 1.d

[73] Controlled Substances Act, 21 U.S.C. §§ 801–904 (2011); Controlled Substances Import and Export Act, 21 U.S.C. §§ 951–971 (2011); Immigration and Nationality Act, 8 U.S.C. §§ 1324–1328 (2012); a law relating to the arrival or departure of merchandise (as defined in § 401 of the Tariff Act of 1930) into or out of the customs territory of the United States; Chapter 705 of Title 46 (The Maritime Drug Law Enforcement Act (46 U.S.C. §§ 70501–70508) (2012)); or any foreign or domestic law prohibiting terrorist activities. 10 U.S.C. § 274(b) (2012).

[74] For example, DoDI 3025.21 adds "including support of FBI Joint Terrorism Task Forces" to the provision of 10 U.S.C. § 274 discussing operation of equipment in the case of foreign or domestic terrorism missions. DoDI 3025.21, *supra* note 6, para. 1.d.(5).

[75] DoDI 3025.21 reiterates all of these approved purposes virtually identically, including those subject to joint approval. DoDI.21 adds one other authorized purpose – the detection, monitoring, and tracking of the movement of weapons of mass destruction under the circumstances described in para. 1.d. of Enclosure 3 and when outside the United States. DoDI 3025.21, *supra* note 6, Encl. 3, para. 1.d.(5)(b)7.

- Subject to joint approval by the Secretary of Defense and the Attorney General (and the Secretary of State in the case of a law enforcement operation outside of the land area of the United States):

  - the transportation of civilian law enforcement personnel along with any other civilian or military personnel who are supporting or conducting a joint operation with civilian law enforcement personnel;
  - the operation of a base of operations for civilian law enforcement and supporting personnel; and
  - the transportation of suspected terrorists from foreign countries to the United States for trial (so long as the requesting Federal law enforcement agency provides all security for such transportation and maintains custody over the suspect through the duration of the transportation).

Additionally, DoD personnel made available to operate equipment for the purposes stated above may continue to operate such equipment into the land area of the United States in cases involving the pursuit of vessels or aircraft where the detection began outside such land area.[76] Lastly, 10 U.S.C. § 274(c) provides that the Secretary of Defense may make DoD personnel available to operate equipment for purposes other than those enumerated in 10 U.S.C. § 274(b)(2) so long as such support does not result in DoD personnel directly participating in a civilian law enforcement operation, unless direct participation is otherwise authorized by law.[77]

DoDI 3025.21 contains the additional provisions that 1) nothing in its guidance prohibits the use of emergency action authority under DoDD 3025.18, and 2) When DoD personnel are otherwise assigned to provide assistance with respect to the laws specified in subparagraph 1.b.(5) of DoDI 3025.21 Enclosure 3, the participation of such personnel shall be consistent with the limitations in such laws, if any, and such restrictions as may be established by policy or the DoD Components concerned.[78]

The process for requests for operation and maintenance of equipment differ slightly between the statute and DoDI 3025.21. No specific guidance is given regarding requests for equipment maintenance under 10 U.S.C. § 274(a). Under 10 U.S.C. § 274(b) requests for equipment operation must come from the head of a Federal law enforcement agency.

DoDI 3025.21 states that a request for DoD personnel to operate or maintain equipment (or assist with these actions) must be made pursuant to section 10 U.S.C. § 274 or other applicable law that permits DoD personnel to provide such assistance to civilian law enforcement officials. It goes on to state a request that is made pursuant to section 10 U.S.C. § 274 of must be made by the head of a civilian agency empowered to enforce any of the laws listed in footnote 75 above.[79] Note that,

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[76] 10 U.S.C. § 274(b)(3) (2012). DoDI 3025.21 differs slightly and states that personnel may operate equipment for both the detection, monitoring, and communication of the movement of air and sea traffic and the interception of vessels or aircraft in accordance with 10 U.S.C. 274(b)(2)(D) (2012).

[77] 10 U.S.C. § 274(c) (2012). DoDI 3025.21 contains this provision at Encl. 3, para. 1.d.(7).

[78] DoDI 3025.21, *supra* note 6, Encl. 3, para. 1.d.(9).

[79] *Id.*, para. 1.d.(4).

unlike 10 U.S.C. § 274, this appears to limit the circumstances under which maintenance (for 10 U.S.C. § 274 purposes) can be approved to these categories.[80]

(5) Other Permissible Assistance

The last main category of regulation over DoD personnel assistance to civilian law enforcement under DoDI 3025.21 is the overarching category of "other permissible assistance." The transfer of information acquired in the normal course of military operations to civilian law enforcement agencies under 10 U.S.C. § 271 is not a violation of the PCA and falls into this category.[81] Criteria for the provision of this information are discussed *infra*, above.

[80] Note also the difference in request language for operation assistance – the statute uses the term "Federal agency" and DoDI 3025.21 uses the term "civilian agency empowered" to enforce certain laws.

[81] *Id*., Encl. 3, para. 1.g.

CHAPTER 5

CIVIL DISTURBANCE OPERATIONS

KEY REFERENCES:

- 10 U.S.C. § 251-255- The Insurrection Act.
- 10 U.S.C. § 2667 - Leases: Non-Excess Property of Military Departments.
- 18 U.S.C. § 231 - Civil Disorders.
- 18 U.S.C. § 1382 - Entering Military, Naval, or Coast Guard Property.
- 18 U.S.C. § 1385 - The Posse Comitatus Act.
- 28 U.S.C. § 1346, 2671–2680 - The Federal Tort Claims Act.
- 31 U.S.C. § 1535 - Agency Agreements.
- Executive Order 12656 - Assignment of Emergency Preparedness Responsibilities.
- Executive Order 13527 - Establishing Federal Capability for the Timely Provision of Medical Countermeasures Following a Biological Attack, December 30, 2009.
- DoDD 3025.18 - Defense Support of Civil Authorities, December 29, 2010, Incorporating Change 2, Effective March 19, 2018.
- DoDD 5111.13 - Assistant Secretary of Defense for Homeland Defense and Global Security, March 23, 2018.
- DoDI 3025.21 Defense Support of Civilian Law Enforcement Agencies, February 27, 2013.
- DoDI 5525.13 Limitation of Authority to Deputize DoD Uniformed Law Enforcement Personnel by State and Local Governments, September 28, 2007.
- CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules For the Use of Force for U.S. Forces (S), June 13, 2005.
- CJCSI 3110.07C, Guidance Concerning Chemical, Biological, Radiological, and Nuclear Defense and Employment of RIOT Control Agents and Herbicides (S), November 22, 2006.
- Joint Pub 3-28 -Defense Support of Civil Authorities, July 31, 2013.
- Department of Defense Dictionary of Military and Associated Terms, April 2018.
- Army Regulation 700-131 - Loan and Lease of Army Materiel, August 23, 2004.
- CNGBI 3000.04-National Guard Bureau Domestic Operations, 24 January 2018.
- NGR 500-5, National Guard Domestic Law Enforcement Support and Mission Assurance Operations (18 Aug. 2010).
- FM 3-07, Stability, June 2, 2014.
- USNORTHCOM CONPLAN 3500 Defense Support of Civil Authorities (S).
- USNORTHCOM CONPLAN 3500-14, Defense Support of Civil Authorities Response.
- USNORTHCOM CONPLAN3600 (S).
- USPACOM CONPLAN 7502 (S).

A. Introduction

The Code of Federal Regulations provides that within civilian communities in the United States, the local governments and the States have the primary responsibility for protecting life and property and maintaining law and order.[1] The Department of Defense is authorized to support this effort.[2]

[1] 32 C.F.R. § 182.6(b)(1)(ii) (2017).

Generally, Federal forces are employed in support of State and local authorities to enforce civil law and order only when circumstances arise that overwhelm the resources of State and local authorities. This basic rule reflects the Founding Fathers' hesitancy to raise a standing army and their desire to render the military subordinate to civilian authority.[3] Limiting direct military involvement in civilian law enforcement activities, is rooted in the Constitution[4] and laws of the United States,[5] and allows for exception only under extreme emergency conditions. However, the Constitution also guarantees to the States that the Federal Government will aid in suppressing civil disturbances and empowers Congress to create laws that provide Federal forces for that purpose.[6] Department of Defense (DoD) policy no longer contains an official definition of civil disturbance, as the definition was removed from the DoD Dictionary of Military and Associated Terms; rather, "civil disturbances" are now referenced in the collective definition of "domestic emergencies."[7] *Civil disturbance* was previously defined as "group acts of violence and disorders prejudicial to public law and order."[8] Courts use similar language when defining "insurrection."[9] The Federal Emergency Management Agency (FEMA) defines civil disturbance more broadly as "[a] civil unrest activity such as a demonstration, riot, or strike that disrupts a community and requires intervention to maintain public safety."

This chapter discusses how DoD personnel and assets are integrated into a civil disturbance response. How those forces are commanded, funded, and employed depends on the Federal or State authority used to activate the personnel and assets.

1. National Response Framework – Civil Disturbance

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[2] U.S. DEP'T OF DEFENSE, INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES Encl. 4, para. 1.b. (27 Feb. 2013) [hereinafter DoDI 3025.21].

[3] Among the several grounds stated in the Declaration of Independence for severing ties with Great Britain includes the fact that the King "has kept among us, in times of peace, Standing Armies without the consent of our Legislature . . . [and] has affected to render the Military independent of and superior to the Civil power." THE DECLARATION OF INDEPENDENCE, para. 13, *available at* http://www.loc.gov/rr/program/bib/ourdocs/DeclarInd.html. This feeling resurfaced during the Constitutional Convention where Maryland Delegate Luther Martin recorded the general sentiment, "When a government wishes to deprive its citizens of freedom and reduce them to slavery, it generally makes use of a standing army." Luther Martin's Letter on the Federal Convention of 1787 (1787), 1 DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (ELLIOT'S DEBATES) 344, 372 (Jonathan Elliot ed., 1836) *available at* http://memory.loc.gov/ammem/amlaw/lwed.html.

[4] The Constitution divides authority over the Armed Forces between the President as Commander in Chief, and Congress, which has the authority to "raise and support Armies . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, para. 11; art. II, § 2, para. 1.

[5] *See, e.g.*, Posse Comitatus Act, 18 U.S.C. § 1385. The Posse Comitatus Act is discussed fully in Chapter 4 of this Handbook.

[6] U.S. CONST. art. I, § 8, para. 15, art. II, § 2, and art. IV, § 4. These sections provide authority to Congress and the President to support the States by providing forces to repel an invasion and suppress domestic violence.

[7] DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 72 (April 2018) [hereinafter DoD Terms].

[8] JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, CIVIL SUPPORT GL-5 (31 July 2013) [hereinafter JOINT PUB. 3-28]. The previous edition of JP 3-28 contained this definition, the newest edition removed this definition.

[9] *See e.g.*, *In re* Charge to Grand Jury, 62 F. 828 (N.D. Ill. 1894) (The open and active opposition of a number of persons to the execution of the laws of the United States, of so formidable a nature as to defy for the time being the authority of the government, constitutes an insurrection, though not accompanied by bloodshed, and not of sufficient magnitude to render success probable.)

The guide for how the Nation responds in the civil disturbance context and other emergencies is broadly known as the National Response Framework (NRF)[10]. The NRF sets out scalable, flexible, and adaptable concepts for the national response to disasters and emergencies.[11] While responses to civil disturbances generally begin and end locally, the NRF provides structure for the Federal response that may also be utilized by States to organize their response resources, capabilities, and authorities for managing incidents. [12] In particular, Federal response resources and capabilities are organized by functional areas and grouped under 15 core Emergency Support Functions (ESFs).[13] Public Safety and Security, inclusive of civil disturbance, is one of the ESFs designed to "[p]rovide Federal public safety and security assistance to local, State, tribal, territorial and Federal organizations overwhelmed by the results of actual or anticipated natural/manmade disaster or an act of terrorism."[14] The primary agency in support of this ESF is the Department of Justice/Bureau of Alcohol, Tobacco, Firearms and Explosives. Support agencies include the Department of Defense and the Department of Homeland Security.

2. The Tiered Response

"The public safety and the welfare of a State's residents are the fundamental responsibility of every Governor." [15] The Governor coordinates State resources to support local governments as needed and coordinates assistance with other States and the Federal Government. [16] Stated very simply, when an incident occurs, local governments are the first to respond. If local resources are inadequate or exhausted, the local government may reach out to neighboring local governments through a variety of mutual assistance compacts or to the State for additional resources and capabilities. When State resources are inadequate or exhausted, the State may request and coordinate assistance from other States through the Emergency Assistance Compact (EMAC), [17] and/or to the Federal government resources. Among the resources available to a State and locality are National Guard personnel and assets of the affected State, National Guard personnel and assets from other States (through the EMAC), and other DoD personnel and assets.[18]

B. Authorities for Use of DoD Forces for a Civil Disturbance

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[10] DEP'T OF HOMELAND SECURITY, NATIONAL RESPONSE FRAMEWORK, Third Edition (June 2016), [hereinafter NRF], available at http://www.fema.gov/national-response-framework. (last visited Aug. 3, 2018). The NRF superseded the National Response Plan (NRP) published in 2005; see infra Chapter 2 National Framework for Incident Management.

[11] *Id.* at 1.

[12] *Id.*

[13] *Id.* at 33. Emergency Support Functions (ESFs) are the grouping of governmental and certain private sector capabilities into an organizational structure to provide support, resources, program implementation, and services that are most likely needed to save lives, protect property and the environment, restore essential services and critical infrastructure, and help victims and communities return to normal following domestic incidents. https://www.phe.gov/preparedness/support/esf8/Pages/default.aspx. (last visited Aug. 3, 2018).

[14] *Emergency Support Function Annexes*, FEMA, https://www.fema.gov/media-library/assets/documents/25512. (last visited Aug. 3, 2018).

[15] NRF, *supra* note 10, at 13.

[16] *Id.*

[17] EMAC, *supra* note 17.

[18] NRF, *supra* note 10.

The U.S. Federal Armed Forces, including the reserves, are governed by Title 10 of the U.S. Code. National Guard forces have an additional statutory authority codified in Title 32 of the U.S. Code, due to their unique status as both a Federal Reserve component and as a part of the organized militia of their respective State or territory. The "3025-series" of DoD instructions and directives provide the guidance necessary to properly operate during civil support operations. More specifically, the following core DoD policies represent the core documents used by Federal personnel: 1) Department of Defense Directive 3025.18, Defense Support of Civil Authorities, 2) Department of Defense Instruction 3025.21, Defense Support of Civilian Law Enforcement Agencies, 3) Department of Defense Instruction 3025.22, The Use of the National Guard for Defense Support of Civil Authorities.

Employment of Federal Military Forces

The President is authorized by the Constitution and laws of the United States to employ the Title 10, Federal Armed Forces of the United States to suppress insurrections, rebellions, and domestic violence under various conditions and circumstances and to provide limited support to civilian law enforcement activities.[19] The specifics are discussed later in this chapter.

Employment of National Guard Forces

Due to the unique status of the National Guard, National Guard forces can be employed as follows: 1) State Active Duty (SAD) State funded, under State command and control, when called to duty by the State Governor in accordance with State law; 2) Title 32 status, using Federal funds, under State command and control, when properly assigned the mission under DSCA in accordance with Federal law; or 3) Title 10 status, Federally funded, under Federal control, when called to Federal military service by the President.

NOTE: Immediate Response Authority as set out in DoDD 3025.18, *Defense Support of Civil Authorities (DSCA)*, allows Federal military commanders, heads of DoD components, and responsible DoD civilian officials to provide an immediate response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States, in response to a request for assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority.[20] Immediate response authority is not an exception to the PCA, nor does it permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.[21]

1. Defense Support of Civil Authorities

The DoD has a broad range of capabilities that can be deployed in support of civilian authorities in emergency situations. As discussed in sections C and D of Chapter 1, the DoD provides Federal military assistance to civil authorities only when civil resources are insufficient, when requested to do so by appropriate civil authorities, and when properly ordered to do so by DoD officials. This DoD assistance is categorized as Defense Support to Civil Authorities (DSCA). DSCA is defined

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[19] DODI 3025.21, *supra* note 2, at encl. 3 and 4.

[20] U.S. DEP'T OF DEF., DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 4.i (29 Dec. 2010) (C2, 19 Mar. 2018) [hereinafter DoDD 3025.18].

[21] *Id.*

as, "[s]upport provided by United States Federal military forces, including Department of Defense civilians, contract personnel, and component assets, and National Guard forces (when the Secretary of Defense, in coordination with the Governors of the affected States, elects and requests to use those forces in a Title 32 status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events."[22] DSCA is initiated by a request for assistance to the DoD from civil authorities, qualifying entities, or by order of the President or Secretary of Defense.[23] The process for requesting military assistance by civilian agencies is set out in DoD Directive 3025.18. As a part of the approval process, before providing assets to support civil authorities, DoD evaluates the request based on the "CARRLL" factors also set out in DoDD 3025.18.[24]

In response to the request for assistance, forces from all branches of service on Federal active duty, including National Guard personnel under Federal command and control (Title 10) and National Guard personnel utilizing Federal funds under State command and control (Title 32) can be utilized.[25] As discussed later in this chapter, the utilization of Federal military forces, for civil disturbances or law enforcement support, unless acting pursuant to The Insurrection Act or other exception to the Posse Comitatus Act (PCA), is restricted from performing law enforcement functions.[26] While under the control of the Governor in a Title 32 or SAD status, the National Guard is not subject to the restrictions of Posse Comitatus. Accordingly, civil disturbance support mission and law enforcement support mission DSCA assignments are better suited to National Guard forces.

2. National Guard Civil Support

When a civil disturbance escalates beyond the capabilities of local and State law enforcement authorities to maintain or restore law and order, in accordance with State law and at State expense, Governors have the authority to activate the National Guard to augment State and local law enforcement authorities to restore law and order. Further, in accordance with State law, Governors also have the authority to activate the National Guard to assist other States as requested through the Emergency Management Assistance Compact (EMAC). National Guard units and personnel, in non-Federal status and under the command of their respective Governors, have primary responsibility for providing military assistance to local governments through their State emergency management response structure.[27] The National Guard Bureau refers to this support as "National

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[22] DoDD 3025.18, *supra* note 20, at 19.

[23] *Id.*, at para. 4.c.

[24] DoDD 3025.18 requires all requests for military support be evaluated against six criteria prior to the decision to employ forces: **C**ost – Who pays and the impact on DoD budget, **A**ppropriateness – Whether it is in the interest of DoD to provide the requested support, **R**eadiness – Impact on DoD's ability to perform its primary mission, **R**isk – Safety of DoD forces, **L**egality – Compliance with the law, and **L**ethality – Potential use of lethal force by or against DoD forces.

[25] In accordance with Title 32 USC, the Secretary of Defense, with the concurrence of the affected Governors, is the sole authority to authorize DOD funding of the National Guard for DOD missions including DSCA, see also DODI 3025.22 July 26, 2013, Incorporating Change 1, May 15, 2017.

[26] Posse Comitatus Act, 18 U.S.C. § 1385 (2012), makes it unlawful to use any part of the Army or Air Force to act in a civilian law enforcement capacity to execute local, State, or Federal laws.

[27] NATIONAL GUARD REG. 500-5, NATIONAL GUARD DOMESTIC LAW ENFORCEMENT SUPPORT AND MISSION ASSURANCE OPERATIONS para. 5-3.a (18 Aug. 2010) [hereinafter NGR 500-5].

Guard Civil Support."[28] This support is more specifically defined as "[s]upport provided by the National Guard while in a State Active Duty status or Title 32 status to civil authorities for domestic emergencies, designated law enforcement, and other activities."[29] The most recent civil disturbance examples in Ferguson Missouri, Baltimore, Maryland Charlottesville, Virginia, and Charlotte, North Carolina were supported by the respective State National Guard personnel primarily in their SAD status.

C. Use of National Guard Forces in a Title 32 or SAD Status (Not in Federal Service) for Civil Disturbance Operations

1. National Guard Civil Disturbance Mission

National Guard Forces have the primary responsibility for providing military assistance to State and local government agencies in civil disturbances for the protection of life, property and the maintenance of law and order within the territorial jurisdiction of any State.[30] National Guard units are particularly well suited for domestic law enforcement missions and civil disturbance operations as the units are located in over 3,000 local communities throughout the nation, readily accessible, routinely perform exercises with local first responders, and have broad experience in providing support to neighboring communities through their many State missions including hurricane and winter storm responses.[31]

2. National Guard Bureau and State Concept Plans (CONPLANS)

The National Guard Bureau (NGB) has the responsibility to develop and maintain an All-Hazards Support Plan, which describes the National Guard's domestic All-Hazards response supporting Federal agencies, States, Territories and the District of Columbia.[32] Each State National Guard prepares a State All-Hazards CONPLAN which incorporate civil disturbance operations and laws enforcement support. These CONPLANs provide the basis for preparation, deployment, employment and redeployment of National Guard Forces.

3. National Guard (Title 32 or SAD) Civil Disturbance Planning Considerations

The following is a non-exhaustive list of standard planning considerations for CDOs:

<u>Command and Control</u>: State laws and policies authorize National Guard forces in either a Title 32 or SAD status to support law enforcement agencies and are incorporated into State emergency operations plans. [33] National Guard forces are generally under the control of State and local civil

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[28] CHIEF, NATIONAL GUARD BUREAU, INSTR. 3000.04, NATIONAL GUARD BUREAU DOMESTIC OPERATIONS GL-2 (24 Jan. 2018) [hereinafter CNGBI 3000.04].

[29] *Id.*

[30] NGR 500-5, *supra* note 27, at para. 5-3.

[31] *Id.*, at para 5-1.

[32] CHIEF, NATIONAL GUARD BUREAU, INSTR. 5200.01, NATIONAL GUARD BUREAU ALL-HAZARDS SUPPORT PLAN para. 4 (03 FEB 2017),

[33] NGR 500-5, *supra* note 27, at para. 3-2.

authorities for mission tasking; however, these forces will remain under their normal military chain of command.[34]

Law Enforcement Functions: National Guard assistance is provided in support of civil authorities, not to replace civil authority. While State law may allow National Guard forces to act in a law enforcement capacity, apprehending, searching, seizing, and questioning should generally be left to civilian law enforcement. For concrete guidance, refer to the laws of each State and the State National Guard's Rules for the Use of Force (RUF) developed by the Office of the Staff Judge Advocate (OSJA) in partnership with the State Attorney General's office.

> Posse Comitatus: National Guard Forces in a SAD or Title 32 status supporting CDOs and law enforcement agencies are subject to the laws of their State; however, they are not subject to the restrictions of the Posse Comitatus Act.[35]
>
> EMAC Requirements: State Governors have the authority to activate their National Guard forces to assist other States as requested through the EMAC. National Guard personnel in SAD status pursuant to the EMAC, or forces serving in a Title 32 status supporting domestic law enforcement or CDOs, outside their home State, may support only civilian law enforcement as specified in a memorandum approved by the sending and receiving Governors.[36]

RUF: National Guard Forces engaged in civil disturbance and law enforcement operations are governed by the laws of the State in which they are serving. Each State develops its own RUF based on State law.

Intelligence Oversight: National Guard domestic intelligence activities are strictly limited by DoD procedures, [37] DoD directives,[38] National Guard policies,[39] and the Constitution.[40]

Use of Federal Equipment: National Guard forces have the authority to use general purpose Federal equipment issued to the National Guard during CDOs or other emergencies declared by the

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[34] *Id.*, at para. 4-2.

[35] *Id.*, at para. 4-3.

[36] EMAC, *supra* note 17.

[37] U.S. DEP'T OF DEFENSE, 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT U.S. PERSONS (26 Apr. 2017) [hereinafter DoD 5240.1-R].

[38] U.S. DEP'T OF DEFENSE, DIR. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE (7 Jan. 1908) [hereinafter DoDD 5200.27].

[39] CHIEF, NATIONAL GUARD BUREAU, INSTR. 2000.01B, NATIONAL GUARD INTELLIGENCE ACTIVITIES (04 Apr. 2017) [hereinafter CNGBI 2000.01B].

[40] U.S. CONST. amend. I (granting to the people the freedom of speech, to peaceably assemble, and to petition the Government for a redress of grievances). The DoD Civil Liberties Program is governed under DoDI 1000.29, which ensures that the DoD will not maintain information on how an individual exercises rights protected by the First Amendment to the Constitution of the United States, including freedoms of speech, assembly, press, and religion unless maintaining the information is authorized by the person(s), by statute, or is pertinent to and within the scope of an authorized law enforcement, intelligence collection, or counterintelligence activity. *See also* Snyder v. Phelps, 131 S.Ct. 1207 (2011); U.S. CONST. amend. IV (granting to the people the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures). *See also* DoD 5240.1-R, *supra* note 37.

Governor, subject to reporting and reimbursement to the Federal government. Federal intelligence equipment, such as certain unmanned aircraft systems (UAS), remotely piloted aircraft (RPA), and the Joint Worldwide Intelligence Communication System (JWICS) cannot be used without SECDEF approval for such purposes.[41]

Required Training: National Guard Units that have been assigned the civil disturbance mission are required to conduct at least annually civil disturbance training and assessment.[42] Direct participation in in CDOs is authorized only for those who have completed the civil disturbance training.[43] National Guard Soldiers who have not been trained and assessed in civil disturbance operations should serve only in a support role.

Claims: National Guard forces serving in a Title 32 status are considered United States Employees for the purposes of the Federal Tort Claims Act (FTCA). National Guard Forces serving in a SAD status are not covered by the FTCA; rather, tort coverage would be as provided for State employees within the respective State.

4. National Guard (Title 32 or SAD) Civil Disturbance Operation Mission Sets

Under the direction of proper civil authorities and supervision of civilian law enforcement and IAW applicable State and Federal laws and regulations, mission sets designed for civil disturbance operations and domestic law enforcement support included in the National Guard Civil Support Task List are as follows: [44]

Crowd management and Control Support: Includes crowd control activities and measures to preserve or restore order in response to events that could, or have escalated causing the disruption of public safety, public order, and interruption of essential services or destruction of critical assets.

Public Safety Support: Includes manning traffic control points, access control, presence patrols and other observation, escort and protective services.

Transportation Security: Includes escort of vehicles in transit, including people or cargo deemed at risk for interference.

Quick Reaction Support: Includes the use of pre-identified support to State and local law enforcement.

Emergency Responder Protection: Includes protection of emergency responder personnel to prevent public interference of emergency operations.

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[41] DoD 5240.1-R, *supra* note 37; CNBI 2000.01B, *supra* note 39.

[42] NGR 500-5, *supra* note 27, at para. 5-3. In accordance with this regulation, the training at a minimum includes: a) apprehension, search and detention, b) civil disturbance formations, c) media relations, d) non-lethal capabilities, e) riot shield and riot baton techniques, and f) use of force.

[43] *Id.*, at para. 5-3.

[44] CHIEF, NATIONAL GUARD BUREAU, INSTR. 3300.02, READINESS REPORTING para. 5.b (13 Nov. 2014) [hereinafter CNGBI 3300.02].

Provide Area Security Support: Includes a presence mission in support of civilian law enforcement and may include static posts, vehicle mounted or foot patrol roving security, checkpoints, area denial, and access control.

Facility Security Operations: Includes maintaining a secure perimeter, performing vulnerability and treat assessments, and securing designated critical facilities and structures to prevent damage or theft.

Manage Public Safety and Security Support Assets: Includes providing direct support to the incident commander or other proper civilian administration to plan, coordinate, track, and supervise all assets providing public safety and security support.

D. Use of Title 10 Forces During a CDO

1. Use of National Guard Forces in a Title 10 Status (in Federal Service)

When National Guard Forces are ordered into a Federal status (Title 10), the Federal military chain of command is followed. Also, the same Federal laws, policies, and restrictions that apply to Federal military forces, apply to the Federalized National Guard (e.g. the PCA).

2. Use of Federal Military Forces in a Title 10 Status for CDOs

Posse Comitatus Limitations
The Posse Comitatus Act (PCA),[45] DoDD 3025.18, and DoDI 3025.21 prohibit the direct, active participation of Title 10 military forces in civilian law enforcement, unless specifically authorized by Federal law or the U.S. Constitution. Certain Constitutional authorities[46] and the Insurrection Act[47] provide for exceptions to the PCA and serve as the basis of authority for Title 10 Federal military forces performing law enforcement during CDOs.

Posse Comitatus Act Exception (The Insurrection Act)
Title 10 of the United States Code, Chapter 13, is entitled "Insurrection." This chapter allows the use of Federal military forces to restore order during times of civil disturbance. The DoD currently classifies civil disturbance as a type of "domestic emergency."[48] While DoD policy no longer contains an official definition of civil disturbance, it was previously defined as, "group acts of

[45] Posse Comitatus Act, 18 U.S.C. § 1385 (2012 & Supp. IV 2017). This Act makes it unlawful to use any part of the Army or Air Force to act in a civilian law enforcement capacity to execute local, State, or Federal laws. The language of the Act specifies that activities expressly authorized by the Constitution or by Federal statute are exempt from the restrictions expressed within the Act. For a more complete discussion of the Posse Comitatus Act, see Chapter 4 of this Handbook.

[46] U.S. CONST. art. IV § 4 (tasking the U.S. Government with protecting each of the States from invasion, and upon application of the State's legislature or the State's Governor, against domestic violence).

[47] The Insurrection Act of 1807, 10 U.S.C. §§ 251-55, at § 252 (2012 & Supp. IV 2017).

[48] U.S. DEP'T OF DEFENSE, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 72 (April 2018) [hereinafter DoD Dictionary].

violence and disorders prejudicial to public law and order."[49] Courts use similar language when defining "insurrection."[50] Currently, the term is defined in Part II of Chief, National Guard Bureau Instruction 3000.04 as, "[g]roup acts of violence and disorder prejudicial to public law and order."[51]

Under the Insurrection Act, Federal forces may be used to restore law and order. As the use of Federal forces to quell civil disturbances is expressly authorized by Federal statute, the proscriptions of the PCA are inapplicable when the President is exercising authority under the Insurrection Act.

The Insurrection Act permits the commitment of Federal military forces by the President, "[w]henever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings . . . ." [52]

3. Supporting a State or Territorial Request

The Federal Government has an obligation to protect every State in the union, upon request, from domestic violence.[53] Pursuant to this obligation, Congress included in the Insurrection Act a provision authorizing the President to use Federal forces to assist State governments. Section 251 of the Insurrection Act provides:

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its Governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.[54]

Responsibility for the coordination of the Federal response to civil disturbances rests with the Attorney General of the United States (Attorney General).[55] In the case of State requests for assistance, the Attorney General is responsible for receiving the State requests for military assistance, coordinating the requests with SECDEF and other appropriate Federal officials, and presenting the requests to the President, who will determine what Federal action will be taken.[56] Should a request for assistance be presented to a local commander, the commander should inform the person making the request to address the request to the Attorney General.

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[49] JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, CIVIL SUPPORT GL-5 (31 Jul. 2013) [hereinafter JOINT PUB. 3-28]. The previous edition of JP 3-28, DSCA, contained the definition of civil disturbance. The definition has been removed from the current version of JP 3-28 dated July 31, 2013.

[50] *See e.g.*, *In re* Charge to Grand Jury, 62 F. 828 (N.D. Ill. 1894) (The open and active opposition of a number of persons to the execution of the laws of the United States, of so formidable a nature as to defy for the time being the authority of the government, constitutes an insurrection, though not accompanied by bloodshed, and not of sufficient magnitude to render success probable.)

[51] CNGBI 3000.04, *supra* note 29, at GL-2.

[52] Insurrection Act, *supra* note 47, at § 252.

[53] U.S. CONST. art. IV, § 4.

[54] The Insurrection Act of 1807, 10 U.S.C. §§ 251-55, at § 251 (2012 & Supp. IV 2017).

[55] See DoDI 3025.21, *supra* note 2, Encl. 4, at para. 1.c.

[56] *Id*. *See also* Exec. Order No. 12656, 3 C.F.R. 585, 53 Fed. Reg. 47491, § 1101(8) (Nov. 18, 1998).

As referenced above, prior to a State requesting assistance in the form of Federal military forces, all local and State resources, including the National Guard in State Active Duty status,[57] should have been brought to bear on the civil disturbance.[58]

One relatively recent example of a State requesting such assistance was the response to the Los Angeles riots of 1992. On May 1, 1992, pursuant to the Insurrection Act, California Governor Pete Wilson requested Federal military support from President George H.W. Bush to assist with restoring law and order in Los Angeles. Governor Wilson advised President Bush that the domestic violence exceeded the capabilities of available law enforcement resources, including National Guard forces mobilized a day earlier.[59] In accordance with the Executive Order issued by President Bush, and to provide Federal assistance to Los Angeles in the restoration of law and order, the Secretary of Defense Federalized the California National Guard and deployed Soldiers of the 7th Infantry Division (7ID) at Fort Ord and Marines from Camp Pendleton.[60]

4. Enforcing Federal Authority

The President has a Constitutional duty to see that the laws of the United States are faithfully executed.[61] Within the Insurrection Act, Congress gave the President the authority to commit the U.S. military to enforce Federal law.[62] 10 U.S.C. § 252 provides:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.[63]

During the 1950s and 1960s, the Insurrection Act statute was used to enforce public school desegregation in Arkansas[64] and Alabama[65] and to control civil rights protests in Mississippi[66] and Alabama.[67]

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[57] *See* Chapter 3 of this Handbook, which discusses the mobilization and activation of National Guard forces.

[58] CNGBI 3000.04, *supra* note 28, at para. 4.b (which anticipates that Governors will use their State National Guards under their control when responding to incidents within their State).

[59] Proclamation No. 6427, 57 Fed. Reg. 19359 (May 5, 1992).

[60] Exec. Order No. 12804, 57 Fed. Reg. 19361 (May 5, 1992). *See also* JOINT CHIEFS OF STAFF, JOINT PUB 3-08, INTERORGANIZATIONAL COOPERATION, para. 2.f.1.e (12 Oct. 2016) (validated 18 Oct. 2017).

[61] U.S. CONST. art. II, § 3.

[62] Insurrection Act, *supra* note 47, at § 252.

[63] *Id.*

[64] *See* Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 24, 1957) (Army and Air National Guard units were Federalized to remove obstructions to justice in respect to enrollment and attendance at public schools in Little Rock, Arkansas.).

[65] *See* Exec. Order No. 11118, 28 Fed. Reg. 9863 (Sept. 10, 1963) (Army and Air National Guard units were Federalized to remove obstructions to justice in respect to enrollment and attendance at public schools in Alabama.).

[66] *See* Proclamation No. 3497, Exec. Order No. 11053, 27 Fed. Reg. 9681 (Sept. 30, 1962) (Army and Air National Guard units Federalized to enforce Federal court orders issued in Mississippi.).

5. Protecting Constitutional Rights

Citizens of the United States are guaranteed equal protection under the law.[68] The final Congressional grant of authority to the President for the use of the U.S. military during times of insurrection is for the protection of citizens in States that cannot protect the Constitutional rights of its citizens.[69] 10 U.S.C. § 253 states:

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—
>
> (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
>
> (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.[70]

10 U.S.C. § 253 was used as an authority by President Kennedy to send Federal military troops to Alabama in April 1963 during the civil rights protests in Birmingham, Alabama.[71]

E. Taking Action under the Insurrection Act (Procedural Considerations)

Prior to utilizing the Federalized militia or Federal troops under the Insurrection Act, the President must issue a proclamation demanding that the insurgents cease and desist all acts of violence and retire peaceably within a prescribed time.[72] 10 U.S.C. § 254 states,

> Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

If the Presidential Proclamation does not end the disturbance, the President will issue an Executive Order to the Secretary of Defense directing the Secretary to use such of the armed forces as are

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[67] *See* Exec. Order No. 11111, 28 Fed. Reg. 5709 (Jun. 11, 1963) (Army and Air National Guard units Federalized to remove obstructions to justice and to suppress unlawful assemblies, conspiracies, and domestic violence that opposed the laws of Alabama.).

[68] U.S. CONST. amend. XIV, § 1 which States in part "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws."

[69] Insurrection Act, *supra* note 47, at § 253.

[70] *Id.*

[71] *See* Alabama v. U.S., 373 U.S. 545 (1963).

[72] Insurrection Act, *supra* note 47, at § 254.

necessary to restore order.[73] Decisions of the President to issue Presidential Proclamations and Executive Orders pursuant to the Insurrection Act are made solely at the discretion of the Executive[74] and cannot be compelled by the courts.[75] Recent examples of a proclamation and follow-on order are Proclamation No. 6427 and Executive Order 12804, cited above, used during the Los Angeles riots of 1992.

F. DoD Considerations Concerning the Insurrection Act

As reviewed, above, Department of Defense Directive (DoDD) 3025.18, Defense Support of Civil Authorities, requires all requests for military support be evaluated against six criteria prior to the decision to employ forces.[76]

The decision to employ Federal military forces for Civil Disturbance Operations (CDO) is made in coordination between the President, the Secretary of Defense, and the Attorney General. Although the Secretary of Defense retains approval authority for all Federal military support in response to civil disturbances,[77] the above-criteria may be helpful to local commanders and their judge advocates as they may advise on formal assistance requests routed to higher headquarters for consideration.

G. Additional Posse Comitatus Exceptions

In addition to the Insurrection Act, authority to use Federal troops in a law enforcement capacity to address civil disturbances can be found in two other major areas.

1. Emergency Authority

Under DoDD 3025.18, Federal military commanders are provided emergency authority. Under this provision, in extraordinary emergency circumstances where prior authorization by the President is impossible and local authorities are unable to control the situation, Federal military commanders may exercise their emergency authority to temporarily engage in activities that are necessary to quell large-scale, unexpected civil disturbances either because:

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[73] *See* Exec. Order No. 10703, 22 Fed. Reg. 7,628 (Sept. 24, 1957) (order authorizing use of military forces for desegregation in Arkansas); Exec. Order No. 11053, 27 Fed. Reg. 9,681 (Sept. 30, 1962) (order authorizing use of military forces during riots in Mississippi); Exec. Order No. 11111, 28 Fed. Reg. 5,709 (June 11, 1963) (order authorizing use of military forces during riots in Alabama); Exec. Order No. 11118, 28 Fed. Reg. 9,863 (Sept. 10, 1963) (order authorizing use of military forces for desegregation in Alabama).

[74] *See, e.g.*, Monarch Ins. Co. of Ohio v. District of Columbia, 353 F. Supp. 1249 (D.D.C. 1973), *aff'd*, 497 F.2d 683, *aff'd*, 497 F.2d 684 (D.C. Cir. 1977), *cert. denied*, 419 U.S. 1021 (1974), *aff'd*, 497 F.2d 685 (D.C. Cir. 1974) (decision whether to use troops or militia to quell civil disorder is exclusively within the province of the President, and presidential discretion in exercising powers granted in U.S. Constitution Article 2, § 2 and Article 4, § 4, and the Insurrection Act is not subject to judicial review).

[75] *See* Consolidated Coal and Coke Co. v. Beale et al., 282 F. 934 (S.D. Ohio 1922) (ruling that court could not compel President to issue Proclamation or exercise discretion under Insurrection Act).

[76] DoDD 3025.18, para. 4.e. sets out the following "CARRLL" factors: **C**ost – Who pays and the impact on DoD budget, **A**ppropriateness – Whether it is in the interest of DoD to provide the requested support, **R**eadiness – Impact on DoD's ability to perform its primary mission, **R**isk – Safety of DoD forces, **L**egality – Compliance with the law, **L**ethality – Potential use of lethal force by or against DoD forces.

[77] *Id.*, at para. 4.l.1 (stating that approval authority for civil disturbance operations is no lower than the Secretary of Defense level).

- Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or,

- if duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions, then Federal action, including the use of Federal military forces, is authorized when necessary to protect the Federal property or functions.[78]

Oral requests from local officials to a commander should be reduced to writing as soon as possible. An officer exercising emergency authority must report the facts surrounding the request, the command's response, and any other relevant information through the chain of command to the Chairman of the Joint Chiefs of Staff, Joint Director of Military Support (JDOMS) with copy to USNORTHCOM Domestic Warning Center expeditiously. If the commander has not received a written request at the time he forwards the request to JDOMS, the written request should be forwarded to JDOMS as soon as it is available.

2. Barment or Removal Authority

A military installation commander, exercising "inherent authority" may take such actions that are reasonably necessary and lawful to protect military installations. This is outside of emergency authority or Insurrection Act authority discussed above, and is not exercised in concert with the type of force that may occur in those situations. Although it can involve civil unrest situations, it involves non-emergency situations where there is time to apply authority allowing for the removal or barment of a person from an installation to remedy a situation. Violations of such orders to stay off an installation carry civil and criminal penalties.[79]

H. The Department of Defense Civil Disturbance Plans

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[78] *Id*., at para. 4.k.

[79] The courts have approved the theory of a commander's inherent authority, that is, authority not found in statute or regulation. *See* Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 893 (1961) (commanders have "historically unquestioned power" to exclude persons from their installations); Greer v. Spock, 424 U.S. 828, 840 (1976) ("There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.").

18 U.S.C. § 1382 states:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined under this title or imprisoned not more than six months, or both.

From this Federal trespass statute, courts have inferred military power of apprehension of civilians trespassing on Federal installations. *See* United States v. Banks, 539 F.2d 14 (9th Cir. 1976), cert. *denied*, 429 U.S. 1024 (1976). For a complete analysis of law enforcement authority over civilians, *see* Major Matthew Gilligan, *Opening the Gate?: An Analysis of Military Law Enforcement Authority over Civilian Lawbreakers on and off the Federal Installation*, 161 Mil. L. Rev. 1 (1999).

DoD works closely with other Federal agencies, in particular DHS and its subordinate organizations, when planning for DSCA.[80] DoD has delegated to geographic combatant commanders responsibility for developing CDO Contingency Plans (CONPLANs).[81] Further, DoD coordinates with interagency partners through the Chief, National Guard Bureau (CNGB) to States/territories on all matters pertaining to the National Guard, to ensure DoD planning supports the needs of those requiring DSCA.[82]

1. The Federal Military Force CDO Mission

The CDO mission is conducted to restore order or enforce Federal law after a major public emergency (e.g., natural disaster, serious public health emergency, or terrorist attack) when requested by the State Governor or when the President determines that the authorities of the State are incapable of maintaining public order.[83] The restoration of law and order must be distinguished from the preservation of law and order.[84] CDO mission statements do not normally allow for commanders to undertake preservation missions.[85] It is generally agreed that missions to restore law and order include dispersing unauthorized assemblages, patrolling disturbed areas, maintaining essential transportation and communications systems, setting up roadblocks, and cordoning off areas.[86] Judge advocates should assist their commanders in ensuring that they do not assume missions involving the routine maintenance of civil order unless absolutely necessary and authorized.

2. Combatant Commanders' CONPLANs

CONPLANs provide the basis for all preparation, deployment, employment, and redeployment of Department of Defense component forces, including National Guard forces called to active Federal service, for use in domestic civil disturbance operations, in support of civil authorities as directed by the President.[87]

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[80] JOINT PUB. 3-28, *supra* note 8, at 28.

[81] DoDD 3025.21, *supra* note 2, at Encl. 4. The principal planning agents for DSCA are the combatant commanders, of United States Northern Command and (USNORTHCOM), United States Pacific Command (USPACOM), and United States Special Operations Command (USSOCOM). *Id.*

[82] *Id.*

[83] JOINT PUB. 3-28, *supra* note 8, at III-3,4.

[84] DODI 3025.21, *supra* note 2, at Encl. 4, para. 1.b. The preservation of law and order is the responsibility of State and local governments and law enforcement authorities. *Id.*

[85] *Id*. Encl. 4, para. 2.e. "The DoD Components shall not take charge of any function of civil government unless absolutely necessary under conditions of extreme emergency. Any commander who is directed, or undertakes, to control such functions shall strictly limit military actions to the emergency needs, and shall facilitate the reestablishment of civil responsibility at the earliest time possible." *Id.*

[86] U.S. DEP'T OF ARMY, DOCTRINE PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 3 (26 July 2012) [hereinafter ADP 3-28].

[87] It is important to remember that any employment of Federal military forces in a CDO must maintain the primacy of civilian authority. *See* 32 C.F.R. 182.6(b) (2017). *See also* 9 Op. Att'y Gen. 517 (1860) ("Under [the Insurrection Act] the President may employ the militia and the land and naval forces for the purpose of causing the laws to be executed; but when a military force is called into the field for that purpose, its operations must be purely defensive, and the military power on such occasion must be kept in strict subordination to the civil authority.").

During the employment of military forces, the Commander will maintain liaison with the Senior Civilian Representative of the Attorney General (SCRAG), State law enforcement representatives, and municipal authorities.[88] Normally, this liaison is through the Defense Coordinating Officer (DCO). The liaison will be maintained until termination of the civil disturbance mission. The Joint Civil Disturbance Task Force Commander (or COCOM) will accept missions, and if reasonably possible within the framework of orders, comply with requests from civil authorities.[89]

Unless in a direct support relationship approved and ordered through the military chain of command, units should not accept tasking directly from law enforcement or civilian officials. Even though the Joint Civil Disturbance Task Force Commander may direct subordinate elements to assist designated civil authorities or officials, military personnel will not be placed under the command of civilians. This requirement does not preclude the establishment of joint patrols or jointly manned operations.

I. Federal Military Forces Civil Disturbance Operation Planning Considerations

1. The Standing Rules for the Use of Force for U.S. Forces

For U.S. armed forces operating under Title 10, civil disturbance operations are conducted in accordance with Enclosures L and N to Chairman, Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces (SRUF).[90] Guidance on how and when forces can use force in a CDO mission are detailed in the enclosures of the policy. Although the policy is classified, Annex L is not and can be shared with our mission partners. In addition to this policy, as part of operating in an inter-agency environment in support of civil authorities, judge advocates must make themselves familiar with State and local laws regarding the use of force. The National Guards in each State have a RUF, not to be confused with the SRUF. The RUF for each State is based on State law. Therefore, each State may have a different RUF. This is particularly important for Federal forces if joint patrols or other missions are conducted. In such case, judge advocates, both active and reserve component, should review the RUF for the State National Guard and the SRUF for Title 10 forces to identify where they may differ in the application of force. The differences should be clearly explained to commanders thereby enabling them to determine how to proceed.

2. Constitutional Considerations

[88] 32 C.F.R. 182.6(b)(5) (2017) (stating that the Attorney General of the United States may assign another Dept. of Justice entity, such as the FBI or ATF, to lead the CDO on the part of the Federal Government).

[89] DoDI 3025.21, *supra* note 2, at Encl. 4.

[90] JOINT PUB. 3-28, *supra* note 8, at B-1.

State and Federal law govern search, seizure, arrest, detention, and confinement occurring during a CDO. The Attorney General of the United States is responsible for setting overall guidelines governing the conduct of civil disturbance operators when the Federal military is involved. Judge advocates should familiarize themselves with any policies and procedures set forth by the Department of Justice. Service-members should be trained in advance on proper legal procedures for search, seizure, arrest, and detention, and should be aware that actions not conforming to Constitutional standards could jeopardize prosecution of criminal actors or subject the member to civil or criminal liability.

a. Detention and Confinement

Whenever possible, any arrest or apprehension should be made by the civil police force unless they are not available or require assistance. If it is necessary for Federal military forces to make an apprehension, they should do so under the appropriate legal authority, work in support of civil authorities, and should, whenever possible, ensure that civilian authorities are present. Joint patrols with members of the State's National Guard and local law enforcement officers has proven to be most beneficial.[91]

Unless otherwise authorized by law, Federal military forces should not operate detention facilities when supporting CDOs.[92] Civil authorities have the responsibility to provide adequate detention facilities for all subjects. If Federal military forces are committed to support local authorities with arrests, commanders should coordinate with local authorities to ensure that adequate detention facilities are available and to learn their locations and capacities. Also, Federal military participation with the arrests must be in accordance with Federal law and DoD policy.[93]

b. Searches

Unless otherwise authorized by law, Federal forces should not be involved in warrant-backed or warrantless searched for evidence of a crime (i.e. searches of houses, crime scenes, etc.).[94] The same holds true for a lawful stop and frisk conducted during patrols. Nonetheless, as Federal military personnel support local law enforcement to restore order, the need to search civilians may arise. In such instances, Federal military personnel should adhere to Federal law and the requirements set forth by USNORTHCOM's plan for civil disturbance operations.[95]

3. Billeting of Troops

Selection of a location to assemble and billet troops can have significant legal implications. When possible, assembly and quartering areas should be on military installations or Federal property. If

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[91] U.S. DEP'T OF ARMY, DOCTRINE REF. PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 4-65 (14 June 2013) [hereinafter ADRP 3-28].

[92] *Id.*, paras. 3-38–3-40; *see generally*, DODI 3025.21, *supra* note 1, Encl. 4 ("DoD Components shall not take charge of any function of civil government unless absolutely necessary under conditions of extreme emergency.").

[93] U.S. DEP'T OF DEFENSE, INSTR. 5525.13, LIMITATION OF AUTHORITY TO DEPUTIZE DOD UNIFORMED LAW ENFORCEMENT PERSONNEL BY STATE AND LOCAL GOVERNMENTS (28 Sept. 2007) (C1, 29 June 2018).

[94] *Id.* at 6.2, 6.3.

[95] ADRP 3-28, *supra* note 91, at para. 4-80.

these locations are not practical, State and other local government property may be sought for use.[96] Locating assembly areas on public property can reduce property damage claims, contract costs, and adverse perceptions about the military operation.

4. Intelligence

See Chapter 9, Intelligence and Information Acquisition and Handling During Domestic Support Operations, for information regarding the proper use of intelligence elements and collection of information during domestic civil support.

5. Claims

Negligent or wrongful acts or omissions of military forces assisting law enforcement during civil disturbances may be covered under the Federal Tort Claims Act (FTCA).[97] In order for claims under the FTCA to be compensable, the damage or injury must be caused by acts or omissions of employees of the United States. National Guard troops in Title 10 or Title 32 status, as well as active duty military members, are considered U.S. employees for the purposes of the FTCA. National Guard forces activated pursuant to a State activation statute are not considered employees of the United States, and potential claims arising out of the activities of these forces should be directed to State authorities.

The development of disaster and civil disturbance claims plans is the responsibility of the head of the various Area Claims Offices (ACOs) across the United States.[98] The ACO in whose geographical area a claims incident occurs is primarily responsible for investigating and processing the claim.[99] With the approval of Commander, United States Army Claims Service, the responsible ACO can appoint a special Claims Processing Office to handle claims arising from civil disturbance operations.[100] For a major CDO, senior judge advocates should consider requesting a claims team from ACO.

Even though primary claims investigating responsibilities fall to the ACO, judge advocates deployed as part of a civil disturbance task force can assist in investigations by ensuring that potential claims are documented and available information concerning the claims is collected. Judge advocates can also assist by collecting information concerning the status of National Guard troops operating within the area.[101]

6. Medical Support

The primary mission of medical support personnel deployed with a Joint Civil Disturbance Task Force is to treat military personnel requiring medical care. When possible, civilians in need of medical treatment should be seen by the healthcare providers within the civilian healthcare system.

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[96] 10 U.S.C. § 2679 (2012 & Supp. IV 2017); U.S. DEP'T OF DEFENSE, INSTR. 4000.19, SUPPORT AGREEMENTS (25 Apr. 2013) (C1, 30 Nov. 2017).

[97] 28 U.S.C. §§ 1346, 2671–2680 (2012 & Supp. IV 2017).

[98] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 1-11k (8 Feb. 2008).

[99] *Id.* para. 2-2.

[100] *Id.* para. 1-17(c).

[101] Detailed information on claims arising during disasters can be accessed at http://www.jagcnet.army.mil/Claims.

Military treatment facilities may be used to treat civilians only in cases of emergency when undue suffering or grievous bodily harm is a possibility. Civilians admitted to military treatment facilities should be transferred to a civilian hospital as soon as medically feasible.

7. Interference with Federal Forces

Federal law makes it a crime to interfere with law enforcement officers engaged in controlling civil disorders.[102] Included in the definition of "law enforcement officers" are members of the National Guard, in both State and Federal status, and members of the Federal armed forces.[103]

8. Loan and Lease of Military Equipment

There is no specific statutory authority to loan or lease equipment for use in civil disturbance situations. Loans to Federal agencies are completed pursuant to the Economy Act and require a loan agreement but no surety bond.[104] Equipment for non-Federal law enforcement agencies must be leased under the leasing statute, 10 U.S.C. § 2667, which requires both a lease agreement and a surety bond. The leasing statute also includes the requirement for the payment of a lease fee, which in the case of the Army may be waived by the Assistant Secretary of the Army (Installation, Logistics and Environment) (ASA(I, L&E)).[105]

Approval authorities for the loan and lease of DoD materiel to Federal, State, and local law enforcement authorities are based upon the type of equipment to be provided. Requests for the loan or lease of personnel, arms, ammunition, tactical vehicles, vessels and aircraft, riot control agents, and concertina wire for expected civil disturbances will be forwarded through the Chairman of the Joint Chiefs of Staff (JDOMS) to the Secretary of Defense (SECDEF). The loan or lease of fire-fighting resources, protective equipment, body armor, clothing, searchlights and use of DoD facilities can be approved by garrison, installation, or task force commanders.[106] See U.S. Army Reg. 700-131, Loan and Lease of Army Materiel (23 Aug. 2004), for more specific guidance on the loan and lease of material.

9. Funding

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[102] 18 U.S.C. §§ 231–233 (2012 & Supp. IV 2017).

[103] *Id.* § 232 which states:

> The term "law enforcement officer" means any officer or employee of the United States, any State, any political subdivision of a State, or the District of Columbia, while engaged in the enforcement or prosecution of any of the criminal laws of the United States, a State, any political subdivision of a State, or the District of Columbia; and such term shall specifically include members of the National Guard (as defined in section 101 of title 10), members of the organized militia of any State, or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia not included within the National Guard (as defined in section 101 of title 10), and members of the Armed Forces of the United States, while engaged in suppressing acts of violence or restoring law and order during a civil disorder.

[104] 31 U.S.C. § 1535 (2012 & Supp. IV 2017).

[105] 10 U.S.C. § 2667 (2012 & Supp. IV 2017); *see also* U.S. DEP'T OF ARMY, REG. 700-131, LOAN AND LEASE OF ARMY MATERIEL, para. 2-7, 2-8 (23 Aug. 2004) [hereinafter AR 700-131] (discussing loan/lease agreements and surety bonds).

[106] AR 700-131, *supra* note 71, paras. 2-6b. NGR 500-1, *supra* note 58, Chap. 3-1, governs the loan or lease of National Guard property.

DoD 7000.14-R, Department of Defense Financial Management Regulation, the USNORTHCOM CONPLAN 3501, Defense Support of Civil Authorities, and the USNORTHCOM CONPLAN 3502, Civil Disturbance Operations, require operating agencies and supported combatant commanders to recover all costs for civil disturbance operations. The operating agency and supported commander are responsible for collecting costs for civil disturbance operations of all components and DoD agencies, preparing cost reports for the executive agency, consolidating billings, forwarding bills to DOJ, and distributing reimbursements.[107]

J. Responsibilities and Relationships of Parties Involved in Civil Disturbance Operations

1. Attorney General

The Department of Justice is the primary Federal agency responsible for coordinating the Federal Government response to restore law and order.[108] As the head of the Department of Justice, the Attorney General is the chief civilian official responsible for the Federal Government's activities in civil disturbances. The Attorney General provides early threat assessments and warnings to the Department of Defense to support civil disturbance planning. States request the assistance of Federal forces through the Attorney General, who also advises the President on the use of Federal military forces to restore law and order. The Attorney General coordinates the activities of Federal law enforcement agencies with those of the local and State agencies in an area faced with a civil disturbance.

2. Senior Civilian Representative of the Attorney General (SCRAG)

Pursuant to 32 C.F.R. § 182.6, the Attorney General may appoint a SCRAG for a civil disturbance. The SCRAG is responsible for the coordination of effort of all Federal agencies involved in the civil disturbance operation with the efforts of State and local agencies engaged in restoring law and order. Note that the appointment of such an official does not replace the military chain of command.[109] DoD forces employed in civil disturbance operations must remain under military authority at all times.[110]

3. Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs

The Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD(HD&ASA)) acts as the principal point of contact between DoD and the Department of Justice for Civil Disturbance Operations.[111] ASD(HD&ASA) is also responsible for the development, coordination, oversight of DoD policy for DSCA plans and activities regarding civil disturbances.[112]

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[107] JP 3-28, *supra* note 8, at Encl. 3, para. 3.c.

[108] DoDI 3025.21, *supra* note 2, at Encl. 4, para. 1.c; 32 C.F.R. § 182.6(b)(5) (2017).

[109] 32 C.F.R. § 182.6(b)(5) (2017).

[110] JP 3-28, *supra* note 7, at III-3, 4.

[111] DoDI 3025.21, *supra* note 2, at Encl. 2, para. 2.b.

[112] U.S. DEP'T OF DEFENSE, DIRECTIVE 5111.13, ASSISTANT SECRETARY OF DEFENSE FOR HOMELAND DEFENSE AND AMERICAS' SECURITY AFFAIRS (ASD(HD&ASA)), para. 4.b.(1) (16 Jan. 2009).

4. Joint Director of Military Support (JDOMS)

JDOMS is the action agent within DoD with responsibility for planning, coordinating, and directing the commitment of all designated Federal military resources during civil disturbance operations. JDOMS coordinates with the supported Combatant Commander (CC) for a CDO, and releases the execute order (EXORD) designating supported and supporting Combatant Commanders and tasking force providers to give the ordered support.[113]

5. Combatant Commanders, U.S. Northern Command and U.S. Pacific Command

The Commanders of USNORTHCOM, USPACOM, and USSOCOM, as the DoD planning agents for CDO, lead the CDO planning activities of the DoD Components in these areas:

- USNORTHCOM - The 48 contiguous States, Alaska, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.
- USPACOM - Hawaii and the U.S. possessions and territories in the Pacific area.
- USSOCOM - CDO activities involving special operations forces.[114]

6. Commander, U.S. Army North

U.S. Army North (ARNORTH) is currently the lead operational authority for Federal civil disturbance support response within the continental United States.[115] The Commander, ARNORTH, designates a Commander, Joint Civil Disturbance Task Force in the event of CDO, receives civil disturbance units, ensures their preparedness, and deploys forces to the objective area.

7. Commander, Joint Civil Disturbance Task Force

The Commander of the Joint Civil Disturbance Task Force is an appointed Commander for all Federal forces, including National Guard forces in Title 10 status, in a civil disturbance area of operations. He or she will be the DoD representative in the civil disturbance area and performs civil disturbance missions assigned.

8. National Guard Bureau

The Chief of the National Guard Bureau (CNGB) is the channel of communication for all National Guard matters between Federal military elements (including the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the DoD Components, and the Departments of the Army and Air Force) and the States.[116] In that capacity, CNGB facilitates and de-conflicts the use of National Guard forces to ensure that adequate and balanced forces are available for domestic and foreign military

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[113] JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INST. 5711.02C, DELEGATION APPROVAL AUTHORITY (30 Nov. 2012). *See also* JP 3-28, *supra* note 8, at Ch. III, V.

[114] DoDD 3025.21, *supra* note 2, Encl. 4, p. 26.

[115] *See* ABOUT USNORTHCOM, http://www.northcom.mil/AboutUSNORTHCOM.aspx (last visited Aug. 14, 2018)

[116] U.S. DEP'T OF DEFENSE, DIR. 5105.77, NATIONAL GUARD BUREAU (NGB) para. 4.3 (21 May 2008) [hereinafter DODD 5105.77].

operations.[117] The NGB maintains a 24/7 National Guard Coordination Center providing situational awareness and common operating picture for any CDO.

9. State Governor/Chief Executive of a U.S. Territory[118]

A State Governor coordinates State resources and provides strategic guidance needed to prevent, mitigate, prepare for, respond to, and recover from incidents of all types.[119] In addition, the Governor, commands the State National Guard Forces (in a SAD or Title 32 status), coordinates for and provides interstate mutual aid and assistance through compacts such as the EMAC, and requests Federal assistance.[120]

10. State Homeland Security Advisor

"The State Homeland Security Advisor serves as counsel to the Governor on homeland security issues and may serve as a liaison between the Governor's office, the State homeland security structure, DHS, and other organizations both inside and outside of the State."[121] This role may be filled by the Director of the State Emergency Management or The Adjutant General of a State, depending on the organization of the State's emergency management system.

11. Director, State Emergency Management Agency

All States have laws mandating the establishment of a State emergency management agency and the development of emergency plans coordinated by that State.[122] The director of the State emergency management agency is responsible for coordinating the State response in any incident.

12. The National Guard

National Guard units have the primary responsibility to respond to a civil disturbance, initially deploying in a State Active Duty (SAD) status or under Title 32.[123] In either capacity, they are not subject to the prohibitions of the PCA and can support State or Federal law enforcement missions.[124] National Guard forces remain under the command of State National Guard officers, and missions are conducted through the National Guard chain of command, after coordination with civil authorities. In extreme circumstances, National Guard units may be Federalized under Title 10 pursuant to a Presidential order.[125] Once Federalized, the National Guard conducts its mission in accordance with DoD regulations, Federal law and under Federal control. (See "Use of National

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[117] *Id.* para. 5.1.11.2.

[118] For this paragraph, the reference to a State Governor also references the chief executive of a US territory.

[119] JP 3-28, *supra* note 8, at II-2.

[120] *Id.*

[121] *Id.* at II-3.

[122] *Id.*

[123] With SecDef approval, the National Guard may conduct operational missions under 32 U.S.C. § 502(f)(2) "operational support" authority. *See* DoDD 3025.18, *supra* note 34, para. 4.h.

[124] *See infra* Chapter 4, Military Support to Civilian Law Enforcement, for a complete discussion on the Posse Comitatus Act.

[125] *See* Chapter 3 of this Handbook for a complete discussion of National Guard status.

Guard Forces in a Title 32 or SAD Status (Not in Federal Service)" and "Planning Considerations" in this chapter.)

CHAPTER 6

DOD RESPONSE FOR CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR (CBRN)[1] INCIDENTS

KEY REFERENCES:

- Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 42 U.S.C. § 5121, *et seq*., as amended.
- The Defense Against Weapons of Mass Destruction Act, 50 U.S.C. §§ 2301–2371 (2011).
- E.O. 13527 Establishing Federal Capability for the Timely Provision of Medical Countermeasures Following a Biological Attack, December 30, 2009.
- National Response Framework, May 2013.
- DoDD 3025.18, Defense Support of Civil Authorities (DSCA), March 19, 2018.
- DoDD 3150.08, DoD Response to Nuclear and Radiological Incidents, January 20, 2010.
- CJCSI 3125.01D, Defense Response to Chemical, Biological, Radiological, and Nuclear (CBRN) Incidents in the Homeland, May 7, 2015.
- Joint Pub 3-26, Counterterrorism, October 24, 2014.
- Joint Pub 3-28, Defense Support of Civil Authorities, July 31, 2013.
- Joint Pub 3-41, Chemical, Biological, Radiological, and Nuclear Response, September 9, 2016.

A. Introduction

In the wake of 9/11 and Hurricane Katrina, the Department of Homeland Security (DHS) developed the National Response Framework (NRF).[2] This document evolved from the National Response Plan (NRP), which was originally mandated under Homeland Security Presidential Directive

[1] This acronym used to include the term "high yield explosive" and was stated "CBRNE." Current policies have shifted to the CBRN term and eliminated "high yield explosives." *See* JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3125.01C, DEFENSE RESPONSE TO CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR (CBRN) INCIDENTS IN THE HOMELAND (4 Jun. 2012) [hereinafter CJCSI 3125.01C], para. 4.a. (noting that a high-yield explosive incident is not addressed in CJCSI 3025.01C because those incidents do not generate similar initial or residual hazards. Responses to high yield explosive incidents without CBRN elements will be provided in accordance with DoDD 3025.18, Defense Support of Civil Authorities, and the current year CJCS Defense Support of Civil Authorities (DSCA) EXORD. CJCSI 3125.01C Encl. 3, para. 3.f. Note, however, that some publications still discuss high explosives (albeit separately from CBRN) because they may be tied to or part of the delivery for CBRN elements. *See, e.g.* JOINT CHIEFS OF STAFF, JOINT PUB. 3-41, CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR CONSEQUENCE MANAGEMENT, at I-15 (21 Jun. 2012) [hereinafter JP 3-41].

[2] DHS, NATIONAL RESPONSE FRAMEWORK, Third Edition (June, 2016) 3 [hereinafter NRF], *available at* https://www.fema.gov/media-library-data/1466014682982-9bcf8245ba4c60c120aa915abe74e15d/National_Response_Framework3rd.pdf..

(HSPD-5), Management of Domestic Incidents. The intent of HSPD-5 was to develop a single, comprehensive approach to domestic incident management[3] built on the template of the National Incident Management System (NIMS).[4] The NRF provides national-level policy and operational direction for all Federal agencies involved in the response to domestic disasters or emergencies. While responses to incidents should generally be handled at the lowest capable jurisdictional level, the NRF and NIMS address the needs that must be met when the responding jurisdiction's capabilities are overwhelmed by the magnitude of a catastrophic incident.[5]

The NRF is designed to ensure timely and effective Federal support in response to State, tribal, and/or local requests. The NRF is the product of DHS, but it applies to all Federal departments and agencies that have jurisdiction for, or responsibility to support, any response or recovery effort. When Federal resources are necessary, DoD may provide advice, assistance, and assets in support of the Lead Federal Agency (LFA). DoD plays only a supporting role, unless otherwise directed by the President,[6] and its activities are referred to as Defense Support to Civil Authorities (DSCA).[7]

The NRF and NIMS provide broad direction for any type of disaster, in what is characterized as an all-hazards approach.[8] Consequently, the framework applies equally to natural disaster relief, the handling of an unintentional or negligent industrial accident, or the Federal government's response

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[3] The term "incident management" is designed to eliminate the prior distinction between crisis and consequence management with respect to domestic incidents. HSPD-5 states that the objective of the United States government is to ensure that all levels of government across the nation have the capability to work efficiently together using a national approach to domestic incident management, and in these efforts, the United States government treats crisis management and consequence management as a single integrated function. *See* Homeland Security Presidential Directive 5, Management of Domestic Incidents (Feb. 28, 2003) [hereinafter HSPD-5], *available at* http://www.gpo.gov/fdsys/pkg/PPP-2003-book1/pdf/PPP-2003-book1-doc-pg229.pdf. Judge advocates should be aware the the terms crisis and consequence management may still be found in policies addressing incident management. For example, JOINT PUB 3-28 addresses CBRN response in terms of consequence management. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES II-10 (31 July 2013) [hereinafter JP 3-28].

[4] FEMA, NATIONAL INCIDENT MANAGEMENT SYSTEM, Third Edition (Oct. 2017), *available at* https://www.fema.gov/media-library/assets/documents/148019 [hereinafter NIMS]. The National Incident Management System (NIMS) is a doctrinal framework for incident management designed to provide consistency at all jurisdictional levels. NIMS includes a core set of concepts, principles, terminology, and technologies covering the incident command system; multi-agency coordination systems; unified command; training; identification and management of resources (including systems for classifying types of resources); qualifications and certification; and the collection, tracking, and reporting of incident information and incident resources. Chapter 2, National Framework for Incident Management, *supra*, contains more discussion on NIMS.

[5] National Incident Management doctrine and policy has expanded significantly since the publication of the first NRF. The NRF is now part of the National Preparedness System, which includes four other Frameworks designed to achieve the National Preparedness Goal. Chapter 2, National Framework for Incident Management, *supra*, contains an extensive discussion of this new model.

[6] JP 3-28, *supra* note 3, at I-5.

[7] DEP'T OF DEFENSE, DIR. 3025.18, MILITARY DEFENSE SUPPORT OF CIVIL AUTHORITIES (29 Dec. 2010) (C2, 19 Mar. 2018) [hereinafter DoDD 3025.18] defines "DSCA" as:

> Support provided by U.S. Federal military forces, DoD civilians, DoD contract personnel, DoD Component assets, and National Guard forces (when the Secretary of Defense, in coordination with the Governors of the affected States, elects and requests to use those forces in title 32, U.S.C. status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events.

[8] *See* NRF, *supra* note 2, at i (noting the NRF describes specific authorities and best practices for managing incidents that range from the serious but purely local to large scale terrorist attacks or catastrophic natural disasters).

to a terrorist's domestic employment of a Chemical, Biological, Radiological, or Nuclear weapon of mass destruction (WMD).[9] Although the various levels of government have experience in responding to natural disasters, CBRN events pose some of the greatest challenges facing the United States today[10] and underscore the importance of maintaining a DoD force that is ready and able to respond to these specialized threats.

B. CBRN Overview and Authorities

A CBRN incident is any occurrence resulting from the use of CBRN weapons or devices, or the release of CBRN hazards, to include toxic industrial materials from any source.[11] Any action taken to address the consequences of any inadvertent or deliberate release of a chemical, biological, radiological, or nuclear agent constitutes a CBRN CM operation.[12] As a general proposition, a catastrophic CBRN event would quickly exceed the capabilities of local, State, and tribal governments; consequently, CBRN CM is normally managed at the Federal level, with DoD in a supporting role.[13] Although an LFA leads and coordinates the overall Federal response to an emergency, supporting DoD entities remain under the command and control of the supported Combatant Commander (NORTHCOM or PACOM). Similarly, State Governors, through their Adjutants General, control National Guard forces when performing duty in a State status or in accordance with Title 32 of the United States Code.[14]

A request for DoD capabilities from State Governors or other Federal agencies is called a request for assistance (RFA). In most cases, these requests for emergency support are written and are processed through formal RFA process. The processing of an RFA varies depending upon the size and urgency of the incident, the level of Federal involvement, and the originator of the request. For

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[9] It is important to note that not all CBRN incidents may be the result of a WMD. A domestic accident on the scale of the radiation release in Chernobyl, Ukraine; Fukushima, Japan; or the pesticide release in Bhopal, India in the U.S. would most likely result in DoD-assisted CBRN consequence management operations.

[10] The Homeland Security Council has developed fifteen scenarios depicting "a diverse set of high-consequence threat scenarios of both potential terrorist attacks and natural disasters." Two of the scenarios represent natural disasters, major earthquake and major hurricane; a third highlights economic and social complications resulting from a cyber attack; and the remaining 12 scenarios focus on chemical, biological, radiological, or nuclear (CBRN) incidents. *National Planning Scenarios*, http://media.washingtonpost.com/wp-srv/nation/nationalsecurity/earlywarning/NationalPlanning ScenariosApril2005.pdf (last visited May 15, 2018).

[11] JP 3-41, *supra* note 1, at I-1. An exception to this general classification is the Government's response to incidents involving U.S. nuclear weapons within DoD custody or fissionable materials within Department of Energy custody. *See generally* FEMA, EMERGENCY SUPPORT FUNCTION #10 – OIL AND HAZARDOUS MATERIALS RESPONSE ANNEX (June 2016), *available at* www.fema.gov; OFFICE OF THE ASSISTANT TO THE SECRETARY OF DEFENSE FOR NUCLEAR AND CHEMICAL AND BIOLOGICAL DEFENSE PROGRAMS, DEPT. OF DEFENSE, DOD MANUAL 3150.08, NUCLEAR WEAPON ACCIDENT RESPONSE PROCEDURES (NARP) (22 Aug. 2013).

[12] CBRN response includes having plans, policies, procedures, training, and equipment necessary to effectively respond to CBRN incidents. CBRN response provides the operational framework for authorized DoD measures in preparation for anticipated CBRN incidents to mitigate the loss of life and property and to assist with the response and short-term recovery that may be required. JP 3-41, *supra* note 1, at I-4.

[13] For example, 10 U.S.C. § 382 (2012 & Supp. IV 2017) authorizes the Attorney General to request DoD support when an emergency situation involving a biological or chemical weapon of mass destruction exists. Additionally, as an exception to the Posse Comitatus Act, 18 U.S.C. § 831 (2012 & Supp. IV 2017) authorizes the Attorney General—during an emergency situation—to request DoD support in enforcing laws against the unlawful dispersal of nuclear material or nuclear byproducts.

[14] JP 3-41, *supra* note 1, at xii, I-2, I-5.

small scale CBRN incidents, and during the initial stages of larger incidents, a State's Emergency Operations Center (EOC) may forward requests to the Federal Emergency Management Agency (FEMA) region's Defense Coordinating Officer (DCO), who, in turn, forwards the RFA to the Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD(HD&ASA)).[15] If the incident exceeds the capabilities of the State and local responders, and the President has issued an emergency or disaster declaration at the request of the Governor and advice of the FEMA Administrator, the LFA will establish a Joint Field Office (JFO), and a Federal Coordinating Officer (FCO) will be designated.

Following the establishment of the JFO, the FCO will forward RFAs from civil authorities to the Office of the Secretary of Defense, Executive Secretariat. SecDef-approved RFAs are assigned to the appropriate Combatant Commander (CCDR). If a DCO is on-site (normally at the JFO), RFAs are validated through the DCO and forwarded to the designated DoD entities for approval and sourcing. Once SecDef approves a request for DoD assistance, a supported CCDR is designated. The CJCS publishes SecDef-approved execute orders (EXORDs) to delineate support relationships, available forces, end state, purpose, and SecDef-approved scope of action.[16] The CCDR will likely order the Commander, Joint Task Force–Civil Support (JTF-CS), to conduct CBRN response operations (see section D of this chapter).

Every RFA must undergo a legal review. All requests by civil authorities for DoD military assistance shall be evaluated by DoD approval authorities against the following criteria (the "CARRLL" factors are discussed in other chapters, including chapter 1):[17]

- **C**ost (who pays, impact on DOD budget)
- **A**ppropriateness (whether the requested mission is in the DOD's interest)
- **R**isk (safety of DOD forces)
- **R**eadiness (impact on the DOD's ability to perform its primary mission)
- **L**egality (compliance with laws)
- **L**ethality (potential use of lethal force by or against DOD forces)

Military missions require legal authority. DoD's CBRN response operations are generally executed under the provisions of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).[18] he Stafford Act is the primary authority for the Federal Government to assist local and State governments with emergencies and disasters.[19]

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[15] The ASD(HD/ASA) is the DoD Executive Agent responsible for approving and monitoring DoD assistance for Federal, State, and local officials in responding to domestic threats or events involving nuclear, chemical, and biological weapons. *See* 50 U.S.C. § 2313 (2012 & Supp. IV 2017).

[16] JP 3-28, *supra* note 3, at II-14.

[17] DODD 3025.18, supra note 7, at. 4.

[18] The Robert T. Stafford Disaster Relief and Emergency Assistance Act, (Public Law 93-288) (42 U.S.C. § 5121, *et seq*.) (as amended) [hereinafter Stafford Act].

[19] The Stafford Act is outlined in Chapter 2. The Secretary of Homeland Security is responsible for overall coordination of Federal Stafford and non-Stafford incident management activities. Requests for DoD assistance may occur under Stafford Act or non-Stafford Act conditions. In general, a Stafford Act incident is one in which State and local authorities declare an emergency or disaster but require and consequently request Federal assistance to adequately

Occasionally, the legal authority to use DoD forces for CBRN incidents arises from other sources. Three examples are:

- DoDD 3025.18 delegates Immediate Response Authority to Heads of DoD Components, Federal military commanders, and/or DoD civilian officials (collectively "DoD officials"). This policy also recognizes the authority of State officials to call on the State's National Guard operating in their State Active Duty (SAD) status under State command, control, and funding. In response to a request for assistance from a civil authority under imminently serious conditions, and if time does not permit approval from higher authority, DoD officials may provide assistance to authorities to save lives, prevent human suffering, or mitigate great property damage. This is subject to any supplemental direction provided by higher headquarters. It is important to note that this authority is extremely fact-specific and expires immediately when the facts no longer meet the threshold.[20]

- DoDD 3025.18 also provides Federal military commanders with emergency authority to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances.[21] See Military Support to Civilian Law Enforcement, chapter 4 of this Handbook, for an in-depth discussion of this authority.

- Executive Order 13527, "Establishing Federal Capability for the Timely Provision of Medical Countermeasures Following a Biological Attack," provides authority for designated Federal agencies (including DoD) to provide support to operations that leverage the U.S. Postal Service to distribute "medical countermeasures" to the general population.[22]

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manage the incident.

42 U.S.C. 5122 (1) defines an emergency as:

> [A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

42 U.S.C. § 5122(2) defines a major disaster as:

> [A]ny natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

A CBRN incident clearly falls into the definition of emergency. Technically, a fire, flood, or explosion would have to occur to trigger a major disaster declaration for a CBRN incident.

[20] DoDD 3025.18, *supra* note 7, para. 4.i. Within 72 hours of receipt of the request for assistance, a review of the need to continue DoD involvement in the response shall occur. These activities performed by the DoD during immediate response efforts may later transition into a Mission Assignment (MA) from the Federal Emergency Management Agency (FEMA) under the Stafford Act.

[21] *Id*. at 4.k.

[22] Exec. Order No. 13257, 75 Fed. Reg. 737 (Jan. 6, 2010).

C. DoD Entities Responsible for CBRN CM Operations

The National Defense Authorization Act of Fiscal Year 2003[23] established what later became the Office of The Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD(HD/ASA)). The ASD(HD/ASA) assumed responsibilities as DoD's Executive Agent responsible for approving and monitoring DoD assistance to Federal, State, and local officials responding to domestic threats or events involving nuclear, chemical, and biological weapons. As a result, this office oversees DoD's DSCA activities, including CBRN response.[24]

The Joint Director of Military Support (JDOMS) is an action agency subordinate to ASD(HD/ASA) that is located at the Pentagon. For DSCA missions, JDOMS plans, coordinates, and monitors DoD support within the U.S. and territories in response to requests from Federal agencies. Accordingly, JDOMs produces military orders for DSCA, including consequence management operations.[25] Many regularly occurring activities, called National Special Security Events, require DoD resources that can be planned in advance (e.g. Presidential inaugurations, and large sporting events). For these, JDOMS plans, coordinates, and facilitates DoD support to Federal, State, and local agencies and organizers. To set expectations and aid in planning for all DSCA responses, CJCS publishes a DSCA EXORD and a CBRN Response EXORD to allow expedited force employment in support of domestic incidents.[26]

In 2002, DoD established USNORTHCOM. The specific mission of USNORTHCOM, headquartered in Colorado Springs, Colorado, is to "conduct homeland defense, civil support and security cooperation to defend and secure the United States and its interests."[27] USNORTHCOM is designated as the command to conduct CBRN response operations in support of an LFA in the forty-eight contiguous States, the District of Columbia, Alaska, and U.S. territorial waters.[28]

In 2008, USNORTHCOM designated U.S. Army North (ARNORTH) as the Joint Force Land Component Commander (JFLCC) for domestic CM operations.[29] ARNORTH, located at Fort Sam Houston, Texas, is responsible for developing and unifying the military response capability for CBRN incidents.[30]

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[23] The Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 902, 116 Stat. 2458 (2002).

[24] DEP'T OF DEFENSE, DIR. 5111.13, ASSISTANT SECRETARY OF DEFENSE FOR HOMELAND DEFENSE AND AMERICAS' SECURITY AFFAIRS (ASD(HD&ASA)) (16 Jan. 2009).

[25] JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION CJCSI 5711.02C, DELEGATION APPROVAL AUTHORITY, 5.d. (30 Nov. 2012).

[26] JP 3-28, *supra* note 3, at II-14. The current DSCA EXORD, as of the publication of this handbook, is dated 5 June 2018. The current CBRN EXORD is dated 24 March 2016.

[27] About USNORTHCOM,USNORTHCOM, http://www.northcom.mil/About-USNORTHCOM/ (last visited June 14, 2018).

[28] CDRUSNORTHCOM, TAB B TO APPENDIX 1 TO ANNEX C TO USNORTHCOM CONPLAN 3500-14 (Chemical, Biological, Radiological, and Nuclear (CBRN) Response Branch Plan), at C-1-B-2 (17 July 2014).

[29] JOINT PUB. 3-41, *supra* note 1, at II-5.

[30] About USNORTHCOM, *supra* note 27.

D. Specialized DoD CBRN Responders

1. Joint Task Force Civil Support[31]

Joint Task Force Civil Support (JTF-CS) will be involved in domestic emergencies, law enforcement support,[32] and other civil support activities.[33] Although Joint Task Force Civil Support (JTF-CS) is nominally linked to broader mission areas, the organization's focus is far narrower: JTF-CS's specific mission is to provide DSCA during a CBRN event.[34]

JTF-CS is a standing joint task force headquartered at Fort Eustis, Virginia. An Army or Air Force National Guard Major General on Federal active duty status commands JTF-CS. The staff consists of active and reserve component military from all five services, government service personnel, and civilian contractors. Collectively, the command possesses expertise in a wide range of functional areas including operations, logistics, intelligence, planning, communications, and medical services. Created by the Unified Command Plan for 1999,[35] JTF-CS provides both an operational capability and an oversight mechanism that can anticipate support requirements for responding to a catastrophic CBRN incident, undertake detailed analysis, conduct exercises, and ultimately respond in support of civil authorities. USNORTHCOM has command authority over JTF-CS, and ARNORTH has OPCON over the unit. It is a deployable command and control headquarters for DoD units and personnel executing CBRN response operations, and it is a source of response plans for essential DoD support to the LFA. When directed, JTF-CS will deploy to the incident site and establish command and control of designated DoD forces, providing defense support of civil authorities to save lives and prevent further injury. JTF-CS may deploy in support of a USPACOM

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[31] *See infra*, Chapter 8, Military Support Operations, for more examples of non-emergency or law enforcement support that JTF-CS may provide.

[32] When situations are beyond the capability of the State, the Governor requests Federal assistance through the President. DoD support or assistance to restore public services and civil order may include augmentation of local first responders and equipment. It may include law enforcement support, continuity of operations/continuity of government measures to restore essential government services, protect public health and safety, and provide emergency relief to affected governments, businesses, and individuals. Responses occur under the primary jurisdiction of the affected State and local government, and the Federal government provides assistance when required. *See* JOINT PUB. 3-28, *supra* note 3, at x.

[33] hese other activities include support to special events designated by the DHS Special Events Working Group (SEWG). "National special security event" (NSSE) is a designation given to certain special events that, by virtue of their political, economic, social, or religious significance, may be the target of terrorism or other criminal activity. The Secretary of Homeland Security, after consultation with the Homeland Security Council, shall be responsible for designating special events as NSSEs. Usually, other military operations will have priority over these missions, unless directed otherwise by the SecDef. These events will be assigned a priority by the SEWG and will normally be monitored by the combatant command responsible for the area in which they are conducted.

[34] Joint Task Force Civil Support Fact Sheet, JOINT TASK FORCE CIVIL SUPPORT, http://www.jtfcs.northcom.mil/About/Factsheets/ (last visited June 14, 2018).

[35] Even though the Unified Command Plan for 1999 doesn't specifically mention JTF-CS, the SECDEF memo accompanying the plan when forwarded to the President notified the President that the SECDEF intended to establish a standing Joint Task Force for Civil Support. The unit would report to the SECDEF through the U.S. Joint Forces Command and the Chairman of the Joint Chiefs of Staff. Its principle focus would be to plan for and integrate DoD's support to the lead Federal agency with the responsibility to manage the consequences of a domestic weapons of mass destruction (WMD) event. The SECDEF felt that, due to the catastrophic nature of a WMD terrorist event that would quickly overwhelm State and local authorities, the structure that existed for providing DoD support needed to be expanded.

incident as well. The NRF provides the coordinating framework under which JTF-CS performs its mission.[36]

On October 1, 2008, JTF-CS received the authority to exercise operational control over various units assigned to the CCMRF (CBRNE Consequence Management Response Force) whenever those units deploy for a CBRN incident or exercise. The CCMRF transitioned to the Defense CBRN Response Force (DCRF) in 2011, and now has approximately 5,000 personnel in 88 units at 35 installations across the U.S.[37] DCRF units are used to support LFAs in the event of a CBRN incident and operate under the NRF when deployed to assist.[38]

JTF-CS employs a three-fold process that enables the command to gain and maintain situational awareness prior to an execution order. First, JTF-CS staffs an around-the-clock operations center tasked with gaining and maintaining situational awareness. Second, the command has liaison officers who routinely interact with interagency partners to ensure familiarity with their operations, facilitate interagency communications and operations, and gain first-hand understanding of their emergency response plans. Third, when an incident actually occurs, but prior to the receipt of an execution order, JTF-CS is prepared to send an assessment element to the incident area. This element is referred to as the NORTHCOM Situational Awareness Team (NSAT). The NSAT's purpose is to establish the "ground truth" concerning what emergency assets and capabilities are either at-hand or available to emergency managers through intrastate or interstate compacts. The NSAT provides this information to the Commander, USNORTHCOM, to assist in his or her decision-making. Additionally, the information enables JTF-CS planners to perform predictive analysis regarding the types of missions that the LFA may ask DoD to perform. These extensive planning efforts enable DoD to organize a timely flow of appropriate assets to the incident area upon request.

Upon receipt of an execution order, JTF-CS has the ability to reconfigure into two command posts to ensure continuity of operations at home station, while deploying forward to the incident site. The magnitude of the CBRN incident determines the size of the deploying command post.

Additionally, JTF-CS routinely provides support to other commands during real-world events with Joint Planning Augmentation Cells (JPACs). JPACs consist of five to fifteen individuals with extensive consequence management planning skills that can help other staffs plan for and respond to CBRN or other incidents in their immediate area of responsibility. JPACs are tailored to fit the type of support requested by the supported organization.

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[36] JOINT PUB. 3-41, *supra* note 1, at II-2–II-5.

[37] Kelley Vlahos, Public Safety Today: CBRN Protection – From CCMRF to DCRF: Changing Letters for Better Results, HOMELAND SECURITY TODAY (Jul. 3, 2012) http://www.hstoday.us/index.php?id=483&cHash=081010&tx_ttnews%5Btt_news%5D=24557.

[38] DCRF, JOINT TASK FORCE CIVIL SUPPORT, http://www.jtfcs.northcom.mil/About/Factsheets/ (last visited June 14, 2018).

2. National Guard Weapons of Mass Destruction Civil Support Teams (WMD-CSTs)

Pursuant to 10 U.S.C. § 12310(c), and additional authorizations by Congress and through SECDEF validation, DoD is authorized a total of 57 WMD-CSTs.[39] Recognizing that the National Guard is "forward-deployed for civil support,"[40] the Secretary of Defense determined that the WMD-CSTs would be most effective if established in the National Guard. Consequently, each WMD-CST is composed of 22 full-time National Guard Soldiers and Airmen and contains five elements: command, operations, administrative/logistics, medical, and survey.

The teams are designed to deploy rapidly to assist local first responders in the event of a CBRN incident.[41] Specifically, the mission of each State National Guard WMD-CSTs is to deploy to an area of operations and:

- Assess a suspected event in support of a local incident commander;
- Advise the local incident commander and civilian responders; and
- Facilitate requests for assistance to expedite arrival of additional State and Federal assets to help save lives, prevent human suffering, and mitigate great property damage.

WMD-CSTs are specially equipped and trained. Special equipment includes the Mobile Analytical Laboratory System (MALS)[42] for nuclear, biological, and chemical (NBC) detection and the Unified Command Suite (UCS) vehicle for communications.[43]

WMD-CST capabilities are specifically designed to complement civilian responders.[44] Community and State emergency management plans may directly incorporate WMD-CST capabilities.

WMD-CSTs operate under the command and control of the State Governor and the Adjutant General. Individual team members serve in a full-time, Title 32 National Guard status.[45] If the teams are called to Federal active duty, they will normally be attached to JTF-CS.[46]

In addition, WMD-CSTs assigned to one State are authorized to operate in another State pursuant to:

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[39] The number of authorized WMD-CSTs is the culmination of legislative actions during the last decade. Most recently, the National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, 126 Stat. 1632 (2012) amended 10 U.S.C. 12310 leading to the establishment of two additional WMD-CSTs for a current total of 57. For a general overview of WMD-CSTs, see 2009 Army Posture Statement, http://www.army.mil/aps/09/information_papers/national_guard_weapons.html (last visited Aug. 20, 2014).

[40] U.S. Secretary of Defense Report to Congress pursuant to FY00 National Defense Authorization Act § 1036, 2 (Feb 24, 2000).

[41] *Id.*

[42] *Id.* at 3. MALS is based on system used by the Marine Corps' Chemical Biological Incident Response Forces with enhanced biological detection capability.

[43] *Id.* The UCS, built by the Navy, provides communication interface across the ICS frequencies, military command and control elements, and technical support assets.

[44] *Id.* at 4.

[45] *Id.* at 5; 10 U.S.C. § 12310(c)) (2012 & Supp. IV 2017).

[46] U.S. Secretary of Defense Report to Congress pursuant to FY00 National Defense Authorization Act § 1036, 5 (Feb 24, 2000).

- State-to-State Emergency Management Assistance Compacts (EMACs);
- State-to-State Memoranda of Agreement; or,
- Activation under Title 10.[47]

3. National Guard CBRN Enhanced Response Force Package (CERFP)

Each CERFP is a response capability comprised of 186 traditional and five Title 32 Active Guard and Reserve (AGR) National Guard members. A CERFP can be utilized in State Active Duty (SAD), Title 32, or Title 10 status. There are currently 17 CERFPs in the United States. The CERFP's mission is to respond to CBRN incidents and assist local, State, and Federal agencies in conducting consequence management by providing capabilities to effect patient and mass casualty decontamination, emergency medical services, and casualty search and extraction. CERFP teams function as either follow-on or pre-positioned forces and work closely with WMD-CSTs.[48]

4. National Guard Homeland Response Force (HRF)

DoD, based on recommendations from the Quadrennial Defense Review (QDR), directed the National Guard to create 10 Homeland Response Forces (HRFs): two in FY11 and eight in FY12. Each HRF is essentially a CERFP with security and a regional command and control element. They are composed of approximately 566 personnel and bring capabilities including search and extraction, decontamination, emergency medical service, security, and command and control. There are ten HRFs (one per FEMA region).[49]

5. USCG National Strike Force (NSF) Coordination Center and Strike Teams

The Coast Guard's NSF deploys specialized capabilities to support lead agency, incident commander, and Federal on-scene coordinator preparation and response to CBRN incidents, hazardous substance releases, oil discharges, and other emergencies. NSF assets include the NSF Coordination Center in Elizabeth City, North Carolina, and three strike teams: the Atlantic Strike Team in Joint Base McGuire-Dix- Lakehurst, New Jersey; the Gulf Strike Team in Mobile, Alabama; and the Pacific Strike Team in Novato, California. NSF equipment includes CBRN detection; air, water, and soil sampling; Level A, B, and C personnel protection; self-decontamination equipment; hazardous material packaging; mobile command posts; and other field operational equipment. NSF equipment is pre-packed for immediate deployment by truck or aircraft. Additionally, as elements of the Coast Guard, NSF units have the organic authority to respond domestically to many types of hazardous materials (chemical) incidents under the National Contingency Plan, either as lead responders in the coastal zone or as an assisting agency to

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[47] *Id.* at 6. *See* Chapter 3 of this Handbook for a detailed discussion of EMACs. A recent example of this was the deployment of the 24th CST from Fort Hamilton, NY to Boston, MA in support of post-Boston Marathon bombing operations. *See* Paula Katinas, Fort Hamilton Anti-Terror Unit Sent to Boston Bombing Site, BROOKLYN DAILY EAGLE, July 22, 2013, *available at:* http://www.brooklyneagle.com/articles/fort-hamilton-anti-terror-unit-sent-boston-bombing-site-2013-04-17-163000.

[48] National Guard CERFP Teams, UNITED STATES ARMY NATIONAL GUARD (Dec. 20, 2010), http://www.arng.army.mil/news/publications/fs/2010/Subject_papers/National%20Guard%20CERFP%20Teams.pdf

[49] National Guard Homeland Response Force, NATIONAL GUARD.MIL (Jan. 2012), http://www.nationalguard.mil/features/ngps/2013/docs/National_Guard_Homeland_Response_Force_(Jan_2012)end-of-year-review-v1.pdf.

the Environmental Protection Agency (EPA) in the inland zone.[50] The NSF may also deploy detachments to support overseas military environmental response operations.[51]

E. Special Legal Considerations During CBRN Response Operations

The parameters under which DoD operates domestically vary greatly from those involved in traditional military activities. DoD domestic CBRN response activities raise legal issues not found in typical non-civil support operations. Depending on the circumstances, and the location of the incident, the scope and complexity of potential legal issues will greatly vary. Below are four common legal issues that would likely arise in the context of any CBRN response operation. As operations involving these areas are largely driven by policy decisions at the SECDEF level or higher - and are additionally vetted through the normal mission assignment process - judge advocates should receive primary guidance concerning these issues through appropriate mission OPORDs, EXORDs, FRAGOs, or relevant service-specific field guidance. Judge advocates should, however, familiarize themselves beforehand with issues they may encounter in these areas, as well as primary Federal and State authorities discussed below.

1. Quarantine/Isolation

Quarantine[52] and isolation[53] enforcement issues may arise most typically in pandemic scenarios. State and local health authorities are primarily responsible for decisions to impose quarantine or isolation, and the power to enforce these is generally considered to be part of a jurisdiction's police powers.[54] Federal power to impose quarantine and isolation measures arises with attempts to halt or impede the "introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."[55]

Regardless of whether the quarantine and isolation measures are imposed at the Federal, State, or local level, DoD enforcement actions may be subject to the Posse Comitatus Act (PCA),[56] absent an alternative statutory or constitutional authority. A potential exception to PCA restrictions is 42 U.S.C. § 97 (involving State quarantine laws), which is listed in DoDI 3025.21 as one of the specific laws that allows direct DoD participation in law enforcement, subject to applicable limitations.[57] It is also possible that a quarantine or isolation actions could lead to conditions

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[50] *See* Chapter 2, National Framework for Incident Management, for more background on the National Contingency Plan.

[51] *See* JP 3-41, *supra* note 1, at II-11.

[52] "Quarantine" is defined as the "[s]eparation of individuals who have been exposed to an infection but are not yet ill from other individuals who have not been exposed to the transmissible infection." Homeland Security Council, National Strategy for Pandemic Influenza: Implementation Plan 209 (GPO May 2006).

[53] "Isolation" is defined as the "[s]eparation of infected individuals from those individuals that are not infected." *Id*. at 208.

[54] Kathleen S. Swendiman and Jennifer K. Elsea , Federal and State Quarantine and Isolation Authority 2, U.S. Congressional Research Service, RL33201, (Jan. 23, 2007).

[55] 42 U.S.C. § 264(a) (2011). Additionally, in some situations, the Federal government may intervene if it deems State and local control measures to be inadequate. 42 C.F.R. § 70.2 (2017).

[56] 18 U.S.C. § 1385 (2011)

[57] 42 U.S.C. § 97 (2011) specifically states "The quarantines and other restraints established by the health laws of any State, respecting any vessels arriving in, or bound to, any port or district thereof, shall be duly observed by the officers of the customs revenue of the United States, by the masters and crews of the several Coast Guard vessels, and by the

necessitating a Presidential invocation of the Insurrection Act.[58] Typically, however, any DoD support provided to quarantine and isolation support will be limited to logistical, communications, medical, and other support commonly envisioned by the Stafford Act. Measures provided by DoD may or may not amount to direct participation in law enforcement activity, and, therefore, a strict analysis of PCA applicability should occur in all cases.[59]

2. Environmental Compliance

Judge advocates planning for CBRN CM operations should assume that Federal, State, and local environmental laws and regulations will remain in place, at least as they pertain to DoD response operations. Specific laws that may apply include the Endangered Species Act (ESA), Federal Water Pollution Control Act (FWPCA), National Historic Preservation Act, and the National Environmental Policy Act (NEPA), to name a few. For example, the Stafford Act specifically states that NEPA applies to actions undertaken pursuant to the Act.[60] There are some laws that streamline applicability of environmental regulations or exempt their application during a response. For example, to streamline the application of NEPA, actions performed under certain sections of the Stafford Act aimed at restoring facilities are not considered "major Federal actions" that would normally trigger more NEPA scrutiny.[61]

The handling and disposal of waste from CBRN response decontamination operations will frequently implicate environmental compliance issues. In such a scenario, the EPA, operating under ESF #10, would be the primary agency responsible for hazardous waste management.[62] Additionally, coordination with State authorities regarding the State's environmental laws and regulations is essential. For example, judge advocates should ensure that appropriate staff sections and levels of command have ascertained whether the decontamination and waste disposal procedures outlined in FM 3-11[63] are sufficient for a specific CBRN response operation, or whether those procedures should be modified pursuant to guidance from appropriate State agencies.

3. Health Care Licensure

In a domestic CBRN event, non-fatality casualties may range from minimal to overwhelming. The greater the number of casualties, the more likely there will be requests for DoD medical personnel to provide care for the affected populace. Because DoD caregivers may not necessarily be licensed/credentialed in accordance with appropriate State laws, judge advocates must be prepared to render advice on Federal and State licensure requirements during emergency support operations.

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military officers commanding in any fort or station upon the seacoast; and all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws, according to their respective powers and within their respective precincts, and as they shall be directed, from time to time, by the Secretary of Health and Human Services."

[58] 10 U.S.C. §§ 331–335 (2012).

[59] Chapter 4, Military Support to Civilian Law Enforcement *infra* has an extensive discussion on how to ensure compliance with the PCA.

[60] 42 U.S.C. § 5170c (2011).

[61] 42 U.S.C. § 5159 (2011).

[62] FEMA, EMERGENCY SUPPORT FUNCTION #10 – OIL AND HAZARDOUS MATERIALS RESPONSE ANNEX, pp. 10-11 (June 2016), *available at* www.fema.gov.

[63] U.S. DEP'T OF ARMY, FIELD MANUAL 3-11, MULTISERVICE DOCTRINE FOR CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR OPERATIONS (July 2011) [hereinafter FM 3-11].

Upon a command's receipt of any mission assignments relating to the provision of health-related services (or even prior to receipt, if practicable), judge advocates on the operational and tactical levels should verify with higher headquarters that any health care licensure requirements have been met or waived by appropriate authorities, and that there is a common understanding between the various agencies involved (including DoD, ESF #8, and State and local agencies) regarding the statutory portability provisions discussed below.

The primary Federal statute regarding credentialing of military personnel is 10 U.S.C. § 1094, Licensure requirement for health care professionals. This law states that an armed forces health care professional who has a current license and is performing authorized duties for DoD may practice his or her health care profession in any State, notwithstanding any other health care licensure laws and regardless of whether the practice occurs in a DoD facility, a civilian facility affiliated with DoD, or any other location authorized by SECDEF[64] DoD has promulgated qualification and coordination requirements for this statutory portability provision as it pertains to off-base duties.[65] The various qualification/coordination with State licensing board requirements pertaining to health care personnel involved in off-base duties can be found in DoD 6025.13-R, para. C.4.2.

10 U.S.C. § 1094 only applies to those "performing authorized duties for the Department of Defense" and Title 32 forces in a § 502(f) status.[66] National Guard members in State status may need to look to State laws for guidance on their status. On the State level, many jurisdictions have passed emergency management provisions containing portability of licensure provisions. For example, the Florida Governor's proclamation of a major or catastrophic disaster provides authority for a health care practitioner licensed in another State to assist in providing health care in the disaster area according to the provisions specified in the proclamation.[67] Similarly, California permits health care providers licensed in other States to provide health care during a statutorily defined state of emergency, if the emergency overwhelms California health care practitioners' response capabilities and California's Director of the Emergency Medical Service Authority requests assistance.[68] Although during a Stafford Act response DoD support will not normally be provided absent a specific request from State authorities, judge advocates, through their technical chains, should ensure that all appropriate agencies and levels of command have a common understanding of the State laws and rules regarding licensure and how those laws complement Title 10 provisions.

Also, at the State level, judge advocates can also look to either the applicable State's Emergency Management Assistance Compact (EMAC)[69] or Article V of the Model EMAC legislation, which states:

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[64] 10 U.S.C. § 1094(d)(1) (2012 & Supp. IV 2017).

[65] "Off base duties" are "[o]fficially assigned professional duties performed at an authorized location outside a MTF and any military installation." U.S. DEP'T OF DEFENSE, REG. 6025.13-R, MILITARY HEALTH SYSTEM CLINICAL QUALITY ASSURANCE PROGRAM, para. DL1.1.32 (11 Jun. 2004).

[66] 10 U.S.C. § 1094(d)(2) and (d)(3) (2012 & Supp. IV 2017).

[67] Fla. Stat. § 252.36(3)(c)1.

[68] Cal. Bus. & Prof. Code § 900.

[69] For more information on EMAC, see EMERGENCY MGMT. ASSISTANCE COMPACT, http://www.emacweb.org/ (last visited Aug. 20, 2018).

> Whenever any person holds a license, certificate, or other permit issued by any State party to the compact evidencing the meeting of qualifications for professional, mechanical, or other skills, and when such assistance is requested by the receiving party State, such person shall be deemed licensed, certified, or permitted by the State requesting assistance to render aid involving such skill to meet a declared emergency or disaster, subject to such limitations and conditions as the Governor of the requesting State may prescribe by executive order or otherwise.[70]

Even if the State has passed the model EMAC legislation without alteration, judge advocates must be cognizant of the particular State Governor's limitations on this portability provision.

4. Mortuary Affairs

As with non-fatality casualties, the number of fatalities in a CBRN event may quickly overwhelm state and local capabilities. As in other aspects of emergency management, primary responsibility for mortuary affairs (MA) operations lies at the local level, normally with the local medical examiner and/or coroner. The National Response Framework gives ESF #8 the responsibility for mass fatality management in the Federal response.,[71] However, in a catastrophic scenario, it is likely that DoD will be asked to provide mortuary affairs support. Types of support DoD may be asked to provide, potentially utilizing personnel that are not MA-skilled, may include search and recovery operations, and transportation and storage of remains, among others.[72] DoD personnel who are not MA-skilled may require training in mortuary affairs (which the civilian agencies responding must provide) prior to engaging in decedent-related missions or activities.[73]

During operations, judge advocates should become familiar with the relevant State laws, regulations, and licensure requirements regarding the handling, transportation, and disposition of human remains, and ensure that these requirements have either been met or waived by appropriate authorities. Judge advocates should also be cognizant of the various points of contact involved in mortuary affairs operations, including the local medical examiner/coroner, local law enforcement, and the FBI.

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[70] *See* EMAC LEGISLATION, https://www.emacweb.org/index.php/learn-about-emac/emac-legislation (last visited Aug. 20, 2018).

[71] DEPARTMENT OF HEALTH AND HUMAN SERVICES, EMERGENCY SUPPORT FUNCTION #8 – PUBLIC HEALTH AND MEDICAL SERVICES 8-2 (June 2016), *available at* FEMA.gov.

[72] JOINT CHIEFS OF STAFF, JOINT PUB. 4-06, CIVIL SUPPORT VII-7 (12 Oct. 2011).

[73] *Id*. at VII-8.

CHAPTER 7

COUNTERDRUG OPERATIONS

KEY REFERENCES:

- 10 U.S.C. § 124 - Detection and Monitoring of Aerial and Maritime Transit of Illegal Drugs: Department of Defense to be the Lead Agency.
- 10 U.S.C. § 284 - Support for Counterdrug Activities and Activities to Counter Transnational Organized Crime.
- 10 U.S.C. § 271-284 - Military Support for Civilian Law Enforcement Agencies.
- 10 U.S.C. § 279 - Assignment of Coast Guard Personnel to Naval Vessels for Law Enforcement Purposes.
- 14 U.S.C. § 89 - Coast Guard Law Enforcement Authority.
- 18 U.S.C. § 1385 - The Posse Comitatus Act (PCA).
- 32 U.S.C. § 112 - National Guard Drug Interdiction and Counter-Drug Activities.
- DoD 7000.14-R, DoD Financial Management Regulation, Vol. 2B, ch. 14, Drug Interdiction and Counter Drug Activities, January 2011.
- Deputy Secretary of Defense Memorandum, Department of Defense Counternarcotics Policy, July 31, 2002.
- Deputy Secretary of Defense Memorandum, Department of Defense International Counternarcotics Policy, December 24, 2008.
- Deputy Secretary of Defense Memorandum, Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities, October 2, 2003.
- Deputy Secretary of Defense Memorandum, OSD/SOLIC Counternarcotics Mission Transfer Plan, February 13, 2003 (FOUO).
- Deputy Assistant Secretary of Defense/CN Memorandum, Policy Definition of "Counterdrug Activities", October 23, 2002.
- Deputy Assistant Secretary of Defense /CN Memorandum, Policy Definition of "Narcoterrorism", April 12, 2004.
- Deputy Assistant Secretary of Defense /CN Memorandum, Counter Drug Support to Counter-Narcoterrorist Activities (Memo to Chief, NGB) August, 26, 2005.
- Deputy Assistant Secretary of Defense /CN Memorandum, Procedures for Handling Requests for Counterdrug Narcoterrorist Support, 2006.
- DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, February 27, 2013.
- CNGB Memo, Counter Drug Support to Counter-Narcoterrorist Activities, December 22, 2005.
- CNGB Memo, Implementation of Procedures for Handling Requests for Counterdrug Narcoterrorist Support, June 2, 2006.
- CNGB Instruction 3100.01A, National Guard Counterdrug Support, June 22, 2015.
- NGR 500-2/ANGI 10-801, National Guard Counterdrug Support, August 28, 2008 (Currently under re-write as a CNGB Manual. Check for publishing at end of FY18).
- CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces, June 13, 2005.
- CJCSI 3710.01B, DoD Counterdrug Support, January 26, 2007.
- Joint Pub 3-07.4, Joint Counterdrug Operations, June 13, 2007.
- The President's National Drug Control Strategy (2013).
- Department of Defense Counternarcotics & Global Threats Strategy, April 27, 2011.

A. Introduction

In the 1980s, Congress determined the DoD should provide increased support to civilian law enforcement agencies' (LEA) counterdrug operations. Over the years, Congress increasingly mandated support by DoD for counterdrug operations. This support now includes both active component and National Guard full-time engagement in the mission. DoD counterdrug operations[1] are coordinated by the Deputy Assistant Secretary of Defense, Counter Narcotics and Global Threats (DASD/CN&GT), which is located within the Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD(SO/LIC)). The National Guard Counterdrug (CD) program is administered through the National Guard Bureau (NGB) J3/7's J32-CD Division. This chapter examines support by both the active duty military and the National Guard.

B. Title 10 Support to Counterdrug Operations

In 1981, Congress passed Chapter 18 of Title 10 entitled *Military Cooperation with Civilian Law Enforcement Officials*.[2] Although Chapter 18 permits general military cooperation with civilian law enforcement agencies, Congress passed the Act and its subsequent amendments with the intent of enabling DoD to provide increased counterdrug support.[3]

In 1989, Congress took additional steps and assigned specific counterdrug missions to DoD. As part of the National Defense Authorization Act (NDAA) for Fiscal Years (FY) 1990 and 1991,[4] Congress designated DoD as the lead agency for the "detection and monitoring" of the aerial and maritime transit of illegal drugs into the United States.[5] Section 1206 of the same act stated that the "Secretary of Defense shall direct that the armed forces, to the maximum extent practicable, conduct military training exercises in drug interdiction areas."[6] In FY 1991,Congress provided more specific counterdrug authority to DoD by passing Section 1004 of the NDAA, discussed further below.[7]

In addition to providing statutory authority for counterdrug support, Congress annually appropriates funds to DoD specifically for these operations.[8] The money is disbursed through DASD/CN&GT

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[1] The term "counterdrug operations" is defined as, "those active measures taken to detect, monitor, and counter the production, trafficking, and use of illegal drugs. Also called 'CD' and counternarcotics (CN)." *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.4, JOINT COUNTERDRUG OPERATIONS (14 Aug. 2013) [hereinafter JP 3-07.4].

[2] 10 U.S.C. §§ 271-282 (2012 & Supp. IV 2017). *See* Chapter 4 of this Handbook.

[3] *See* H.R. Rep. No. 97-71, 1981 U.S.C.C.A.N. 1785. The 1986 amendments to Chapter 18 were contained in the Defense Drug Interdiction Assistance Act, Pub. L. 99-570, § 3051, 100 Stat. 3207.

[4] National Defense Authorization Act of 1990, Pub. L. No. 101-189, 103 Stat. 1563 [hereinafter FY90 NDAA].

[5] 10 U.S.C. § 124 (2012 & Supp. IV 2017).

[6] FY90 NDAA, *supra* note 4, § 1206.

[7] National Defense Authorization Act of 1991, Pub. L. No. 101-510, § 1004, as amended, 104 Stat. 1629 [hereinafter FY91 NDAA].

[8] The Counternarcotics Program is financed through the Drug Interdiction and Counterdrug Activities defense appropriation, which is a central transfer account (CTA). It is a single line that accounts for all associated counter narcotics (CN) resources with the exception of those resources for the active components' military personnel and service OPTEMPO. In 2018, Congress authorized appropriations of $750 million for counterdrug operations. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017).

and it differs from the funding for most other military support to civilian law enforcement in that reimbursement is not required.

1. National Defense Authorization Act of 2017[9]

As a result of NDAA for FY 2017, authority for DoD support to counterdrug operations underwent significant changes. Section 1004 from the NDAA for FY 1991 was replaced by Section 1011 of FY17 NDAA and subsequently codified under 10 U.S.C. § 284. This authority was also extended through 2020 and applies to both U.S. and foreign law enforcement agencies (LEAs). In addition, 10 U.S.C. §§ 371-382 was administratively changed to 10 U.S.C. §§ 271-284. Types of counterdrug support to U.S. LEAs under this authority include the following:

- Maintenance and repair of loaned defense equipment to preserve the potential future utility or to upgrade to ensure compatibility of that equipment § 284(b)(1) & (2)
- Transportation support § 284(b)(3)
- Establish and/or operate bases or training facilities (includes minor military construction projects) § 284(b)(4)
- Counterdrug-related training of law enforcement personnel § 284(b)(5)
- Detect, monitor, and communicate the movement of air and sea traffic within 25 miles of and outside United States borders § 284(b)(6)(A)
- Detect, monitor, and communicate the movement of surface traffic detected outside U.S. borders for up to 25 miles within the United States § 284(b)(6)(B)
- Engineering support (roads, fences, and lights) at U.S. borders § 284(b)(7)
- Establish command, control, communications, and computer networks § 284(b)(8)
- Linguist and intelligence analysis services § 284(b)(9)
- Aerial and ground reconnaissance support § 284(b)(10)

Types of counterdrug support to foreign LEAs under this authority include the following:

- Transportation support § 284(c)(1)(A)
- Establish and/or operate bases or training facilities (includes small scale construction) § 284 (c)(1)(B)
- Detect, monitor, and communicate movement of air and sea traffic within 25 miles of and outside U.S. borders § 284(c)1(C)(i)
- Detect, monitor, and communicate movement of surface traffic outside U.S. borders § 284(c)(1)(C)(ii)
- Establish command, control, communications, and computer networks § 284 (c)(1)(D)
- Linguist and intelligence analysis services § 284 (c)(1)(E)
- Aerial and ground reconnaissance support § 284 (c)(1)(F)

Sections 271-284 also provides statutory exceptions to the Posse Comitatus Act (18 U.S.C. § 1385) (PCA), basically stating that counterdrug support provided under these sections is not subject to the requirements of 10 U.S.C., Chapter 18 (with the exception of 10 U.S.C. §§ 274 and 275).[10] Further,

[9] National Defense Authorization Act of 2017, Pub. L. 114-328, §§ 271-284, 130 Stat. 2000 [hereinafter FY17 NDAA].

[10] 10 U.S.C. § 274 authorizes the Secretary of Defense to make DoD personnel available to U.S. LEAs for the maintenance and operation of DoD or LEA equipment only to the extent that such support does not involve direct

the Secretary of Defense may provide support that will adversely affect military preparedness in the short term in contravention of 10 U.S.C. § 276 if the Secretary determines that the importance of providing such support outweighs the short-term adverse impact.[11] Lastly, judge advocates should be aware that the policy limits on assistance to law enforcement agencies set forth in DoDI 3025.21, Defense Support to Civilian Law Enforcement Agencies, do not apply to counternarcotics activities.[12]

2. Detection and Monitoring

10 U.S.C. § 124 makes DoD the lead Federal agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States. This statute does not extend to the detection and monitoring of land transit.[13] Although detection and monitoring is now a DoD mission per § 124, it must still be carried out in support of Federal, State, local, or foreign law enforcement authorities.[14]

In order to perform the detection and monitoring mission, DoD personnel may operate DoD equipment to intercept a vessel or an aircraft detected outside the land area of the United States for the purposes of:

- Identifying and communicating with that vessel or aircraft; and
- Directing that vessel or aircraft to go to a location designated by appropriate civilian officials.[15]

In cases where a vessel or aircraft is detected outside the land area of the United States, DoD personnel may begin, or continue, pursuit of that vessel or aircraft over the land area of the United States.[16] Notably, the DoD detection and monitoring mission does not authorize DoD personnel to conduct searches or make seizures or arrests—which are prohibited under 10 U.S.C. § 275.

3. Chairman of the Joint Chiefs of Staff Instruction (CJCSI)

Authority to approve counterdrug operational support to LEAs under the statutes discussed above has been delegated by the Secretary of Defense (SECDEF), through the Chairman of the Joint

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participation in a civilian law enforcement operation. 10 U.S.C. §275 directed the Secretary of Defense to promulgate regulations that prohibit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

[11] 10 U.S.C. § 284(e) (2012 & Supp. IV 2017).

[12] U.S. DEP'T OF DEFENSE, INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES para. 2.f.(1) (27 Feb. 2013) [hereinafter DoDI 3025.21].

[13] But, note that § 284(b)(6) authorizes "[a]erial and ground reconnaissance outside, at, or near the borders of the United States" in support of other agencies and in accordance with other provisions of § 284; *See* FY17 NDAA, *supra* note 8 § 284(b)(6).

[14] 10 U.S.C. § 124(a)(2) (2018).

[15] *Id.* § 124(b).

[16] The term "United States," as used in 10 U.S.C. § 124, means the land area of the several States and any territory, commonwealth, or possession of the United States. 10 U.S.C. § 124(c) (2018).

Chiefs of Staff, to the Commanders of the Unified Combatant Commands (with the authority to further delegate to flag and general officers within their chains of command).[17]

CJCSI 3710.01B provides a specific list of the types of counterdrug missions that may be approved, such as certain types of aerial reconnaissance, transportation support, intelligence analyst support, and engineering support, among others. Authority to approve counterdrug support missions involving ground reconnaissance, detection and monitoring operations, and deployments for longer than 179 days or involving more than 400 personnel is specifically withheld from this delegation. These missions require specific SECDEF approval. CJCSI 3710.01B should be consulted whenever reviewing a proposed operation.

On July 31, 2002, the Deputy Secretary of Defense published the DoD Counternarcotics Policy. This policy states that DoD will focus its counternarcotics activities on programs that: enhance the readiness of the DoD; satisfy DoD's statutory detection and monitoring responsibilities; contribute to the war on terrorism; advance DoD's security cooperation goals; or enhance national security.

On October 2, 2003, the Deputy Secretary of Defense published the policy on domestic counternarcotics activities. This policy established the goals of reducing the operational stress on Title 10 forces that conduct domestic counternarcotics activities through utilization of Title 32 National Guard forces; focusing DoD's support on areas of unique military skills and capabilities that domestic law enforcement agencies lack or cannot practically replicate; and employing those measures designed to detect, interdict, disrupt, or curtail any activity reasonably related to narcotics trafficking. This policy directed that the Under Secretary of Defense for Policy shall be responsible for reviewing and approving Title 10 counternarcotics support, except where that authority was delegated pursuant to CJCSI 3710.01B.

This policy also dictates that all requests for department support must satisfy the following criteria:

- there must be a valid counterdrug activities nexus;
- there must be a proper request;[18]
- the support must improve unit readiness or mission capability;
- the support must provide a training opportunity that contributes to combat readiness; and
- Title 10 forces will not be used for continuing, on-going, long-term operational support commitments at the same location.

USNORTHCOM reviews all domestic counternarcotics support requests. Commander, USNORTHCOM, will first ensure a National Guard unit cannot provide the support. If the NGB determines that Title 32 National Guard forces cannot provide the support, USNORTHCOM will

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[17] See CJCSI 3710.01B, *supra* note 10, Encl. A, paras. 1 & 8.g. U.S. Northern Command (USNORTHCOM) further delegated its authority to the Joint Force Land Component Commander (JFLCC), who further delegated this authority to Commander, Joint Task Force-North (JTF-N).

[18] A proper request must be from an appropriate official of a Federal, State, or local government agency who has responsibility for counternarcotics activities. First, Federal law must authorize DoD to provide the requested support. Second, the support must assist the requesting agency with accomplishing its counternarcotics activities within the United States. Third, the support must be consistent with DoD's implementation of the National Drug Control Strategy. Finally, the support must be limited to those activities that are militarily unique and significantly benefit the DoD or are essential to national security goals. *See, e.g.* Memorandum, Deputy Secretary of Defense, Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities (2 Oct. 2003).

determine whether the requested support is feasible, supportable, and consistent with DoD policy. If approval is authorized under CJCSI 3710.01B, Commander, USNORTHCOM, or his or her delegated authority, may approve the request and will request Title 10 forces through the Joint Staff from the appropriate service. All other requests will be forwarded through the Joint Staff deployment order process, to the DASD/CN&GT and Under Secretary of Defense for Policy for consideration.

Detailed rules governing the use of force by military forces engaged in counterdrug support operations within the United States are provided in CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces,* Appendices L and O.

4. Counterdrug Support Task Forces

Counterdrug support operations are planned, coordinated, and controlled primarily via three headquarters: Joint Interagency Task Force (JIATF) South, located in Key West, Florida, (under the command and control of U.S. Southern Command (USSOUTHCOM)); JIATF West, located in Honolulu, Hawaii, (under the command and control of U.S. Pacific Command (USPACOM)); and Joint Task Force North (JTF-N), located in El Paso, Texas, (under the command and control of U.S. Northern Command (USNORTHCOM)). While the two JIATFs do provide some support to LEAs in their Areas of Responsibility (AORs),[19] their primary focus is on detection and monitoring of illicit traffic in the source and transit zones of South and Central America, Southeast and Southwest Asia, and in international waters and airspace. This enables interdiction by law enforcement in the source and transit zones consistent with priorities outlined in the President's National Drug Control Strategy.[20]

To deconflict and identify interim and long-term solutions for command and control arrangements between USNORTHCOM, USSOUTHCOM, and USPACOM, the ASD (SO/LIC) established specific areas of responsibility for JIATF-S, JIATF-W, and JTF-N.[21] While the JIATFs focus their attention on international AORs, the bulk of domestic counterdrug support is provided by JTF-N.

Joint Task Force Six, activated on November 13, 1989, was designated as the lead DoD organization responsible for planning and coordinating all DoD support to civilian drug law enforcement agencies in the continental United States (CONUS). Joint Task Force Six's original AOR, composed of the four southwest border States of Texas, New Mexico, Arizona, and California, was expanded in 1995 to cover all of CONUS.[22] On 28 September 2004, Joint Task Force Six was officially renamed Joint Task Force North (JTF-N). JTF-N's mission includes synchronizing and integrating DoD operational, technological, training, and intelligence support to

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[19] For example, Hawaii falls within PACOM's AOR, and Puerto Rico and the Virgin Islands fall within NORTHCOM's AOR.

[20] 2013 National Drug Control Strategy, *available at* https://obamawhitehouse.archives.gov/sites/default/files/ondcp/policy-and-research/ndcs_2013.pdf (last visited 24 April 2018).

[21] Memorandum, Assistant Secretary of Defense (Special Operations/Low Intensity Conflict) Joint Interagency Task Force (JIATF) Area Responsibilities (21 Aug 2003).

[22] History of Joint Task Force North, JOINT TASK FORCE NORTH, *available at* http://www.jtfn.northcom.mil/About-Us/History/ (last visited 24 April 2018)..

domestic law enforcement agency counterdrug efforts in CONUS to reduce the availability of illegal drugs.

Located at Fort Bliss, Texas, there are approximately 175 personnel assigned to JTF-N, including civilians, contractors, and service-members from all five services. Unlike the JIATFs, JTF-N has no LEA representatives assigned to or working in the command. Joint Task Force North has no assigned units and no tasking authority. It solicits volunteer units from all four DoD branches to execute the support missions requested by the Department of Justice and Department of Homeland Security. From its inception as JTF-6, JTF-N has completed over 6,000 counterdrug support missions throughout CONUS. These included aerial and ground reconnaissance missions, detection and monitoring, use of mobile training teams, and engineer support missions.

Co-located with JTF-N is Operation Alliance, a headquarters comprised of representatives from Federal law enforcement agencies. Operation Alliance serves as the single point of contact for all law enforcement agencies (Federal, State, and local) to request DoD counterdrug support. Operation Alliance verifies the counterdrug nexus, prioritizes LEA support requests, and then forwards their requests to JTF-N for review and consideration.

JIATF-S and JIATF-W are both under the direction of Coast Guard Rear Admirals with senior representatives from DoD, DHS, and DOJ components in other senior leadership positions. JIATF-S conducts detection & monitoring operations in the Caribbean and Eastern Pacific source and transit zones.[23] JIATF-W combats drug-related transnational organized crime to reduce threats in the Asia-Pacific region in order to protect U.S. national security interests and promote regional stability.

5. Coast Guard Law Enforcement Detachments

As the primary enforcer of U.S. maritime law, the U.S. Coast Guard plays a critical role in drug enforcement. The Coast Guard has the lead role in maritime drug interdiction and shares the lead role in air interdiction with the U.S. Customs and Border Protection agency. The Coast Guard conducts extensive maritime counterdrug operations year-round. These operations range from enforcing drug possession and use laws during routine recreational and other vessel boardings in all areas where the Coast Guard operates, to conducting sustained multi-unit operations targeting major drug traffickers far from U.S. shores. Since the PCA does not apply to the Coast Guard,[24] the PCA restrictions on arrest, search, seizure, and the interdiction of vessels and aircraft are inapplicable to Coast Guard operations and personnel. Moreover, the Coast Guard has broad law enforcement authority under 14 U.S.C. § 89 to enforce U.S. laws in waters subject to U.S. jurisdiction and over vessels subject to U.S. jurisdiction wherever they may be located.[25]

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[23] When JIATF-S locates suspect vessels, it transfers TACON of surface assets to the U.S. Coast Guard Seventh District (Caribbean operations) or Eleventh District (Eastern Pacific operations), at which point the U.S. Coast Guard conducts interdiction and apprehension operations. In cases in which evidence of maritime drug trafficking or other illegal activity is discovered, the Coast Guard coordinates case disposition with JIATF-S and DOJ or with foreign partners, as appropriate. JIATF-S works closely with ongoing DOJ Organized Crime Drug Enforcement Task Force investigations such as Operation Panama Express to synthesize and evaluate available information about suspected maritime and aerial drug movement to detect, monitor, and facilitate the interdiction of suspect vessels and aircraft.

[24] United States v. Chaparro-Almeida, 679 F.2d 423 (5th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1982).

[25] 14 U.S.C. § 89(a) (2012 & Supp. IV 2017) states:

To capitalize on the Coast Guard's expertise and uniquely broad maritime law enforcement authority, 10 U.S.C. § 279 requires the Secretary of Defense and the Secretary of Homeland Security to assign Coast Guard law enforcement detachments (LEDETs) to every appropriate naval surface vessel operating at sea in a drug interdiction area.[26]

Coast Guard personnel assigned to LEDETs are trained in law enforcement and have the powers of arrest, search, and seizure in accordance with 14 U.S.C. § 89. Coast Guard personnel assigned to U.S. Navy vessels under 10 U.S.C. § 279 will perform functions which are agreed to by the Secretary of Defense and Secretary of Homeland Security and which are otherwise within the Coast Guard's jurisdiction.[27] No fewer than 500 active duty Coast Guard personnel will be assigned duties under 10 U.S.C. § 279, unless the Secretary of Homeland Security, after consulting with the Secretary of Defense, determines that there are not enough naval surface vessels to support this number of personnel. If this is the case, these Coast Guard personnel may be assigned duties to enforce the laws listed under 10 U.S.C. § 274(b)(4)(A).[28] U.S. Navy ships transporting Coast Guard LEDETs under TACON of the Coast Guard will follow the Use-of-Force Policy issued by the Commandant, USCG, regarding use of warning shots and disabling fire.[29]

Specific rules governing the use of Coast Guard LEDETs are provided in Commandant, United States Coast Guard Instruction (COMDTINST) M16247.1G, *Maritime Law Enforcement Manual*.[30] The primary Federal statute that the Coast Guard enforces in counterdrug operations is the Maritime

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> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

[26] 10 U.S.C. § 279(a) (2012 & Supp. IV 2017). A "drug interdiction area" is defined as an area outside the land area of the United States in which the Secretary of Defense, after consulting with the Attorney General, determines that activities involving smuggling of drugs into the United States are ongoing.

[27] *Id.* § 279(b).

[28] *Id.* § 279(c).

[29] JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT, Encl. H, Counterdrug Support Operations Outside the U.S. Territory, para. 1(b) (13 June 2005). CJCSI 3121.01B is classified in part. Enclosure H is confidential in part. The provision cited is unclassified.; *See also* 14 U.S.C. § 637 (2012 & Supp. IV 2017), Stopping Vessels; Indemnity for Firing at or Into Vessels.

[30] U.S. COAST GUARD, COMDTINST M16247, U.S. COAST GUARD MARITIME LAW ENFORCEMENT MANUAL ch. 3 para. b.2 (2017) (FOUO) (copy on file with CLAMO) [hereinafter MLEM]. The MLEM is also available at the Maritime Operations Resources web portal at the CLAMO website (AKO account required). *See also* Memorandum, Commander, Atlantic Area, U.S. Coast Guard, to Commanding Officers, Regional TACLETs North, South, and Gulf, Memorandum of Agreement Concerning Deployment of Law Enforcement Detachment (5 Aug. 1993) (on file with CLAMO).

Drug Law Enforcement Act (MDLEA).[31] The MDLEA prohibits any person on board a U.S. vessel, or a vessel subject to the jurisdiction of the U.S., from knowingly or intentionally manufacturing or distributing, or possessing with the intent to manufacture or distribute, a controlled substance.[32] The term "U.S. vessel" includes:

- Federally documented or State numbered vessels;
- Vessels owned in whole or in part by:
    - the U.S. or a territory, commonwealth, or possession of the U.S.;
    - a State or political subdivision thereof;
    - a citizen or national of the U.S.; or
    - a corporation created under the laws of the U.S. or any State, the District of Columbia, or any territory, commonwealth, or possession of the U.S.; and
- U.S. documented vessels sold or registered in a foreign country in violation of U.S. law.[33]

"Vessel subject to U.S. jurisdiction" includes a foreign vessel if located:

- In U.S. customs waters;
- On the high seas and the flag State has consented or waived objection to the enforcement of U.S. law; or
- In the territorial waters of another nation and that coastal State consents to the enforcement of U.S. law.[34]

In addition to placing LEDETs on U.S. Navy ships, the Coast Guard also relies on extensive bilateral and multilateral agreements between the United States and other nations to place LEDETs on the ships of foreign countries. These agreements can take various forms—from standing formal memoranda of agreements to *ad hoc* verbal agreements.[35]

The United States and most countries in South America, Central America and the Caribbean are parties to the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Article 17 of that Convention requires parties to cooperate with each other to suppress illicit trafficking by sea. Pursuant to this mandate, the United States has entered into dozens of

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[31] 46 U.S.C. §§ 70501–70508 (2012 & Supp. IV 2017). In 2010 Congress passed the Drug Trafficking Vessel Interdiction Act, 18 U.S.C. § 2285 (the DTVIA) at the urging of the Coast Guard and DOJ. This law makes the operation of or embarkation in a stateless self-propelled semi-submersible or submersible vessel beyond any State's territorial sea (or having crossed from one State's territorial sea into another) a felony punishable by up to fifteen years in prison. Although not an anti- drug-trafficking statute *per se*, the Coast Guard uses this new law to combat the threat posed by maritime drug traffickers who have increasingly resorted to the use of semi-submersible vessels to avoid detection while transporting multi-ton loads of cocaine. This was necessary because the crews of these vessels would frequently scuttle them to avoid prosecution, but under the DTVIA merely being on board is a criminal violation. Many of the jurisdictional provisions and definitions in the MDLEA are included in the DTVIA as well.

[32] 46 U.S.C. § 7503(a) (2012 & Supp. IV 2017).

[33] *Id.* § 7502(b).

[34] *Id.* § 7502(c).

[35] For a list of current counterdrug bilateral agreements, see USCG OPLAW FAST ACTION REFERENCE MATERIALS, series (2012) (For Official Use Only manual) (copy on file with CLAMO) [hereinafter FARM]. The FARM is also available at the Maritime Operations Resources web portal at the CLAMO website (AKO account required).

bilateral agreements or understandings with partner States in the region. These standing bilateral maritime counterdrug agreements typically address various aspects of enforcement including: deployment of shipriders from foreign navies and coast guards on U.S. surface assets; over flight by U.S. air assets within the territory or territorial seas of foreign partners; patrols and pursuit of suspect vessels in the territorial seas of foreign partners; combined operations; flag State authorization to board, search, seize, or make arrests; and procedures by which foreign partners may waive jurisdiction over vessels and persons in favor of prosecution in the United States when appropriate. As with all international agreements, these bilateral and multilateral agreements can only be negotiated by following Department of State approval procedures.

C. National Guard Support to Counterdrug Operations

National Guard forces are authorized by 32 U.S.C. § 112(a) to use CD funds for "drug interdiction and counterdrug activities." This includes:

- Pay, travel, allowances, clothing, subsistence, gratuities, travel, and related expenses, as authorized by State law, for National Guard personnel used for drug interdiction and counterdrug activities while not in Federal service;
- The operation and maintenance of National Guard equipment and facilities used for drug interdiction and counterdrug activities; and
- The procurement of services and equipment, and the leasing of equipment, by the National Guard for the purpose of drug interdiction and counterdrug activities.[36]

Funds provided by the Secretary of Defense under 32 U.S.C. § 112 are part of the DoD counterdrug appropriation and cannot be used for purposes other than the National Guard counterdrug support program. Authority to spend CD funds depends on whether the primary purpose of the mission is to conduct CD activities. Evidence that CD is a purpose, but not the *primary* purpose, is insufficient to justify the expenditure. For example, a Purpose Act violation occurred when the Texas National Guard used counterdrug funds in January 1993 in support of the joint ATF-FBI operation concerning the Branch Davidians near Waco, Texas. The finding was returned despite evidence that a former Branch Davidian had stated to the ATF that there was a methamphetamine lab in the compound, and David Koresh had stated to an undercover ATF agent that the compound would be an ideal location for a meth lab. The Anti-Deficiency Act[37] (ADA) violation was based on the fact that the operation's primary purpose was to investigate potential Federal firearms violations—not narcotics violations.[38]

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[36] Procurement of equipment cannot exceed $5,000 per purchase order unless approval is granted by the Secretary of Defense. 32 U.S.C. § 112(a)(3) (2012 & Supp. IV 2017). Further, equipment purchased, loaned, leased, or otherwise obtained using 32 U.S.C. § 112 funds will only be used for the Counterdrug Support Program except in very limited circumstances. NATIONAL GUARD BUREAU, REG. 500-2/ANGI 10-801, NATIONAL GUARD COUNTERDRUG SUPPORT paras. 7-10, 7-11 (29 August 2008) [hereinafter NGR 500-2].

[37] 31 U.S.C. § 1341 et seq. (2012 & Supp. IV 2017).

[38] Department of the Army (FM&C), Report of Antideficiency Act Violation Case # 95-09 (11 Mar. 1997).

CD funds may also be used for the purpose of drug interdiction and counterdrug activities in which (1) drug traffickers use terrorism to further their aims of drug trafficking, or (2) terrorists benefit from or use drug trafficking to further their aims of drug trafficking.[39]

In order to qualify for Federal funding under 32 U.S.C. § 112(a), the Governor of the State requesting such funding must submit a State drug interdiction and counterdrug activities plan (State Plan) to the Secretary of Defense.[40] A State drug interdiction and counterdrug activities plan shall:

- Specify how personnel of the National Guard of that State are to be used in drug interdiction and counterdrug activities;
- Certify that those operations are to be conducted at a time when the personnel involved are not in Federal service;
- Certify that participation by National Guard personnel in those operations is service in addition to training required under 32 U.S.C. § 502;[41]
- Certify that any engineer-type activities (as defined by the Secretary of Defense) under the plan will be performed only by units and members of the National Guard;
- Include a certification by the State Attorney General that the use of the National Guard for the activities proposed under the plan is authorized by, and is consistent with, State law; and
- Certify that the Governor or a civilian law enforcement official of the State designated by the Governor has determined that any activities included in the plan that are carried out in conjunction with Federal law enforcement agencies serve a State law enforcement purpose.[42]

The National Guard Counterdrug Coordinators for each State or territory must submit their State Plan to the National Guard Bureau (NGB) for review. The NGB submits all 54 State Plans, complete with original certifying signature from the respective Adjutant General, Attorney General, and Governor, to the DASD CN&GT. DASD CN&GT reviews the State Plans and, in coordination with the Comptroller, ASD (HD & ASA), the Joint Staff, the Commander, USNORTHCOM, and other appropriate offices within the department, recommends approval or rejection to the Secretary of Defense.[43]

To ensure that the use of National Guard units and personnel participating in counterdrug operations does not degrade training and readiness, the following requirements apply in determining what activities National Guard personnel may perform:

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[39] JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.4, JOINT COUNTERDRUG OPERATIONS (13 Jun. 2007) (defining narcoterrorism); NGR 500-2, *supra* note 39, glossary (defining counternarcoterrorism); Memorandum, Chief of the National Guard Bureau, Implementation of Procedures for Handling Requests for Counterdrug Narcoterrorist Support (2 Jun. 2006).

[40] State drug interdiction and counterdrug support plans must be submitted through the Counterdrug Office of the National Guard Bureau. NGR 500-2, *supra* note 39, para. 2-5.

[41] *See* 32 U.S.C. § 502 (2012 & Supp. IV 2017) (addressing annual drill and field exercise requirements of National Guard personnel).

[42] *Id.* § 112(c).

[43] Memorandum, Deputy Secretary of Defense, Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities (2 Oct 2003).

- The performance of the activities may not adversely affect the quality of that training or otherwise interfere with the ability of a member or unit of the National Guard to perform the military functions of the member or unit;
- National Guard personnel will not degrade their military skills as a result of performing the activities;
- The performance of the activities will not result in a significant increase in the cost of training; and,
- in the case of drug interdiction and counterdrug activities performed by a unit organized to serve as a unit, the activities will support valid unit training requirements.[44]

The Secretary of Defense will examine the State Plans in consultation with the Director of National Drug Control Policy. If the Governor of a State submits a plan substantially similar to the one submitted the prior fiscal year, and funds were provided to the State under the prior plan, consultation by the Secretary of Defense with the Director of National Drug Control Policy is not required. National Guard units can execute only those missions approved by the Secretary of Defense in the State Plans.

Although Federally funded, National Guard members performing counterdrug missions under 32 U.S.C. § 112 are under State command and control. In fact, 32 U.S.C. § 112(c)(2) specifically requires the State drug interdiction and counterdrug activities plan to certify that "operations are to be conducted at a time when the personnel involved are not in Federal service." 32 U.S.C. § 112(b) also requires that CD personnel serve in a full-time National Guard duty (FTNGD) status pursuant to 32 U.S.C. § 502(f). As with all National Guard personnel performing duties pursuant to 32 U.S.C. §§ 115, 316, 502, 503, 504, or 505, National Guard members performing CD activities in FTNGD status are employees of the Federal government for purposes of Federal Tort Claims Act[45] coverage.[46] If the appropriate United States Attorney determines that a Title 32 National Guard member was acting within the scope of employment when an alleged tort occurred, then the plaintiff's exclusive remedy would be against the United States, which would accordingly be substituted as the defendant in any FTCA litigation.[47] Conversely, for actions not cognizable under the FTCA, such as a constitutional or *Bivens*[48] action against a National Guard member in his or her individual capacity, the United States could not be substituted as the defendant in the action. In such cases, the National Guard member may request representation from the Department of Justice pursuant to 32 C.F.R. § 516.30 and AR 27-40, chapter 4 or AFI 51-301, chapter 1. The process of determining representation is separate and distinct from the determination of FTCA coverage. If representation is granted, National Guard personnel remain individually-named defendants in the action and are responsible for any criminal convictions, fines or civil judgments. The Department

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[44] 32 U.S.C. § 112(b)(2)(C) (2012 & Supp. IV 2017).

[45] 28 U.S.C. §§ 2671-2680 (2012 & Supp. IV 2017).

[46] *See id.* § 2671 (defining "employee of the government").

[47] *See id.* § 2679(b). *See also* NGR 500-2, *supra* note 39, para. 2-4a ("National Guard members acting within the scope of their authority and performing approved support (listed in the Governor's State Plan and approved by the SECDEF) are immune from suit except for certain constitutional torts, i.e., when a negligent act or omission constitutes a violation of the constitutional rights of the injured party, including persons suspected of criminal activity, and certain intentional torts, such as assault and battery, false arrest and imprisonment.").

[48] Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

of Justice is not obligated to indemnify National Guard personnel for any adverse monetary judgments or sanctions in these cases, but may, in its sole discretion, do so upon request.[49]

The PCA does not apply to National Guard counterdrug missions performed under 32 U.S.C. § 112, even though these units are performing missions using Federal funds and operating under Federal fiscal oversight.[50] This allows Title 32 National Guard personnel more flexibility than Title 10 forces in conducting domestic counterdrug missions. Nonetheless, DASD CN&GT and the NGB have imposed several policy restrictions on National Guard counterdrug operations in NGR 500-2.[51] As a matter of policy, National Guard personnel will not directly participate in the arrest of suspects, conduct searches which include direct contact of National Guard members with suspects or the general public, or become involved in the chain of custody for any evidence, except in exigent circumstances, or when otherwise authorized.[52] Exigent circumstances are defined as situations where immediate action is necessary to: protect police officers, National Guard personnel, or other persons from death or serious injury; prevent the loss or destruction of evidence; to prevent the escape of a suspect already in custody.[53]

NGR 500-2 paragraph 2-7 establishes that the following missions have been approved for Federal funding by the Secretary of Defense under 32 U.S.C. § 112:

- Counterdrug Coordination, Liaison, and Management – Planning and coordinating State counterdrug supply and demand reduction support;
- Linguist Support – Providing transcription/translation of audio/video tapes, seized documents and other information media (active/real-time conversation monitoring or direct participation in interrogations is not allowed);
- Investigative Case and Analyst Support – Assisting law enforcement agencies (LEAs) in the establishment of counterdrug intelligence systems/databases and providing intelligence analysis support;
- Communications Support – Providing personnel to establish, operate and maintain communications stations, bases, and equipment in support of LEA counterdrug operations;
- Operational/Investigative Case Support – Providing assistance to LEAs in developing investigations and cases for prosecution;
- Engineer Support – Providing engineer support to LEAs and community organizations where the project has a counterdrug nexus;
- Subsurface/Diver Support – Conducting subsurface inspections of commercial vessel hulls within U.S. territorial waters or maritime ports of entry through the use of sidescan sonar buoys

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[49] *See* 32 C.F.R. § 516.30(a)(8) (2017).

[50] Gilbert v. United States, 165 F.3d 470, 473-474 (6th Cir. 1999) (Where a State used National Guard members for purpose of carrying out drug interdiction and counterdrug activities, in accordance with Federal statute, the National Guard members were found to be exempt from the Posse Comitatus Act); United States v. Benish, 5 F.3d 20, 25-26 (3rd Cir. 1993) (The use of a National Guard unit that was not in Federal service for civilian law enforcement involving surveillance of possible drug operation was not a violation of Federal law, where under Pennsylvania law the Governor could place members of National Guard on special state duty to support drug interdiction programs).

[51] This regulation does not address National Guard counterdrug activities performed under the authority of Title 10, United States Code.

[52] NGR 500-2, *supra* note 39, para. 2-1e.

[53] *Id*.

or divers to detect alien devices or containers attached to vessel hulls, or other underwater activities;

- Domestic Cannabis Suppression/Eradication Operations Support – Supporting LEA domestic cannabis suppression and eradication operations;[54]
- Transportation Support – Providing transportation (aerial, ground, or maritime) of LEA personnel/equipment, persons in LEA custody, seized property or contraband as part of on-going time-sensitive counterdrug operations, when security or other special circumstances reasonably necessitate National Guard support and there is a counterdrug nexus;
- Training LEA/Military Personnel – Training LEA/military personnel in military subjects and skills useful in the conduct of counterdrug operations or in the operation of equipment used in counterdrug operations;
- Surface Reconnaissance – Reconnoitering or performing area observation by land or water to detect and report illegal drug activities that include, but are not limited to, cultivated marijuana, suspected isolated drug trafficking airstrips, drug drop zones, drug trafficking corridors, illegal drug laboratories, suspicious aircraft, watercraft, or motor vehicles;
- Aerial Reconnaissance – Conducting reconnaissance/observation of airspace, maritime or surface areas (land and internal waterways of the U.S. and territories) for illegal drug activities which include, but are not limited to, cultivation of marijuana or delivery of illegal drugs;[55]
- Drug Demand Reduction Support – Providing support to community based activities primarily designed to educate, train, or otherwise prevent drug abuse among youth, and providing information about drug abuse or drug abuse programs;
- Drug Demand Reduction Education and Programs – Supporting community based activities that focus on educational institutions, or otherwise have an educational institution as the primary sponsor, and are primarily designed to educate, train, or otherwise prevent drug abuse;
- Leadership Development – Supporting camps, retreats, seminars and programs, not primarily associated with educational institutions that focus on developing drug abuse prevention leadership skills in youth and adults; and
- Coalition Development – Assisting in the development of functioning community-based coalitions organized to reduce the illegal use of legitimate drugs and the use of illegal drugs.[56]

National Guard personnel carrying out the above missions serve in a support role to LEAs and will not be directly involved in law enforcement duties. Consequently, National Guard members will only be armed at the request of the supported law enforcement agency and after meeting certain criteria. A mission risk analysis will be conducted by The Adjutant General (TAG) of that State to determine whether National Guard personnel should be armed as a force protection measure.[57]

Since National Guard personnel providing counterdrug support under 32 U.S.C. § 112 are acting under State command and control, they operate under their own State Rules for the Use of Force (RUF). CJCSI 3121.01B, Encl. O, Counterdrug Support Operations Within U.S. Territory, is not

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[54] Note that the destruction of contraband portion of the marijuana eradication mission is no longer authorized. *See* Memorandum, Assistant Secretary of Defense (SO/LI-C), Counternarcotics Mission Transfer Plan (13 Feb. 2003).

[55] An additional requirement for aerial reconnaissance (otherwise known as "Mission 5a") is that at least one person involved in either the operation or training of the mission must attend the National Counterdrug Civil-Military Institute (NICI) Mission 5a course. NGR 500-2, *supra* note 39, para. 5-16.

[56] *See id.*, para. 2-7 for a detailed description of what each mission entails.

[57] *Id.* para. 3-3. This authority may be delegated in accordance with para. 3-3b of NGR 500-2.

applicable to the National Guard unless they are in Federal service (Title 10 status). Sample National Guard RUF cards are on file with CLAMO. Consequently, judge advocates must be aware of the application of the law of the State in which operations are being conducted.[58]

If National Guard personnel are armed, NGR 500-2 requires the State's TAG to consider the following:

- All personnel authorized to carry firearms must have received qualification training and testing on the type of firearm to be carried, in accordance with current regulations. Training will include instruction on safety functions, security, capabilities, limitations, and maintenance of the firearms. Testing will include qualification firing in accordance with current qualification standards;
- Arms and ammunition will be secured at all times in accordance with appropriate regulations and policies. Rounds will be chambered only on order of the commander/senior officer/senior noncommissioned officer present, in coordination and in conjunction with the supported LEA, except in cases of exigent circumstances;
- Firearms will not be discharged from moving vehicles (except in self-defense or to defend other persons);
- Pilots in command of aircraft have the authority to override an order to chamber rounds while on board an aircraft;
- Possession or use of non-issued or personally owned firearms and/or ammunition during counterdrug support operations is prohibited. National Guard personnel will not accept offers of weapons or ammunition from LEAs except for use on LEA operated ranges for training purposes only. The only weapons used for counterdrug support operations will be Federally owned military weapons listed on the unit's property books;
- Federally owned military weapons will not be secured in private dwellings at any time;
- The counterdrug coordinator will direct additional weapons training when, in his judgment, it is advisable, regardless of the level of training indicated by training and qualification records;
- National Guard units may use minimum force for the following purposes:

    - To defend themselves or other persons;
    - To protect property, or prevent loss/destruction of evidence;
    - To make arrests if they have arrest powers pursuant to State law and exigent circumstances require such action.

- The discharge of any firearm is always considered deadly force; and
- National Guard members will be thoroughly briefed on the Rules of Engagement and Use of Force prior to the commencement of any operation.[59]

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[58] *See, e.g.* Lieutenant Colonel Wendy A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, ARMY LAW, *Nov.* 2000, at 1.

[59] NGR 500-2, *supra* note 39, para. 3-3.

CHAPTER 8

MILITARY SUPPORT OPERATIONS

KEY REFERENCES:

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- 10 U.S.C. § 2012 - Support and Services for Eligible Organizations and Activities Outside DoD
- 10 U.S.C. § 2554 - Equipment and other services: Boy Scout Jamborees
- 32 U.S.C. § 508 - Assistance for Certain Youth and Charitable Organizations
- 50 U.S.C. § 3045- National Mission of National Geospatial-Intelligence Agency
- HSPD-7 - Critical Infrastructure, Identification, Prioritization, and Protection, December 17, 2003
- PDD-62 - Protection Against Unconventional Threats to the Homeland and Americans Overseas, May 22, 1998 (Declassified on March 18, 2014, under E.O. 13526
- National Oil and Hazardous Substances Contingency Plan, 40 C.F.R. § 300
- EO 12333 - United States Intelligence Activities (as amended by EO 13355 and 13470)
- EO 12580 - Superfund Implementation (as amended by EO 12777, 13286, and 13308)
- EO 12656 - Assignment of Emergency Preparedness Responsibilities (as amended by EO 13074, 13286) (*See also* amendments contained in EO 13753, Dec. 9, 2016)
- EO 12657 - Federal Emergency Management Agency Assistance In Emergency Preparedness Planning At Commercial Nuclear Power Plants (*See also* amendments contained in EO 13286, Feb. 28, 2003)
- DoDD 1100.20 - Support and Services for Eligible Organizations and Activities Outside the Department of Defense, April 12, 2004
- DoDD 3020.26 - Department of Defense Continuity Programs, January 9, 2009, Incorporating Change 1, May 10, 2017
- DoDI 3025.20 - Defense Support of Special Events, April 6, 2012, Incorporating Change 1, May 24, 2017
- DoDD 3025.13 - Employment of Department of Defense Resources in Support of the United States Secret Service, October 8, 2010
- DoDD 3150.08 - DoD Response to Nuclear and Radiological Accidents, January 20, 2010
- DoDD 4500.9E - Transportation and Traffic Management, September 11, 2007, Incorporating Change 1, July 31, 2017
- DoDD 5105.60 - National Geospatial-Intelligence Agency (NGA), July 29, 2009
- DoDD 6000.12E - Health Services Operations and Readiness, January 6, 2011, Incorporating Change 1, October 3, 2013.
- Deputy Secretary of Defense (DepSecDef) Policy Memorandum (PM) 16-002, Cyber Support and Service Provided Incidental to Military Training and National Guard Use of DOD Information Networks, Software, and Hardware for State Cyberspace Activities, 24 May 2016
- AR 95-1 - Flight Regulations, March 11, 2014
- AR 500-3 - U.S. Army Continuity of Operations Program Policy and Planning, April 18, 2008
- NGR 500-1/ANGI 10-8101, National Guard Domestic Operations, June 13, 2008

I. Introduction - Military Support to Special Events

The Department of Defense (DoD) supports a wide variety of special events held within the United States. Judge advocates must carefully analyze requests, approvals, and types of support when advising commanders on these kinds of operations. In addition to the sources cited within, the Center for Law and Military Operations (CLAMO) at the Judge Advocate General's Legal Center and School has numerous after action reports providing lessons learned from DoD's support to domestic events that judge advocates will find very helpful.

There are two general types of DoD support to special events: support to designated special events under statutory authority, and community support as part of Innovative Readiness Training (IRT). Designated special events include the Boy Scout Jamboree and "National Special Security Events" (NSSEs)[1] such as major sporting events (e.g. the Olympics, Presidential inaugurations, and international meetings like the 2012 NATO Summit). The IRT program allows commanders to conduct training in the civilian community, provided the training primarily benefits the participating unit notwithstanding incidental benefits to the community.

A. Support to Special Events or Organizations

Congress has specifically authorized military support to certain events, such as the Olympics or World Cup soccer.[2] Additionally, support to a variety of unspecified designated National Special Security Events may be approved in accordance with DoDI 3025.20.[3]

1. Types of Events and Support from DoD/National Guard

a. Sporting Events

Security and safety support for certain sporting events is authorized by 10 U.S.C. § 2564 to include the World Cup Soccer Games, the Goodwill Games, and the Olympics, and other events when special security and safety needs exist as authorized by the Attorney General.[4] DoD previously supported other sporting events to include the World Alpine Ski Championships and the Special Olympics. Military forces also provided extensive support during the 1996 and 2002 Olympic

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[1] 32 C.F.R. § 183.3 defines National Special Security Event as "An event of national significance as determined by the Secretary of Homeland Security. These national or international events, occurrences, contests, activities, or meetings, which, by virtue of their profile or status, represent a significant target, and therefore warrant additional preparation, planning, and mitigation efforts. The USSS, FBI, and FEMA are the Federal agencies with lead responsibilities for NSSEs; other Federal agencies, including DoD, may provide support to the NSSE if authorized by law."

[2] 10 U.S.C. § 2564 (a) (2012) states:

> Security and Safety Assistance. At the request of a Federal, state, or local government agency responsible for providing law enforcement services, security services, or safety services, the Secretary of Defense may authorize the commander of a military installation or other facility of the Department of Defense or the commander of a specified or unified combatant command to provide assistance for the World Cup Soccer Games, the Goodwill Games, the Olympics, and any other civilian sporting event in support of essential security and safety at such event, but only if the Attorney General certifies that such assistance is necessary to meet essential security and safety needs.

[3] U.S. DEP'T OF DEFENSE, INST. 3025.20, DEFENSE SUPPORT OF SPECIAL EVENTS, Encl. 2, para. 2.c. (6 Apr. 2012) [hereinafter DoDI 3025.20].

[4] 10 U.S.C. § 2564(a) (2012).

Games held in Atlanta, Georgia and Salt Lake City, Utah, respectively. Since its establishment in 2002, U.S. Northern Command (USNORTHCOM) coordinates DoD's support mission for these events.

b. Non-athletic Events

The Secretary of Defense may also direct that non-athletic events receive support. Non-athletic events include large events such as Presidential Inaugurations and International Summits hosted domestically. Many of these events are designated as National Special Security Events (NSSEs).

(1) Boy Scout Support

The Secretary of Defense is authorized, pursuant to 10 U.S.C. § 2554, to lend support for the Boy Scouts of America (BCA) by providing equipment to include cots, flags, tents, and other equipment such as expendable medical supplies without reimbursement from BCA Jamborees.[5] This support may be provided to the BSA in support of both national and world scout jamborees.[6] Further, if the Jamboree is conducted on a military installation, the Secretary may authorize logistical and personnel support on the military installation.[7] Certain expenses such as those associated with transportation must be reimbursed and in some cases a payment bond must be secured before the support is rendered.[8]

c. National Guard Assistance for Certain Youth and Charitable Organizations

National Guard members and units, in conjunction with required military training,[9] may provide services to certain eligible youth and charitable organizations.[10] The eligible organizations are:

- Boy and Girl Scouts of America;
- Boys and Girls Clubs of America;
- Young Men's and Young Women's Christian Associations (YMCA/YWCA);
- Civil Air Patrol;
- U.S. Olympic Committee;
- Special Olympics;
- Campfire Boys and Girls;
- 4-H Clubs; and
- Police Athletic Leagues.[11]

Authorized services include ground transportation, administrative support, technical training, emergency medical assistance, and communications services. The Special Olympics are specifically authorized air transportation.[12]

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[5] 10 U.S.C. § 2554 (2012).

[6] 10 U.S.C. § 2554(a.) (2012).

[7] 10 U.S.C. § 2554(g) (2012).

[8] 10 U.S.C. § 2554(b–f) (2012).

[9] 32 U.S.C. § 502 (2012).

[10] *Id.* § 508 (2012).

[11] *Id.* § 508(d) (2012).

In providing authorized services, National Guard facilities and equipment including vehicles leased to the National Guard and the DoD may be used.[13] As with other types of domestic support operations, the provision of services must not adversely affect the quality of National Guard training or otherwise interfere with the member or unit's ability to perform military functions. Further, training costs should not significantly increase as a result, and National Guard personnel should enhance their military skills as a result of their participation. Lastly, the requested services must not be commercially available. If services are available commercially, the commercial entity affected can approve, in writing, such services provided by the National Guard.[14]

(1) National Guard Civilian Youth Opportunities Program

The SECDEF, through the Chief, National Guard Bureau, conducts a National Guard civilian youth opportunities program, known as the "National Guard Challenge Program."[15] Intended to improve the life skills and employment potential of civilian youth, the Challenge Program is a youth program directed at helping children attain a high school diploma, providing job training and placement, improving personal and social skills, and providing health and hygiene education and physical training.[16] Soldiers work with civilian leaders to provide a comprehensive support package ranging from choosing appropriate clothing to attending residential training facilities.

The Challenge Program uses National Guard personnel to provide military-based training, including supervised work experience in community service and conservation projects, to civilian youth who have not graduated from a secondary school.[17] To carry out the Program, the SECDEF enters into an agreement with a State Governor or, in the case of the District of Columbia, with the commanding general of the District of Columbia National Guard.[18] Usually, the Governor will delegate the establishment, organization and administration of the Program to The Adjutant General (TAG) of the State.

The Challenge Program is not cost-free.[19] Since 2009, a State must provide at least 25 percent of the annual Challenge Program operating costs. National Guard equipment and facilities, including U.S. military property issued to the Guard, may be used to carry out the Challenge Program.[20] A State may supplement its cost-share out of other resources, including gifts. It is also permissible for the Program to accept, use, and dispose of gifts or donations of money, other property, or services.[21]

Individuals selected for training in the National Guard Challenge Program may receive the following benefits: allowances for travel, personal and other expenses; quarters; subsistence; transportation; equipment; clothing; recreational services and supplies; and, a temporary stipend

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[12] *Id.* § 508(b) (2012).

[13] *Id.* § 508(c) (2012).

[14] *Id.* § 508(a) (2012).

[15] 32 U.S.C. § 509 (2012).

[16] *Id.* § 509(a) (2012).

[17] *Id.* § 509(g) (2012).

[18] *Id.* § 509(c) (2012).

[19] *Id.* § 509(d) (2012).

[20] *Id.* § 509(h) (2012).

[21] 32 U.S.C. § 509(j) (2012).

upon the successful completion of the training (GS-2 minimum rate of pay under 5 U.S.C. § 5332).[22] A person receiving training under the Challenge Program is considered a U.S. employee for the purposes of Title 5 (relating to compensation of Federal employees for work injuries) and Title 28, and any other provision of law relating to Federal liability for tortious conduct of employees.[23]

d. National Special Security Events

Pursuant to Homeland Security Presidential Directive 7 (HSPD-7), the Secretary of the Department of Homeland Security (DHS) makes the final determination as to whether to designate an event as a national special security event (NSSE).[24] This determination is made after consultation with the Homeland Security Council.[25] Other events may be categorized through the use of the Special Events Assessment Rating (SEAR) process used by the Department of Homeland Security to address events that do not rise to the level of an NSSE.[26] Military assets provided in support of NSSEs may include explosive ordnance disposal (EOD) teams, technical escort units (TEU),[27] geospatial intelligence support,[28] and chemical, biological, radiological, and nuclear threat identification and response forces.[29]

The designation of an NSSE by the Secretary, DHS, is based upon an analysis of several factors. These factors include: the anticipated attendance of United States and foreign officials, the size of the event, and the significance of the event. Certain events not designated as NSSEs may still receive DoD support in accordance with DoDD 3025.20. The 2004 G-8 meeting was an event approved for DoD support, but not designated as an NSSE.

For a list of designated NSSEs in recent years, see Table 7-1 below.

Event	**Location**	**Date**
2009 Presidential Inauguration	Washington, DC	Jan. 20, 2009
2009 Presidential Address to Congress	Washington, DC	Feb. 24, 2009
2009 G-20 Pittsburgh Summit	Pittsburgh, PA	Sep. 24 25, 2009
2010 State of the Union Address	Washington, DC	Jan. 27, 2010
2010 Nuclear Security Summit	Washington, DC	Apr. 12–13, 2010
2011 State of the Union Address	Washington, DC	Jan. 25, 2011

[22] *Id.* § 509(g) (2012).

[23] *Id.* § 509(i) (2012).

[24] HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 7, CRITICAL INFRASTRUCTURE IDENTIFICATION, PRIORITIZATION, AND PROTECTION para. 26 (Dec. 17, 2003) [hereinafter HSPD-7], available at: *http://emilms.fema.gov/IS700aNEW/NIMS0102040t1.htm.*

[25] *Id*.

[26] DHS, DHS RISK LEXICON 52 (Sept. 2008), *available at* http://www.dhs.gov/xlibrary/assets/dhs_risk_lexicon.pdf.

[27] TEU teams are capable of detecting, rendering safe, and transporting chemical and biological devices.

[28] 10 U.S.C. § 442 (2012), National Geospatial-Intelligence Agency, Missions.

[29] DoDI 3025.20, Encl. 3, 2.b.(7).

Asia Pacific Economic Coop Summit	Honolulu, HI	Nov. 12–13, 2011
2012 State of the Union Address	Washington, DC	Jan. 24, 2012
2018 State of the Union Address	Washington, DC	Jan. 30, 2018
38th G8 Summit	Chicago, IL	May 19-21, 2012
NATO 2012 Chicago Summit	Chicago, IL	May 19-21, 2012
2012 Republican National Convention	Tampa, FL	Aug. 27-31, 2012
2012 Democratic National Convention	Charlotte, NC	Sep. 3-6, 2012
2013 Presidential Inauguration	Washington, DC	Jan. 20, 2013
2016 Republican National Convention	Cleveland, OH	Jul 18-21, 2016
2016 Democratic National Convention	Philadelphia, PA	Jul. 25-26, 2016
2017 Presidential Inauguration	Washington, DC	Jan. 20, 2017

Table 7-1 Recent Designated NSSEs

2. Requests for Support and Coordination

a. Processing Requests for Support

Requests for assistance (RFAs) to a special event may be made to DoD by Federal, State, or local authorities, or a qualifying entity.[30] Often, this means that local police or a FBI field office requests the military support.

If the initial engagement is not a written RFA, representatives of the Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD (HD & ASA)) and the Joint Staff will confer to determine actual requirements. This may involve meetings between DoD representatives and event organizers, civil authorities, or qualifying entities. Once an RFA is received, it will be sent to the ASD (HD&ASA) and the CJCS simultaneously for staffing and recommendation. Additional engagement with the requestor may be required to quantify the scope of the support requested.[31] If the authority for the event is 10 U.S.C. § 2564 (sporting event support), and safety and security support is sought, the Attorney General must certify that the DoD assistance is necessary to meet "essential security and safety needs" (unless an event excepted under the statute, such as the Special Olympics, is involved).[32]

For NSSEs and events that may require the employment of military forces and centralized command and control, the Chairman, Joint Chiefs of Staff (CJCS) will issue a planning order requesting a Combatant Commander initiate planning and notify potential supporting commands and the Chief, NGB, as appropriate. When possible, established CJCS-directed planning procedures will be used by the Combatant Commander to provide an assessment and request for forces. The

[30] DoDI 3025.20, Encl. 3. A qualifying entity is a non-governmental organization that DoD can assist by virtue of a statute, regulation, policy, or other approval by SECDEF or an authorized designee.

[31] *Id.*

[32] 10 U.S.C. § 2564 (2012).

NSSE designation process generally is initiated by a formal written request to the Secretary of Homeland Security by the State or local government hosting the event. In other situations where the event is Federally sponsored, an appropriate Federal official will make the request. As stated above, the Secretary of Homeland Security makes the final determination to designate an event as an NSSE pursuant to Homeland Security Presidential Directive 7.[33]

b. Types of Support[34]

Support that the DoD can provide includes, but is not limited to:

- Aviation
- Communications
- Security equipment
- Operations and command centers
- Explosive ordnance detection and disposal
- Logistics (transportation, temporary facilities, food, lodging)
- Ceremonial support (in coordination with the ASD(PA))
- Chemical, biological, radiological, and nuclear threat identification, reduction, and response capabilities
- Incident response capabilities (in coordination with the Department of Justice, DHS, the Department of Health and Human Services, and in consultation with appropriate State and local authorities)

c. Funding Support

Military support may be provided on a reimbursable or non-reimbursable basis depending on the authority involved. Logistical and security support for certain international sporting competitions may be paid, in part, from the support for international sporting competitions (SISC) defense account.[35] Events which may be funded out of the SISC account include the Special Olympics, the Paralympics, and other events meeting the criteria of paragraph 2.b.(5)(d) of Enclosure 3 in DoDI 3020.25.

If there is no separate funding or authority for the DoD to provide the type of support requested, the support must be approved by the Secretary of Defense and must be provided on a reimbursable basis in accordance with the Economy Act or other applicable reimbursement authorities.[36] Note that for a single event, certain types of support may require reimbursement, and other types of support may not. For example, essential safety and security support to the Olympics need not be reimbursed, but other logistical support provided to the same event must be reimbursed.[37]

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[33] DoDI 3025.20, *supra* note 4, Enc. 3.

[34] *Id*.

[35] *Id.*; *See also* 10 U.S.C. § 2564, and Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[36] DoDI 3025.20, *supra* note 4, Encl. 3. *See also* 10 U.S.C. §§ 272-274, 277 (sections 372-384 were amended to 271-284 in 2016),2012, 2553-2555, and 2564 (2012); 31 U.S.C. §§ 1535, 1536 (2012).

[37] 10 U.S.C. §§ 2564(a), 2564(b) (2012).

Congress has provided specific appropriations to fund support to NSSEs. In addition to general funding for NSSEs that began in FY2006, Congress has also designated funds for specified NSSEs since 2004. Examples of NSSEs receiving specific appropriations include the Presidential Nominating Conventions for both parties in 2004 and 2008.

B. Innovative Readiness Training

Through innovative readiness training (IRT), military units and personnel can sometimes be used to assist eligible organizations and activities in "addressing community and civic needs" in the United States, to include U.S. territories and possessions.[38] The purpose of IRT is to build upon the long-standing tradition of the Armed Forces of the United States, acting as good neighbors at the local level, in applying military personnel to assist worthy community needs.[39] Although IRT missions simultaneously support the unit and the local community, regulations require that steps be taken to ensure that IRT activities do not impermissibly compete with local commercial enterprises. This is accomplished by either a determination that there is no reasonably available commercial alternative, or, by providing a certification of non-competition from the requesting official that "the commercial entity that would otherwise provide the services agrees to the provision of such services by the armed forces."[40]

IRT projects include, but are not limited to, constructing rural roads, providing medical and dental care to medically underserved communities, and performing small building and warehouse construction or re-assembly. The scope of IRT projects is open to all career fields and can include cybersecurity projects.[41] While active components may conduct IRT programs, the National Guard and Reserve elements primarily provide this support.

1. Innovative Readiness Training Procedures

Military units may provide this support to certain eligible organizations in the United States, its territories and possessions, and the Commonwealth of Puerto Rico.[42] Such assistance must be provided incidental to training or be otherwise authorized by law.[43] Assistance is primarily provided by combat service support units, combat support units, and personnel serving in the areas of health-care services, general engineering and infrastructure support, and assistance services.[44]

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[38] U.S. DEP'T OF DEFENSE, DIR. 1100.20, SUPPORT AND SERVICES FOR ELIGIBLE ORGANIZATIONS AND ACTIVITIES OUTSIDE THE DEPARTMENT OF DEFENSE para. 4.1 (12 Apr. 2004) [hereinafter DoDD 1100.20]. DoDD 1100.20 implements 10 U.S.C. § 2012.

[39] *Id*. *See* Lieutenant Commander W. Kent Davis, *Innovative Readiness Training Under 10 U.S.C.* § *2012: Understanding the Congressional Model for Civil-Military Projects*, ARMY LAW., Jul. 2001, at 21, for additional background. Military training in support of certain community and charitable organizations can also be accomplished through 32 U.S.C. § 508 and U.S. DEP'T OF DEFENSE, INST. 3025.17, CIVIL-MILITARY ASSISTANCE FOR CERTAIN YOUTH AND CHARITABLE ORGANIZATIONS (14 Dec. 2002).

[40] DoDD 1100.20, *supra* note 41, paragraph 4.4.1.2.

[41] *See* Chapter 12 of this Handbook, Cyberspace Operations in the National Guard.

[42] 10 U.S.C. § 2012 (2012); DoDD 1100.20, *supra* note 41.

[43] 10 U.S.C. § 2012(a) (2012).

[44] DoDD 1100.20, *supra* note 41, para. 4.2.

a. Requests for Assistance

Requests for assistance must come from a "responsible official" of an "eligible organization."[45] A responsible official is "an individual authorized to represent the organization or activity regarding the matter of assistance to be provided."[46] There are three categories of eligible organizations. Any Federal, regional, State, or local government entity is an eligible organization.[47] Eligible organizations also include youth and charitable organizations as specified in 32 U.S.C. § 508. Finally, an entity can be approved as an eligible organization by the Secretary of Defense on a case-by-case basis.[48]

The request for IRT assistance must specify that the requested assistance is not reasonably available from a commercial entity.[49] An organization may request Innovative Readiness Training assistance from a military unit or individual members. In determining whether assistance from a commercial entity is reasonably available, it is permissible to consider whether the requesting organization "would be able, financially or otherwise, to address the specific civic or community need(s) without the assistance of the Armed Forces."[50] If commercial assistance is reasonably available, the requesting individual must certify the commercial entity agrees to the provision of such services by the military.[51] A good resource for materials related to IRT is http://irt.defense.gov/. This site maintains current forms and other items of interest to those seeking to file or process an IRT application.

b. IRT Provision Requirements

Requested IRT assistance must meet three requirements. First, it must be related to military training. In the case of a military unit, the requested assistance must accomplish valid unit training requirements (there is an exception to this particular requirement discussed below). In the case of assistance provided by an individual military member, the requested assistance must involve tasks directly related to the individual's military occupational specialty (MOS). Second, the provision of assistance cannot adversely affect the quality of training or otherwise interfere with a unit or its members' abilities to perform military functions. Third, the provision of assistance cannot result in a significant increase in training costs.[52]

There is one exception to the requirement that requested IRT assistance must accomplish valid unit training requirements. In cases where the assistance consists primarily of military manpower and will not exceed 100 man-hours, the assistance need not accomplish unit training requirements.[53] The second and third requirements discussed above must still be met. In such cases, volunteers will

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[45] 10 U.S.C. § 2012(c)(1) (2012).

[46] DoDD 1100.20, *supra* note 41, para. 4.4.1.1.

[47] 10 U.S.C. § 2012(e)(1) (2012).

[48] *Id.* § 2012(e)(3) (2012).

[49] *Id.* § 2012(c)(2) (2012).

[50] DoDD 1100.20, *supra* note 41, para. 4.4.1.2.

[51] 10 U.S.C. § 2012(c)(2); DoDD 1100.20, *supra* note 41, para. 4.4.1.2.

[52] 10 U.S.C. § 2012 (d)(1)(C) (2012).

[53] *Id.* § 2012 (d)(2) (2012).

meet manpower requests, and assistance other than manpower will be extremely limited.[54] Military vehicles may only be used, for example, to provide transportation of personnel to and from the work site.[55]

2. Legal Considerations for IRT Projects

a. Approval Authority for IRT Projects[56]

All IRT submission packets must be approved by a general officer. IRT projects that seek additional funding from OSD, seek support for any non-governmental organization not specified in 32 U.S.C. § 508, or seek to reallocate IRT funds to another IRT project require approval by the Office of the Assistant Secretary of Defense for Reserve Affairs (OASD/RA). Major Commands (MACOMs) otherwise have the authority to approve Army-funded IRT projects not meeting the criteria above submitted by qualifying entities. This approval authority may be delegated to commanders of major subordinate commands.

b. Processing Requests for IRT Projects

(1) How the IRT Project Request Process Begins

First, a representative from an eligible organization will approach a commander or command representative with a concept for a project. The project concept must address a need that is not otherwise being met. The commander will evaluate the project to determine whether it is compatible with unit or individual training requirements. If the project is compatible, the commander then must determine the feasibility of using the project as a training exercise.

(2) Contents of IRT Project Requests

If the commander determines the proposed IRT project is feasible as a training exercise, the commander works with the requestor to assemble the IRT project request. An IRT project request must contain a cost analysis of the proposed project. The cost analysis includes total program costs and identifies whether the costs are borne by military department accounts or defense-wide accounts. The requesting commander must certify that the proposed project will not increase the cost of the training above the amount it would cost if conducted independent of an IRT project. The IRT project request must contain a certification of non-competition. The certification of non-competition must determine that the requested assistance is not reasonably available from a commercial entity, or the existing commercial entities agree to the provision of such services by the military. The IRT project request must also contain an environmental assessment.[57]

(3) IRT Request Review

All IRT project requests must be reviewed for full compliance with applicable guidelines and law. All IRT project requests must be reviewed and endorsed by a Staff Judge Advocate or legal officer,

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[54] DoDD 1100.20, *supra* note 41, para. 4.4.2.1.3.

[55] *Id.* (note that the use of military aircraft is prohibited in these instances).

[56] Army IRT Policy, *supra* note 2, at 2.

[57] *See* Army IRT Policy, *supra* note 2, at. 2. IRT medical project proposals have additional submission requirements.

a U.S. Property and Fiscal Officer or Federal Budget Officer, and Plans, Operations and Training officials.[58] Depending on the nature of assistance requested, additional endorsements may be required from medical, dental, or nursing officials.[59] If applicable, the command may request endorsement from the State Adjutant General of the project state or intergovernmental agencies.[60]

c. Claims Arising From IRT Projects

Claims involving Active Duty, Reserve, or National Guard Soldiers that arise from IRT projects are cognizable under the Federal Tort Claims Act (FTCA) despite the fact that a non-DoD or private entity derives a benefit from the project. IRT projects are conducted in a Federally funded training status under Title 10 or Title 32 status.[61] Community assistance undertaken by National Guard units is accomplished in a State Active Duty (SAD) status and is not IRT. Therefore, claims generated incident to projects accomplished in SAD status are solely a State responsibility.

II. Miscellaneous Domestic Support Operations

Domestic support operations supplement the efforts and resources of State and local governments, and can include a variety of lesser-known types of support. This chapter will address these areas that may not frequently arise in domestic support operations, but nonetheless contain significant legal implications and thus are worthy of discussion.

A. Disaster and Domestic Emergency Assistance

1. Military Assistance to Safety and Traffic

The Military Assistance to Safety and Traffic (MAST) program is designed to "assist civilian communities in providing medical emergency helicopter services beyond the capability of the community."[62] The Secretary of the Army serves as the DoD Executive Agent for the MAST program.[63] In response to a request from civilian authorities, military medical helicopter units may provide emergency air evacuation and recovery assistance if local civilian resources are not available or are not sufficient for response to emergencies.[64] Circumstances for which military support is envisioned are:[65]

- Those of a life-saving nature;
- Those specifically authorized by statute;
- Those in direct support of a DoD Mission;
- Those requested by an Agency head pursuant to 31 U.S.C. §§ 1535–36;

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[58] *Id.* at 1.

[59] *Id*. at 2.

[60] *Id.*

[61] *Id.* at 1.

[62] U.S. DEP'T OF DEFENSE, DIR. 4500.9E, TRANSPORTATION AND TRAFFIC MANAGEMENT, E4.2.1 (11 Sept. 2007) [hereinafter DoDD 4500.9E], Incorporating Change 1, 31 July 2017.

[63] *Id.* para. 1.4.

[64] *Id.* para. E.4.2.1.

[65] *Id.* para. E.4.3.1.

- Medical evacuations pursuant to the provisions of DoDI 6000.11, "Patient Movement," May 4, 2012;[66] and,
- As authorized and funded pursuant to DoD 7000.14-R, "Department of Defense Financial Management Regulation" (DoD FMR), Volumes 11A, 11B, and 15.[67]

Military support is subject to the following limitations:

- Assistance may be provided only in areas where military units able to provide such assistance regularly are assigned.
- Military units shall not be transferred from one area to another to provide such assistance.
- Assistance may be provided only to the extent that it does not interfere with the performance of military missions.
- The provision of assistance shall not cause any increase in funds required for DoD operation.
- The Secretary of Defense, or designee, shall be the final decision authority for commitment of DoD resources to the MAST program.
- DoD costs incurred in the program shall be funded by the Military Departments within their annual training program.[68]

Additionally, military units shall not compete for emergency medical evacuation missions if support can be provided by civilian contractors.[69]

DoD assets will provide interim support until civilian assets become available.[70] Medical helicopter units must operate within their allocated training hour program.[71] The Secretary of Defense or his or her designee is the final decision authority for commitment of resources to the MAST program.[72]

2. Search and Rescue Operations (SAR)

The U.S. Air Force, U.S. Pacific Command (USPACOM), and U.S. Coast Guard all have significant day-to-day SAR responsibilities.[73] For typical SAR cases, the USAF is the recognized SAR coordinator for the continental U.S. aeronautical SAR Region, USPACOM is the recognized SAR coordinator for the Alaskan aeronautical SAR Region, and the U.S. Coast Guard is the recognized SAR coordinator for all other aeronautical and maritime SAR regions. The following paragraphs in this section address when DoD resources may be applied in a Stafford Act or other civil support event, outside these normal day-to-day SAR operations.

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[66] *Id.* para. E.4.3.3.1.

[67] *Id.* para. E.4.3.2.

[68] U.S. DEP'T OF DEFENSE, DIR. 4500.9E, TRANSPORTATION AND TRAFFIC MANAGEMENT, E.4.2.3.1 - E4.2.3.6 (11 Sept. 2007) [hereinafter DoDD 4500.9E], Incorporating Change 1, 31 July 2017. .

[69] *Id.* para. E.4.2.1.

[70] *Id.* E.4.2.2.

[71] *Id.* E.4.2.3.6.

[72] *Id.* E.4.2.3.5.

[73] *See* National Search and Rescue Plan of the United States, para. 22 (2007), *available at* http://www.dtic.mil/dtic/tr/fulltext/u2/a486340.pdf.

If Emergency Support Functions (ESFs) have been activated (typically during a Stafford Act response), DoD may have a large role in land-based search and rescue. ESF #9 identifies DoD as a primary agency for land SAR. During a Stafford Act or other civil support incident, DoD may provide SAR support following a request by FEMA as directed by JDOMS and approved by SECDEF.[74] In this capacity, under the National Response Framework DoD assists civil authorities by conducting SAR missions on a reimbursable basis (pursuant to the Stafford Act or Economy Act as appropriate).[75] Note that local commanders may also provide SAR support when an "imminent[ly] serious" threat to "public health and safety" exists and time does not permit prior approval.[76]

When requested, DoD, through U.S. Northern Command (USNORTHCOM) and/or USPACOM, coordinates facilities and resources according to applicable directives, plans, guidelines, and agreements. Per the National SAR Plan and as mentioned above, the U.S. Air Force and USPACOM provide resources for the organization and coordination of civil SAR services and operations within their assigned SAR regions and, when requested, to assist Federal, State, tribal, and local authorities.[77]

If DoD SAR capabilities deploy at the direction of an Air Force Rescue Coordination Center in support of the National SAR Plan (during a typical SAR mission as mentioned above), and the Stafford Act is subsequently invoked,[78] those capabilities will then be administered under the National Response Framework and ESF #9. As soon as practical, a DHS/FEMA or other department/agency mission assignment will then be submitted to DoD for those capabilities' continued support.[79]

3. Employment of DoD Resources in Support of the U.S. Postal Service

When ordered by the President, DoD may be called upon to provide materials, supplies, equipment, services, and personnel to enable the USPS to safeguard, process, and deliver the mail in areas affected by postal work stoppages. Authority to support the USPS rests in the President's authority to use the armed forces to prevent interference with transporting the mail[80] and the authority for interdepartmental transfer of services and equipment prescribed by the Economy Act,[81] as implemented by DoD Instruction 4000.19, *Support Agreements*.[82] Upon Presidential declaration of a national emergency, selective mobilization of reserve components to support the USPS would occur under 10 U.S.C. § 12301.[83] Army and Air National Guard units would be called under

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[74] U.S. DEPARTMENT OF DEFENSE, DoDD 4515.13-R AIR TRANSPORTATION ELIGIBILITY, (Nov. 1994) [hereinafter DoDD 4515.13-R], through change 3, April 9, 1998, para. C5.7; *see also* FEMA, EMERGENCY SUPPORT FUNCTION #9 – SEARCH AND RESCUE, (June 2016), *available at* www.FEMA.gov.

[75] FEMA, EMERGENCY SUPPORT FUNCTION #9 – SEARCH AND RESCUE, (Feb. 2011), *available at* www.FEMA.gov.

[76] *See* DoDD 4515.13-R, *supra* note 77, at C.10.11.

[77] FEMA, EMERGENCY SUPPORT FUNCTION #9 – SEARCH AND RESCUE, (June 2016), *available at* www.FEMA.gov

[78] This could occur in the case of a large airline crash or large vessel casualty, requiring the need for a mass rescue.

[79] *Id*.

[80] *In re* Debs, 158 U.S. 564 (1895).

[81] 31 U.S.C. § 1535 (2012), implemented by 39 U.S.C. § 411 (Cooperation with other Government Agencies).

[82] U.S. DEP'T OF DEFENSE, INSTR. 4000.19, SUPPORT AGREEMENTS (25 Apr. 2013), *Incorporating Change 1, November 30, 2017*.

[83] 10 U.S.C. §§ 12301–12304 (2012).

authority granted in 10 U.S.C. § 12406. Note also that, consistent with this use of authority, EO 13527, *Establishing Federal Capability for the Timely Provision of Medical Countermeasures Following a Biological Attack* (Dec. 30, 2009) directs the integration of DoD into plans to provide support to the USPS delivery of medical countermeasures in the event of biological attack.[84]

4. Public Health or Medical Emergencies

In a large-scale public health or medical response, DoD will likely provide civil support to the Department of Health and Human Services (HHS), which is the primary agency responsible for this mission under ESF #8. DoD may be asked to provide support for casualty clearing and staging, patient treatment, and services such as laboratory diagnostics. DoD resources may be needed to assist with the protection of food and water, the provision of medical supplies, coordination of patient processing, and/or the management of human remains, among other items. All activities would be coordinated through the mission assignment process under ESF #8.[85]

The new Public Health Emergency Medical Countermeasures Enterprise (PHEMCE) Implementation Plan (December 2012) is another part of the response framework for public health emergencies. It establishes the PHEMCE as an interagency coordinating body led by the HHS Assistant Secretary for Preparedness and Response (ASPR), and comprises the Centers for Disease Control (CDC), the National Institutes of Health (NIH), the Food and Drug Administration (FDA), as well as interagency partners at the Department of Veterans Affairs (VA), Defense (DoD), Homeland Security (DHS), and Agriculture (USDA). It coordinates the development, acquisition, stockpiling, and use of medical products that are needed to effectively respond to a variety of potential high-consequence public health emergencies, whether naturally occurring or intentional.[86]

5. Animal and Plant Disease Eradication

Under ESF #8, USDA is responsible for providing the resources to control and eradicate an outbreak of highly contagious or economically devastating animal disease.[87] DoD's role under ESF #8 is to support this function when requested by providing available military medical personnel for the protection of public health (to include food and water supplies), and for the support of the medical treatment of animals.[88] The National Guard maintains National Guard Expeditionary Medical Support (EMEDS) Fatality & Services Recovery Response Team packages that can support these missions with proper approvals.[89]

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[84] Exec. Order No. 13527, 75 Fed. Reg. 737 (Jan. 6, 2010).

[85] FEMA, EMERGENCY SUPPORT FUNCTION #8 – PUBLIC HEALTH AND MEDICAL SERVICES, (Jan. 2008) [hereinafter ESF #8], *available at* www.FEMA.gov. The mission assignment process is discussed further at Chapter 2, *infra*.

[86] *See* U.S. Department of Health and Human Services, Public Health Emergency Medical Countermeasures Enterprise (PHEMCE) Implementation Plan (Dec. 2012), *available at* http://www.phe.gov/Preparedness/mcm/phemce/Documents/2012-PHEMCE-Implementation-Plan.pdf (last visited Dec 17, 2017).

[87] ESF # 8, *supra* note 89, 8-10,11.

[88] *Id.* at 8-11.

[89] *See* NATIONAL GUARD REGULATION 500-1/ANGI 10-8101 - NATIONAL GUARD DOMESTIC OPERATIONS, para. 5-11a, 11b (13 Jun. 08) [hereinafter NGR 500-1].

6. Mass Migration Emergency

The Department of Homeland Security (DHS) is charged with enforcing the laws of the United States regarding immigration.[90] The majority of this responsibility is fulfilled by the routine daily operations of U.S. Immigration and Customs Enforcement (ICE)[91] under DHS. When individuals enter the United States illegally, they are subject to apprehension by law enforcement authorities. ICE then takes action to deport or resettle these immigrants. If the number of illegal immigrants exceeds the capacity of the ICE, the President may declare a Mass Immigration Emergency and DoD may be called on to provide support to DHS.[92]

DoD may be tasked to assist in initial migrant reception, transportation, housing, and the full range of support services associated with those tasks. At no time is DoD expected to engage in law enforcement activities or in the processing of immigrants. FORSCOM, operating with DoD Lead Operational Authority, is charged by JFCOM to develop and coordinate detailed planning and execution of DoD support mass migration operations in the continental United States. The National Guard supports domestic emergencies such as mass migration emergencies in a civil support role while in a Title 10 status.[93]

7. Nuclear and Radiological Incidents

Nuclear/Radiological incidents are defined as an "unexpected event involving the release or potential release of radioactive material that poses an actual or perceived hazard to public health, safety, national security, or the environment."[94] The Nuclear/Radiological Incident Annex of the National Response Framework provides national policy for and assigns responsibility to designated Federal departments for the release of nuclear or radiologic materials, whether purposeful or inadvertent, and whether the incident involves government or privately owned materials.[95] Per this policy, DoD is the coordinating agency for incidents occurring on all DoD owned or operated facilities, and for incidents involving a nuclear weapon, special nuclear material, or nuclear components under DoD custody.[96] In the event of a deliberate attack in the United States, DHS is the coordinating agency and DOJ is the lead law enforcement authority.[97] DoDD 3150.08, *DoD Response to Nuclear and Radiological Incidents*, establishes additional policy in accordance with

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[90] *See* 6 U.S.C. § 101B, Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified primarily at 6 U.S.C. §§ 101-557) [hereinafter HSA 2002].

[91] ICE is the investigative arm of the Department of Homeland Security (DHS). The agency is comprised of several components from the former Immigration and Naturalization Service (INS), the U.S. Customs Service, and the Federal Protective Service (FPS). The agency combines the investigative, detention and removal, and intelligence functions of the former INS with the investigative, intelligence, and air & marine functions of the former Customs Service. All the functions of the former FPS are also part of ICE.

[92] For example, during the Mariel Boatlift approximately 124,000 Cuban migrants entered the United States between April and September of 1980. *See Mariel Boatlift* GLOBALSECURITY.ORG, https://www.globalsecurity.org/military/ops/mariel-boatlift.htm (last visited Aug. 22, 2018).

[93] NGR 500-1, *supra* note 93, para. 4-2.d.

[94] U.S. DEP'T OF DEFENSE, DIR. 3150.08, DOD RESPONSE TO NUCLEAR AND RADIOLOGICAL INCIDENTS (20 Jan. 2010) [hereinafter DoDD 3150.08].

[95] FEMA, NUCLEAR/RADIOLOGICAL INCIDENT ANNEX, (Jun 2008) 1,4,7, *available at*: http://www.fema.gov/pdf/emergency/nrf/nrf_nuclearradiologicalincidentannex.pdf (last visited Dec. 12, 2017).

[96] *Id.* at 8.

[97] *Id.* at 9.

the National Response Framework regarding DoD consequence management response to U.S. nuclear weapon incidents and other nuclear or radiological incidents involving DoD materials.[98]

8. DoD Support to Wildfires

State and local governments have the primary responsibility to prevent and control wildfires.[99] DoD support for wildland firefighting operations are the same as those for other natural disasters and emergencies.[100] DoD provides disaster and emergency support of FEMA pursuant to approved FEMA mission assignments (MAs)..[101]

The primary Federal entity responsible for coordinating the Federal response to wildfires is the National Interagency Fire Center (NIFC). The NIFC, located in Boise, Idaho,[102] is the nation's support center for wildland firefighting[103] and is a joint operation of the DOI and USDA.[104] Seven Federal agencies operate from the NIFC and work together to coordinate and support fire disaster operations. These agencies are:

- Bureau of Indian Affairs (BIA);
- Bureau of Land Management (BLM);
- Forest Service (USFS);
- Fish and Wildlife Service (USFWS);
- National Park Service (NPS);
- National Weather Service (NWS); and,
- Office of Aircraft Services (OAS) [105]

The NIFC evolved from the "Boise Interagency Fire Center" which was established in 1965. The Boise Interagency Fire Center began as an effort to consolidate fire planning and response among the Bureau of land Management, U.S. Forest Service, and National Weather Service. In 1993, the name was changed to the National Interagency Fire Center to reflect a national mission. [106]

If a national fire situation becomes severe, the National Multi-Agency Coordinating (NMAC) Group is activated. This group consists of representatives of each of the Federal wildland

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[98] DoDD 3150.08, *supra* note 99, para. 1.

[99] U.S. DEP'T OF DEFENSE MANUAL, 3025.01, DEFENSE SUPPORT OF CIVIL EMERGENCIES, Vol. 2, Sec 7, para. 7.1.b. and table 6 (Aug. 2016) [hereinafter DoDM 3025.01]; *See also* approved Memorandum of Understanding Between the Department of Defense, National Geospatial-Intelligence Agency, the Department of Agriculture, and Department of the Interior, ; *see also* FEMA, EMERGENCY SUPPORT FUNCTION #4 – FIREFIGHTING ANNEX (May 2013), *available at* www.FEMA.gov.

[100] DoDM 3025.01, *supra* note 104, Sec. 4, para. 4.4.

[101] DoDM 3025.01, *supra* note 104, Sec. 4, para. 4.4.

[102] ESF #4, *supra* note 104.

[103] DoDM 3025.01, *supra* note 104, Sec. 7, para. 7.1; *see also* National Interagency Fire Center (NIFC), *available at:* http://www.nifc.gov/aboutNIFC/about_mission.html (last visited Dec. 12, 2017).

[104] DoDM 3025.01, *supra* note 104.

[105] *See About Us*, NATIONAL INTERAGENCY COORDINATION CENTER, http://www.nifc.gov/nicc/about/about.htm (last visited Mar. 17, 2018).

[106] *See NIFC History, Mission*, NATIONAL INTERAGENCY FIRE CENTER, http://www.nifc.gov/aboutNIFC/about_mission.html (last visited Dec. 17, 2017). .

firefighting agencies. Representatives from the General Services Administration, the U.S. military, and State forestry services may also participate. The Federal and State representatives of this group are responsible for responding to wildland fires and other emergency events. Depending on the national fire situation, the NMAC group helps set priorities for critical, and occasionally scarce, equipment, supplies, and personnel. [107]

The National Interagency Coordination Center (NICC) is located within the NIFC. The NICC was established in 1975 to provide logistical support and intelligence for wildland fires across the nation. Because NICC is an "all-risk" coordination center, it can also provide support in response to other emergencies such as floods, hurricanes, and earthquakes. The NICC coordinates supplies and resources across the United States and provides support to incidents in foreign countries. The NICC includes the National Multi-Agency Coordination Group (NMAC) which is comprised of representatives from the BLM, USFS, Bureau of Indian Affairs (BIA), National Park Service, USFWS, FEMA, and National Association of State Foresters.[108]

Subordinate to the NICC are eleven "Geographic Area Coordination Centers" (GACCs). Each GACC is composed of Federal and State wildland fire agencies. See Figure 8-1.[109]

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[107] *See* NATIONAL INTERAGENCY FIRE CENTER, THE NATIONAL MULTI-AGENCY COORDINATING GROUP, *available at:* http://www.nifc.gov/nicc/administrative/nmac/index.html.

[108] *See About Us*, NATIONAL INTERAGENCY COORDINATION CENTER, http://www.nifc.gov/nicc/about/about.htm (last visited Dec. 17, 2017).

[109] *See Welcome to the National Interagency Coordination Center* NATIONAL INTERAGENCY FIRE CENTER, http://www.nifc.gov/nicc/index.htm (last visited Dec. 17, 2017).

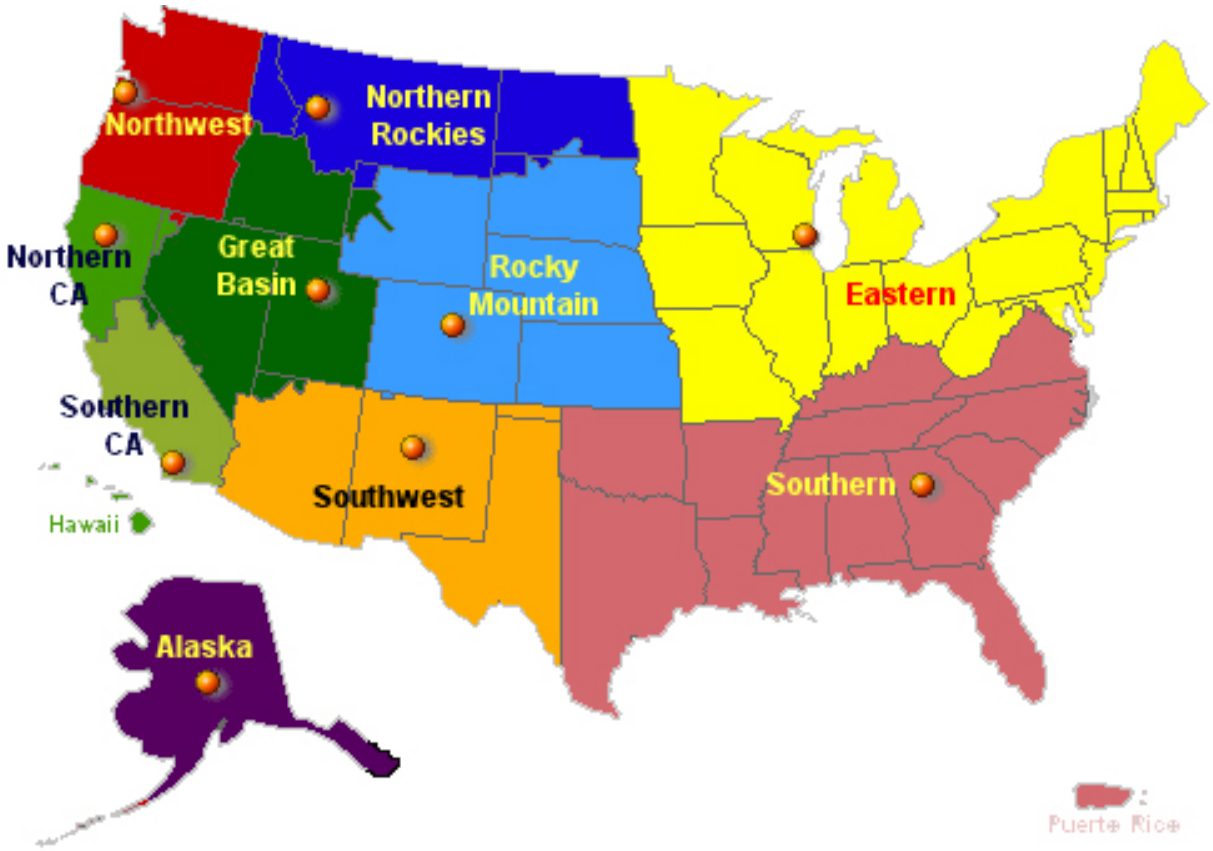

Figure 8-1. Map of Geographical Area Coordination Centers.

The NICC uses a three-tiered coordination system to respond to wildland fires.[110] First, a wildland fire is initially managed by the local agency that has fire protection responsibility for that area. Engines, ground crews, smokejumpers, helicopters with water buckets, and air tankers may all be used for initial suppression. Various local agencies may work together, sharing personnel and equipment, to fight new fires and those that escape initial action. If a wildland fire grows to the point where local personnel and equipment cannot contain the fire, the responsible agency contacts one of the eleven GACCs, which is the second tier of response. The GACC will locate and dispatch additional firefighters and support personnel throughout the geographic area. The third tier is triggered when GACCs can no longer meet requests because they are supporting multiple incidents, or GACCs are competing for resources. When this occurs, requests for equipment and supplies are referred to NIFC. [111]

NIFC can request DoD assistance through several key authorities.[112] Requests for DoD assistance is coordinated with the FEMA Region 10 DCO or the DoD Liaison at NIVC headquarters with the NICC.[113] Only the NIFC Director, Deputy Director, or the NICC Director may sign a request for

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[110] *See About Us*, NATIONAL INTERAGENCY COORDINATION CENTER, http://www.nifc.gov/nicc/about/about.htm (last visited Dec. 17, 2017).

[111] *Id.*

[112] DoDM 3025.01, *supra* note 104, Sec. 7, para. 7.2.

[113] *Id.*, at 7.4.

DoD assistance.[114] All requests for DoD assistance to support wildland firefighting operations are submitted to the CCDR..[115] NIFC normally requests a specific number of firefighters and/or items of equipment. NIFC taskings will provide the necessary information, such as incident name, location, agency representation, and duration of assignment.

Normally, as part of the efforts of State and local governments to prevent and control wildfires, the National Guard (NG) will respond in State Active Duty (SAD) status.[116] For example, during the summer of 2000, ten States provided more than 1,500 National Guard soldiers and airmen who served in SAD status. The National Guard personnel provided law enforcement support for traffic control, transportation and aviation support, and firefighters. The Air National Guard (ANG) and Air Force Reserve (AFR) provided eight C-130 aircraft equipped with the modular airborne firefighting system (MAFFS). Additionally, Federal firefighting officials at NIFC formally requested assistance from DoD. More than 4,600 active duty members were committed to augment Federal and local firefighters and law enforcement officials. NIFC instituted a "Preparedness Level 5" indicating that all Federal firefighting resources were fully committed. [117]

DoD can provide Modular Airborne Fire Fighting System (MAFFS) capable C-130 aircraft, MAFFS-certified aircrews, and appropriate support personnel to conduct aerial dispersal of fire retardant on a reimbursable basis when requests for this type of assistance comply with the requirements of the June 2010 interagency agreement between DoD, USDA, and DOI, and DoD is able to provide the support..[118] Congress established the MAFFS Program in the early 1970s as a joint effort between U.S. Forest Service and DoD..[119] The objective of the MAFFS program is to provide emergency capability to supplement the existing commercial air tanker support on wildfires.[120] The NICC can activate the MAFFS when all other contract air tankers are committed, or are otherwise unable to meet requests for air operations.[121] Approval for use of MAFFS equipment must be obtained from the FS Assistant Director for Operations, NIFC, prior to this

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[114] *Id*.

[115] DoDM 3025.1, *supra* note 104, Sec. 7.

[116] This is different from Title 32 or Title 10 status for National Guard personnel. *See infra* Chapter 3, Reserve Components, for further information on National Guard member status.

[117] *See More Troops Tabbed to Battle Montana Wildfires*, AMERICAN FORCES PRESS SERVICE (Aug. 23, 2000), (Archived - http://archive.defense.gov/news/newsarticle.aspx?id=45369, (last visited Dec. 12, 2017).

[118] DoDM 3025.1, *supra* note 103, ch. 3, para. C3.; *see also Aviation*, U.S. FOREST SERVICE FIRE & AVIATION MANAGEMENT, http://www.fs.fed.us/fire/aviation (last visited Dec. 12, 2017). A MAFFS is a self-contained and pressurized, reusable 3,000 gallon aerial fluid dispersal system that allows Lockheed C-130 cargo/utility aircraft to be converted to wildland firefighting air tankers without structural modification to the aircraft. The 3,000 gallons of retardant are discharged in about five seconds through two tubes exiting the rear ramp of the plane. Most MAFFS are "single-shot" systems, meaning the full load is discharged at one time. One load may lay down a "line" about one-quarter-mile-long and sixty feet wide. The units are loaded with either water or retardant—a chemical that inhibits the combustion potential of vegetation on the ground. This allows firefighters on the ground to rapidly take advantage of the retardant effect, which helps in line-building efforts. The retardant's bright red or fuchsia color helps pilots observe the accuracy of their drops on the edge of the fire.

[119] U.S. Forest Service, U.S. Department of Agriculture, Modular Airborne Fire Fighting Systems, https://www.fs.fed.us/managing-land/fire/planes/maffs, (last visited March 17, 2018).

[120] National Interagency Mobilization Guide, Chapter 18, pg. 69, March 2018, https://www.nifc.gov/nicc/mobguide/Chapter%2050.pdf, (last visited march 17, 2018).

[121] *Id*.

activation.[122] Governors of States where NG MAFFS units are stationed may activate MAFFS missions within their State boundaries when covered by a memorandum of understanding with the USFS. In accordance with military requirements for initial qualification and recurrent training, MAFFS crews are trained every year with Forest Service national aviation operations personnel.

There are currently eight MAFFS units for operational use.[123] There are currently four airlift wings (AW) that provide MAFFS-equipped C-130s and certified crews:

- 146th Airlift Wing (AW), Channel Islands, CA (ANG);
- 152nd AW, Reno, NV (ANG);
- 153rd AW, Cheyenne, WY (ANG); and,
- 302nd AW, Peterson AFB, Colorado Springs, CO (AFR)[124]

The mobilization of MAAFS resources requires a pre-deployment analysis. Prior to deployment of these assets, local foresters are responsible for ensuring that regional, commercially-available assets are unavailable or already committed to a mission. Similarly, if assets are sought by the NICC, commercial assets must be unavailable at the national level. A Memorandum of Understanding–Collection Agreements governs payments. These agreements are between the military authority and the Forestry Service.[125]

B. Environmental Missions[126]

Military services carry out environmental compliance programs focused internally on DoD facilities. DoD may also be called upon to provide assistance during domestic contingency operations involving a major Federal response to an environmental disaster. DoD has representation on the national and regional response teams that oversee response planning for oil and hazardous materials incidents under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Federal Water Pollution Control Act or Clean Water Act of (1972).[127] The National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. § 300, sets forth the responsibilities of all State and Federal entities with a role in environmental response under these laws.[128]

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[122] *Id*.

[123] U.S. Forest Service, U.S. Department of Agriculture, Modular Airborne Fire Fighting Systems, https://www.fs.fed.us/managing-land/fire/planes/maffs, (last visited March 17, 2018).

[124] DoDM 3025.1, *supra* note 104, Sec. 7, para. 7.3(b).

[125] *See* DoD 3025.1-M, *supra* note 103, ch. 3, para. C3; *see also Modular Airborne Fire Fighting Systems (MAFFS)*, U.S. FOREST SERVICE FIRE & AVIATION MANAGEMENT, https://www.fs.fed.us/managing-land/fire/planes/maffs (last visited Aug. 22, 2018).

[126] Chapter 2, *infra*, contains additional information on environmental response and how this mission fits within the National Response Framework.

[127] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9605 – 9675 (2011); The Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251 *et. seq*. (1972), as amended by the Oil Pollution Act of 1990 (OPA 90) (1991).

[128] 40 C.F.R. § 300 (2017). The NCP is required by section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended. *See also* 40 C.F.R. § 300.2 (2017). Executive Orders 12580 and 12777 delegated to the EPA responsibility to revise the NCP as necessary.

Executive Order 12580 directs creation of a National Response Team (NRT) for national planning and coordination of preparedness and response actions. The NRT is composed of representatives of appropriate Federal departments and agencies, including DoD.[129] Regional Response Teams (RRTs), the regional counterpart to the NRT, plan and coordinate regional preparedness and response actions. The EPA chairs the standing NRT, and the EPA, U.S. Coast Guard, and regional States chair the RRTs. RRTs coincide geographically with FEMA and EPA regions. At the local level in the coastal zones are the Area Committees, co-chaired by Coast Guard Captains of the Port[130] and their geographic State counterparts.

The NCP is the Federal government's plan for emergency response to discharges of oil into the navigable waters of the United States or releases of chemicals into the environment.[131] Under the National Response Framework, the Environmental Protection Agency (EPA) is the coordinator for ESF #10 – Oil and Hazardous Materials Response Annex.[132]

The NCP provides that a predesignated on-scene coordinator (OSC) shall direct response efforts at the scene of a discharge or release. Inland, the Environmental Protection Agency (EPA) is the lead response agency and provides OSCs for responses. In coastal areas, the U.S. Coast Guard is the lead response agency for coordinating the Federal response and provides the OSC. States typically have concurrent jurisdiction with the EPA/USCG, and will provide a State OSC with significant authority granted under the NCP and State law. DoD provides the On-Scene Coordinator (OSC) (person who directs and supervises the response) for all hazardous substance releases, except oil spills, that originate from DoD facilities or vessels.[133]

For incidents where DoD does not provide an OSC, DoD generally will provide hazardous materials or oil spill incident response expertise and resources from the Navy and/or Army Corps of Engineers (USACE), both of whom have a representative attending NRT, RRT, and/or Area Committee meetings. USACE oil spill cleanup capabilities include recovery of oil using USACE reserve fleet vessels, contracting, construction management, real estate support services, engineering, environmental review and monitoring, and regulatory permitting, among other items. The Navy's Supervisor of Salvage has an extensive array of specialized equipment and personnel for use in ship salvage, shipboard damage control, and diving – all of which may be critical needs during a spill occurring from a large oil-carrying cargo vessel.[134] With the exception of support

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[129] Exec. Order No. 12580.

[130] Per 33 C.F.R. § 1.01-30 Coast Guard "Captains of the Port and their representatives enforce within their respective areas port safety and security and marine environmental protection regulations, including, without limitation, regulations for the protection and security of vessels, harbors, and waterfront facilities; anchorages; security zones; safety zones; regulated navigation areas; deepwater ports; water pollution; and ports and waterways safety."

[131] It is important to note that the NCP is a separate response regime from the National Response Framework and the Stafford Act, yet there can be overlap between them. Large oil or hazardous materials incidents will be addressed under the NCP, and not the Stafford Act, because this allows the government to direct the "responsible party" (entity responsible for the incident) to take response action in addition to government efforts (thus meeting Congressional intent of the "polluter pays" under CERLA and the FWPCA). Nonetheless, elements of the National Response Framework (in particular ESF #10) can be activated in addition to the NCP to address the response. See the discussion of the Deepwater Horizon Oil Spill, *infra*, as an example.

[132] FEMA, EMERGENCY SUPPORT FUNCTION #10 – OIL AND HAZARDOUS MATERIALS RESPONSE ANNEX, (June 2016), *available at* www.FEMA.gov.

[133] 40 C.F.R. § 300.120 (2017).

[134] DoDD 3025.1-M, *supra* note 104, ch. 3, para. C3.2.1.6.4.5.3.

provided under Immediate Response Authority, the use of DoD resources to support requests for assistance is subject to the approval of the Secretary of Defense.[135] JDOMS will then coordinate any DoD support under the NCP. Such support will typically be requested through the RRT by the U.S. Coast Guard or EPA OSC overseeing the response.

1. The Deepwater Horizon Oil Spill – Use of the NCP vs. Stafford Act

Major environmental contingency operations within the United States are addressed exclusively under the NCP without a Presidential declaration of a major disaster under the Stafford Act. During the Deepwater Horizon crisis in 2010, there was substantial confusion in the public and in press reports regarding the applicability of the Stafford Act to response operations. There was never a Stafford Act declaration during the Deepwater Horizon response.

Despite the magnitude of that emergency, all operations were conducted under the President's delegable authorities under the Clean Water Act[136] and the NCP. Those authorities specifically provide mechanisms by which the "Responsible Parties" for the discharge[137] directly pay all removal costs and certain damages arising from the discharge.[138] Consequently, a Stafford Act declaration was not necessary during Deepwater Horizon because the primary responsible party, BP, directly funded all removal costs. The National Incident Commander,[139] Admiral Thad Allen, U.S. Coast Guard, and the FOSC (a position occupied during 2010 by several Coast Guard flag and senior-level officers) managed the response and directed BP's activities in close coordination with State and local leaders.

If other events caused or exacerbated damage to the Gulf Coast during the Deepwater Horizon clean-up efforts, e.g., a hurricane or similar event, a Stafford Act response could have been directed for those contingencies in addition to the environmental response already ongoing pursuant to the Clean Water Act and the NCP.

C. Miscellaneous Missions in Support of Law Enforcement

1. Support of United States Secret Service

DoDD 3025.13, *Employment of DoD Capabilities in Support of the U.S. Secret Service (USSS), Department of Homeland Security (DHS),* provides for reimbursable support for the Secret Service

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[135] FEMA, EMERGENCY SUPPORT FUNCTION #10 – OIL AND HAZARDOUS MATERIALS RESPONSE ANNEX 11 (June 2016), *available at* www.FEMA.gov.

[136] 33 U.S.C. §1321(c) (2011).

[137] Among the Responsible Parties in DEEPWATER HORIZON were BP and Transocean.

[138] 33 U.S.C. § 2702(a) (2011). In oil discharge situations, the Federal government may use the Oil Spill Liability Trust Fund to pay costs related to oil spill removal activities. Responsible Parties reimburse the fund for these costs. The statute recognizes that reimbursement may not be available when a Responsible Party is insolvent or cannot be identified.

[139] 40 C.F.R. § 300.323(c) (2017) provides that a National Incident Commander (NIC) may be appointed for a "Spill of National Significance." The NIC assumes the role of the FOSC in communicating with effected parties and the public and coordinating Federal, State, local and international resources at the national level.

and identifies reimbursement accounting procedures.[140] Requests for assistance are routed through the White House Military Office or DoD Executive Secretary.[141]

2. Imagery Intelligence and Geospatial Support

The National Geospatial-Intelligence Agency (NGA) is tasked with organizing, directing, and managing NGA and all assigned resources to provide peacetime, contingency, crisis, and combat geospatial intelligence support to the operational military forces of the United States.[142] Although the use of intelligence assets are subject to extensive regulation, NGA capabilities can provide appropriate Federal agencies access to real-time and near real-time imagery and geospatial support.

Intelligence activities in the United States are governed broadly by Executive Order 12333. EO 12333 prohibits directed collection on U.S. persons through the use of overhead reconnaissance by intelligence agencies.[143] EO 12333, however, grants broad authority to U.S. intelligence agencies to provide direct support to other Federal agencies. This support may be extended to local law enforcement in circumstances where lives are at risk.[144] Such support, however, requires approval of the General Counsel of the Supporting Agency. Chapter 9, *infra*, contains much more specific guidance regarding the use of intelligence during domestic operations.

3. Critical Asset Assurance Program

EO 12656 requires that every Federal department and agency identify and develop plans to protect facilities and resources essential to the nation's defense and welfare, in order to minimize disruptions of essential services during national security emergencies. Such security emergencies could result from natural disasters, military attack, or any other event that seriously degrades the security of the United States.[145]

4. Continuity of Operations Policies and Planning

EO 12656 requires heads of Federal agencies to ensure the continuity of essential functions during a national security emergency.[146] DoDD 3020.26, *Department of Defense Continuity Policy*, tasks DoD components to prepare plans for the continuity of its operations and of government during an emergency.[147] Continuity of Operations (COOP) is defined as "An internal effort within each DoD Component to ensure that essential functions continue to be performed during disruption of normal operations.."[148] DoD and OSD Component heads will develop, coordinate, and maintain a DoD Component continuity program in accordance with this directive to ensure the continuation of

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[140] U.S. DEP'T OF DEFENSE, DIR. 3025.13, EMPLOYMENT OF DOD CAPABILITIES IN SUPPORT OF THE U.S. SECRET SERVICE (USSS), DEPARTMENT OF HOMELAND SECURITY (DHS), (8 Oct. 2010).

[141] *Id.* para. 3.4.2.

[142] U.S. DEP'T OF DEFENSE, DIR. 5105.60, NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY, para. 6 (29 July 2009).

[143] *See* Exec. Order No. 12333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401.

[144] *Id.* at para. 2.6(c).

[145] Exec. Order No. 12656, 3 C.F.R. 585 (1988), sec. 204.

[146] *Id.*, sec. 202.

[147] U.S. DEP'T OF DEFENSE, DIR. 3020.26, DEPARTMENT OF DEFENSE CONTINUITY POLICY (14 Feb. 2018).

[148] *Id.*, at Glossary.

Component essential functions across the spectrum of threats. Minimum requirements for continuity planning are outlined in DoDD 3020.26.[149]

5. Explosive Ordnance Disposal

DoDD 5160.62, *Single Manager Responsibility for Military Explosive Ordnance Disposal Technology and Training,* establishes the Assistant Secretary of Defense for Special Operations and Low intensity Conflict, under the authority of the Under Secretary of Defense for Policy (USD(P)). as theOSD proponent for explosive ordnance disposal (EOD) program.[150] Army Regulation 75-14/OPNAVINST 8027.1E/ARF 136-8/MCO 8027.1B, *Interservice Responsibilities for Explosive Ordnance Disposal,* delineates EOD areas of responsibilities for the Army, Navy, Marine Corps, and Air Force.[151]

The EOD mission within the Department of the Army is defined in AR 75-15, *Policy for Explosive Ordnance*. The mission includes providing assistance to public safety and law enforcement agencies and conducting "explosive ordnance disposal training for civil preparedness, law enforcement, fire protection[,] and other public officials."[152] It also includes providing "explosive ordnance disposal support to the Departments of Energy and Justice in the neutralization of improvised nuclear devices in accordance with current agreements and directives."[153] The Army should primarily provide training or advice, rather than physical assistance. AR 75-15 provides Army EOD is not authorized without an approved exception in accordance with 32 CFR 185 and 32 CFR 182 to respond to, or dispose of, non-DOD commercial explosives, chemicals, or other dangerous materials that are possessed or controlled by commercial concerns not located on DOD installations. Thus, EOD forces should only provide physical assistance when the explosive is a DoD munition or when necessary under immediate response authority to save lives.

D. Pandemic Influenza

In response to growing concerns about the potential for an H5N1 pandemic, the Homeland Security Council issued the *National Strategy for Pandemic Influenza* during November 2005.[154] Although H5N1 has not emerged as a pandemic, the World Health Organization declared on June 11, 2009

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[149] *Id.* at 2.13.

[150] U.S. DEP'T OF ARMY, REG. 75-15, RESPONSIBILITIES AND PROCEDURES FOR EXPLOSIVE ORDNANCE, para. 3-1 (17 Dec, 2013). AR 75-15 does not apply to the Army Reserves or Army National Guard.

[151] *Id.* paras. 1-1, 2-1. The Army has EOD responsibility on Army installations and on landmass areas not specifically assigned as the responsibility of the Navy, Marine Corps, or the Air Force. The Department of the Navy is responsible for: EOD activities on Navy installations; explosive ordnance in the physical possession of the Navy; in assigned operational areas; within the oceans and contiguous waters, up to the high water mark of sea coasts, inlets, bays, harbors, and rivers; in any rivers, canals or enclosed bodies of water; and for the rendering safe and disposal of underwater explosive ordnance. The Department of the Air Force and the Marine Corps have EOD responsibility on their own installations, for explosive ordnance in their physical possession, and in assigned operational areas.

[152] *Id.* para. 1-4.

[153] *Id.*

[154] HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA (November 2005), *available at* . https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf (last visited Dec. 12, 2017).

that the H1N1 influenza had become a pandemic.[155] This was followed by statements by the Secretaries of HLS and HHS indicating that the United States had already activated their pandemic response plans in anticipation of such a declaration.[156] Although easily transmissible, the H1N1 influenza has not shown a high mortality rate. Nonetheless, leaders and planners are concerned that a more virulent and deadly strain could present itself in the future. Accordingly, judge advocates advising commanders need to be prepared to confront the myriad of legal challenges that a pandemic could bring. This section provides an overview of the support DoD anticipates providing in the event of a severe pandemic.

The DoD issued the *Department of Defense Implementation Plan for Pandemic Influenza* during August 2006.[157] This "Implementation Plan" includes several planning assumptions that trigger scenarios of interest to the domestic operational lawyer. These assumptions include:

- There will be interagency requests for assistance with mortuary affairs (MA);
- The spread of H1N1 will start from multiple points of entry in the United States and spread rapidly throughout the Nation;
- State, tribal, and local governments will not be able to ensure the provision of essential commodities and services;
- Interstate transportation will be restricted to contain the spread of the virus;
- The security of critical infrastructure will require "Federal augmentation;"
- Both military and civilian MTFs will be overwhelmed;
- Under existing agreements, DoD will provide support to local communities medical efforts to include the provisioning of personnel, supplies, and materiel;
- DoD will support civil authorities consistent with applicable authorities;
- DoD will support and perhaps staff key aspects of the National Critical Infrastructure; and,
- U.S. Army Reserve forces will be mobilized.[158]

Based upon these and other assumptions, the Implementation Plan outlines nineteen planning categories informed by the Homeland Security Council's (HSC) five planning priorities and thirteen priority areas. DoD support in the following fifteen categories will require legal analysis prior to execution:

- Category 1: Intelligence;
- Category 2: Force Protection;
- Category 4: Interagency Planning Support;
- Category 5: Surge Medical Capability to Assist Civil Authorities;
- Category 7: Patient Transport and Strategic Airlift;

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[155] The end of this 2009 Pandemic was declared by the World Health Organization (WHO) International Health Regulations Emergency Committee on 10 August 2010. *See 2009 H1N1 Flu*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/h1n1flu/ (last visited March 9, 2018).

[156] *Statements by HHS Secretary Kathleen Sebelius and DHS Secretary Janet Napolitano on WHO Decision to Declare H1N1 Virus Outbreak a Pandemic*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/h1n1flu/statement061109.htm (last visited March 9, 2018).

[157] ASD, HD, MEMORANDUM FOR SECRETARIES OF MILITARY DEPARTMENTS, DEPARTMENT OF DEFENSE IMPLEMENTATION PLAN FOR PANDEMIC INFLUENZA (12 Sept. 2006) [hereinafter "Implementation Plan"].

[158] *Id.* at 8–9.

- Category 8: Installation Support to Civilian Agencies;
- Category 10: Security in Support of Pharmaceutical/Vaccine Production (Critical Infrastructure Protection (CIP));
- Category 11: Security in Support of Pharmaceutical/Vaccine Distribution;
- Category 12: Communications support to Civil Authorities;
- Category 13: Quarantine Assistance to U.S. Authorities;
- Category 14: Military Assistance for Civil Disturbances;
- Category 15: Military Assurance: Defense Industrial Base;
- Category 16: Mortuary Affairs;
- Category 17: Continuity of Operations & Continuity of Government; and,
- Category 19: Public Affairs support to Civil Authorities.[159]

The Congressional Research Service has also developed a CRS Report for Congress that outlines key legal issues raised by Pandemic Influenza outbreak.[160] The authors note that the Federal authorities authorizing Federal support for a pandemic influenza contingency include the Public Health Service Act and the Stafford Act. These authorities involve the establishment of quarantines and isolation facilities at borders, or of an interstate nature.[161] As discussed above, DoD planning guidance directs consideration be given to the potential for DoD to provide quarantine support to U.S. authorities.[162] This would be in support of HHS's authority "to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."[163] These foreign and interstate quarantine authorities are administered by the Director of the CDC and executed as necessary by the Division of Global Migration and Quarantine.[164] Further, DHS provides support to the CDC through three of its agencies: U.S. Customs & Border Protection; U.S. Immigration and Customs Enforcement; and, the United States Coast Guard.[165]

This authority provided to DoD will be secondary to the States, which have primary quarantine and isolation authorities under State law.[166] Upon request, or upon the determination that local efforts are inadequate, the Federal government may assume primary responsibility for such activity.[167] To the extent that State and local efforts prove ineffective, the likelihood of Federal intervention and a corresponding request for support to the DoD increases. The situation in affected areas may trigger broad requests or directions of DoD support to other Federal or non-Federal entities.[168] Such requested support may prove unpopular. It could also involve the detailing of military law enforcement personnel to augment civilian Federal law enforcement pursuant to the Emergency

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[159] *Id.* at 10–11.

[160] KATHLEEN S. SWENDIMAN & NANCY LEE JONES, The 2009 Influenza Pandemic: Selected Legal Issues, CRS REP'T TO CONG. (October 29, 2009) [hereinafter "CRS REP'T"].

[161] *Id.* at summary.

[162] *See* Implementation Plan, *supra* note 155, at 11, Category 13.

[163] 42 U.S.C. § 264(a) (2011).

[164] *See* CRS REP'T, *supra* note 158 at 11.

[165] *Id.* at 7.

[166] *Id.*

[167] *See id.* at 8, n.41; *see also* 42 U.S.C. § 264(c) (2011); 42 C.F.R. § 70.2 (2017).

[168] *See* Implementation Plan, *supra* note 155 at 10–11, Categories 1, 2, 4–5, 7–8, 10–17 & 19.

Federal Law Enforcement Assistance Act (EFLEAA).[169] Such detailing is viewed by DOJ as removing the military law enforcement personnel from the control of the armed forces and therefore outside of the restrictions found in the PCA.[170]

[169] 42 U.S.C. § 10501 *et seq*.

[170] OAG MEMORANDUM FOR THE PRESIDENT, Summary of Legal Authorities for use in Response to an Outbreak of Pandemic Influenza (April 25, 2009).

CHAPTER 9

INTELLIGENCE AND INFORMATION ACQUISITION AND HANDLING DURING DOMESTIC OPERATIONS

REFERENCES:

- National Security Act of 1947 (as amended), codified throughout 50 U.S.C. § 401 *et seq*. and 50 U.S.C. § 3001 *et seq.*
- Foreign Intelligence Surveillance Act (as amended), 50 U.S.C. § 1801 *et seq*.
- Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 [S. 2845], December 17, 2004.
- The Immigration and Nationality Act (as amended), 8 U.S.C. §§ 1101 *et seq*.
- The Privacy Act (as amended), 5 U.S.C. §552a
- EO 12333 - U.S. Intelligence Activities, December 4, 1981, as amended by EO 13284 (2003), EO 13355 (2004) and EO 13470 (2008).
- EO 13526, *Classified National Security Information*, December 23, 2009.
- DoD 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components That Affect U.S. Persons, December, 1982, Incorporating Change 2, Effective April 26, 2017.
- DoDD 3025.18, Defense Support of Civil Authorities (DSCA), December 29, 2010, Incorporating Change 1, September 21, 2012.
- DoDD 5143.01, Undersecretary of Defense for Intelligence (USD(I)), October 24, 2014, Change 1 Effective April 22, 2015.
- DoDD 5148.13, Intelligence Oversight, April 26, 2017.
- DoDD 5200.27 - Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense, January 7, 1980.
- DoDD 5240.01, DoD Intelligence Activities, August 27, 2007, Incorporating Change 1 and Certified Current Through August 27, 2014.
- DoDD 5400.11- DoD Privacy Program, October 29, 2014.
- DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, February 27, 2013.
- DoDI 3115.15, Geospatial Intelligence (GEOINT), December 6, 2011.
- DoDM 5240.01, Procedures Governing the Conduct of DOD Intelligence Activities, August 8, 2016.
- Deputy Secretary of Defense Policy Memorandum 15-002, Guidance for the Domestic Use of Unmanned Aircraft Systems, 27 February 2015.
- Defense Intelligence Agency Regulation (DIAR) 50-30 - Security Classification of Airborne Sensor Imagery, June 25, 1997.
- Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation, (FOUO) April 5, 1979.
- Supplement to 1979 FBI/DoD Memorandum of Understanding: Coordination of Counterintelligence Matters Between the FBI and DoD, (S) June 20, 1996.
- Joint Publications Intelligence series 2-0.
- AFPD 14-1 - ISR Planning, Resources, and Operations, April 2, 2004.
- AFI 14-104 - Oversight of Intelligence Activities, November 5, 2014.
- AFI 14 series on Intelligence.
- AR 380-13 – Acquisition and Storage of Information Concerning Non–Affiliated Persons and Organizations, September 30, 1974

- AR 381-10 - Army Intelligence Activities, May 3, 2007.
- AR 381-20 - The Army Counterintelligence Program, May 25, 2010.
- AR 381-xx series on Intelligence.
- SECNAVINST 3820.3E - Oversight of Intelligence Activities Within the Dep't of the Navy, September 21, 2005.
- SECNAVINST 3850.2C - Dep't of the Navy Counterintelligence, July 20, 2005.
- Marine Corps Warfighting Pub 2-1 - Intelligence Operations, September 10, 2003.
- Marine Corps Warfighting Pub 2-6 - Counterintelligence, July 13, 2004.
- Marine Corps Warfighting Pub 2-x series on Intelligence.
- National Guard Joint Force Headquarters State J2 Incident Awareness and Assessment Handbook, February 27, 2009.
- Chief National Guard Bureau Instruction (CNGBI) 2000.01C, National Guard Intelligence Activities, 14 August 2018.
- CNGBI 7500.00, Domestic Use of National Guard Bureau Unmanned Aircraft Systems, 13 October 2016.
- Chief National Guard Bureau Manual (CNGBM) 2000.01, National Guard Intelligence Activities, November 26, 2012.
- U.S. NORTHERN COMMAND Instruction 14-3, Domestic Imagery, July 29, 2014.
- U.S. NORTHERN COMMAND Instruction 14-103, Intelligence Oversight, June 14, 2017.

A. Introduction

With the ever-increasing number of domestic military missions conducted in the Homeland, there has been a concurrent search for appropriate assets and capabilities to best perform those missions. Although domestic military missions are no different than overseas missions in that a key requirement for mission success is maintaining a commander's situational awareness, the operating environments are completely different. In a deployed or overseas location, 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, the DoD has the lead, and is in charge of most operational activities. There, the intelligence assets available to the commander normally provide him or her with the common operating picture that will establish situational awareness. However, the domestic operational domain is complicated by Federal statutory and Constitutional restrictions and protections which effectively preclude, or in a best case scenario, limit use of intelligence assets, capabilities and platforms, and even the use of intelligence personnel. In the absence of a Homeland Defense environment or direction from the President, DoD will not be the lead Federal agency conducting operations; indeed, DoD will be supporting the lead Federal agency.[1] Further, in the absence of a Homeland Defense initiation order, there is no "battlespace" in the Homeland; to the contrary, the domain is called the "operational environment." Due to subtle distinctions such as these, the conduct of domestic military operations can be extremely challenging, and in some cases, fraught with legal or political peril.

How, then, can these same assets be used in the Homeland to support DoD missions while at the same time complying with applicable U.S. laws and policies? In this regard, the judge advocate is

[1] *See* U.S. DEP'T. OF DEF., DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 13.d (29 Dec. 2010) (C2, 19 Mar. 2018) [hereinafter DoDD 3025.18].

critical to the conduct of domestic operations utilizing intelligence assets and components. Judge advocates must recognize that collecting not only domestic intelligence but also domestic information may include collecting information on U.S. persons,[2] or persons not affiliated with the DoD.[3] Therefore, the oversight program rules regarding information and intelligence collection in the United States by DoD are quite strict and more than a little complex. This is because these rules are designed to strike a balance between the rights of U.S. Persons and the government's legitimate need for essential information. In so doing, protection of an individual's Constitutional rights and privacy remains paramount while enabling collection of authorized information by the least intrusive means, and by restricting dissemination of this information for lawful government purposes only.

As a result, balancing the commander's need for information against this domestic framework of protections can pose unique issues in the information and intelligence-gathering arena. This chapter provides a broad overview of the rules for collection of information on U.S. persons. If you are addressing an issue involving the collection of information in the Homeland, you may want to seek out additional expertise to assist you in this complicated area.

Before discussing the details of collecting information or intelligence on U.S. persons and Non-DoD Affiliated Persons, it is important to understand first that there are two distinct DoD activities which are involved in the collection of information in the Homeland:

- The first endeavor consists of collecting data that will be processed into intelligence.[4] These are intelligence activities which are comprised of the collection, production and dissemination of foreign intelligence and counterintelligence in accordance with E.O. 12333 and E.O. 13470, as implemented by DoDD 5240.01, (policy documents governing collection, retention and dissemination by DOD intelligence components of information that identifies U.S. Persons). This activity is accomplished by members of the DoD Intelligence Community (DoDIC), as defined in E.O. 12333, and amended by E.O. 13470. In simple terms these are the Title 10 intelligence specialists—J2s, G2s, A2s, etc. This activity is governed by one set of rules referred to as Intelligence Oversight (IO). (Title 32 National Guard intelligence specialists—though not technically members of the intelligence community—follow National Guard policies concerning intelligence oversight.[5])

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[2] U.S. DEP'T OF DEF., MANUAL 5240.01, PROCEDURES GOVERNING THE CONDUCT OF DOD INTELLIGENCE ACTIVITIES 54 (8 Aug. 2016) [hereinafter DoDM 5240.01].

[3] *See* U.S. DEP'T OF DEF., DIR. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE (7 Jan. 1980) [hereinafter DoDD 5200.27]; *see also* U.S. DEP'T OF ARMY, REG. 380-13, ACQUISITION AND STORAGE OF INFORMATION CONCERNING NON-AFFILIATED PERSONS AND ORGANIZATIONS (30 Sept. 1974) [hereinafter AR 380-13].

[4] Raw data by itself has relatively limited utility. However, when data is collected from a sensor and processed into an intelligible form, it becomes information and gains greater utility. In other words, raw data is collected from the operational environment. Raw data that is processed and exploited turns into information. Information that is analyzed and undergoes production into a product turns into intelligence.[4] *See* U.S. DEP'T OF ARMY, REG. 381-10, ARMY INTELLIGENCE ACTIVITIES (3 May 2007) [hereinafter AR 381-10].

[5] *See* CHIEF, NAT'L GUARD BUREAU, INST. 2000.01C, NATIONAL GUARD INTELLIGENCE ACTIVITIES (14 Aug. 2018) [hereinafter CNGBI 2000.01C].

- The second activity deals with the acquisition of information necessary for the conduct of domestic military missions, for other than intelligence purposes. Those persons involved in this activity consist of everyone else in DoD, including various force protection, investigative units and police forces, who are not part of the DoDIC. Equally important however, is that with a growing increase in other-than-traditional military missions such as the provision of humanitarian aid, disaster assistance, and disaster consequence management within the United States, the demand for information has significantly increased to ensure effective, and timely mission accomplishment. This activity is subject to a different set of rules known as "Sensitive Information" (SI) program rules, which are governed by DoDD 5200.27, and AR 380-13.

Therefore, commanders must direct their need for information or intelligence to the right component—the component with the mission and authority to achieve the commander's intent. To do so effectively, the commander must not only determine the purpose the information or intelligence will be used for, but also the context under which the information or intelligence will be used.[6] Determining the nature of the data and the right unit to gather it often requires judge advocate input. Therefore, you must ensure that two questions are asked and answered when considering collection in the Homeland: 1) Who is collecting the information or data? (intelligence assets or non-intelligence assets); and 2) What is the purpose of the information or data needed? (for intelligence or non-intelligence purposes). The analysis will then lead to the oversight rules that govern the collection effort.

Section B of this chapter examines the proper use of DoD intelligence components during domestic support operations. Section C examines collection of information on Non-DoD-Affiliated Persons (NDAPs) by DoD components that are not part of the DoDIC, and are not involved in intelligence operations. Section D addresses Title 10 Domestic Imagery activities and restrictions. Section E briefly addresses the policies and restrictions applicable to the National Guard when collecting information on U.S. persons during domestic operations.

B. The Role of DoD Intelligence Components in Domestic Support Operations

DoD intelligence components[7] are governed by four primary references. The National Security Act of 1947 establishes a comprehensive program for national security and defines the roles and

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[6] For example, a Task Force commander charged with supporting civil authorities during a natural disaster may identify the need for domestic imagery of the ingress and egress routes to determine if the roadways are congested with the civilian population fleeing the disaster zone, or seeking medical aid, food, and water. While intelligence surveillance and reconnaissance (ISR) platforms and packages may afford the most effective means of acquiring situational awareness, military commanders are prohibited from using intelligence assets for such purposes absent SecDef authorization. In a Defense Support of Civil Authorities (DSCA) event, a limited set of ISR platforms and capabilities have been approved for use. ISR conducted for DSCA purposes is called Incident Awareness and Assessment (IAA). When IAA is conducted, it must still be employed consistent with Intelligence Oversight program rules, and still requires authorization by the Commander, U.S. Northern Command (USNORTHCOM) or SecDef. The same products may however, be available commercially or from other Federal agencies. In this example, the commander was not seeking "intelligence." The commander was seeking "information" to enhance situational awareness and establish a common operating picture (COP). The value of this distinction is discussed further in this chapter.

[7] DODM 5240.01, supra note 1, at 46 (defining the DoD intelligence components are as the NSA/CSS, the DIA, the NGA, the NRO, the intelligence and CI elements of the Army, the Navy, the Air Force, and the Marine Corps, the Intelligence and Counterintelligence elements of the Coast Guard, and the other offices within the DoD for the collection of specialized national foreign intelligence through reconnaissance programs). *See also*, U.S. DEP'T OF DEFENSE, DIR. 5148.13, INTELLIGENCE OVERSIGHT (26 Apr. 2017) [hereinafter DoDD 5148.13].

missions of the intelligence community and accountability for intelligence activities. Executive Order (E.O.) 12333, *United States Intelligence Activities*, lays out the goals and direction of the national intelligence effort, and describes the roles and responsibilities of the different elements of the U.S. intelligence community.[8] E.O. 12333 was further amended by E.O. 13470, and in many ways, refined to provide for a more uniform approach to conduct U.S. Government intelligence activities by addressing the formation of the Office of the Director of National Intelligence ("ODNI"), and specifically addressing each facet of intelligence responsibilities respective members of the Intelligence Community ("IC") now hold.[9] Pursuant to paragraph 1.7.(f)(1), the DoDIC is limited to conducting *defense and defense-related* foreign intelligence and counterintelligence activities, thereby necessitating a DoD nexus for all foreign intelligence (FI) and counterintelligence (CI) activities conducted.[10] This limitation is further buttressed by paragraph 4 of DoDD 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities*.

Presently, DoD Directive (DoDD) 5240.01,[11] DoD 5240.1-R,[12] DoDM 5240.01,[13] and DoDD 5148.13[14] implement the guidance contained in E.O. 12333, as amended, pertaining to DoD (see Diagram 1). Further, each Service also has its own regulations and policy guidance. These authorities establish the operational parameters and restrictions under which DoD intelligence components may conduct intelligence activities. "Intelligence activities" are defined in DoDD 5240.01 as, "the collection, analysis, production, and dissemination of foreign intelligence and counterintelligence pursuant to [DoDD 5143.01 and E.O. 12333]."[15] Therefore DoD intelligence activities are solely limited to the conduct of defense-related foreign intelligence (FI) [16] and counterintelligence (CI)[17] activities. FI and CI are the *only* authorized intelligence mission sets for the DoD.

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[8] *See*, Exec. Order No. 12333, 22 Fed. Reg. 59941 (Dec. 4, 1981) (as amended by Exec. Order No. 13470, July 30, 2008) [hereinafter E.O. 12333].

[9] Exec. Order No. 13470 sec. 2 pt. 1. (July 30, 2008) [hereinafter E.O. 13470].

[10] E.O. 12333, *supra* note 8, at para. 1.7.f.1.

[11] U.S. DEP'T OF DEFENSE, DIR. 5240.01, DOD INTELLIGENCE ACTIVITIES (27 Aug. 2007) [hereinafter DoDD 5240.01].

[12] U.S. DEP'T OF DEFENSE, 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT U.S. PERSONS (26 Apr. 2017) [hereinafter DoD 5240.1-R].

[13] DoDM 5240.01, *supra* note 2.

[14] DoDD 5148.13, *supra* note 7.

[15] DoDM 5240.01, supra note 2, at 49 (defining intelligence activities as "[a]ll activities that the DoD Components conduct pursuant to E.O. 12333." This definition reflects a more liberal approach to the conduct of intelligence activities than in the past.).

[16] *Id.* at 48 (defining foreign intelligence as, "[i]nformation relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, foreign persons, or international terrorists.").

[17] *Id.* at 45 (defining counterintelligence (CI) is as, "[i]nformation gathered and activities conducted to identify, deceive, exploit, disrupt, or protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, or persons, or their agents, or international terrorist organizations or activities.").

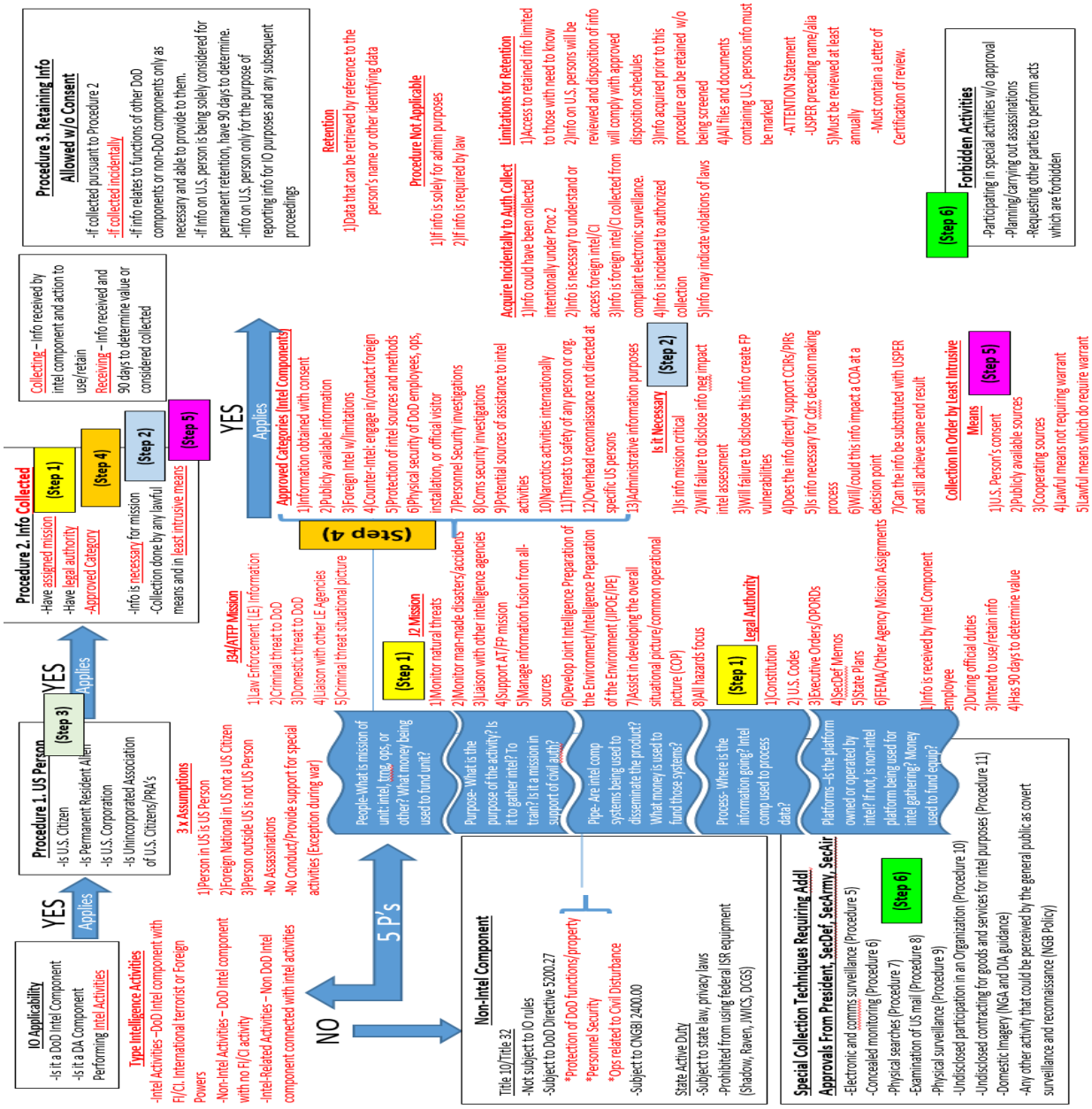

Diagram 1

Judge advocates may find use of the "Legality Formula" instructive when assisting their clients, especially those in leadership roles, by helping them to shift their respective paradigms from OCONUS operations to Domestic Operations (DOMPOS).

Legal Intelligence Activity = Lawful DoD Mission + General/Technical Intelligence Authority to perform that mission.

Simply, to conduct a legal intelligence activity in the Homeland, the activity must be rooted in a lawful DoD mission, and supported by authority granting intelligence policies.

As stated in E.O. 12333 (as amended by E.O. 13470), unless otherwise directed by SecDef, the only authorized DoD intelligence activities (lawful missions) are defense-related foreign intelligence (FI)

and counterintelligence (CI) activities.[18] Further, all lawfully-assigned DoDIC missions must be based on the existence of a DoD nexus, a relationship between the intelligence or information sought and the performance of national defense responsibilities assigned to the DoD. General authorities to conduct intelligence activities are rooted in Articles I and II of the U.S. Constitution, Titles 5, 10, and 50 of the U.S. Code, and Presidential E.O.s assigned to the SecDef as further delegated to Service Secretaries, military departments, and combatant commanders ("CCDRs"). Finally, Technical Intelligence Authority ("TIA") is based on authority bestowed by the office or agency involved, such as the SecDef, Service Secretary, or CCDR. TIA is also derived from the legal authority to conduct missions assigned and managed by the agency or office that is responsible for conducting or overseeing the particular mission(s). For example, The National Security Agency (NSA)/Central Security Service (CSS) has primary (statutory) TIA for the conduct of signals intelligence (SIGINT).

Overall, these intelligence mission sets address the activities of international terrorists or, foreign powers, organizations, persons, and their agents. Moreover, to the extent that DoD intelligence components are authorized to collect FI or CI within the United States, they may do so only upon coordination with the Federal Bureau of Investigation (FBI), which has primary responsibility for intelligence and counterintelligence collection within the United States.[19]

In short, whenever DoD Intelligence Components are conducting defense-related FI or CI, Intelligence Oversight (IO) rules apply.[20] These rules govern the collection, retention, and dissemination of information concerning U.S. persons.[21] A U.S. person includes any unincorporated associations and U.S. corporations (e.g., "Joe's Diner").[22] Special emphasis is given to the protection of the Constitutional rights and privacy of U.S. persons, so the IO rules generally prohibit the acquisition of information concerning the domestic activities[23] of any U.S. Person. Questionable intelligence activities (QIA) that run afoul of these and other restrictions must be reported in accordance with DoDD 5148.13.[24]

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[18] E.O. 12333, *supra* note 8, at paras. 1.7.f, 1.10.

[19] *Id*. para 1.14(a); Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation (5 Apr. 1979); and Supplement to 1979 FBI/DoD Memorandum of Understanding: Coordination of Counterintelligence Matters Between the FBI and DoD (20 Jun. 1996).

[20] DoDD 5240.01, *supra* note 11, at para 2; DoDM 5240.01, *supra* note 2, at para. 1.2(a).

[21] Judge advocates should consider reading these authorities before advising a commander on the collection of information in a domestic support operation. Further, DoDD 5240.01 and DoD 5240.1-R should be consulted when advising members of the intelligence community or if a questionable intelligence activity is identified.

[22] "United States Person" is a term of art for the Intelligence Oversight program which consists of a United States citizen, an alien known by the intelligence agency 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, except for a corporation directed and controlled by a foreign government or governments. E.O. 12333, *supra* note 8, para. 3.4(i). A person or organization in the United States is presumed to be a U.S. Person, unless specific information to the contrary is obtained. Conversely, a person or organization outside the United States, or whose location is not known to be in the United States, is presumed to be a non-U.S. Person, unless specific information to the contrary is obtained. DoDM 5240.01, *supra* note 2, at 54.

[23] The term "Domestic activities" refers to activities that take place within the United States that do not involve a significant connection with a foreign power, organization, or person. DoDM 5240.01, *supra* note 2, at 48.

[24] DoDD 5148.13, *supra* note 7, at para. 4.1(a) (stating that "DoD personnel must identify any QIA or S/HSM to their chain of command or supervision immediately. If it is not practical to report a QIA or S/HSM to the chain of command or supervision, reports may be made to the DoD Component legal counsel or IG; the GC DoD; the DoD SIOO; the Joint

For many members of the DoD who have been deployed OCONUS, these CONUS restrictions may be somewhat challenging considering the broad range of intelligence *and* information support available through DoDIC channels overseas. Upon returning to assignments and operations within the United States, many may be unaware of the restrictions placed upon DoD while operating within the Homeland; this is especially true when considering collection activities of any sort. While oversight rules are the same whether used OCONUS or CONUS, impacts and effects, and more importantly, *applications*, are quite different between the two locations. This difference is so because intelligence, information, and data collection conducted overseas are foreign by nature and definition. On the other hand, all such activities conducted within the Homeland and its territories, are, by definition, "domestic." Therefore, unless otherwise directed by SecDef, such activities conducted within the Homeland do not normally fall within the authorized foreign intelligence and counterintelligence mission sets. Further, since the purpose of DoD intelligence and information collection oversight rules is to protect the Constitutional and privacy rights of U.S. and Non-DoD Affiliated Persons, the likelihood of inadvertently (or intentionally) collecting information on such persons in violation of these rules within the U.S. is significantly higher than would be the case overseas.[25] This likelihood is due to the relatively few U.S. Persons or U.S. Citizens who are Non-DoD Affiliated Persons that will normally be encountered overseas, as compared to the preponderance to be found stateside. For these reasons, procedural application and enforcement of these rules domestically is much more stringent.

The key regulatory authority for the IO program is DoDM 5240.01. This manual is divided into ten separate procedures that govern the collection, retention, and dissemination of intelligence. Collection of information on U.S. Persons must be necessary to the functions (FI or CI) of the DoD intelligence component concerned.[26] Procedure 1 establishes the scope and administrative provisions for implementing DoDM 5240.01. Procedures 2 through 4 provide the sole authority by which DoD components may collect, retain, and disseminate information concerning U.S. Persons. Procedures 5 through 10 set forth the applicable guidance for the use of certain collection techniques to obtain information for foreign intelligence and counterintelligence purposes. Additionally, DoD 5240.1-R contains procedures 11 through 13 which govern other aspects of DoD intelligence activities, including classified contracting, assistance to law enforcement authorities, and prohibitions on experimentation on human subjects for intelligence purposes. Finally, DoDD 5148.13 contains Procedures 14 and 15 governing employee conduct, questionable intelligence activities (QIAs), and significant or highly sensitive matters (S/HSMs), respectively. See Diagram 2 for an overview of these procedures.

In addition to the procedures themselves, the Defense Intelligence Agency (DIA) has published an instructive manual entitled The Intelligence Law Handbook (September 1995), to provide additional interpretive guidance to assist legal advisers, intelligence oversight officials, and operators in applying DoD 5240.1-R.[27] In the absence of any foreign nexus, DoDICs generally perform non-

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Staff IG or intelligence oversight officer; the Legal Counsel to the CJCS; the IG DoD; or the Intelligence Community IG.").

[25] E.O. 13470, *supra* note 9, at pt. 1 para. 1.1(b); DoDD 5240.01, *supra* note 11, at para. 4.1; DoDM 5240.01, *supra* note 2, at para. 1.2.b.2.

[26] DoDM 5240.01, *supra* note 2, at sec. 3.2.

[27] The DIA Handbook was published well before the new DoDM 5240.01 was written, and is therefore based solely on DoD 5240.1-R. Although it is an outstanding resource, it is somewhat dated. Judge advocates are therefore cautioned to be aware of the changes that occurred moving from the latter Regulation to the new Manual. However, the content of

intelligence activities. A non-intelligence activity would be any activity that is conducted by or with a DoDIC asset or capability, but which does not involve FI or CI; for example, the collection, retention, production, and dissemination of maps, terrain analysis, and damage assessments for a DSCA mission. When intelligence assets fly planned or disaster support missions, such as post-hurricane operations, they are termed "incident awareness and assessment" (IAA) missions. [*see* Section D below for a more complete discussion of Domestic Imagery (DI) and IAA missions.]

When Title 10 DoDIC personnel, assets or capabilities are needed for a non-intelligence activity, specific authorization from the SecDef is required for both the mission and use of the DoDIC capability or asset.[28] Depending on the mission undertaken, and whether intelligence platforms, packages personnel or capabilities are used, IO rules may or may not apply to DoD non-intelligence activities. For this reason, requests for SecDef authorization must be sure to include whether intelligence capabilities are sought and what additional restrictions shall be placed upon the assets or capabilities used in the domestic support operation.

C. Information Handling and the Role of DoD Non-Intelligence Components

DoD organizations that are not part of the DoDIC must also comply with strict procedural restrictions. These restrictions relate to the acquisition of information concerning the activities of persons and organizations not affiliated with DoD. This type of information is needed every day for force protection missions, to include force protection in domestic support operations. Within the DoD, the Military Criminal Investigative Organizations (MCIOs) have primary responsibility for gathering and disseminating information about the domestic activities of U.S. persons that threaten DoD personnel or property.

DoD units, other than the intelligence components, may *only* acquire information concerning the activities of persons and organizations not affiliated with the DoD only in the limited circumstances authorized by DoD 5200.27, *Acquisition of Information Concerning Persons and Organizations Not Affiliated with the Department of Defense.*[29] Unlike the Intelligence Oversight Program, programs affiliated with DoDD 5200.27 are premised on the concept of collection by exception. By policy, DoD may only collect, report, process, or store information on individuals or organizations affiliated with the Department of Defense. To collect information on others, the information must be essential to the accomplishment of a specific DoD mission, and a clear DoD nexus must exist which permits the use of an exception. Non-DoD Affiliated Person Information (NDAPI) is information (including data and imagery/likenesses) on identified or identifiable NDAPs, that is acquired for non-intelligence purposes by DoD elements or organizations not part of the DoDIC nor performing intelligence tasks.[30]

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the explanatory information remains quite useful. *See also* Kevin W. Kapitan, *An Introduction to Intelligence Oversight and Sensitive Information: The Department of Defense Rules for Protecting Americans' Information and Privacy*, THE ARMY LAW. 3, 3-42 (Apr. 2013) (providing more in-depth explanations and practice tips based on pre-DoDM 5240.01 policies).

[28] Deputy Secretary of Defense Policy Memorandum 15-002 should be consulted before use of any Unmanned Aircraft Systems (UASs).

[29] U.S. DEP'T. OF DEF., DIR. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE (7 Jan. 1980) [hereinafter DoDD 5200.27].

[30] *Id.* at para. 3.1.

While the term, "collection" is not defined by DoDD 5200.27, it is defined by AR 380-13 as "[t]he acquisition of information in any manner, including, direct observation, liaison or solicitation from official, unofficial or public services." [31] Also, the term "information" is not defined by DoDD 5200.27 nor AR 380-13. However, current custom and practice in this regard at U.S. Northern Command (USNORTHCOM), Headquarters, Department of the Army (HQDA), and OSD is consistent with IO Program rules. IO Program rules protect *any* information, data, personally identifying information (PII), or imagery[32] of the individual or individuals that identifies or could reasonably lead to the identification of an NDAP. In this regard, the Privacy Act and related analogous legal parameters provide the requisite standard.

So, what exactly is an NDAP? An NDAP is anyone who has no affiliation whatsoever with the DoD. Thus, the NDAP classification is not exclusive to U.S. citizens in the Homeland. Basically, an NDAP has no relationship, professional, personal, or otherwise, with the DoD or the Armed Services.

The basic DoDD 5200.27 analysis may be useful to judge advocates unfamiliar with this area of law and policy. The questions to be asked:

1. Has a collection, gathering or acquisition of information occurred, and by whom?

2. Who/what is the target of collection? (DoD or NDAP?)

3. Is the collection authorized or sanctioned?

4. Is the NDAP's information essential to the accomplishment of specific DoD missions?

5. Is there a DoD nexus, or a relationship between the info, the NDAP collected on, and a reasonable and articulable threat or impact upon the DoD, its missions, personnel or resources?

6. Is there an applicable exception permitting collection?

DoDD 5200.27 provides limitations on the types of information that may be collected, processed, stored, and disseminated about the activities of persons and organizations not affiliated with DoD.[33] As a result, there are only three possible mission exceptions that will permit the acquisition of NDAP information.[34] These mission exceptions consist of the acquisition of information essential to accomplish the following DoD missions: 1) protection of DoD functions and property; 2) personnel security; and 3) civil disturbance operations (CDOs). If the collection on an identified or

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[31] AR 380-13, *supra* note 3, at 7.

[32] As of the publication of this Handbook, debate continues at the Service and OSD levels as to whether *unidentified* imagery or likenesses of persons constitutes a form of PII. DODD 5400.11, The DoD Privacy Program, defines PII as, "Information used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, biometric records, home phone numbers, other demographic, personnel, medical, and financial information. PII includes any information that is linked or linkable to a specified individual, alone, or when combined with other personal or identifying information. For purposes of this issuance, the term PII also includes personal information and information in identifiable form."

[33] *See also* AR 380-13, *supra* note 3 (implementing the original and early versions of DoDD 5200.27).

[34] DoDD 5200.27, *supra* note 3, at sec. 4.

identifiable NDAP does not fall within one of these exceptions, it is not authorized under DoDD 5200.27 nor AR 380-13.

The most commonly used exception in DoDD 5200.27 falls under circumstances protecting DoD functions and property. Initially this seems like a broad exception that would allow for the collection of information on U.S. Persons in multiple situations. However, DoDD 5200.27 further defines an activity that threatens defense personnel, activities, and installations as "direct threats" to DoD personnel in connection with their official duties.[35] Understanding the difference is crucial. For instance, it is not uncommon for protests to occur outside the main gate of an installation. Under the broad brush of "protecting" DoD property, it might seem appropriate to report the name of the protesting group to installation personnel. Yet, further analysis is required to determine whether the group poses a direct threat to the installation. If the group is quietly and calmly protesting, it is unlikely that they pose a direct threat. Therefore, information should not be collected on them by name.[36]

Judge advocates must also be aware of a series of restrictions that are imposed by both DoDD 5200.27 and AR 380-13, which are otherwise absent in intelligence oversight programs. Specifically, there are no exceptions available for *publicly available information*, which permit collection or acquisition of information on NDAPs because the information is readily available from public sources. Similarly, there is no stated exception for information provided by NDAP *consent*. Further, *unlike* the new IO rules,[37] there is no DSCA exception or exclusion. However, DoD may acquire information on NDAPs if that information consists of contact lists of Federal, State, and local officials with responsibilities related to the control of Civil Disturbances; e.g., public officials' emergency contact info or business cards,[38] and information on geospatial physical data relating to vital public or private installations, facilities, highways, and utilities necessary to carry out an assigned DoD mission where geographical reference points or staging areas are necessary.[39]

Judge advocates should also be mindful of historical problem areas that have led to specific prohibitions under DoDD 5200.27.[40] The Directive specifically prohibits acquisition of information about a person or organization solely because they protest Government policy, or support racial interests or civil rights.[41] The Directive also prohibits, covert or deceptive

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[35] The challenge of understanding exactly what constitutes a "threat" versus a "direct threat" is further complicated by not only the lack of a definition of the term "direct threat" in DoDD 5200.27, but also the numerous definitions of the term "threat" found in various DoD polices. *See, e.g*, U.S. DEP'T. OF DEF., INST. 5505.17, COLLECTION, MAINTENANCE, USE, AND DISSEMINATION OF PERSONALLY IDENTIFIABLE INFORMATION AND LAW ENFORCEMENT INFORMATION BY DOD LAW ENFORCEMENT ACTIVITIES 6 (19 Dec. 2012) (C1, 29 Nov. 2016) [hereinafter DoDI 5505.17] *and* U.S. DEP'T. OF DEF., INST. 5525.18, LAW ENFORCEMENT CRIMINAL INTELLIGENCE IN DOD (18 Oct. 2013) (C1, 29 June 2018) [hereinafter DoDI 5525.18].

[36] Note that while it would be counter to DoD 5200.27 to collect information on the activities of the group by stating "Group Against the Military (the name of the group) is protesting outside the front gate," one could report all the necessary information without naming the group and therefore collecting on its activities. For example, one could report that "a group not in support of the military is protesting outside the front gate" without losing relevant information and without violating the DoD policy.

[37] *See* DODM 5240.01, *supra* note 2, at para. 3.1.a.3.b.

[38] DoDD 5200.27, *supra* note 29, at para. 6.2.1.

[39] *Id.* at para. 6.

[40] *Id.* at para. 5.

[41] *Id.* at para. 5.1.

surveillance of civilian organizations without specific authorization from the Service Secretary or the Secretary's designee.[42] Finally, the Directive does not permit assignment of Army military or civilian personnel to attend an organization's public or private meetings, demonstrations, or other similar activities held off–post, without approval by the Service Secretary or the Secretary's designee.[43]

Similar caution should be exercised when considering such activities in the context of the cyber domain. Both DoDD 5200.27 and AR 380-13 impose prohibitions on the maintenance of "computerized data banks," similarly indicating that none "shall be maintained relating to individuals or organizations not affiliated with the Department of Defense, unless authorized . . . ."[44] In like fashion, infiltration or surveillance of chat room groups, or other forms of social, by failing to disclose one's affiliation with the DoD, or other similar acts, cannot occur without proper authorization.[45]

D. Title 10 Domestic Imagery Activities and Restrictions

1. Domestic Operations

Whenever the DoDIC is providing support in the Homeland, special care must be taken to comply with IO Program Rules and the Posse Comitatus Act (PCA). Unless otherwise directed by the President or SecDef, anytime an aspect of the DoDIC is used in an information gathering capacity, even for non-intelligence purposes, IO rules apply whether the usage is for DSCA or Homeland Defense (HD).[46] These rules are complemented by Domestic Imagery (DI) program rules, which are quite similar since DI rules are derived from IO program rules. Understanding the interplay of these procedures and restrictions is critical when intelligence assets are used for non-intelligence purposes.

Whether DoDIC Components (DoDICC) are conducting an intelligence activity or a non-intelligence activity, certain rules universally apply to data and imagery collected from overhead and airborne sensors. Geospatial data, commercial imagery, and data or domestic imagery collected and processed by the National Geospatial-Intelligence Agency (NGA) is subject to specific procedures covering the request for geospatial data or imagery and its use. Judge advocates should ensure that they are familiar with NGA policy on requests for geospatial data or imagery and its authorized use. Additionally, DoDI 3115.15, *Geospatial Intelligence* provides specific guidance on mandatory security classification review of all data collected by airborne sensor platforms to determine whether it can be disseminated.[47]

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[42] *Id.* at paras. 5.3, 5.4., and 5.5.

[43] *Id.* at para. 5.6.

[44] DoDD 5200.27, *supra* note 29, at para. 5.7; AR 380-13, *supra* note 3, at para. 9.g.

[45] Activities like failure to disclose one's DoD affiliation in an attempt to infiltrate a chat group is under scrutiny at the HQDA and OSD levels in an effort to develop effective policy to ensure that NDAP Constitutional and privacy rights are adequately protected, while at the same time fulfilling DoD mission and force protection requirements.

[46] CHAIRMAN, JOINT CHIEFS OF STAFF, STANDING DSCA EXECUTE ORDER (EXORD) paras. 3.C.4.J.1., 3.I.10.A. (5 June 2018) [hereinafter DSCA EXORD].

[47] *See generally* U.S. DEP'T. OF DEF., INST. 3115.15, GEOSPATIAL INTELLIGENCE (6 Dec. 2011) (C1, 10 May 2018) [hereinafter DoDI 3115.15].

In providing guidance to commanders on authorized use of DoDIC capabilities and assets, and the products derived from the data collected, it is important for judge advocates to understand the various platforms, their sensors, and how they operate. Whether an activity is subject to IO is determined by the "5 P's": process, people, pipelines, platforms, and purpose. Issues to consider include: whether the sensor is fixed or moveable; whether the platform with the sensor can have its course altered during a mission; how is the data collected, transmitted, and processed; and the specific purpose of its mission. For example, an Unmanned Aircraft System (UAS) may transmit data by live feed only to a line-of-sight receiver, or by satellite to a remote location.

In this example, evidence of a criminal act "incidentally" collected during an authorized mission using DoDIC capabilities *should* be forwarded to the appropriate civilian law enforcement agency (CLEA). However, altering the course of an airborne sensor (such as an UAS) from an approved collection track to loiter over suspected criminal activities would no longer be incidental collection. Thus, unless specifically authorized in advance, such an act could result in a PCA violation.[48] Certain data contains classified metadata which may need to be stripped at a remote site before it can be disseminated in an unclassified manner. Different platforms require different operational support, which requires preposition planning as well as intended use consideration.

A domestic support operation using DoDIC capabilities, which includes support to CLEAs,[49] requires a separate mission review and authorization by SecDef. Those planning the mission should consider whether the date is to be exclusively transmitted to the CLEA, and whether the CLEA personnel are properly located to control or direct use of the assets. To determine whether the collection platform and data transmission are wholly owned, operated, and received by a DoDIC, a DoD non-IC, or a combination of both, judge advocates will need to carefully consider the applicable rules and operational restrictions for the mission.

2. Domestic Imagery and Intelligence Oversight Programs

There are complexities inherent in the domestic operating environment (OE) with regard to the use of intelligence assets. *Any* use of intelligence capabilities for purposes other than "traditional intelligence" uses (support of combat operations) must be approved by the SecDef. "Traditional intelligence activities" include the collection, retention and dissemination of defense-related foreign Intelligence (D-FI) and counterintelligence (D-CI) products by the DoDIC. The exception to permit use of intelligence assets, personnel and capabilities for other than traditional intelligence purposes first became prevalent in the DSCA context.[50] In an effort "to save lives, prevent human suffering, or mitigate great property damage within the United States . . . ," SecDef permitted the use of DoD intelligence assets for other than traditional intelligence activities.[51] In so doing, DI capabilities were among the first to be considered for such uses.[52] However, immediate challenges followed these decisions due to the complexities involved in employing DI assets in the Homeland.

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[48] U.S. DEP'T. OF DEF., INST. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES GEOSPATIAL INTELLIGENCE (26 FEB. 2013) (hereinafter DoDI 3025.21]; DODD 3025.18, *supra* note 1.

[49] DoD 5240.1-R, *supra* note 12, at proc. 12.

[50] DSCA EXORD, *supra* note 46, at para. 4.D.2.

[51] *Id*. at paras. 10.L.2., 4.D.2.

[52] *Id*. at para 4.D.2.

There are two core regulatory authorities that provide structure and procedure with regard to DI: National Geospatial Intelligence Agency, National System for Geospatial Intelligence Functional Manager for Foreign Affairs 1806 (NSGM FA 1806)[53] and related series of policies; and, when operating in support of USNORTHCOM, or within the USNORTHCOM area of operations (AO), North American Aerospace Defense Command/U.S. Northern Command Instruction 14-3 (NNCI 14-3).[54] These policies are straightforward, but somewhat complicated procedurally. The complications become exacerbated due to the necessity to include IO program rules into the mix. Together, the interplay of all these rules may be summarized by the following:

> DI captured in the Homeland, and/or processed, exploited, analyzed or disseminated by any component or element of the DoDIC must comply with IO program restrictions, unless otherwise directed by the President, SecDef or his designee; this compliance is certified by executing a Proper Use Memorandum (PUM).

The PUM is an integral part of the DI mission process, arguably as equally important as the platform and packages used to capture imagery. A PUM is a memorandum submitted by an organization's Certifying Government Official and reviewed by its legal advisor.[55] The Imagery user organization will submit this PUM to NORAD and USNORTHCOM Collection Management (N-NC/J23M) for approval "that defines their requirements, intended use, and contains a proper use statement which acknowledges their awareness of the legal and policy restrictions regarding domestic imagery."[56] What a PUM *is not*, is an *authorization* to collect DI. However, a PUM will specify the authority to collect imagery, the location, intended use, analysis or exploitation of the imagery, retention, security and declassification (DCLAS) review, and authorized recipients of the DI captured. The core purpose of the PUM is to certify compliance with IO program rules by providing a statement of compliance by the Certifying Intelligence Official. The PUM also contains a legal opinion as to whether compliance is certifiable and legally sufficient which helps to ensure that the DI to be collected will be used for proper and lawful purposes consistent with law and policy.[57]

3. Incident Awareness and Assessment versus Intelligence Surveillance and Reconnaissance

DI and related data are most frequently captured during the course of DSCA missions. Since, by definition, DSCA only occurs within the U.S. and its territories,[58] DoD personnel must carefully review and adhere to IO rules, DoDD 5200.27, Federal laws, DoD policy, and the U.S. Constitution.

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[53] NAT'L GEOSPATIAL INTELLIGENCE AGENCY, NAT'L SYS. FOR GEOSPATIAL INTELLIGENCE FUNCTIONAL MANAGER FOR FOREIGN AFFAIRS 1806, DOMESTIC IMAGERY (Mar. 2009), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB527-Using-overhead-imagery-to-track-domestic-US-targets/documents/EBB-Doc17.pdf [hereinafter NSGM FA 1806].

[54] N. AM. AEROSPACE DEF. COMMAND/U.S. N. COMMAND, INS'T 14-3, DOMESTIC IMAGERY (29 July 2014) [hereinafter NNCI 14-3]. The instructions for the North American Aerospace Defense Command (NORAD) and U.S. Northern Command (USNORTHCOM) are on the intranet for those commands. However, NNCI 14-3 is also on file with the Center for Law and Military Operations (CLAMO).

[55] NNCI 14-3, *supra* note 54, at 20.

[56] *Id.*

[57] *Id.*

[58] DoDD 3025.18, *supra* note 1, at para. 2.c.; see also U.S. DEP'T. OF DEF., DIR. 5100.46, FOREIGN DISASTER RELIEF (6 July 2012) [hereinafter DoDD 5100.46]; *and* JOINT CHIEFS OF STAFF, JOINT PUB. 3-29, FOREIGN HUMANITARIAN ASSISTANCE (3 Jan. 2014) [hereinafter JP 3-29].

DoD (Title 10) forces involved in DSCA operations may conduct incident awareness and assessment (IAA). IAA is similar to intelligence, surveillance, and reconnaissance (ISR) operations used by DoD forces in combat. However, the differences are material as expressed through the next several paragraphs.

ISR is "an integrated operations and intelligence activity that synchronizes and integrates the planning and operation of sensors, assets, and processing, exploitation, and dissemination systems in direct support of current and future operations." [59] Therefore, ISR is an integrated intelligence and operations function that is conducted by using intelligence assets, systems, resources, or capabilities consisting of platforms and packages.

Incident Awareness and Assessment (IAA) is a subset of ISR because it constitutes the domestic use of ISR assets and capabilities for DSCA purposes. Based on the same concepts as ISR, IAA differs in its geographic scope, governing laws, and regulations. Further, IAA is a term of art used only during domestic operations. Because IAA only occurs domestically, it is also a subset of Domestic Imagery (DI), and subject to all DI rules and policies. IAA is the DoD's term for ISR-type operations conducted during DSCA operations in the Homeland. So, when you read "IAA," think ISR in CONUS, employed *only* for DSCA purposes. National ISR resources are limited and allocated among the combatant commands. In like fashion, IAA assets are limited as well. For this reason, IAA assets should only be used when necessary. Finally, because IAA is a is only employed to support DSCA, and is not used in Homeland Defense (HD) operations, when intelligence activities are conducted during HD, those activities are considered to be ISR, not IAA. For this reason, ISR conducted within the United States is strictly regulated and requires specific SecDef approval on a case-by-case basis.

Since, by definition, IAA uses intelligence assets, platforms, capabilities and databases,[60] it is subject to IO restrictions, and any additional limitations imposed by SecDef or the Combatant Commander. In the instances when there is no intelligence interface, then IAA does not exist. Instead, there is only DI capture subject to Sensitive Information rules, the Privacy Act, Civil Liberties considerations, and the Fourth Amendment. ISR, IAA, and DI are different tools for different missions.

Because IAA and its relationship to ISR can be confusing, the following formulaic explanations and bullet points are offered:

Intelligence, Surveillance, & Reconnaissance (ISR) = Collection of foreign intelligence (FI) + counterintelligence (CI) information/imagery

- ISR is conducted outside the U.S. and its territories, or inside the U.S. in support of Homeland Defense operations;
- Any domestic use of ISR requires SecDef approval of each mission and all assets used;
- Any DI missions including ISR require a Proper Use Memorandum (PUM) approved by Higher Headquarters (HHQ);

[59] U.S. DEP'T OF DEF., DOD DICTIONARY OF MIL. AND ASSOCIATED TERMS 116 (Apr. 2018) [hereinafter DoD Terms].

[60] NNCI 14-3, *supra* note 54, at 19.

- All domestic ISR missions are subject to Intelligence Oversight (IO) limitations on collection of information on U.S. Persons.[61]

Domestic Imagery (DI) = Collection of Imagery within the U.S. and its territories that may or may not involve use of DoDICC:

- A Domestic Imagery Legal Review (DILR) is required if no DoDICC are used;

- All DI is subject to limitations on collection of information on persons not affiliated with DoD (NDAPs), the Privacy Act, Civil Liberties considerations, and Fourth Amendment rules. [62]

Incident Awareness and Assessment (IAA) = DI using DoDICC for DSCA missions:

- To determine applicability of IO Program rule sets, use the "5 Ps" test: People, Pipes (uplink, downlink), Process, Platforms, and Purpose;

- All IAA missions require SecDef approval;[63]

- All IAA missions require a Proper Use Memorandum (PUM) approved by HHQ;[64]

- All IAA missions are subject to IO limitations on collection of information on U.S. Persons.[65]

4. Domestic Imagery and Sensitive Information Programs (DoDD 5200.27 and AR 380-13)

Consider this scenario:

> Your operations center is full of people passing reports and DI around various work stations. Some individuals are intelligence technicians and analysts, some are operations personnel, and others are DoD law enforcement. All personnel have been mobilized under the DSCA EXORD. The intelligence personnel are using their technical expertise to assist in the interpretation of DI captured in a disaster zone, and they are doing so in non-intelligence capacities for other than traditional intelligence purposes.

Which Oversight Rules will apply, and to whom and with respect to DI?

If DI is being captured, processed, exploited and disseminated by the DoD for non-intelligence purposes, and the activities are conducted by personnel not within the command and control of an intelligence organization or unit, then DoDD 5200.27 and all related regulatory authorities apply.

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[61] E.O. 12333, *supra* note 8.

[62] DoDD 5200.27, *supra* note 9.

[63] DSCA EXORD, *supra* note 45, at paras. 3.C.4.J.1, 3.B.5., and 3.I.10.C.

[64] NNCI 14-3, *supra* note 54, at para. 2.5.

[65] DSCA EXORD, *supra* note 45, at paras. 3.C.4.J.1., and 3.I.10.A.

Therefore, non-DoDIC produced DI, or DI produced for non-intelligence purposes, is *always* subject to DoDD 5200.27 and AR 380-13.

Another real-world example of this situation may be illustrative:

> During DSCA operations after a natural catastrophe, ingress and egress routes to establish lines of communication are critical to relief efforts. The Joint Operating Area (JOA) commander, an active component officer, desires to get an aerial view of the routes. To do so, the commander wants to use rotary wing platforms from Title 10 assets. Rotary wing assets available with the National Guard are another alternative. The Chief of Staff and the Operations Officer are available to advise the commander. However, they are not intelligence personnel. Once airborne, the JOA commander wants to use a U.S. Government smartphone to take photographs of possible routes and of the general area for purposes of situational awareness and damage assessment. The commander turns to you and asks your opinion. What do you say?

As long as the photographs are not used for intelligence purposes (FI or CI), and no intelligence assets, personnel or databases are used to process any images or reports, only DoDD 5200.27 and AR 380-13 will come into play. However, if the DSCA mission is being conducted in support of, or under direction by, USNORTHCOM, a Domestic Imagery Legal Review (DILR) will be required to be accomplished *before* the mission is flown.[66]

Specifically, a DILR is a memorandum submitted by an organization's Certifying Government Official and reviewed by its legal advisor for proper use of domestic imagery collection that *does not include* use of DOD intelligence component capabilities. The imagery user organization should submit the DILR to NORAD and USNORTHCOM Collection Management (N-NC/J23M) for approval that defines their requirements, the intended use of the imagery, and contains a proper use statement which acknowledges awareness of the legal and policy restrictions regarding domestic imagery.[67] In so doing, DILRs certify compliance with basic DI rules IAW DoDD 5200.27, and other pertinent regulatory authority. Recall also that a DILR *does not constitute authority* to collect domestic imagery; there it should specify *what* the authority is to collect the imagery, the *location* of the imagery and its *intended use*, analysis or exploitation of the imagery, retention of the imagery, security and declassification review of the imagery (if required), *authorized recipients* of the imagery, and any further restrictions on dissemination of the imagery, and it *will certify compliance* with legal and policy requirements.[68] Whenever possible, the DILR should state whether the imagery will be used in briefings or publications and identify the likely audiences.[69] The proper completion and filing of a DILR is necessary to create accurate and timely audit trails ensuring the DI captured and its dissemination does not violate DODD 5200.27 or AR 380-13, while conforming to a proper use statement, which acknowledges awareness of the legal and policy restrictions regarding capture of the domestic imagery.

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[66] NNCI 14-3, supra note 54, at paras. 2.5, 2.5.3, 2.6 -2.8, 2.11, 3.1-3.3, and Attachment 4.

[67] *Id*. at Attachment 1.

[68] *Id.* at para. 2.5.3.

[69] *Id.* at para. 2.6.

5. Domestic Imagery Summary

While DI rules, regulations and procedures may seem complex, and at times, counterintuitive, they are formulated to ensure that the maximum protection of privacy and Constitutional rights is afforded to U.S. Persons and NDAPs during the conduct of domestic imagery capture missions within the United States and its territories. Here are some notes to try to keep it all straight:

Any time any form of air or space-borne imagery is captured within the United States, its territories or protectorates, the imagery and/or data is considered Domestic Imagery (DI), and certain pertinent program rules will apply. Depending on who is conducting the DI capture, how it is collected, processed, exploited, analyzed or disseminated and for what purpose, will indicate which oversight program(s) and legal restrictions must be followed. When DoDIC resources are involved in the DI production process, Intelligence Oversight rules will apply. If the DI capture does not involve the DoDIC, then Sensitive Information program rules apply.

As a general rule, whenever members of the DoD are involved in the collection of intelligence for intelligence purposes that could affect the privacy or Constitutional rights of U.S. Persons, Intelligence Oversight rules apply. Whenever members of the DoD are involved in the acquisition of information for non-intelligence purposes that could affect the privacy or Constitutional rights of NDAPs (for non-intelligence purposes), Sensitive Information Program rules (DoDD 5200.27 and AR 380-13) will apply. Regardless of situation, unless otherwise authorized by law, whenever a DoD action involves collection of intelligence, one of the programs will apply.[70]

E. The National Guard

The National Guard presents a different set of challenges for the judge advocate as the NG's mission regularly focuses on domestic threats or providing situational awareness. Notwithstanding, the National Guard does not generally conduct domestic intelligence operations. Primarily, domestic intelligence involving U.S. persons is a law enforcement matter and is the responsibly of State/local law enforcement and the FBI. The Joint Force Headquarters at the State (JFHQ-State) will have an Intelligence officer (J2) that is responsible for coordinating intelligence requirements for intelligence preparation of the environment (IPE) in support of State and Federal missions. The J2 serves as the State's executive agent for foreign threat information sharing between the local, State, and the national levels to ensure situational awareness and a common operating picture (COP). The J2 also interprets, develops, and implements intelligence and security guidance and policy for the JFHQ-State. The National Guard judge advocate must work in conjunction with the J2, and the Inspector General for Intelligence Oversight (IG-IO) in reviewing all intelligence plans, proposals and concepts, to include Proper Use Memoranda (PUMs – the use of which is explained below), for legality and propriety. The State Provost Marshal (PM) also plays a vital role in developing the situational picture by being the lead liaison to the civilian law enforcement community. Thus in this area, NG judge advocates need to determine four facts: 1) the status of the

[70] Conflict has arisen between the new DoDM 5240.01 and the CJCS 2013 Standing DSCA EXORD. The new manual has created an exclusion for DSCA operations. Specifically, it states that DoDM 5240.01 is inapplicable to such activities because DoDIC resources and personnel used during a DSCA operation are not being used for intelligence purposes. (See Section 3, paragraph 3.1.a.(3)(b).) However, the CJCS 2018 Standing DSCA EXORD consistently orders that Intelligence Oversight program rules are applicable to all IAA activities. (*see, e.g.,* paragraphs 3.A.7., and 3.l.).

person doing the collecting; 2) whether that person is operating as part of an intelligence activity; 3) how the information is being collected; and, 4) the purpose behind the collection.

1. Status: State Active Duty, Title 32 or Title 10

National Guard personnel can serve in three statuses: State Active Duty (SAD), Title 32, or Title 10, as explained in detail in Chapter 3. A Soldier's status has a direct impact on the authorities at issue regarding the collection of information on a U.S. Person. Therefore, this determination must be made first.

Members of the National Guard perform their normal "drills" and "annual training" under Section 502(a) of Title 32.[71] When an emergency or disaster occurs within a State, the State's National Guard may be called upon to provide civil support (National Guard Civil Support, NGCS; not to be confused with DSCA. Because the disaster or emergency is first the State's responsibility, versus that of the Federal Government, the Governor may not initially call up the National Guard in their T-32 status without the approval of SecDef.[72] Instead, the State's Governor or The Adjutant General (TAG) may call up members of the National Guard to provide civil support by placing them in State Active Duty (SAD) status. With that said, there is another option under Title 32. Pursuant to Section 502(f) of Title 32, the National Guard may perform "additional training other duty" for their Federal mission or provide "operational support" as directed by POTUS or SecDef but with the concurrence of the State's Governor.[73] In this status, and subject to the proper authorities, the National Guard may be called upon to support a Federal DSCA mission.[74] The State's Governor retains command and control authority. National Guard status under Section 502(f) should not be improperly referred to using the blanket term "Title 32 status" because such a reference is misleading and often leads to confusion. Instead, the proper sections of Title 32 should be used. As noted above, status under Section 502(a) is materially different from status under Section 502(f) in both purpose and approval authority.

Finally, the National Guard may be called into the service of the United States under Title 10 of the United States Code. In this instance, National Guard personnel fall under Federal command and control. As stated previously, USNORTHCOM has separate IO rules and processes in place that must be considered for Title 10 missions.

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[71] 32 U.S.C. § 502(a) (2012) ("(a) under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National guard, unless excused by the Secretary concerned, shall (1) assemble for drill and instruction, including indoor target practice, at least 48 times each year; and (2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.").

[72] U.S. DEP'T OF DEF., INST. 3025.22 THE USE OF THE NATIONAL GUARD FOR DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 3.f.1. (26 July 2013) (C1, 15 May 2017) [hereinafter DoDI 3025.22].

[73] 32 U.S.C. § 502(f) (2012) ("(f)(1) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may (A) without his consent, but with the pay and allowances provided by law; or (B) with his consent, either with or without pay and allowances; be ordered to perform training or other duty in addition to that prescribed under [section 502(a)]. (f)(2) The training or duty ordered to be performed under paragraph (1) may include . . . (A) Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.").

[74] DoDI 3025.22, *supra* note 72, at paras. 3.d., and 3.e.

Members of the NG intelligence community serving in a SAD or Title 32 status are not included in the definition of DoDIC, and therefore are technically not regulated by IO. The Chief of the National Guard Bureau established an IO policy that applies to all members of the National Guard serving in Title 32 status.[75] This IO policy requires that National Guard intelligence personnel operating in a Title 32 as members of the DoD intelligence component, must also "comply with all DoD guidance and Federal laws applicable to the component, including all intelligence oversight (IO) rules."[76] Furthermore, the National Guard's Inspector General Intelligence Oversight policy recognizes that while National Guard intelligence personnel operating in a SAD status are not members of the DoDIC, they are limited by their State law—to include State privacy laws—and are "prohibited from using DoD intelligence resources and equipment while in a SAD status."[77] In most States, the collection, use, maintenance, and dissemination of information related to individuals by State agencies is strictly regulated. Therefore, the practical affect is that even in a SAD status, and unless authorized by law, members of the National Guard cannot collect information on U.S. Persons.[78]

In addition to being prohibited from prohibited from using DoD intelligence resources and equipment while in a SAD status, unless authorized by SecDef or SecDef's designee, National Guard personnel in a SAD status are also prohibited from: 1) engaging in DoD intelligence operations; and 2) gaining access to access DoD classified systems (SIPRnet/JWICS - Joint Worldwide Intelligence Communication System) or equipment (MQ-1, border sensors).[79] Further, National Guard personnel while in a SAD status may only access classified information if sponsored by a Federal executive agency pursuant to E.O. 13549. This includes National Guard personnel with a DoD security clearance.

2. Collection via an Intelligence Activity

The responsibilities of the National Guard member, not the AFSC/MOS or duty title per se, determine whether they are part of an "intelligence activity." Many States will either reassign intelligence personnel to a non-intelligence mission to assist the J34 force protection section, or will assign them to a unit that is specifically tasked to assist local law enforcement and authorized to provide intelligence support—such as the NG Counter Drug Units operating under 32 U.S.C. § 112 authority. While serving in a non-intelligence role, these individuals should not have access to intelligence-related equipment.

If the person collecting the information is a part of the intelligence activity and is conducting missions as a member of an intelligence activity without separate special authority, then the person must follow the rule for IO as provided in section B of this chapter. If the person is not collecting the information as part of, or for, an intelligence activity then the person must follow rules for the handling of U.S. Person information as provided in section C of this chapter.

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[75] CNGBI 2000.01C, *supra* note 5; CHIEF, NAT'L GUARD BUREAU, MANUAL 2000.01 NATIONAL GUARD INTELLIGENCE ACTIVITIES para. 2 (26 Nov. 2012) [hereinafter CNGBM 2000.01].

[76] CNGBI 2000.01C, *supra* note 5, at para. 4.

[77] CHIEF, NAT'L GUARD BUREAU, INST. 0700.01 INSPECTOR GENERAL INTELLIGENCE OVERSIGHT encl. A, para. 1.h (9 June 2013) [hereinafter CNGBI 0700.01].

[78] CNGBI 2000.01, *supra* note 5, at para. 4.e.

[79] *Id*. at 4.d.

An example of this latter group would be military law enforcement personnel. They are governed by the provisions of DoDD 5200.27. They are responsible for tracking and analyzing criminal threats to DoD and domestic threats to DoD. LE personnel liaise with other law enforcement agencies to develop the criminal threat situational picture.

3. Method of Collecting

Military Intelligence Equipment may only be used to conduct counter- and foreign- intelligence related missions unless separate authorizations have been granted. This equipment therefore may only be operated by NG intelligence personnel serving in a Title 10 or Title 32 status. States wishing to utilize this equipment for other than counter- and foreign- intelligence purposes must request authorization from SECDEF or his designee. Legal review by the Office of the Chief Counsel at NGB is required prior to such authorizations. Military intelligence equipment includes, but is not limited to, JWICS (Joint Worldwide Intelligence Communication System) and ASAS-L (All Source Analysis System-Light).

The National Guard has a variety of Incident Awareness and Assessment[80] tools within its arsenal, many of which are not DoD Intelligence Assets. Some of the tools are considered to be both an intelligence asset and a non-intelligence asset and therefore a thorough analysis will look at not only the capability of the asset but also the sourcing and the authorized use to determine whether or not it is a true intelligence asset subject to IO and limitations applicable to Intelligence Equipment. A perfect example of this is the RC-26 fixed wing aircraft used by the National Guard. The RC-26 in most States is a counter-drug asset, not an intelligence asset, even though it is capable of collecting imagery of U.S. persons. In accordance with each respective State counter-drug plan, RC-26's mission is to assist law enforcement in the capture of personnel involved in drug activities. When disaster strikes RC-26 is often called upon to assist in life-saving situations. RC-26 provides an aerial surveillance capability that enables a commander to understand their area of operations. While conducting damage assessments, obstacle and hazard assessments, and other such non-intelligence missions the incidental collection of information on U.S. persons is not a *per se* violation. Commanders must be reminded that this information should not be retained and must be purged from military records as soon as possible. Likewise, a platform that uses a fixed or movable camera may limit incidental collection, and the careful planning of aerial surveillance routes when possible (such as to avoid populated areas) may accomplish this as well. Any incidental collection of U.S. person information along the planned route that is criminal in nature can be passed along to the appropriate law enforcement officials, but information should be purged from the retention platform as soon as possible.

Domestic imagery collected by National Guard aerial imagery sensor platforms must be properly documented and approved via a PUM prior to collection.[81] These PUMs must be in accordance with applicable Defense Intelligence Agency (DIA) policy, "Proper Use Statements for Domestic Imagery." The NGB-J2 publishes a PUM handbook to assist JFHQ-J2s on the protocol for submitting a PUM. National Guard judge advocates are responsible for reviewing these PUMs for

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[80] Incident awareness and assessment (IAA) is the use of intelligence, surveillance and reconnaissance (ISR) DoD intelligence capabilities for domestic non-intelligence activities approved by the SecDef, such as search and rescue (SAR), damage assessment and situational awareness.

[81] Note CNGM 2000.01 allows an exception for SAR whereby the PUM is filed after mission conclusion.

compliance with Federal and State law and National Guard policy (Diagram 2 outlines determination process as to whether a PUM is required).

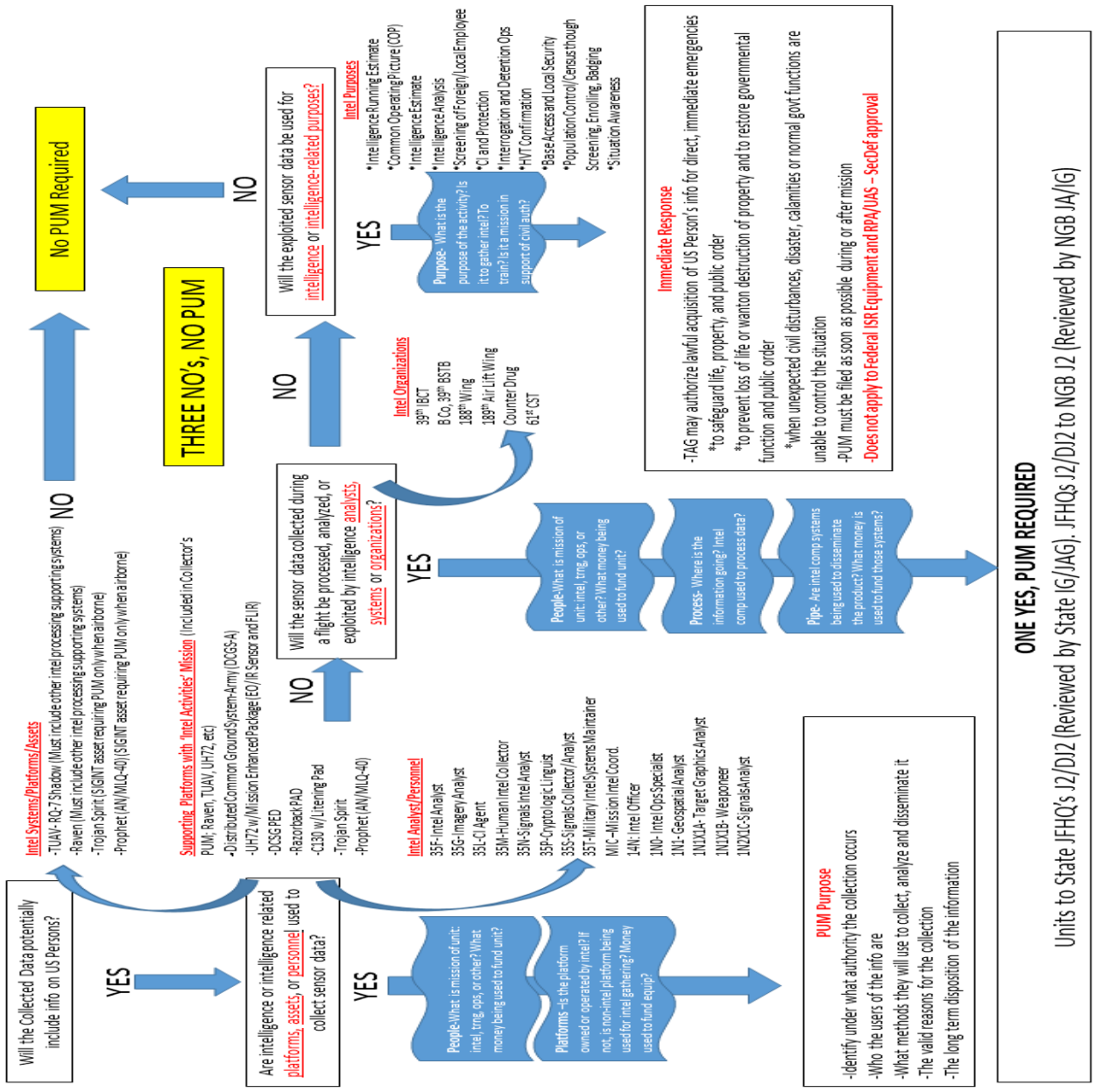


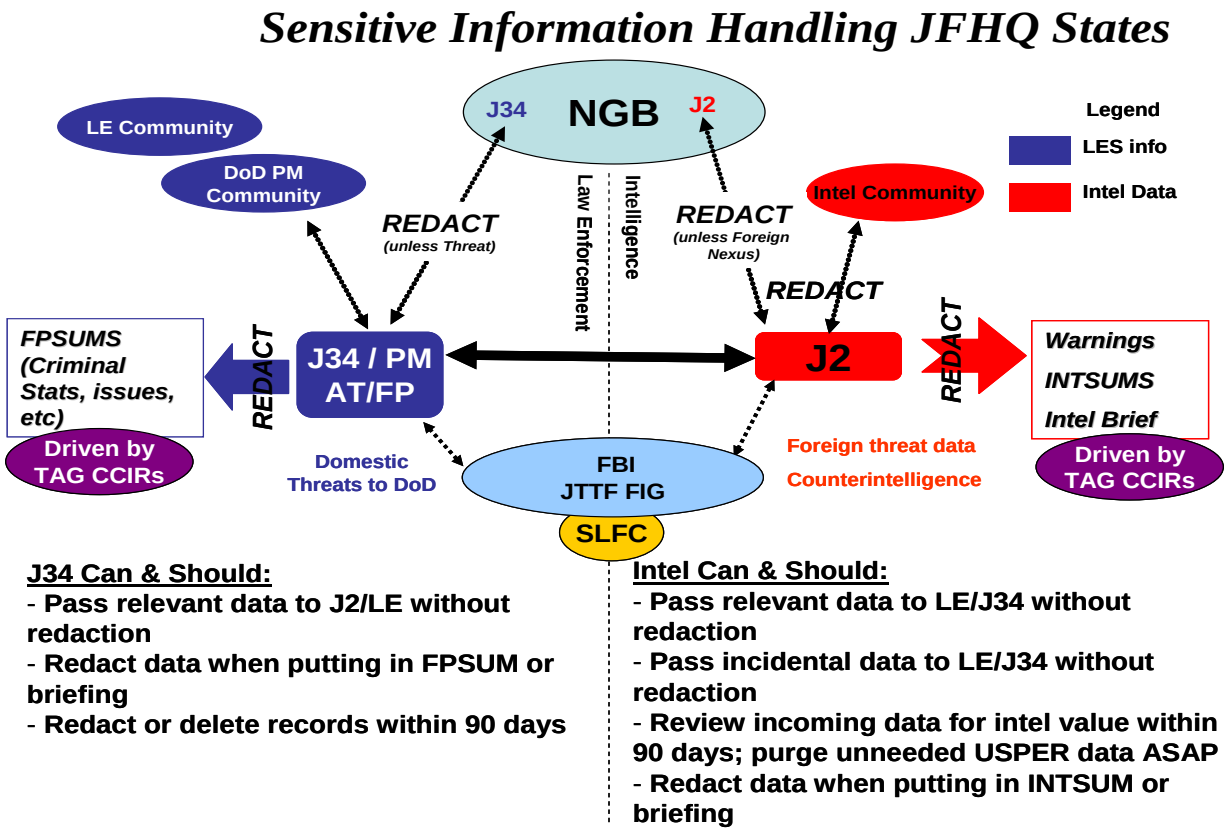
Diagram 2

4. Purpose of the Collection

A judge advocate must also determine whether information is being collected for an intelligence purpose or whether it is being collected to help the commander gain situational awareness. As mentioned earlier, information is often acquired in response to a National Guard commander's need to establish a common operating picture. If the information is for situational awareness, then the judge advocate should assist the command by helping shape the collection such that it is limited to

the information actually needed to accomplish the mission. For example, if the mission requires imagery of ingress and egress routes, it is unnecessary for cameras to collect information regarding the license plate numbers of those individuals traveling on the roads. It is necessary to carefully document the roads. Therefore, the recommendation can be to remind the collector not to focus on specific PII.

The chart below illustrates the proper flow of information to remain compliant with IO regulations. It depicts how the State's J2 and Provost Marshall share and handle sensitive information in accordance with both IO regulations and DoDD 5200.27.



5. Dissemination

DoDM 5240.01, Sec 3, Procedure 4 governs the dissemination of USPI collected or retained by an intelligence component. Generally, information may be disseminated to a variety of organizations if it was properly collected or retained. Dissemination to "Other DOD Elements", "Other Federal Government Entities", and "State, Local, Tribal, or Territorial Governments" is permissible if the recipient is reasonably believed to have a need to receive such information for the performance or its lawful missions or functions.

F. Judge Advocate Responsibilities

Judge advocates are responsible for the following: advising the commander and staff on all intelligence law and oversight matters within their purview; advising on the permissible acquisition

and dissemination of information on non-DoD affiliated persons and organizations; recommending legally acceptable courses of action; establishing, in coordination with the Head Intelligence Officer (J-2/G-2/S-2/N-2) and the Inspector General (IG), an intelligence oversight program that helps ensure compliance with applicable law and policy; reviewing all intelligence plans, proposals, and concepts for legality and propriety; and training members of the command who are engaged in intelligence activities on all laws, policies, treaties, and agreements that apply to their activities.

In order to properly perform these duties, judge advocates advising commanders on collecting intelligence and information should know and understand a variety of key types of information. Judge advocates must be familiar with the missions, plans, and capabilities of subordinate intelligence units, and all laws and policies (many of which are classified) that apply to their activities. At a minimum, judge advocates should be familiar with the restrictions on the collection, retention, and dissemination of information about U.S. persons and non-DoD persons and organizations, the approval authorities for the various intelligence activities performed by subordinate units, and the requirement to report and investigate questionable activities and certain Federal crimes.[82] Judge advocates must also be familiar with the jurisdictional relationship between intelligence and counterintelligence activities as well as the parallel jurisdictions of force protection and law enforcement activities. Finally, judge advocates should establish close working relationships with the legal advisors of supporting intelligence agencies and organizations, all of whom can provide expert assistance.

G. Conclusion

This chapter has but scratched the surface of Intelligence Oversight and Sensitive Information processes and authorities. The two programs are separate and independent, although in an era of domestic operational up-tempo, the lines between the two are becoming blurred because the distinctions between intelligence and information have become equally blurred. Which program applies depends on the user, the user's mission, the type of information or intelligence being used, whether U.S. Persons or NDAPs are identified, and what will be done with the information. Judge advocates must be aware of these distinctions and know where answers may be found to the difficult questions posed by commanders. Familiarity with, and understanding of, this chapter is a good start, but it is only the beginning. A careful review of all referenced materials is therefore suggested. See Table 1 for a summary of the applicable DoD policies referenced in this chapter.

[82] DoD 5240.1-R, *supra* note 6, Procedure 15.

DoD Rules for Collecting Intelligence, Domestic Imagery and Information: *Domestic Imagery Authorities*

PLATFORM / CAPABILITY	DEFINITION	OVERSIGHT PROGRAM	AUTHORIZING OFFICIAL	CERTIFICATION INSTRUMENT
Domestic Imagery	Domestic Imagery—Imagery covering the land areas of the 50 United States, the District of Columbia, and the territories and possessions of the United States as assigned by the UCP, extending 12-nautical-miles seaward from land areas. [NNCI 14-3, Defs.]	Intel Oversight or DoDD 5200.27/AR 380-13, depending on who is capturing or processing it. Consider also DODD 3025.18, para. 4.o; DODI 3025.21, Encl. 7; NNCI 14-3; and, NGA NSGM FA 1806 restrictions.	Depending on platform or capabilities, and/or involvement of DoDIC, either SECDEF, CCDR or Mission Cmdr. DoDIC involvement usually requires SecDef approval, especially if outside of DSCA realm.	If DoDIC is involved, a Proper Use Memorandum (PUM); if not, then a Domestic Imagery Legal Review (DILR)
IAA (DSCA)	Incident Awareness and Assessment (IAA)—The approved use of *intelligence, surveillance and reconnaissance* (ISR) DOD intelligence capabilities for domestic non-intelligence activities approved by the SecDef for DSCA missions. [NNCI 14-3, Defs.]	Intel Oversight program requirements, DoD 5240.1-R, DoDM 5240.01, NNCI 14-103; Domestic Imagery restrictions under NNCI 14-3; and, NGA NSGM FA 1806 restrictions.	SECDEF, NORTHCOM/CC (limited authority by delegation, predominantly for NNC-specific mission sets or SAR)	PUM
Non-IAA, Non-DODIC	Domestic Imagery captured in support of assigned DSCA missions that does not involve DoDIC assets, capabilities, people or databases.	DODD 5200.27, AR 380-13	Depending on breadth of mission, usually the Mission Cmdr if UAS are *not* involved	DILR
UAS and Others	Unmanned Aircraft System (DOD) That system whose components include the necessary equipment, network, and personnel to control an unmanned aircraft. (JP 3-52)	I O or DoDD 5200.27/AR 380-13, depending... See *also*, DODD 3025.18, para. 4.o. and Policy Memorandum 15-002, "Guidance for the Domestic Use of Unmanned Aircraft Systems"	Depending on platform or capabilities, and/or involvement of DoDIC, either SECDEF, or CCDR.	Depending on whether DoDIC is involved *at all*, most likely a Proper Use Memorandum (PUM)

Table 1

CHAPTER 10

RULES FOR THE USE OF FORCE (RUF) FOR FEDERAL FORCES

KEY REFERENCES:

- U.S. CONST. art. II, § 1–3 (Executive, Commander in Chief, and Execution of the Laws Clauses, respectively).
- U.S. CONST. amend. IV.
- U.S. CONST. amend. V.
- U.S. CONST. amend. VIII.
- 10 U.S.C. §§ 251–255 - The Insurrection Act.
- 10 U.S.C. § 12301 - Reserve Components Generally.
- 18 U.S.C. § 242 - Deprivation of Rights Under Color of Law.
- 18 U.S.C. § 1385 - Posse Comitatus Act.
- 50 U.S.C. § 2301 *et seq.* - Defense Against Weapons of Mass Destruction Act.
- Pub. L. No. 105-277 (Omnibus Consolidated and Emergency Appropriations Act 1999), Section 101(h), as amended by Pub. L. No. 106-58, Title VI, Section 623, Sept. 29, 1999.
- CJCSI 3121.01B - Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces, June 13, 2005 (S). ***** NOTE: As of the publishing of this Handbook, the current SROE/SRUF remains under revision. Judge advocates should check to see if the 2005 SROE/SRUF have been updated.*****
- DoD Directive 5210.56, Arming and the Use of Force, November 2018, 2016
- AR 190-14, Carrying of Firearms and the Use of Force for Law Enforcement and Security Duties, March 12, 1993.
- Current Policies Concerning the Use of Deadly Force.FORSCOM Augmentation Forces to Designated AMC and ATEC Sites.
- FORSCOM and USARC Force Protection OPORDs.
- DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, Encl. 4 (DoD Support of Civil Disturbance Operations), February 27, 2013.

A. Introduction

CJCSI 3121.01B, which contains the Standing Rules for the Use of Force (SRUF), provides operational guidance and establishes fundamental policies and procedures governing actions taken by DoD forces performing civil support missions and routine service functions (including AT/FP) within the United States and its territories. The document is classified overall Secret, however the portions discussed and referenced in this chapter are unclassified.

Per CJCSI 3121.01B, the SRUF also apply to land-based homeland defense missions within the United States and its territories. With respect to personnel, the SRUF apply to DoD forces, civilians, and contractors performing law enforcement and security duties at all DoD installations worldwide, unless otherwise directed by the Secretary of Defense.

The SRUF apply to Title 10 forces performing missions both for homeland defense and defense support to civil authorities. These rules do not apply to National Guard forces in either State Active Duty (SAD) or Title 32 status. For information concerning National Guard rules for the use of

force (RUF), see Chapter 11, *infra*. Judge advocates should coordinate with the National Guard when operating in a joint environment to review the RUF the National Guard is using and ensure compatibility if joint missions are contemplated.

Before beginning any discussion on the use of force in an operational setting, members need to understand the basic legal, policy, and practical limitations for the use of force. The use of force for domestic mission accomplishment is constrained by Federal law and the Standing Rules for the Use of Force. Members should also always be aware of the practical ramifications their actions may have on the greater mission; they must understand the commander's intent and ensure they understand specific limitations that apply to a specific mission in addition to normal policy and legal limitations.

Overall, the SRUF provide the template for training on RUF for domestic operations. The development of hypothetical scenarios will assist in posing the ultimate question of whether the service-member may use force, up to and/or including deadly force. While there are some very significant differences between the Standing Rules of Engagement (SROE) and SRUF, SROE training concepts for overseas operations can be useful in developing training for SRUF application.

It is imperative to ensure commanders, as well as the service-members who execute the commander's plans, understand the potential limits on self-defense when operating as part of a unit. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless *otherwise directed* by the unit commander, service-members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense becomes a subset of unit self-defense and the unit commander may limit individual self-defense by members of the unit.[1]

Use of force practice is one of the areas in which the legal competence of judge advocates can have potential life or death consequences for service-members and civilians. Therefore, it is vital that judge advocates understand and apply appropriate legal and practical considerations when practicing in this area.

This chapter will provide the reader with an introduction to use of force and its key legal references. It will discuss the role of judge advocates in use of force training and implementation, the practical realities involved in use of force incidents that are often not included in legal references, the legal standard for Federal use of force, the existing Army policies on use of force, and the potential legal liability involved in use of force.

B. The Judge Advocate's Role in the Use of Force

Judge advocates are frequently called upon to practice domestic use of force law in routine legal duties as well as in domestic operations. This need commonly arises when attorneys advise on

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[1] *See* JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES, Enclosure L (U) para. 4.a. (13 June 2005) [hereinafter CJCSI 3121.01B]. Note that the SRUF supersede CJCSI 3121.02, RUF for DoD Personnel Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States.

routine force protection and installation law enforcement activities. Many judge advocates will need to train service-members on domestic operational RUF or use of force policies for law enforcement and security operations. Judge advocates advise units executing domestic operations, and will also advise on or review investigations into incidents involving the use of force by a service-members. Judge advocates may be involved in civil or criminal proceedings for a use of force incident as a trial counsel, trial defense counsel, Special Assistant U.S. Attorney, or as an attorney assisting in defensive Federal litigation involving his or her respective service.

Judge advocates may also be called upon to draft mission-specific RUF. There are differing opinions as to whether judge advocates should be tasked with directly drafting RUF, or if they should simply handle their review. The fact remains, commanders may task an attorney to draft RUF directly, so judge advocates should be prepared to do so. Executing this task should be done in coordination with the unit staff, to include law enforcement professionals (when applicable), and higher headquarters.

In drafting or reviewing RUF, judge advocates have to understand both the substantive law that governs the use of force, as well as the procedures necessary to modify the SRUF. Efforts to either augment or restrict the current SRUF must follow precise staffing requirements, and, in the case of augmentation, require advanced planning and should be initiated (if not already done by higher headquarters) as soon as the need is identified.[2]

Judge advocates performing these duties must know the controlling law for domestic use of force. For operations in areas subject to U.S. jurisdiction, the appropriate constitutional law standards as interpreted by the courts and the executive branch regulate the use of force. As important, the policies or RUF issued by higher headquarters further define the legal requirements for use of force.

RUF drafters involved in planning or executing a domestic operation should consider critical factors that are similar to those involved in SROE development. These factors include the following.

- What is your mission and your commander's concept of operation?
- What type of unit is involved, what weapons and equipment, if any, will be deployed, and what is the level of training of members with the assigned weapons?
- What threat could your command face?[3]
- What kind of interaction and exposure to the general public will your service-members face?
- What training resources are available for pre-deployment RUF training?
- Does the training program properly address the issues involved with RUF or do training deficits raise the potential for misapplication of the rules?

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[2] *See* CJCSI 3121.01B, *supra* note 2, Enclosure L (U) para. 3.a.–3.b. and Enclosure P (U). The SRUF requires Combatant Commanders desiring to augment the SRUF to staff such actions through the CJCS to the Secretary of Defense for approval. Restrictions to the SRUF require notification although limited flexibility is provided for time critical situations. Enclosure P provides the template for requests for mission specific SRUF.

[3] Judge advocates should consider basing their draft SRUF and legal guidance on the worst feasible scenario. For example, attorneys often advise on detention or migrant and refugee camp operations. In most cases, no one expects the detainees to violently riot. Unfortunately, rioting can occur in extended detention operations. Structuring your SRUF assuming the detainees will passively comply will leave your security force without adequate guidance on how to respond to an emergency situation should they face one.

- Does the mission being planned fit well with the existing SRUF or should the local commander initiate a process to seek augmentation of the SRUF by submitting a request for a mission specific RUF?[4]

C. Practical Realities of Use of Force Situations

Judge advocates need to understand practical aspects of deadly force confrontations in order to be competent in use of force law. Understanding the law and policy of use of force is not enough. Judge advocates must recognize that the real world does not always allow for dispassionate, reflective, and judicious decision making on whether to use force. Thus, judge advocates should consider a number of critical factors when advising on civil support missions. These include: the capabilities and limitations service-members bring to a potential deadly force confrontation; what is known about potential attackers; and, what physical reactions may affect service-members during and after use of force incidents.

1. Capabilities and Limitations

a. Soldier Equipment

Compared to civilian law enforcement personnel, most service-members are not as well-equipped for potential confrontations with civilians involving use of force. When drafting RUF for a particular mission, commanders must decide if the mission requires service-members to be issued firearms or other non-lethal weapons. Further, if non-lethal weapons or non-standard weapons or ammunition are authorized for the mission, it is critical that soldiers be well-trained in the proper employment of these systems.

b. Skill and Training

Due to the understandable focus on overseas missions, many Title 10 service-members do not receive extensive training on the types of confrontations that are involved in domestic operations.[5] Because of limited exposure to domestic missions, to include training focused in this area, service-members may require further tactical marksmanship and close quarters training in order to effectively and appropriately respond to domestic threats or how to employ lesser means of force competently.

Many service-members have not been trained on domestic law applicable to the use of force and, as a consequence, do not understand many of the policy requirements imposed by DoD or their service.[6] Additionally, service-members may also not be sufficiently experienced in applying deadly vs. non-deadly techniques. Judge advocates should assist commands in ensuring members

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[4] If such a need is identified, staffing of the request should be initiated using Enclosure P to CJCSI 3121.01B as a template. As this must be staffed to the Combatant Commander for staffing through the CJCS to the Secretary of Defense for approval, it is imperative that this action be initiated upon the identification of the need.

[5] An exception to this is the U.S. Coast Guard. Coast Guard members often operate in a law enforcement environment and have extensive RUF training.

[6] Military police and special operations Soldiers may be part of general population in the Army that routinely learn and understand these rules due to the nature of their missions.

not only get the right legal and policy training but also the right operational training if they see a gap.

2. Potential Threat

Judge advocates must also consider the nature of the threat that service-members might face since this can factor into advice given for an operation. Service-members must be able to correctly apply force and distinguish between threats and innocent civilians. Judge advocates should be aware of any background information on a threat in an operating area to better inform advice given to commanders.

3. Physical and Psychological Effects

It is also important to keep in mind that physical and psychological effects on a member resulting from a life or death situation can be critical. The stress of a life or death encounter will often trigger the "fight, flight, or freeze" response. Accompanying this, the body and mind undergo a number of changes that can affect performance. Judge advocates may have to research these reactions and consider their effects if tasked to investigate a use of force incident.

D. SRUF and Areas of Confusion and Concern

Most RUF practitioners will be called to advise and train on either the SRUF or mission specific RUF crafted and approved by higher headquarters and the Secretary of Defense. RUF practitioners, whether being asked to propose mission specific RUF, advise on existing RUF, or to train RUF need to be conscious of several areas that often become the source of confusion or error.

Example areas include the concept of use of "minimum force," the general prohibition on the use of warning shots by land forces, the use of warnings to include verbal warnings, and the introduction of restrictions that go beyond what is required by the SRUF, any of which may have the inadvertent effect of depriving a member of otherwise valid defenses available to Federal officers acting in their official capacities. For example, State law may impose a duty to retreat as it relates to the use of force by private citizens. Judge advocates should ensure Federal forces and their RUF are not improperly limited by concepts that are not applicable to Federal RUF.

Another potential source of confusion for the Army (as an example) can specifically flow from an effort to reconcile portions of AR 190-14, Carrying of Firearms and Use of Force for Law Enforcement and Security Duties[7] with the SRUF. The SRUF applies broadly both on and off installations and specifically provides that its provisions apply to "DoD forces, civilians and contractors performing law enforcement and security duties at all DoD Installations."[8] AR 190-14, Chapter 3, was revised in 1993 to synchronize with the use of force guidance contained in a contemporary publication of DOD Directive 5210.56. Subsequently, the use of force guidance contained in DoDD 5210.56 was specifically superceded by the SRUF.[9] Additionally, DOD Directive 5210.56 has subsequently revised several times, the latest update occurring in November,

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[7] U.S. DEP'T OF ARMY, REG. 190-14, CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITY DUTIES (12 Mar. 1993).

[8] CJCSI 3121.01B, *supra* note 2, para. 1.a.

[9] CJCSI 3121.01B, *supra* note 2, para. 1.b.

2016. Judge advocates advising in a variety of areas related to law enforcement and security missions to include the development of provisions for contract security forces need to be aware of this disconnect between AR 190-14 and the SRUF. They also must do due diligence to ensure that the most updated regulations, directives, and authorities are used. When the provisions two or more cannot be reconciled, the SRUF will control as its provisions cannot be augmented without the approval of the Secretary of Defense and cannot be further restricted without providing notice to the same.

E. Legal Authority and Standard for U.S. Military Use of Force in Domestic Operations

The underlying legal authorities for use of force are grounded in the constitutional role of the Executive Branch, and are tempered by the constitutionally protected civil rights as listed in the Bill of Rights. Against this backdrop, Congress has imposed a number of statutory provisions that help define and limit this authority.

The competent use of force practitioner must understand these underlying authorities.[10] This is similar to the duty of the competent SROE practitioner to understand the underlying public international law and law of war authorities guiding their actions. The use of force practitioner and SROE practitioner must also understand the differences between these two bodies of law and resist the temptation to confuse and meld terms and concepts from one to the other.

Domestic use of force authority flows from the powers of the President as granted under the Constitution. The underlying authority of the President to order routine installation force protection and law enforcement is justified under the President's executive powers.[11] The authority to order the military to defend the homeland against international aggression can be found in the President's authority as the Commander in Chief.[12] Finally, the President's authority to order the military to execute DSCA operations (Defense Support of Civil Authorities)[13] to enforce Federal law is based on the President's duty to execute the laws.[14] As officers of the Executive Branch, service-members conduct operations and derive authority from the President's constitutional authorities.[15] Whenever the military uses force to execute the orders of the President or those he appoints, that use of force must be based on constitutional authority.

All Executive Branch uses of force are balanced against the civil rights of the public. While three primary provisions of the Bill of Rights limit Federal use of force in domestic operations, the main focus is on the Fourth Amendment.[16] The constitutional standard is whether the use of force

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[10] Since domestic operations have generated very few reported cases involving service-members, we must look to civilian agency law enforcement cases to help define the limits of military use of force.

[11] U.S. CONST., art. II.

[12] *Id*.

[13] U.S. DEP'T OF DEFENSE, INST. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (27 Feb. 2013). *See also*, U.S. DEP'T OF DEFENSE, DIRECTIVE 3025.18, DEFENSE SUPPORT TO CIVILIAN AUTHORITIES (29 Dec.2010).

[14] U.S. CONST., art. II.

[15] *See e.g.*, In Re Neagle, 135 U.S. 1 (1890).

[16] The other two are the Fifth Amendment Due Process Clause, which limits the ability of Federal officers to use force after an arrest has occurred, and the Eighth Amendment, which defines the rights of a prisoner when corrections personnel use force.

violates the Fourth Amendment prohibition against unreasonable seizures.[17] The U.S. Supreme Court has described this standard as an objective measurement based on the facts and circumstances known to the service-member at the time of the use of force.[18] This rule is the very heart of the standard for governmental use of force.

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.*[19]

The courts have long recognized the authority to use force, including deadly force, in the performance of Federal governmental duties.[20] Judge advocates must know the limits of the mission and how the commander intends to execute this mission in order to advise on the RUF that support the operation. This makes the mission analysis portion of planning critical. The phrasing of Operations Orders or other directives that define the mission and operation are vital to defining the limits of this authority.

Judge advocates involved in drafting mission specific RUF should carefully consider where to balance the interests of force protection and the lives of service-members against the important interest of not risking an excessive use of force incident involving the military. Further, judge advocates involved in the development of RUF training must be careful that the training does not introduce procedures that introduce tactically dangerous or unsound practices.

Such errors can occur because judge advocates are mistaken in their understanding of the law or less familiar with the application of the RUF. Specifically, judge advocates should never apply Law of War to the domestic law on the use of force.[21] Likewise, judge advocates should not confuse the law of individual self-defense of a private individual with the authority of self-defense for government officials.[22]

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[17] U.S. CONST., Amend. IV, provides that "[t]he right of the people to be secure in their persons…against unreasonable searches and seizures, shall not be violated . . . ."

[18] Graham v. Connor, 490 U.S. 386 (1989).

[19] *Id.* (emphasis added).

[20] In Re Neagle, 135 U.S. 1 (1890).

[21] As discussed above, the underlying substantive law applicable to domestic governmental use of force is the Constitution, not the Law of War.

[22] While related, these legal standards are significantly different. A common example of this confusion is a requirement to retreat. Government officials using force in the performance of their duty have no duty to retreat and in some instances could be in breach of their duty if they do retreat. It is also possible to inadvertently lose the authority to use force under governmental authority by wording the RUF to invoke the law of individual right of self-defense of the state law or Federal common law. For example, a provision that says, "Service-members retain their right to use force in self-defense as defined by local and state law" reduces the service-member's right to use force in self-defense to the

1. Minimum Force Necessary or Deadly Force as a Last Resort

The SRUF states "Normally, force is to be used only as a last resort, and the force used should be the minimum necessary."[23] The SRUF further states that, "Deadly force is to be used only when all lesser means have failed or cannot be reasonably employed."[24] Lastly, the SRUF imposes a reasonableness requirement stating that the force used must be "reasonable in intensity, duration and magnitude" based on the totality of the circumstances to counter the threat.[25]

Federal courts, however, do not require that service-members employ "minimum force necessary" or that they employ deadly force as only a "last resort." The courts have generally held that the issue is solely whether deadly force was reasonably necessary. They have declined to impose a requirement to use minimum force.[26] Nor do courts require the use of feasible lesser force alternatives to avoid the use of justified deadly force.[27] Judge advocates involved in planning domestic operations that carry a significant risk of potentially lethal encounters with armed or dangerous elements should evaluate whether the SRUF meets the task or whether augmented mission specific RUF that more closely resembles the standards of case law (and therefore may provide more flexibility) should be developed and staffed for approval by the Secretary of Defense.[28]

2. Mandatory Verbal Warnings

Federal courts require the issuance of a verbal warning, where feasible, in the case of using deadly force against a fleeing criminal. This is clearly required in the seminal case of *Tennessee v. Garner*.[29] The SRUF does not specifically require a verbal warning but does state that "[w]hen time and circumstances permit, the threatening force should be warned and given the opportunity to withdraw or cease threatening actions.[30] Although the type of warning that should be given is not specifically established, it cannot take the form of a warning shot.[31] Exceptions to the restriction on warning shots general apply to Naval vessels; Navy as well as Coast Guard authorities should be consulted to determine the application, if any, of such exceptions.

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level of a private citizen under State law. This is a significant (and unnecessary) concession of otherwise lawful defensive authority. Conversely, as of the publishing of this documents, some States have pending litigation regarding the application of so-called "stand your ground" laws and whether they apply to law enforcement.

[23] CJCSI 3121.01B, *supra* note 2, Encl. L, para. 5.b.1.

[24] *Id.* para. 5.c.

[25] *Id*. para. 5.b.1.

[26] *See e.g.*, O'Neal v. DeKalb County, Ga., 850 F.2d 653, 666 (11th Cir. 1988).

[27] *See e.g.*, Deering v. Reich, 183 F.3d 645, 652–53 (7th Cir. 1999).

[28] Staffing of the request should be initiated using Enclosure P to CJCSI 3121.01B as a template. As this must be staffed to the Combatant Commander for staffing through the CJCS to the Secretary of Defense for approval; it is imperative that this staffing process be initiated upon the identification of the need.

[29] Tennessee v. Garner, 471 U.S. 1, 11–12 (1985). *Garner* provides a three prong analysis under the Fourth Amendment for the evaluation of whether the use of deadly force is reasonable. These prongs include: whether there is probable cause to believe that the individual suspect is dangerous; whether the use of deadly force is necessary to prevent the suspect's escape; and, whether, if feasible under the circumstances, a verbal warning was given.

[30] CJCSI 3121.01B, *supra* note 2, Encl. L para. 5.a.

[31] *Id*. para. 5.b(3). There are some limited exceptions to this restriction, but these exceptions are unlikely to be encountered by most U.S. Army personnel.

3. Denial of Deadly Force in Self-Defense

Federal courts do not require that service-members who are not armed in the course of their duties be denied the authority to use deadly force in their own defense. Some commanders and judge advocates believe that if there is no authority to arm service-members, then there is no authority to use deadly force. This presumption is not imposed by Federal law. In reference to self-defense, however, judge advocates must ensure that service-members, acting as part of a unit, understand that the SRUF specifically provides that the individual right of self-defense may be restricted. This is rationalized by stating that when "individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, commanders may limit individual self-defense by members of their unit."[32]

4. Operational Orders/Execution Orders

For those operations that have not been thoroughly anticipated, attorneys may find that the RUF are disseminated through message traffic with an OPORD or EXORD. Often judge advocates will have to wait for RUF guidance from higher headquarters because the decision on whether to draft new RUF or adopt an existing template has not yet been announced.

5. SRUF Authority to Use Deadly Force

In RUF, the authority to use deadly force exists for limited purposes. The SRUF provides uniform guidance on domestic use of force.

a. Inherent Right of Self-defense

As discussed above, unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to hostile acts or demonstrated hostile intent. Unless otherwise directed by the unit commander, service-members may use deadly force when it appears reasonably necessary to respond to a hostile act or demonstrated hostile intent. Individual self-defense is a subset of unit self-defense and as such may be limited by the unit commander when an individual service-member is acting as part of a unit. Unit self-defense includes the defense of other DoD forces in the vicinity.

b. Defense of Others

The use of deadly force extends to the use of force to defend other non-DoD persons in limited circumstances. Service-members may use deadly force in defense of non-DoD persons who 1) are in the vicinity when there is probable cause to believe the target of that force poses an actual or imminent threat of death or bodily harm, and 2) when the use of force is directly related to the assigned mission.[33]

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[32] *Id*. para. 4.a.

[33] *Id*. para. 5.c.2. *See also,* U.S. DEP'T OF DEFENSE, DIRECTIVE 5210.56, ARMING AND THE USE OF FORCE (18 Nov. 2016).

c. Protection of Assets Vital to National Security

Service-members may use deadly force when it appears reasonably necessary to prevent the actual theft or sabotage to assets vital to national security. The SRUF defines assets vital to national security as President-designated non-DoD and/or DoD property, the actual theft or sabotage of which the President determines would seriously jeopardize the fulfillment of a national defense mission and would create an imminent threat of death or serious bodily harm.[34] The SRUF provides a list of *potential* examples: nuclear assets, nuclear command and control facilities, other designated areas that contain sensitive codes or involve special access programs. Planners and commanders need to determine the existence of assets in their anticipated area of operations to apply the SRUF properly so as to safeguard these designated assets.

d. Protection of Inherently Dangerous Property

Service-members may use deadly force when reasonably necessary to prevent the actual theft or sabotage of inherently dangerous property. The SRUF defines "inherently dangerous property" as property that, in the hands of an unauthorized individual, would create an imminent threat of death or serious bodily harm.[35] Examples include portable missiles, rockets, arms, ammunition, explosives, chemical agents, and special nuclear material. On-scene DoD commanders are authorized to classify property as inherently dangerous.[36] Command guidance in this area is critical. Without clear and proper guidance, the commander's intent could easily be frustrated. For example, a commander may not want to have lethal force deployed against looters who steal small arms ammunition. Failure to provide guidance on this could lead to an engagement that was proper under a strict reading of the SRUF but is inconsistent with the on-ground commander's intent. Likewise, a commander may consider all crew-served weapons as "inherently dangerous," but a failure to make such designations may lead to confusion over what is "inherently dangerous property" by members on the ground. As a reminder, if a subordinate commander chooses to emplace restrictions that go beyond the mission-specific RUF that was issued by a higher command, notification of these restrictions up to the Secretary of Defense is required per the SRUF.

e. National Critical Infrastructure[37]

Service-members may use deadly force when reasonably necessary to prevent the sabotage of national critical infrastructure. National critical infrastructure for DoD purposes is President-designated public utilities, or similar critical infrastructure, vital to public health or safety, the damage to which the President determines would create an imminent threat of death or serious bodily injury. Commanders and planners need to identify the existence of such infrastructure when preparing for a domestic operation.

6. Other Mission-Related Circumstances for Use of Deadly Force

As with the circumstances described above, deadly force may be used, under limited circumstances, when directly related to the assigned mission. Further, such force may only be used "when all

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[34] *Id*. para. 4.e.

[35] *Id*. para. 4.f.

[36] *Id*.

[37] *Id*. para. 4.g.

lesser means have failed or cannot reasonably be employed."[38] These additional circumstances, where such force may be used when directly related to the assigned mission, are discussed below.

a. Prevention of Serious Offenses against Persons

Service-members may use deadly force when it appears reasonably necessary to prevent a serious offense involving the threat of imminent death or serious bodily harm. Examples of such crimes include murder, armed robbery, and aggravated assault. Further, attempting to set fire to an inhabited building or sniping would constitute offenses that involve the threat of imminent death.[39]

b. Escape[40]

Service-members may use deadly force when it appears reasonably necessary to prevent the escape of a prisoner, provided there is 1) probable cause to believe that the prisoner committed or attempted to commit a serious offense involving the infliction or threatened infliction of serious physical injury or death; *and* 2) that escape of the subject would pose an actual or imminent threat of death or serious bodily harm to DoD personnel or others in the vicinity. Serious offense is defined as one that involves an imminent threat of death or serious bodily harm, or an offense that would pose an imminent threat of death or serious bodily harm to DoD forces or others in the vicinity.

c. Arrest/Apprehension of Persons Believed to have Committed a Serious Offense[41]

Service-members may use deadly force when it appears reasonably necessary to arrest or apprehend a person who they have probable cause to believe has committed a serious offense as defined above.

7. Augmentation of the RUF

A unit commander that desires to augment the SRUF must staff the action to the appropriate Combatant Commander. The Combatant Commander must then staff the request through the CJCS to the Secretary of Defense for approval.[42] Requests for augmentation must be prepared using the template provided at Enclosure P, RUF Messaging Process, to CJCSI 3121.01B. Unit commanders may further restrict the SRUF without prior approval; however, if a restriction is implemented by a unit commander on a Secretary of Defense-approved RUF, the Secretary of Defense must be notified through the Joint Staff. When confronted with time critical situations, commanders can notify the CJCS and the Secretary of Defense concurrently, or if not possible, may notify the CJCS as soon as possible after the Secretary of Defense notification.[43]

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[38] *Id.*, paras. 5.c & 5.d.

[39] *Id.*, para. 5.d.1.

[40] *Id.*, para. 5.d.2.

[41] *Id.*, para. 5.d.3.

[42] *Id.*, para 3.a.

[43] *Id.*, para. 3.b.

F. Liability for Service-Members, Leaders, and RUF Drafters in Use of Force Situations

Service-members, their leaders, and the planners who draft the RUF for domestic operations face potential personal liability for any unlawful use of force by a service-member during a domestic operation. This includes Federal or State civil or criminal proceedings after an incident. In addition, such incidents are often accompanied by a variety of investigations that could result in adverse administrative consequences. Therefore, it is important that judge advocates be aware of this liability as they draft RUF, disseminate the RUF, and participate in training for and the execution of domestic operations under RUF. Appropriate attorney involvement can reduce the risk a member is unnecessarily exposed to the financial and emotional burdens of litigation.

1. Federal Civil Liability

A person injured by a service-member's use of force could seek damages in a Federal civil suit against the service-member and others involved in the RUF. If the person is dead, the family members of the decedent could file the suit. This private cause of action for damages—caused by a service-member's use of force—is based on deprivation of a Constitutional right. In most cases, this will involve the Fourth Amendment standard of objective reasonableness. The seminal case that created this cause of action is *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*,[44] a civilian law enforcement case. There is caselaw concerning DoD civil support that addresses this issue. . One reported Supreme Court case (discussed below) involves an Army soldier and use of force against a civilian.[45]

Litigation can also occur in situations where force was not used and an innocent civilian is killed or injured as a result. A soldier's decision not to use force, or a commander's decision to limit the use of deadly force would most likely be found to be within the "discretionary function" defense to claims made under the Federal Tort Claims Act (FTCA).[46] But if the decision not to engage an otherwise lawful target was a result of a failure to train or the use of ill-conceived training materials, the U.S. Government could be found liable for negligence under the FTCA.

a. The Application of Qualified Immunity

Judge advocates serving as advisors, investigators or litigators should understand that qualified immunity is a critical dispositive measure to forestall unnecessary burdens on the government and its representatives, and it can serve as a bar to trial. Pertinent case law provides guidance on how courts apply qualified immunity.

Saucier v. Katz, a 2001 Supreme Court decision, is a noteworthy case in the context of military support to domestic operations. Saucier, a Military Police officer assigned to protect the Vice

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[44] Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In that case, the Court held that the warrantless entry of Federal agents into the petitioner's apartment, under color of Federal authority, provided a Federal cause of action for damages under the Fourth Amendment.

[45] *See* Saucier v. Katz, 533 U.S. 194 (2001). In *Saucier*, Katz attempted to unfurl a protest banner in close proximity to Vice President Gore's speaking stand on the Presidio of San Francisco. Katz brought a *Bivens* action against the military police that apprehended him. Katz alleged that the military police violated his Fourth Amendment rights by use of excessive force in forcibly removing him from the immediate vicinity of the podium and in placing him into a van. The Court held the military police member was entitled to qualified immunity.

[46] United States v. Gaubert, 499 U.S. 315 (1990).

President, was accused by Katz of using excessive force. Pursuant to *Bivens*, Katz filed suit against Saucier on the grounds that Saucier had violated Katz' Fourth Amendment rights. *Pearson v. Callahan*, a 2009 Supreme Court decision, is now the key case from which to analyze issues of qualified immunity.[47] (*Pearson* involved an accusation of a Fourth Amendment violation for a warrantless search and seizure conducted by Utah State law enforcement officers.). Both cases are relevant for judge advocates and discussed below.

For judge advocates vis-à-vis their roles as RUF practitioners, it is first necessary to understand the analysis handed down in *Saucier* as it may still be used by lower courts. In *Saucier*, the Court mandated a two-prong analysis to determine whether an official was entitled to qualified immunity. First, a court was required to decide: 1) "whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) if so, whether that right was 'clearly established' at the time of the defendant's alleged misconduct."[48] This analysis was to be strictly applied and provided an analytical paradigm that often served to direct early disposition of cases in favor of the official without the need for extensive and costly pretrial discovery and litigation.

In *Pearson* however, the Supreme Court effectively reversed its position in *Saucier* by holding that lower courts were no longer bound to the rigid two-prong analysis. The Court noted, however, that the *Saucier* case could still be used as an appropriate analytical paradigm by lower courts in their discretion, but that lower courts were no longer required to use the *Saucier* procedure.[49]

Saucier remains an important qualified immunity case; however, in light of *Pearson* and the difficulties lower courts have had with the *Saucier* analysis, it is uncertain how effective its analysis will be for those attempting to assert its procedure to establish qualified immunity.

b. State and local government use of force cases are usually based on a civil cause of action created by 42 U.S.C. § 1983

Section 1983 has evolved into an effective basis for citizens to seek damages for alleged violations of their rights by governmental organizations or their employees under the Fourteenth Amendment. Section 1983 liability has also been extended to apply to those who are involved in use of force policy and training decisions. These individuals have been found liable for civil damages if their decisions and work contributed to an improper use of force by an individual law enforcement or security person.[50] As the SRUF specifically directs that commanders at all levels must train their

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[47] Pearson v. Callahan, 555 U.S. 223 (2009). The Court held that the officer's entry into a home, based on the consent of an informant, did not violate clearly established law, and they were thus entitled to qualified immunity.

[48] *Saucier*, 533 U.S. at 194.

[49] *Pearson*, 555 U.S. at 223.

[50] A supervisor who causes a constitutional violation by a "deliberate indifference" to constitutional standards in proper training for officers may be liable under a Section 1983 cause of action. City of Canton v. Harris, 489 U.S. 378, 388–89 (1989). While agencies can be found liable for a lack of proper training on deadly force, agency officials have also been found liable for a lack of training on non-deadly force (Davis v. Mason County, 927 F.2d 1473, 1483 (9th Cir. 1991)) and for training conducted that was insufficient (*e.g.*, Berry v. city of Detroit, 25 F.3d 1342, 1345 (6th Cir. 1994)). The judge advocate advising a commander on RUF for a domestic operation should compare the difference in effort and attention to law between military RUF practice and the comparable efforts of Federal law enforcement agencies. While Section 1983 may provide plaintiffs with a compensable claim after a use of force encounter as a result of a failure to train, the FTCA could also provide a potential remedy when a training requirement existed and it was either not accomplished or it can be demonstrated that the training was inadequate or failed to apply the proper standards.

subordinates on the use of both deadly and non-deadly force,[51] failure to do so may expose commanders, their Soldiers, their advisors, and the U.S. Government to a host of legal consequences as discussed below.

2. Federal Criminal Liability

Service-members could be held criminally liable for unconstitutional or illegal use of force before a court-martial, a Federal district court, and in some cases, a State court. A Federal statute prohibits use of force under the color of law that deprives any person of their constitutional or legal rights.[52] Accordingly, DOJ has, in the past, investigated use of force during a domestic military operation with a view toward seeking a Grand Jury indictment for violation of this statute.[53]

3. State Civil and Criminal Liability

Immunity from Federal liability (under the Supremacy Clause) will not always prevent a service-member from having to face trial in *State* civil or criminal proceedings. In fact, in the "Ruby Ridge" use of force incident, a Federal officer was not granted immunity from a State criminal proceeding for the shooting of a civilian involved in an armed confrontation with the FBI.[54]

G. Other Trial or Litigation Issues

Judge advocates involved in post-use of force procedures and litigation should be prepared to address a number of other issues. First, be prepared to advise commanders on the many investigations that could occur. Second, be aware of their service's procedures on civilian litigation. Finally, know that service-members potentially have less legal protection against use of force liability than a Federal law enforcement agent due not only to potential UCMJ liability, but also punitive administrative options.

Judge advocates should know that if a service-member kills or injures a civilian during a domestic operation, a number of agencies could initiate investigations of the incident that would affect both the service-member and their service. The various units involved, their parent services, any joint command, and the National Guard Bureau or State National Guard authorities could initiate an administrative investigation and/or Rules for Courts-Martial (RCM) 303 inquiries.[55] Commanders

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Ironically, it is conceivable that a third party that could have been covered under "defense of others" could argue the government failed to protect him or her from other civilians and attempt to bring a claim under the FTCA alleging that the Government was negligent in its training of RUF and it contributed to the injury suffered.

[51] CJCSI 3121.01B, *supra* note 2, Encl. L para. 1.b.

[52] 18 U.S.C. § 242 (2011).

[53] For an comprehensive overview of the liability issues resulting from a Marine shooting that was authorized and proper under the Rules of Engagement (the correct term at the time) for JTF-6, see Lieutenant Colonel W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 1.

[54] State of Idaho v. Horiuchi, 215 F.3d 986 (9th Cir. 2000). Interestingly, one of the critical factors in the Court's analysis was the fact that a supervisor had published unlawful use of force guidance. This became an issue, even though Special Agent Horiuchi based his decision to shoot on the lawful pre-existing RUF, rather than the flawed rules published by his team commander.

[55] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2012).

and judge advocates should be aware that the following civilian investigations could occur in addition to their own service's criminal and/or administrative investigation:

- An investigation by DOJ or the U.S. Attorney for potential Federal civil or criminal disposition;
- An investigation by State, county, or municipal law enforcement authorities for State criminal disposition; and
- An administrative investigation by the Inspector General or internal investigative element of a Federal law enforcement agency if the command was providing support to that Federal agency.

Judge advocates also need to know the procedures and considerations involved when dealing with potential civil litigation. Army Regulation 27-40, Litigation,[56] Air Force Instruction 51-301, Civil Litigation,[57] Navy Instruction 5800.7D, and Manual of the Judge Advocate General (JAGMAN)[58] outline service guidelines on issues such as whether a service-member will be entitled to government-provided representation, investigation of potential litigation cases, whether the government will indemnify the service-member for damages in civil cases, and the key points of contact when the service may be involved in litigation. Further, Army Pamphlet 27-162, Claims Procedures,[59] provides guidance on the management of potential claims against the U.S. Government under a variety of theories and statutory authorities.[60] Finally, they should contact the litigation divisions of their respective services for further information.

Finally, judge advocates need to recognize that service-members and commanders involved in use of force incidents may have less legal and practical protection than their counterparts in Federal law enforcement. Case law defining the role of service-members using force during Homeland Security operations is extremely limited. Many of the cases interpreting governmental use of force have expressly or impliedly based their interpretations of the "reasonableness" of the force on the law enforcement status of the Federal officers involved. These were qualified and credentialed law enforcement officers with clear statutory investigative jurisdiction and duties to uphold Federal law and confront criminals. Service-members performing non-traditional Homeland Security operations may not have the benefit of this well-defined case law. Finally, Congress has not extended immunity that is routinely applied to Federal law enforcement to military domestic operations.[61]

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[56] U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION (19 Sep. 1994).

[57] U.S. DEP'T OF AIR FORCE, INSTR. 51-301, CIVIL LITIGATION (20 Jun. 2002).

[58] U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) (26 Jun. 2012).

[59] U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES (21 Mar. 2008).

[60] Claims have been paid in recent history for shootings by U.S. military personnel engaged in the performance of their duties. For example, in 1997 U.S. Marines were sent to support the U.S. Border Patrol in Texas along the Mexican border during a period of escalating border violence and drug related activity. Although the facts are disputed, a U.S. person of Hispanic ancestry was under observation by U.S. Marines. The Marines claimed that the individual under surveillance fired at them with a .22 caliber rifle that he had in his possession. The Marine claimed that he returned fire when fired upon and he killed the individual with one shot from his M-16 rifle. There was immediate controversy that surrounded the incident and the Navy agreed to settle the claim for an amount reported to be between $1.3 and $1.9 million dollars. *See U.S. Settles with Family in Fatal Border Shooting*, NY TIMES (August 12, 1998), available at http://www.nytimes.com/1998/08/12/us/national-news-briefs-us-settles-with-family-in-fatal-border-shooting.html.

[61] Congress, recognizing that the scope of duties for Federal law enforcement officers does not typically extend to enforcing laws against simple assaults, homicides, and other types of violent crime, extended the scope of employment for Federal officers having to use force to prevent such violent crimes. The language of this statute does not make it

H. Training of Judge Advocates

Ideally, attorney training should include the study of executive, congressional, and judicial authorities and constraints on the use of force by government and military personnel, and tactical skills training using both lethal and non-lethal measures. Leaders should seek opportunities for their judge advocates to obtain basic training in the deployment of weapons in tactical engagements under the RUF vs. the extensive training based on the ROE/LOAC.[62] If available, training with police may provide them with great insight into the challenges confronted by a member in a use of force situation. Although training such as this is resource intensive and time consuming, it is difficult for judge advocates that have not been exposed to tactical scenarios involving the use of weapons to provide comprehensive advice and support to training the force.

If resources or time do not permit "hands on" training, the development of scenario training packets can assist in developing better appreciation for application of the RUF. An analysis of likely scenarios done in conjunction with a robust discussion of controlling legal authority can help illuminate the challenges that will be faced by those who may be called to apply RUF and thus better inform judge advocates. Further, these scenarios can be developed to highlight the challenges that often face RUF drafters, and thus improve upon their ability to advise on the development and application of the RUF.

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applicable to the majority of service-members engaged in domestic operations. *See* Pub. L. 105-277, Section 101(h), *as amended* by Pub. L. No. 106-58, Title VI, sect. 623, Sept. 29, 1999, often referred to as the Federal Good Samaritan Statute.

[62] Although the law that governs RUF is different than that which governs ROE, this training will assist judge advocates that are called to assist in the development or training of either RUF or ROE, as an appreciation of the tactical use of small arms and other lethal and non-lethal weapons will improve a judge advocate's ability to support members and the command significantly.

CHAPTER 11

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

KEY REFERENCES:

- 10 U.S.C. §§ 251-255 - The Insurrection Act.
- 18 U.S.C. § 1385 - The Posse Comitatus Act (PCA).
- 28 U.S.C. §§ 1346, 2671 - 2680 - The Federal Tort Claims Act (FTCA).
- 32 U.S.C. § 502 - Required drills and field exercises.
- National Guard Regulation 500-1/ANGI 10-8101 - National Guard Domestic Operations, June 13, 2008.
- National Guard Regulation 500-5/ANGI 10-208 - National Guard Domestic Law Enforcement Support and Mission Assurance Operations, August 18, 2010.
- Emergency Management Assistance Compact (EMAC), Pub. L. No. 104-321, 110 Stat. 3877 (1996).

A. Introduction

The National Guard, or organized militia, is a Federally-recognized State[1] government entity, except when called or ordered[2] to Federal active duty as an element of the National Guard of the United States.[3] The effect of this constitutionally-derived[4] status is perhaps greatest on the rules for the use of force (RUF) for the National Guard.[5] Some policies of DoD and service regulations apply to the National Guard when they are in Federal status but not when they are commanded by

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[1] "State" as used here includes the fifty States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands, all of which have National Guard organizations headed by an Adjutant General (or a Commanding General in the case of the District of Columbia National Guard) governed by State law. For example, the New York National Guard is governed by NY Consolidated Laws Service, Military Law and the Virginia National Guard is governed by the Code of Virginia, Title 44.

[2] Members of the National Guard are called to duty under 10 U.S.C. §§ 331–333 and are ordered to duty under 10 U.S.C. §§ 12301–12304.

[3] *See* Perpich v. Department of Defense, 496 U.S. 334 (1990).

[4] The National Guard derives its State status from the Militia Clauses of the U.S. Constitution. U.S. CONST., art. I, § 8, cl. 15, 16.

[5] The law forming the bases for the Rules for the Use of Force (RUF) by the National Guard is the general criminal law of the States. There is, therefore, no single term used to describe those rules as States have referred to them variously as rules of engagement (ROE), rules for the use of force (RUF), rules on the use of force (ROUF), and rules of interaction (ROI). "RUF," as used in this chapter, is used as a generic term intended to encompass those rules of the 54 National Guard jurisdictions which are based upon the criminal laws of those individual jurisdictions. Compare this to the standing rules on the use of force (SRUF) in JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 Jun. 2005) [hereinafter CJCSI 3121.01B]. CJCSI 3121.01B is classified overall secret; the portions regarding SRUF discussed herein are unclassified. ***** NOTE: As of the publishing of this Handbook, the current SROE/SRUF remain under revision. Judge advocates should check to see if the 2005 SROE/SRUF have been updated before providing advice on these rules.*****

State authorities.[6] As a result, the law that is the basis for National Guard RUF is the criminal law of the State in which a National Guard unit is performing the mission.[7] The drafting and application of State National Guard RUF, derived from State law and National Guard Bureau policy,[8] is the subject of this chapter.[9]

B. RUF and State Criminal Laws

1. State Law Applicable to Both Title 32 and SAD Statuses

Most National Guard operations in support of civil authorities are in support of *State* civil authorities and are undertaken on a State-funded basis, usually referred to as "State Active Duty" (SAD).[10] These types of operations include response to natural disasters, providing security during civil disturbances, and assistance to civil authorities during other State emergencies, such as strikes at State institutions. The notable operational exceptions include National Special Security Events (NSSE) as discussed in Chapter 8 *infra*,[11] the 2001–2002 National Guard airport security mission (hereinafter airport security mission), [12] the 2012 NATO Summit in Chicago, and the Democratic

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[6] For example, CJCSI 3121.01B SRUF applies to the National Guard only when called or ordered to active duty in a Federal status under the provisions of Title 10, U.S.C. *See, e.g.*, U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (29 Dec. 2010) (C2, 19 Mar. 2018); U.S. DEP'T OF DEFENSE, INST. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (27 Feb. 2013). NATIONAL GUARD REGULATION 500-1/ANGI 10-8101 - NATIONAL GUARD DOMESTIC OPERATIONS (13 Jun. 08) [hereinafter NGR 500-1]. However, Army regulations and Air Force instructions govern the National Guard not in the active Federal service in the same manner as they do the regular components, when such regulations or instructions have been made applicable to the National Guard. Specific applicability is indicated in departmental regulations and instructions. *See* NGR 500-1, para. 3-2.

[7] *See* NATIONAL GUARD REGULATION 500-5/ANGI 10-802 - National Guard Domestic Law Enforcement Support and Mission Assurance Operations (18 Aug. 10) [hereinafter NGR 500-5], para. 4-4. A more in-depth explanation is that the criminal law of the States applies to both members of the National Guard operating in a State status and to off-post operations (and in some instances, some on-post activities) of the active components of the U.S. armed forces (including the National Guard called or ordered to active Federal service). *See* Lieutenant Colonel Wendy A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, ARMY LAW, Nov. 2000, at 1. The active component, because of its Federal mission, is however largely protected from the impact of State criminal law by the doctrine of Federal Supremacy Clause immunity. Judicial opinions dealing with the application of that doctrine to the military are discussed in the text *infra* at subparagraph C.2.

[8] National Guard Bureau policy states that use of force is governed by State law. NGR 500-5, *supra* note 7, para. 4-4.b. *See, e.g.*, NGR 500-1, *supra* note 6, para. 3-2.c.(2).

[9] This chapter does not include consideration of State rules for the use of force applied as part of the National Guard counter-drug program, for that see *infra* Chapter 7, Counterdrug Operations.

[10] *See* NGR 500-5, *supra* note 7, para. 4-1. DEP'T OF DEFENSE, DIR. 5101.83, NATIONAL GUARD JOINT FORCE HEADQUARTERS-STATE (NG JFHQS-STATE) (5 Jan. 2011). State active duty [SAD] is a status pursuant to State law only and is funded by the State, unlike the status in which the National Guard trains for its Federal mission pursuant to Title 32 of the United States Code [Title 32 status], which is Federally funded and regulated. The National Guard in an SAD status may, however, use certain Federal equipment, subject to a requirement for reimbursement for that use. In SAD status, many National Guard Bureau and Active Army regulations may not apply unless the State has adopted those regulations as a matter of State law; for more information, see Chapter 3 *infra*.

[11] For example, the National Guard provided security support for the 1996 Summer Olympics in Atlanta, Georgia, and the 2002 Winter Olympics in Salt Lake City, Utah.

[12] The airport security mission was served as "other duty," pursuant to 32 U.S.C. § 502(f). On September 27, 2001, the President made a request to all of the State Governors that they call their National Guard personnel to duty, to be paid for by the United States, according to a White House press release. Between four and five thousand National Guard personnel served at approximately 450 commercial airports around the United States in response to the President's

and Republican National Conventions of 2016. These operations were performed in Title 32 status.[13] As explained in detail in Chapter 3 *infra*, both SAD and Title 32 statuses are non-Federal and State law applies.[14] As such, it is the criminal law of the States hosting the events, i.e. the Olympics and the conventions; that govern the RUF. In the case of airport security, missions were executed in many of the 54 National Guard jurisdictions. Each jurisdiction in which an airport was secured by National Guard personnel applied its own criminal law.[15] Consequently, multiple sets of RUF were used during the airport security mission. Although most rules addressed similar subjects, the specific implementation of these rules varied depending on the jurisdiction.[16] Examples of State RUF referred to throughout this chapter are, unless otherwise indicated, the RUF of the airport security mission.

2. Subjects for Inclusion in State RUF for the National Guard

When the National Guard executes a Title 32 or SAD mission that utilizes RUF, the subjects appropriate for the RUF are derived from the mission operation plan or operation order (OPLAN/OPORD). The RUF covers core State criminal law subjects such as the right of self defense (including the retreat doctrine) necessary warning, proportionality, and location issues (for instance the defender's home or work place). The RUF should also address the right to carry and discharge firearms, the authority of National Guard personnel as peace officers, and the authority for apprehension, search, and seizure. Whether, and the extent to which, these basic RUF subjects are included in a given OPLAN/OPORD are mission-dependent decisions.[17]

a. Subjects Appropriate for Inclusion in <u>All</u> RUF

(1) RUF Change Authority

An important element appropriate for virtually all State National Guard RUF is an explanation of the authority to modify the RUF. If Adjutants General have delegated that authority to subordinate

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request. Additionally, New York National Guard personnel in a Title 32 status after the 9/11 terrorist attacks performed another mission in the form of armory security. *See* Transcript of After Action Review Conference, Office of the Staff Judge Advocate, State Area Command (STARC), New York Army National Guard, and the Center for Law and Military Operations, at 17–18 (17–18 May 2002) [hereinafter NYARNG Transcript] (on file with CLAMO).

[13] NATIONAL GUARD REG. 350-1, ARMY NATIONAL GUARD TRAINING, para. 3-9.j.4 Aug. 2009) [hereinafter NGR 350-1] (providing that Title 32 status may be used by an Adjutant General for what would otherwise be a State (SAD) mission if the Adjutant General determines that the mission will provide a training benefit for National Guard personnel in their Federal role). At least one State, New York, chose to exercise all or part of the airport security mission in SAD status.

[14] *See infra* Chapter 3. Note that this may not always be the case in Federal use of force law liability. For example, if National Guard personnel in a Title 32 or SAD status are inadvertently made subject to the orders and authority of a Federal commander, they could be held to a use of force standard as defined by applicable Federal law.

[15] The 1996 Summer Games in Georgia and the 2002 Winter Games in Utah are two examples.

[16] In 2003, the Operational Law and Counterdrug Team of the Chief Counsel's Office, National Guard Bureau, collected and reviewed virtually all of the State RUFs used in the airport security mission. All these RUFs are retained by that office in both paper and electronic format. The Operational Law and Counterdrug Team has continued to collect and review the State RUFs since 2003, including those used in hurricane responses such as Hurricanes Harvey, Irma and Nate in 2018.

[17] For example, if the mission includes the security of certain real property, then the right to search and seize and amount of force necessary to undertake the inspection of persons and personal property entering and leaving that location should be included in the OPLAN/OPORD or RUF.

commanders, then the RUF must clearly state which part(s) of the RUF may be changed, in what manner and by whom. If the RUF contain no delegation of authority, then either the Adjutant General or State level task force commander retains the authority. If authority to change the RUF is wholly denied, including the authority to further restrict the RUF, then that should also be made clear.

(2) Right of Self-Defense

Another element appropriate for inclusion in all RUF, even for unarmed security missions, is the right to exercise reasonable and necessary force in self-defense.[18] Mission analysis[19] and State law[20] will determine whether, as part of the general right of self-defense, National Guard personnel will be armed. Judge advocates should help determine that appropriate procedural requirements regarding the carriage of weapons have been met well before a mission. One of the early concerns for New York Army National Guard judge advocates after the 11 September 2001 terrorist attacks was the authority of New York National Guard personnel to carry weapons. Under New York law "[p]ersons in the military service of the State of New York when duly authorized by regulation issued by the adjutant general" are authorized to carry firearms.[21] Unfortunately, such regulations were not previously promulgated. Consequently, the judge advocates drafted Department of Military and Naval Affairs (DMNA) Regulation 27-13, Carrying of Firearms and Use of Force, which the Governor's Counsel Office approved on 29 September 2001.[22]

The RUF must also address State law topics such as the right to defend others,[23] the duty to retreat,[24] the use of deadly force to prevent escapes,[25] the requirement or limit on the use of

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[18] *See* CJCSI 3121.01B, *supra* note 5, Encl. L(U), para. 4.a. It provides that service-members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent, except as limited by a commander as part of unit self-defense. The SRUF provide that a unit commander may limit the use of individual self-defense by members of their unit. Whether State National Guard RUF may, like the SRUF, deny the right of individual self-defense in some instances, is open to question, especially because many States have statutes applicable to all persons within the State, including National Guard personnel, providing for the right of self-defense. *See, e.g.*, MONT. CODE ANN. § 45-3-102. It is likely that National Guard commanders could lawfully place restrictions on the use, for self-defense purposes, of weapons issued by the National Guard; however, if a weapon is issued for the purposes of mission accomplishment, it may make little tactical sense to deny the use of the same weapon for purposes of individual self-defense.

[19] As used herein, "mission analysis" refers to the commander's vision of the execution of the mission, a determination of the amount of force necessary for mission accomplishment, and a determination, in light of known factors such as intelligence on the nature of the threat presented to State forces, of whether National Guard personnel could be the subject of any type of physical attack in executing the mission.

[20] It is important to distinguish between the citizen's individual right of self-defense from the right of a government official to use force in self-defense. The rights and duties for these two different legal theories are similar, but contain critical differences. RUF drafters must decide which legal authority they wish to invoke, and then ensure that the description of this authority remains consistent. Ambiguities created by confusing the two authorities could lead to confusion by members. Almost all of the topics listed in this section will allow for different conduct by a member acting in self-defense under the two theories.

[21] N.Y. PENAL LAW § 265-20.

[22] NYARNG Transcript, *supra* note 12, at 51.

[23] The right to defend others is frequently the subject of the same State statutes that provide for an individual's right to defend him or herself. *See, e.g.*, CONN. GEN. STAT. § 53a-19(a); COLO. REV. STAT. § 18-1-704(1).

[24] The laws of several States require the duty to retreat, so, for the airport security mission, those States included the duty in the RUF. *See, e.g.*, Connecticut airport security mission RUF para. IIIC(b) and CONN. GEN. STAT. § 53a-19(b).

warnings before the employment of deadly force in self defense,[26] the requirement for the use of proportionality,[27] and whether the place where the right of self defense is exercised imposes additional legal implications.[28]

(3) Special Orders

Many RUF include discussion of issues not directly related to the use of force. These issues are called "special orders" and cover such matters as: training (including training scenarios), military bearing and appearance, immunity, standards of conduct and treatment of civilians, safety, handling news media, discussion of the mission with others, and handling of suspicious persons, vehicles, and activities. Usually, The Adjutant General (TAG) of the State or the task force commander will decide whether to include them in the RUF or in the OPLAN/OPORD.

b. Role of State Law in Determining RUF for Law Enforcement, Law Enforcement Support, and Security Missions

There are variations between the States regarding National Guard authority to apply force during a law enforcement,[29] law enforcement support,[30]or security operation. For example, some States by statute give the National Guard the full authority of peace officers.[31] In other States, the National Guard has only those peace officer-type powers enjoyed by the population at large.[32] Still others

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[25] For a detailed discussion of the Fourth Amendment aspects of this topic in the context of FBI RUF, *see* Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997).

[26] Many, if not most, States included the necessity for a warning (if possible) before resorting to the use of deadly force in the airport security mission RUF.

[27] Some State RUF used for the airport security mission specifically required that action taken in self-defense must be proportional to the force used in the attack necessitating the defense. It is unclear whether this duty was imposed in the RUF as a result of a State law requirement, or whether it was an inadvertent carryover from the law of war rule of proportionality that is reflected in the SROE.

[28] In some States, the right of self-defense is greater when exercised in the defender's home or place of work. In those places there is often no duty to retreat. *See, e.g.,* CONN. GEN. STAT. § 53a-19(b); N. D. CENT. CODE § 12.1-05-07.

[29] Because the Posse Comitatus Act, 18 U.S.C. § 1385 (2016) [hereinafter PCA] does not apply to the National Guard when not in Federal status or under Federal control, there is no Federal law prohibiting the National Guard from participating in direct law enforcement actions. Whether the National Guard forces of any State may otherwise participate in such actions therefore depends upon the law of the individual States. Concerning application of the PCA to the National Guard, see also *infra* subparagraph C.2.

[30] For the purposes of the National Guard, "law enforcement support" usually means assistance provided to civilian law enforcement agencies at their direction or request – a meaning which may differ for purposes of the PCA regarding Federal military forces.

[31] For example, Arkansas law at ARK. CODE ANN. § 12-61-112(a) provides the following:

> (a) Whenever such forces or any part thereof shall be ordered out for service of any kind, they shall have all powers, duties, and immunities of peace officers of the State of Arkansas in addition to all powers, duties, and immunities now otherwise provided by law.

[32] *See, e.g.,* Iowa RUF for the airport security mission "Task Force Freedom Flight - Airport Security Instructions," para. 4 and its reliance, for the purposes of arrest of civilians committing crimes in the presence of National Guard personnel, on Iowa Code § 804.9, granting ordinary citizens the power of arrest; Nebraska Rules of Interaction (ROI) #02, 2 Oct. 2001, para. 7 ("You must apply the use of force rules that apply to a private citizen under State law"); and Use of Force and Arrest Powers of New York National Guard Soldiers, para. 5 ("a National Guardsman's power and authority under New York State law are the same as any other citizen"). When conducting SAD missions in the wake of the 11 Sept. 2001 terrorist attacks, the NYARNG had no greater power than the normal citizen regarding arrest authority. Although a New York State Emergency Act provided a mechanism for the NYARNG to be designated as

provide that the National Guard has certain specific authorities in limited situations.[33] Depending upon the State statutes, the National Guard's authority to act as peace officers may apply to operations in a Title 32 status, SAD status, or both.[34] Regardless, the National Guard judge advocate must participate in the effort to tailor the RUF to the particular mission, State law, and the policies of the TAG..[35]

c. Subjects Appropriate for Inclusion in Law Enforcement, Law Enforcement Support, and Security Mission RUF

(1) Use of Force and Level of Force Generally

If the National Guard mission is law enforcement, law enforcement support, or security, the mission OPLAN/OPORD or its RUF must specify what type of government weapons, if any, may be used for mission accomplishment and self defense. How those weapons may be used, what law enforcement-type actions (such as search and seizure) may be taken, and the level of force that may be used should also be addressed. If authority is not granted for any law enforcement-type action (such as search and seizure) under any circumstances for mission accomplishment, the RUF or mission OPLAN/OPORD should expressly deny the use of force for the specified purpose. Conversely, if National Guard personnel are allowed to take some law enforcement-type actions as a last resort, such as the power to detain and question and/or search persons only when civilian law enforcement personnel are unavailable or where National Guard personnel have been directed to do so by civilian law enforcement personnel, this should be stated. The RUF must also address the degree of force authorized for National Guard personnel in the execution of law enforcement-type actions for mission accomplishment, self defense, or both.

For example, if a law enforcement support or security mission includes guarding buildings or real property, the RUF must address whether persons entering or leaving the property may be detained and questioned or searched by National Guard personnel. If detention, questioning and/or search are authorized, then the RUF must State whether and to what degree force may be used to enforce the action. Moreover, for missions that include guarding buildings or real property, the RUF must address whether force up to and including deadly force may be used to defend the property. Some airport security mission RUF, for instance, provided that deadly force could only be used to defend specially designated property.[36] When this device is used, National Guard judge advocates must ensure that a statutory or other system exists for the designation of such property.

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peace officers, the provision was not used because the Act also required a lengthy training period. *See* NYARNG Transcript, *supra* note 12, at 52.

[33] *See, e.g.*, GA. CODE ANN. § 38-2-6–38-2-6.1.

[34] For example, Ark. Code Ann. § 12-61-112 applies "Whenever" National Guard forces are ordered to "service of any kind," but Ga. Code Ann. § 38-2-6 to 38-2-6.1, when read *in toto*, provide that the Governor has the power "in case of invasion, disaster, insurrection, riot, breach of the peace, combination to oppose the enforcement of the law, or imminent danger thereof" to declare an emergency ordering the National Guard into "the active service of the State" and granting the National Guard the authority to "quell riots, insurrections, or a gross breach of the peace or to maintain order."

[35] For the purposes of the airport security mission, some States adopted more restrictive RUF than State law allowed.

[36] On the other hand, the NYARNG RUF did not allow the use of deadly force to protect property. Deadly force was only authorized in self-defense "if there was a threat of death or grievous bodily harm." *See* NYARNG Transcript, *supra* note 12, at 70.

(2) Definitions

Definitions may be appropriate for inclusion in all RUF but they are particularly necessary in armed law enforcement, law enforcement support, or security operations. Using law enforcement-type terms that National Guard personnel may not be familiar with may create confusion and may have unintended consequences. Terms commonly defined include: deadly weapon; firearm; reasonable, necessary, or minimum force; peace officer; probable cause; reasonable suspicion; reasonable belief; deadly and non-deadly force; arrest (civilian or military term); apprehension; detention; property vital to public health or safety (or other similar phrase); forcible felony (when defense is predicated on commission of a forcible felony); hostile act; hostile intent; proportionality or proportional force; felony; and misdemeanor.

(3) Arming Orders

If firearms or other weapons with the capability to kill or severely injure another will be issued, then the RUF should provide for positive control by experienced NCOs or officers. One method of accomplishing this is to specify how members will carry their weapons, ammunition, and other ancillary equipment, expressed through arming orders. Arming orders are a state of preparedness to use force. They should not be confused with the authority to use force once a member is faced with a threat. Arming orders are typically written in a chart or matrix format, specifying where or how the weapons will be carried and where ammunition will be kept, including when and where loaded magazines should be carried and when rounds should be chambered. Use of weapons other than firearms should also be addressed if those weapons will be issued.[37] Below is an example of arming orders used by the Indiana National Guard for the airport security mission.

Arming Order	Rifle or Shotgun	Pistol	Baton	Chamber	Ammo	Bayonet	Weapon/ Safety
AO-1	Sling	Holster	Belt	Empty	In Pouch	Not issued	ON
AO-2	Port	Holster	Belt	Empty	In Pouch	Not issued	ON
AO-3	Sling	Holster	Hand	Empty	In Pouch	Not issued	ON
AO-4	Port	Holster	Hand	Empty	In Pouch	Not issued	ON
AO-5	Port	Holster	Hand	Empty	In Weapon	Not issued	ON
AO-6	Port	In Hand	Belt	Locked & Loaded	In Weapon	Not issued	ON*

[37] Other weapons may include use of water, batons, pepper spray, or tasers (electric stun guns). In airport security mission RUF, some States began their use of force matrix at a much lower level than would usually be the case, such as with an unarmed member first attempting verbal persuasion, then using "unarmed defensive techniques," then using non-deadly physical force to restrain the aggressor, then stating that a weapon would be drawn if the aggressor continued his or her aggression, then drawing and displaying the weapon, then stating that a round would be chambered, etc. Commanders using this technique must of course explain that in a true tactical situation, the command does not expect that each service-member must always use each and every incremental increase in the use of force; in some instances it would be futile and could risk injury to do anything except for, drawing and firing a weapon.

* Leave safety on until ready to fire

(4) Special Orders

Other potential subjects appropriate for inclusion in National Guard RUF for law enforcement, law enforcement support, or security missions concerning use of force include: the relationship of National Guard personnel to civilian law enforcement personnel,[38] acting at the direction of civilian law enforcement,[39] defense of others, pursuit of suspects, retention of evidence,[40] use of restraints, reports of firearm discharge,[41] or other use of deadly force, accountability of weapons and ammunition, and a prohibition against use of non-issued weapons and ammunition.

C. Specific RUF Issues

1. RUF in Interstate (Cross Border) Operations

National Guard forces may cross State borders both for training in a Title 32 status for their Federal mission and for assisting neighboring States in SAD status. Naturally, for many of these operations, the units carry their organic weapons. In some States, however, State code or constitutions may complicate this practice. For example, § 33 of the Montana Constitution provides that no "armed persons . . . shall be brought into this State for the preservation of the peace . . . except upon application of the legislature . . ." and § 431.011 of Texas Statutes provides that a "military force from another State . . . may not enter the State without the permission of the Governor." Statutes or constitutional provisions like these can impede the timely flow of National Guard forces from one State to another.

Federal Supremacy Clause immunity[42] may be a viable defense should an violation of State law arise in the case of a National Guard force crossing a State border for Federal training purposes (this

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[38] In a mission supporting civil authorities, National Guard personnel are typically instructed to rely upon civilian law enforcement personnel to detain and question persons, conduct searches and seizures, and to apprehend offenders, and to take any of these steps themselves only when requested or directed by those civilian law enforcement personnel or only in the most exigent of other circumstances. *See* NGR 500-1, *supra* note 6; and, for the purposes of the airport security mission, 29 Sept. 2001 ARNG Airport Security Instructions, para. 2-1, 3-6b [hereinafter ARNG Airport Security Instructions] (limiting the National Guard to a law enforcement support role during the airport security mission).

[39] Actions taken at the direction of Federal personnel will help support the argument that National Guard members are shielded by Federal Supremacy Clause immunity from State criminal charges. *See* text *infra*, subparagraph C.2.; *also see*, West Virginia v. Laing, 133 F. 887 (4th Cir. 1904) and James River Apartments, Inc. v. Federal Hous. Admin., 136 F. Supp. 24 (D. Md. 1955), in which persons who otherwise had no Federal or other governmental status were given Federal Supremacy Clause immunity by judicial opinion because they acted at the behest of Federal officials. Note also that National Guard members taking law enforcement-type action at the express request or direction of law enforcement personnel may be provided with *State* immunity from civil or criminal prosecution. *See, e.g.*, UTAH CODE ANN. § 76-2-404; CONN. GEN. STAT. § 53a-22(d)–(e).

[40] DA Form 4237-R (Detainee Personnel Record) may be used to inventory items taken from detainees.

[41] ARNG Airport Security Instruction, *supra* note 41, para. 3-17a(3), required that the discharge of firearms, among other matters, by National Guard personnel serving in that mission be reported to the National Guard Bureau as a serious incident.

[42] *See* text *infra* subparagraph C.2.

concept is discussed more below). If Federal Supremacy Clause immunity is successful in defense of a violation of State law, then the use of one State's RUF would not appear to be an issue in cross-border operations (unless the RUF themselves are unconstitutional),[43] unless operations undertaken in an SAD status are involved.[44]

The best approach is to work in advance of the need to cross a State border to get proper approvals to enter. Cross-border operations by State National Guard units in an SAD status for the purposes of disaster relief or other State emergencies within a second State have typically been accomplished pursuant to the several disaster-related or "National Guard-only" interstate compacts.[45] The latest of these compacts available for use during disaster relief or other State emergencies by the National Guard, and the one most recently approved by Congress, is the Emergency Management Assistance Compact (EMAC).[46] As table 11-1 demonstrates below, all States now have codified the EMAC, most without change. Since its approval by Congress in 1996, many States have used EMAC for various State emergencies. The possibility of its use in situations where the use of force may be necessary exists.[47]

EMAC, like all congressionally-approved interstate compacts, is Federal law.[48] As such, it is applied in the same manner as other Federal legislation.[49] This position in the legal hierarchy provides a basis to overcome State constitutional provisions that would otherwise serve to prohibit the entry of National Guard members from other States.[50] Further, peace officer powers granted by the requesting State's statutes only to the National Guard forces of that State[51] may be granted to

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[43] For an example of unconstitutional RUF, see Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997).

[44] It is even more likely that an armed National Guard force would be seen as a threat if entering the State in a SAD status to control civil unrest, rather than under a pure training mission pursuant to 32 U.S.C. § 502(f). Also note that some civil support missions undertaken for State purposes may be counted as training; however, under NGR 350-1, *supra* note 13, para. 3-9.j., and Federal Supremacy Clause, immunity may be available to protect that mission or part of that mission.

[45] AMERICAN LAW SOURCE ON-LINE, United States – Interstate Compacts, http://www.lawsource.com/also/usa.cgi?usi (last visited Apr. 20, 2018) provides a listing of interstate compacts, including those of most direct concern to the National Guard: the Emergency Management Assistance Compact (EMAC); the Interstate Civil Defense and Disaster Compact; the Interstate Emergency Management Compact; the Interstate Mutual Aid Compact; and the National Guard Mutual Assistance Compact. This on-line list includes neither the Massachusetts Compact with New York for Military Aid in an Emergency nor the New England States Emergency Military Aid Compact.

[46] The Emergency Management Assistance Compact (EMAC) was approved by Congress in October of 1996, *see* Pub. L. No. 104-321, 110 Stat. 3877 (1996) [hereinafter EMAC]. At the time of the 9/11 terrorist attacks, New York was not a member of the EMAC. New York did, however, have a 1951 Mutual Aid Compact with New Jersey, Vermont, and Massachusetts. A major issue that arose was what State would have command and control over service-members from other States. NYARNG Transcript, *supra* note 12, at 35-6.

[47] The Emergency Management Assistance Compact Guidebook & Standard Operating Procedures manual of the National Emergency Management Association notes that EMAC has been used for several large-scale emergencies, such as Hurricane Andrew, and notes that it was used in response to 9/11 terrorist attacks on the World Trade Center in New York. MUNRO, DOUGLAS P., THE EMERGENCY MANAGEMENT ASSISTANCE COMPACT GUIDEBOOK & STANDARD OPERATING PROCEDURES (Diane Pub. Co., 1997) [hereinafter EMAC SOP manual].

[48] *See, e.g.*, Texas v. New Mexico, 462 U.S. 554 (1983).

[49] *See, e.g.*, Skamania County v. Woodall, 16 P.3d 701 (Wash. 2001).

[50] The EMAC provides that a request by one party State for mutual aid from a second State is mandatory in that the request must be honored, subject only to the second State's right to retain within that State those resources as are necessary for self protection. EMAC, *supra* note 49, art. IV, para.1.

[51] *See* ARK. CODE ANN. § 12-61-112(a).

the National Guard forces of the sending State by the use of one or more EMAC supplemental agreements.[52] Under most situations, National Guard cross border operations are usually limited to providing law enforcement support to civil authorities, rather than providing direct law enforcement service.[53] However, National Guard can in some instances be used for Domestic Law Enforcement Operations.[54]

State	**EMAC Legislation**
Alabama	Ala. Code § 31-9-40
Alaska	Alaska Stat. § 26.23.135
Arizona	Ariz. Rev. Stat. § 26-402
Arkansas	Ark. Code § 12-49-402
California	Cal. Gov't Code §§ 179-179.9
Colorado	Colo. Rev. Stat. § 24-60-2901
Connecticut	Conn. Gen. Stat. § 28-23a
Delaware	Del. Code tit. 20, § 3401
District of Columbia	D.C. Code § 7-2331
Florida	Fla. Stat. §§ 252.921-933
Georgia	Ga. Code § 38-3-81

[52] The EMAC provides that the power of arrest is granted to the emergency forces of the sending State if that power is "specifically agreed to" by the receiving State. EMAC, *supra* note 49, art. IV, para. 2. If the statutes of the receiving State grant only the National Guard forces of that State the authority of a peace officer, that limitation might be overcome by providing for the expanded authority of those forces from the sending State into one or more supplementary agreements pursuant to EMAC Article VII. Including this authority in a supplemental agreement could overcome the limitations to a State's own National Guard units because an agreement implementing an interstate compact that has been approved by Congress has been held also to have the force and effect of Federal law. *See* Tahoe Reg'l Planning Agency v. McKay, 769 F.2d 534, 536 (9th Cir. 1985). A related issue is whether the executive branch emergency forces of two States whose legislative branches have granted no peace officer authority to either of their respective National Guard forces can nevertheless give themselves those powers and their supporting RUF by the inclusion of those powers in an EMAC Article VII supplementary agreement.

[53] *See* NGR 500-5, *supra* note 7, para. 4-2. The National Guard instruction governing the airport security mission contemplated cross border operations but provided that National Guard forces were not to participate in law enforcement operations unless in exigent circumstances. ARNG Airport Security Instructions, *supra* note 41, paras. 2-1e, 2-8..

[54] *See generally*, NGR 500-5, *supra* note 7, Chapter 5

Guam	Guam Pub. L. 29-29
Hawaii	Haw. Rev. Stat. § 128F-2
Idaho	Idaho Code § 46-1018A
Illinois	45 Ill. Comp. Stat. 151
Indiana	Ind. Code §§ 10-14-5-1 to 16
Iowa	Iowa Code § 29C.21
Kansas	Kan. Stat. § 48-9a01
Kentucky	Ky. Rev. Stat. § 39a.950
Louisiana	La. Stat. § 29:733
Maine	Me. Rev. Stat. tit. 37-B, § 921-933
Maryland	Md. Code, Pub. Safety § 14-702
Massachusetts	2000 Mass. Acts ch. 339
Michigan	Mich. Comp. Laws § 3.991
Minnesota	Minn. Stat. § 192.89
Mississippi	Miss. Code § 45-18-3
Missouri	Mo. Rev. Stat. § 44.415
Montana	Mont. Code 10-3-1001
Nebraska	Neb. Rev. Stat. § A1-124
Nevada	Nev. Rev. Stat. § 415. 010
New Hampshire	N.H. Rev. Stat. §§ 108:1-3
New Jersey	N.J. Stat §§ 38A:20-4, 20-5
New Mexico	N.M. Stat. §§ 12-10-14, 15
New York	N.Y. Exec. Law § 29-g
North Carolina	N.C. Gen. Stat. § 166A-40 to 53

North Dakota	N.D. Cent. Code §37-17.1-14.5
Ohio	Ohio Rev. Code § 5502.40
Oklahoma	Okla. Stat. tit. 63, §§ 684.1-13
Oregon	Or. Rev. Stat. § 402.105
Pennsylvania	35 Pa. Cons. Stat §§ 7601-7604
Puerto Rico	P.R. Laws tit. 1, §§ 621-633
Rhode Island	30 R.I. Gen. Laws §§ 30-15.9 to 14
South Carolina	S.C. Code §§ 25-9-410, 25-9-420
South Dakota	S.D. Codified Laws §34-48A-53
Tennessee	Tenn. Code § 58-2-403
Texas	Tex. Health & Safety Code § 778.001
Utah	Utah Code §§ 53-2a-401 to 403
Vermont	Vt. Stat. tit. 20, §§ 101-112
Virgin Islands	V.I. Code tit. 23, §§ 1051-1064
Virginia	Va. Code § 44-146.28:1
Washington	Wash. Rev. Code § 38.10.010
West Virginia	W. Va. Code § 15-5-22
Wisconsin	Wis. Stat. § 323.80
Wyoming	Wyo. Stat. §§ 19-13-401 to 414

Table 11-1. State EMAC Legislation

2. State Criminal Liability of National Guard Members for Use of Force

Immunity from State criminal charges for wrongful use of force by National Guard personnel was a topic addressed by some National Guard RUF for the airport security mission.[55] The subject is

[55] *See, e.g.*, Airport security mission RUF for the States of Nevada, New Jersey, and New York.

addressed here in the context of National Guard personnel on active duty for the purpose of Federal domestic law enforcement support or Federal security mission,[56] and both Title 32 status[57] and SAD status for the purposes of a State emergency. As discussed at the beginning of this chapter, State criminal law and therefore State RUF apply to both missions in Title 32 and SAD statuses. The focus of criminal liability under State law while in Federal active duty status or in a State status is on the doctrine of Federal Supremacy Clause immunity.[58]

a. Active Duty Federal Mission

Although the early history of the doctrine of Federal Supremacy Clause immunity[59] began somewhat before the case was decided,[60] the opinion of the Supreme Court in *In Re Neagle*, 135 U.S. 1 (1890), is regarded as the seminal case establishing the theory that the employees of the United States cannot be limited, by prosecution under State criminal laws, by the States in their good faith, rightful, and proper execution of their Federal duties.

Mr. David Neagle, who served as a Deputy U.S. Marshal and bodyguard to Mr. Justice Stephen Field, then a sitting member of the U.S. Supreme Court, was charged with murder by the State of California after killing another individual, Mr. David Terry, whom Neagle thought was reaching for a weapon in an attempt to kill Mr. Justice Field. Neagle successfully argued that in killing Mr. Terry, he (Neagle) did no more than was required of him by his Federal position as Deputy Marshal and bodyguard and that California should not be allowed to proceed in its prosecution lest that State by implication be allowed to control the proper execution of his Federal duties.

Since that case, the defense that proved so valuable to Mr. Neagle has been applied successfully numerous times in judicial opinions on behalf of Federal employees and other persons carrying out Federal missions, including Federal military personnel carrying out Federal military missions. Those Federal active duty military defendants have successfully employed the "Neagle defense" of Federal Supremacy Clause immunity against State criminal charges for improper operations of a motor vehicle,[61] defamation,[62] assault,[63] and murder in the course of guarding prisoners of the U.S.

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[56] Such as during the 2002–2003 Air Force security mission, in which approximately 8,100 Army National Guard Soldiers were mobilized under 10 U.S.C. § 12302 for the purposes of providing security at U.S.A.F. and Air National Guard installations.

[57] This was the case in the airport security mission.

[58] Since National Guard Soldiers performing security duties may be subject to both criminal and civil liability based on both State and Federal law for use of force incidents, the concepts of Federal Supremacy Clause immunity and governmental qualified immunity under both State and Federal law will be critical. For simplicity, this discussion is limited to Federal Supremacy Clause immunity.

[59] *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

[60] A U.S. Supreme Court case predating *Neagle* is Tennessee v. Davis, 100 U.S. 257 (1880).

[61] *See* Montana v. Christopher, 345 F. Supp. 60 (D. Mont. 1972) (operating a vehicle without lights); Commonwealth v. Thomas, 612 F. Supp. 14 (W.D. Pa. 1984) (violation of State weight limits).

[62] Howard v. Sikula, 627 F. Supp. 497 (S.D. Ohio 1986).

[63] *See* Lima v. Lawler, 63 F. Supp. 446 (E.D. Va. 1945); Commonwealth v. Johnson, 297 F.Supp. 877 (W.D. Pa. 1969).

Army.[64] There is no limitation expressed in any of those opinions as to the type or character of the State offense to which the doctrine might be applied on a service-member's behalf.[65]

In only one reported military-related case has anything like Federal military RUF been clearly the subject of a Federal Supremacy Clause defense to State criminal charges. In United States v. Lipsett, 156 F. 65 (W.D. Mich. 1907), a case involving the shooting of an innocent bystander by a military guard, the Court examined the manual of guard duty used for training guards assigned to military prisoners. The Court found that per the manual, the guard's duty in response to an attempted escape was to first call for the escapee to halt, and if the escapee did not halt, to then fire upon the prisoner.[66] In this case, based largely on the court's understanding of the guard's Federal duties, the guard was acquitted of manslaughter.

The only reported case found involving Federal RUF is a non-military civil case involving the RUF used by the FBI during the standoff between alleged weapons trafficker Randy Weaver and the FBI at Ruby Ridge, Idaho, in 1992. In Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997), the Court held the "shoot any armed male" FBI RUF to have been overly broad and to have deprived the plaintiff of his constitutional rights under the Fourth Amendment of the Constitution. Thus, not only may a Federal officer, in the performance of his duties under a set of rules unlawfully deny the victim his constitutional rights, but the RUF at issue may be considered unconstitutional on their face as well.

b. Title 32 or SAD Status and Mission

The holding of *Perpich v. Dep't of Defense*[67] (noted above) stated that National Guard personnel in a Federal training or "other duty" status under 32 U.S.C. 502 are a State military force, and consequently, their RUF are derived from State criminal and civil law. Under this analysis, the best defenses to the possibility of a State criminal charge[68] resulting from good faith compliance with State RUF include:

- A State statute providing criminal immunity for National Guard personnel.[69]
- An agreement with the State Attorney General (possibly at the time the State Attorney General gives any approval of the RUF[70]) that National Guard personnel will not be prosecuted criminally for good faith compliance with the National Guard RUF.[71]

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[64] *See* In re Fair, 100 F. 149 (C.C.D. Neb. 1900) and United States v. Lipsett, 156 F. 65 (W.D. Mich. 907).

[65] The only limitation is that the act in question be taken in good faith and that the act be truly necessary for the purposes of the Federal mission. Thus, the defense has not been judicially applied in defense to State charges of unintentional death where the particular maneuver of a government vehicle was not required by the Federal military mission. *See* State v. Ivory, 906 F.2d 999 (4th Cir. 1990).

[66] United States v. Lipsett, 156 F. 65 (W.D. Mich. 1907).

[67] Perpich v. Department of Defense, 496 U.S. 334 (1990).

[68] Of course, because the subject is the possibility of State *criminal* charges, there is no value to tort law "hold harmless" agreements or the possible application of both the Federal Tort Claims Act and State tort claims laws.

[69] New York, for example, has a statute that grants civil and criminal immunity to members of the New York National Guard ordered into active service of the State for "any act or acts done by them in the performance of their duty." N.Y. PENAL LAW § 235. *See also*, NEV. REV. STAT. 412.154(1). In the case of the statutory immunity predicate for National Guard missions for which firearms are issued, the most basic statute providing for use of force may be a statute providing for immunity for the carrying of firearms. *See, e.g.*, N.J. REV. STAT. § 2C: 39-6(1).

[70] The ARNG airport security instruction required the National Guard RUF used for that mission be reviewed by the State Attorney General. ARNG Airport Security Instructions, *supra* note 41, para. 3-6a.

- Extension of the doctrine of Federal Supremacy Clause immunity to National Guard personnel acting under Federal control.

The application of Federal Supremacy Clause immunity to a State military force may rest upon the accumulation of indicia of a Federal mission such as: Federally-funded orders, use of Federal equipment, governance by Federal regulations, execution of the mission on a Federally-owned or governed facility, application of the State RUF through execution of supplemental agreements under EMAC,[72] execution of the mission details at the direction of Federal authorities such as Department of Homeland Security personnel, contracts or memoranda of agreement (MOAs) with Federal officials, or orders to Title 32 duty at the request of Federal Government officials. Case law clearly indicates that Federal Supremacy Clause immunity should be applied to cases involving a Federal mission whether or not the subject of that protection is a Federal employee.[73]

3. RUF in Mixed National Guard and Active Component Operations

Given the doctrine of Federal Supremacy Clause immunity, Federal active duty Soldiers have less reason to consider themselves bound by the exact restrictions of a State's criminal law and more reason to follow the requirements of the SRUF than do National Guard personnel in Title 32 or SAD status. For this reason, in domestic law enforcement support or security operations involving both active component and National Guard members, judge advocates must pay close attention to their RUF (in particular to ensure compatibility with Federal SRUF) if each group has similar duties. The RUF applicable to National Guard personnel must respect State limitations on law enforcement-type activities by the National Guard (such as searches and seizures) and the use of force to support those activities.[74]

D. Role of the National Guard Judge Advocate

1. Drafting RUF

While RUF are an S-3/G-3 and commander responsibility, judge advocates should assist in drafting them (and may be tasked directly to draft them nonetheless). In addition, judge advocates should be directly involved in the production of RUF-related documents, such as information papers,

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[71] This type of agreement would have to be predicated upon the approval of the National Guard RUF by the State Attorney General. It also must be based upon the Attorney General's statutory or common law powers of supervision over county or district prosecutors; the more independent the local prosecutor, the less value of any agreement with the State Attorney General. Where local prosecutors are mostly independent, assurance can only come from the agreement(s) of the local prosecutor(s).

[72] Thus making the supplemental agreement and the RUF contained therein a matter of Federal law. *See, e.g.*, Tahoe Regional Planning Agency v. McKay, 769 F.2d 534, 536 (9th Cir. 1985).

[73] For cases in which defendants, who had no Federal employee status, were subject to State criminal charges successfully argued the application of Federal Supremacy Clause immunity based upon a Federal mission, see, e.g., West Virginia v. Lang, 133 F. 887 (4th Cir. 1904) (member of U.S. Marshal's posse made of ordinary citizens charged with murder); Connecticut v. Marra, 528 F. Supp. 381 (D. Conn. 1981) (informer cooperating with FBI charged with attempting to bribe a city policeman).

[74] This does not necessarily imply that State RUF will always be more restrictive than the SRUF. For example, in civil disturbance support operations in which NGR 500-5 applies. *See* NGR 500-5, *supra* note 7, para. 404, In contrast, the analogous provision of the draft SRUF, CJCSI 3121.01B *supra* note 5, Encl. L para. 5.c.(2), authorizes the use of deadly force to protect president-designated assets vital to national security, which by definition is property the theft or sabotage of which must create an "imminent threat of death or serious bodily harm."

memoranda of law, and memoranda of agreement with supported civil authorities.[75] Some MOAs may contain hold harmless provisions which the judge advocates should review, negotiate, and advise upon. If the RUF used by the National Guard in a law enforcement, law enforcement support, or security mission refers the reader to, or adopts the RUF currently used by a State law enforcement agency, judge advocates must review the documents relied upon for the RUF. The documents should be carefully reviewed to ensure compatibility with member skills, training, capabilities, weapons, and mission. It may be necessary to add provisions specifically applicable to the National Guard.

2. Negotiating RUF with State Agencies

Judge advocates will want to determine whether the RUF, MOA, OPLAN/OPORD, training documents, and other matters relating to the RUF are comprehensive, legally accurate, and well understood by the drafters and commanders. At times, other State officers or agencies, such as the Attorney General, district attorneys, or State law enforcement agencies may be involved in drafting or approving the RUF. In such cases, judge advocates may find it necessary to educate and negotiate issues that meld legal requirements with operational imperatives. For example, in New York after September 11th, New York Army National Guard judge advocates assisted in drafting the Governor's airport security plan, including RUF. The plan and RUF were staffed through the Adjutant General and the Governor's Counsel Office, and approved by the Governor on 29 September 2001.[76]

3. Providing Legal Advice on Liability

Counseling decision makers on the legal requirements necessary to protect members from civil and criminal liability can be a complicated task. The primary focus of the judge advocate's counseling will be State's TAG; the Deputy Chief of Staff for Operations; the Plans, Operations, and Training Officer; and the Task Force or other commanders.

4. Training

Judge advocates should seek opportunities to assist trainers responsible for ensuring that individual members learn and apply the correct standards for force. In this role, they can write or assist in writing information papers, training vignettes, and legal memoranda. Also, the use of a training certification process may be useful.

E. Conclusion

When the National Guard operates in a State status, either Title 32 or SAD, the rules for the use of force are based on the State law where the mission is taking place. Developing these rules for the use of force requires knowledge of the relevant State law, including the level of law enforcement authority given to the National Guard, and the criminal laws relating to self-defense. Judge advocates providing advice on the drafting of the RUF must also tailor their RUF to the specific

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[75] The National Guard Bureau Instruction governing the airport security mission required that States execute memoranda of understanding or memoranda of agreement (MOU/MOA) with supported airports for missions longer than thirty days. *See* ARNG Airport Security Instructions, *supra* note 41, para. 2-8a.

[76] NYARNG Transcript, *supra* note 12, at 184.

mission, and determine the appropriate level of coordination with the State Attorney General's Office, the local district attorney, and other law enforcement agencies. Finally, judge advocates should assist commanders in developing appropriate training so that all National Guard service-members are fully aware of the State's RUF prior to engaging in operations.

CHAPTER 12

FUNDING DOMESTIC OPERATIONS

KEY REFERENCES:

- 10 U.S.C. §§ 271-284 - Military Support For Civilian Law Enforcement Agencies.
- 10 U.S.C. §§ 251-255 - Insurrection Act.
- 10 U.S.C. § 2012 - Support and Services for Eligible Organizations and Activities Outside Department of Defense (Innovative Readiness Training Program).
- 10 U.S.C. § 2551 - Equipment and Barracks: National Veterans' Organizations.
- 10 U.S.C. § 2552 - Equipment for Instruction and Practice: American Red Cross.
- 10 U.S.C. § 2554 - Equipment and Other Services: Boy Scout Jamborees.
- 10 U.S.C. § 2555 - Transportation Services: International Girl Scout Events.
- 10 U.S.C. § 2556 - Shelter for Homeless; Incidental Service.
- 10 U.S.C. § 2558 - National Military Associations; Assistance at National Conventions.
- 10 U.S.C. § 2564 - Provision of Support for Certain Sporting Events.
- 10 U.S.C. § 2576 - Surplus Military Equipment: Sale to State and Local Law Enforcement, Firefighting, Homeland Security, and Emergency Management Agencies.
- 10 U.S.C. § 2667 - Leases: Non-Excess Property of Military Departments and Defense Agencies.
- 18 U.S.C. § 1385 - Posse Comitatus Act.
- 31 U.S.C. § 1301 - The Purpose Statute
- 31 U.S.C. §§ 1341-44, 1350-51, 1511-19 - Amount and the Anti-Deficiency Act
- 31 U.S.C. § 1502 - The Time Statute
- 31 U.S.C. § 1535 - Economy Act.
- 31 U.S.C. § 3302 - Miscellaneous Receipts.
- 32 U.S.C. § 112 - Drug Interdiction and Counter-Drug Activities.
- 42 U.S.C. § 5121, et seq., as amended - Stafford Act.
- 50 U.S.C. § 2311 - Response to Threats of Terrorist Use of Weapons of Mass Destruction
- National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1004 (as amended, Additional Support for Counter-Drug Activities).
- Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8131 (Emergency Response Fund, Defense).
- Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 5802 (Support to International Sporting Competitions - Defense).
- National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1031, (as amended, Authority to Provide Additional Support for Counter-Drug Activities of Mexico).
- National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1033 (Authority to provide Additional Support for Counter-Drug Activities of Peru and Colombia).
- National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 1021 (Extension and Restatement of Authority to Provide Department of Defense Support for Counter-Drug Activities of other Governmental Agencies).
- National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 302, Working Capital Funds.
- National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-248, Title II Operation and Maintenance.

- National Defense Authorization Act for Fiscal Year, 2009, Pub. L. No 110- 417, Subtitle C, Counter Drug Activities.
- Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118.
- National Defense Authorization Act for Fiscal Year 2011, Pub. L. No 111-383.
- DoDD 1100.20 - Support and Services for Eligible Organizations and Activities Outside the Department of Defense, April 12, 2004.
- DoDD 3025.18 - Defense Support of Civil Authorities, September 21, 2012 (C2, March 18, 2018).
- DoDD 5200.31E - DoD Military Working Dog (MWD) Program, August 10, 2011.
- DoDI 3025.20 - Defense Support of Special Events, April 6, 2012.
- DoDI 3025.21 - Defense Support of Civilian Law Enforcement Agencies, February 27, 2013.
- DoD Financial Management Regulation (FMR) 7000.14-R vol. 14 - Administrative Control of Funds and Anti-Deficiency Act Violations
- DoD Financial Management Regulation (FMR) 7000.14-R, vol.12, ch. 6 - Defense Emergency Response Fund.
- Department of the Army Financial Management Guidance for Disaster Relief Operations, February 14, 2014
- CNGBI 3000.04 - National Guard Bureau Domestic Operations, January 24, 2018 (Cancels and incorporates NGR 500-1/ ANGI 10-8101).
- NGR 500-2/ ANGI 10-801 - National Guard Counterdrug Support, August 29, 2008.
- CJCSI 3710.01B, DoD Counterdrug Support, January 26, 2007.
- AR 75-14/OPNAVINST 8027.1G/MCO 8027.1D/AFR 136-8 - Interservice Responsibilities for Explosive Ordinance Disposal, February 14, 1992.
- AR 75-15 - Responsibilities and Procedures for Explosive Ordinance Disposal, February 22, 2005.
- AR 190-12, Military Working Dogs, March 11, 2013.
- AR 700-131, Loan and Lease of Army Material, August 23, 2004.
- AR 725-1, Special Authorization and Procedures for Issues, Sales, and Loans, October 17, 2003.
- SECNAVINST 5820.7C - Cooperation With Civilian Law Enforcement Officials, January 26, 2006.
- OPNAVINST 3440.16D - Navy Defense Support of Civil Authorities Program.
- AFI 10-801 - Defense Support of Civil Authorities (DSCA), September 19, 2012.
- AFI 31-202 - Military Working Dog Program, May 16, 2009.

A. Introduction: Basic Fiscal Law Framework

The principles of Federal appropriations law permeate all Federal activity. Fiscal issues arise frequently during domestic operations, and the failure to understand fiscal nuances may lead to the improper expenditure of funds and sanctions against those responsible for funding violations.

Under the Constitution, Congress raises revenue and appropriates funds for Federal agency operations and programs.[1] Courts interpret this constitutional authority to mean that Executive Branch officials, e.g., commanders and staff members, must find affirmative authority for the

[1] *See* U.S. CONST. art. I, § 7.

obligation and expenditure of appropriated funds.[2] To that end, the Comptroller of the United States at the Government Accountability Office (GAO) developed a three-part "necessary expense" test to ensure that Federal funds are expended properly: 1) the expenditure must have a logical relationship to the appropriation charged; 2) the expenditure must not be prohibited by law; and 3) the expenditure must not be otherwise provided for. Likewise, in many cases, Congress has specifically limited the ability of the Executive Branch to obligate and expend funds, in annual authorization or appropriations acts or in permanent legislation.

Because DoD functions primarily in a support role in domestic operations, most military assistance to civil authorities is provided on a reimbursable basis. In the case of some authorized activities such as counter-drug support, Congress annually appropriates money to DoD for this purpose. For other authorized activities, Congress has established special "no year" accounts (such as the Disaster Relief Fund (DRF) and the Support for International Sporting Competitions (SISC) account) into which DoD can transfer part of its annual appropriation of Operation and Maintenance (O&M) funds. Once O&M funds are transferred into such an account, the funds are available for the same purposes and for the same time period as the appropriation to which transferred. In providing some types of support such as Military Assistance to Safety and Traffic (MAST), DoD has the authority to act directly and expend O&M funds. As a result of these various types of situations, it is important to understand that the purpose, time, and amount rules apply in domestic support operations.

B. Basic Fiscal Controls

Congress imposes fiscal controls through three basic mechanisms, each implemented by one or more statutes. The controls are as follows: (1) obligations and expenditures must be for a proper purpose (the purpose of the funds appears in the language of the appropriation and normally follows the word "for"); (2) obligations must occur within the time limits applicable to the appropriation (e.g., O&M funds are available for obligation for one fiscal year) (remember, "current year funds for current year needs"; and (3) obligations must be within the amounts authorized by Congress (no spending in advance of nor in excess of an appropriation). With that said, there are certain statutory exceptions to these fiscal controls. When dealing in a domestic operations scenario, most of the expenditures are unplanned and emergent. It is the responsibility of the judge advocate to work with the Contracting Officer, or in the case of the National Guard, the United States Property and Fiscal Officer (USPFO), to identify legal courses of action then properly advise the commander.

1. Purpose

Although each fiscal control is important, the "purpose" control is most likely to become an issue during military operations. The Purpose Statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[3]

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[2] *See, e.g.*, U.S. v. MacCollom, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."). An obligation arises when the government incurs a legal liability to pay for its requirements, e.g., supplies, services, or construction. For example, a contract award normally triggers a fiscal obligation. Commands also incur obligations when they obtain goods and services from other U.S. agencies or a host nation. An expenditure is an outlay of funds to satisfy a legal obligation. Both obligations and expenditures are critical fiscal events. *See* 31 U.S.C. § 1501 (2012).

[3] *See* 31 U.S.C. § 1301(a) (2012).

Thus, expenditures must be authorized by law (permanent legislation or annual appropriations act) or be "reasonably related" to the purpose of an appropriation. Judge advocates should ensure, therefore, that an expenditure fits an appropriation (or permanent statutory provision), or is for a purpose that is necessary and incident to the general purpose of an appropriation; the expenditure is not prohibited by law; and the expenditure is not provided for otherwise, i.e., it does not fall within the scope of some other appropriation.

A corollary to the "purpose" control is the prohibition against augmentation.[4] Appropriated funds designated for a general purpose may not be used for another purpose for which Congress has appropriated other funds.[5] If two funds are equally available for a given purpose, an agency may elect to use either, but once the election is made, the agency must continue to charge the same fund.[6] This concept is known legally as the "election doctrine," and the election is binding even after the chosen appropriation is exhausted.[7]

Unless otherwise authorized by law, a Federal unit's O&M funds, cannot be used to provide support to civil authorities. The same holds true for equipment procured with Federal funds. So, the question becomes, "What law or policy authorizes a unit to expend funds or incur expenses when providing support to civil authorities?" The answer is discussed in-depth further in this chapter. Likewise, if a Federal agency accepts funds outside the normal appropriations process, then the agency is augmenting the funds that Congress has appropriated. In addition, retaining those funds violates the Miscellaneous Receipts Statute.[8] When these retained funds are expended, this also violates the Constitutional requirement for an appropriation.[9] These legal principles prohibit unauthorized doD expenditures to further State missions. These principles also prohibit units from accepting resources directly from State and local entities.

There are, however, statutory [and GAO-sanctioned] exceptions to the Miscellaneous Receipts Statute. For example intra- and intergovernmental acquisition authorities allow agencies to retain and use funds from sources other than those appropriated by Congress directly to that particular agency.[10] The Economy Act authorizes a Federal agency to order supplies or services from another Federal agency. For these transactions, the requesting agency must reimburse the performing agency fully for the direct and indirect costs of providing the goods and services.[11] This stage is

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[4] *See* Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); *cf.* 31 U.S.C. § 1532 (2012) (prohibiting transfers from one appropriation to another except as authorized by law).

[5] Secretary of the Navy, 20 Comp. Gen. 272 (1940).

[6] *See* Funding for Army Repair Projects, Comp. Gen. B-272191, Nov. 4, 1997, 97-2 CPD P141.

[7] Honorable Clarence Cannon, B-139510, May 13, 1959, *available at* http://www.gao.gov/products/403911 (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable for used to dredge channel to shipyard).

[8] *See* 31 U.S.C. § 3302(b) (2012); Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992).

[9] *See* Use of Appropriated Funds by Air Force to Provide Support for Child Care Centers for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988); Bureau of Alcohol, Tobacco, and Firearms--Augmentation of Appropriations--Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988).

[10] *See, e.g.*, Economy Act, 31 U.S.C. § 1535 (2012).

[11] *See* Washington Nat'l Airport; Fed. Aviation Admin., B-136318, 57 Comp. Gen. 674 (1978) (depreciation and interest); Obligation of Funds Under Mil. Interdep'tal Purchase Requests, B-196404, 59 Comp. Gen. 563 (1980); s*ee also* DoD 7000.14-R, vol. 11A, ch. 1, para. 010201.J (waiving overhead for transactions within DoD).

also where misunderstandings arise regarding the National Guard in terms of State Active Duty (SAD) missions. That is, when a State performs a SAD mission using Federal equipment (e.g., vehicles and helicopters), the United States Property and Fiscal Officer (USPFO) is required under National Guard Regulation NGR) 500-5 to seek reimbursement from the State.[12] However, the request from the USPFO to the State is not an Economy Act transaction, and therefore the reimbursement authority at 31 USC 1536 is not applicable. Judge advocates may wish to consult agency regulations for order approval requirements.[13]

[12] U.S. DEP'T OF ARMY AND AIR FORCE, NAT'L GUARD, REG. 500-5, NATIONAL GUARD DOMESTIC LAW ENFORCEMENT AND MISSION ASSURANCE OPERATIONS para. 5-5.c (18 Aug. 2010) [hereinafter NGR 500-5].

[13] *See, e.g.*, GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. Subpart 17.5 (Aug 2018) [hereinafter FAR]; Defense Federal Acquisition Regulation Subpart 217.5; Army Federal Acquisition Regulation Supplement Subpart 17.5.

Congress also has authorized certain expenditures for military support to civil law enforcement agencies (CLEAs) in counter-drug operations. Support to CLEAs is reimbursable unless it occurs during normal training and results in DoD receiving a benefit substantially equivalent to that which otherwise would be obtained from routine training or operations.[14] Another statutory provision authorizes operations or training to be conducted for the sole purpose of providing CLEAs with

Practice Scenario: A major storm pummels your base and the surrounding local area. The community has suffered major damage. Also, a lightning strike knocked out power to the town water distribution system. Your commander wants to purchase bottled water for the community with unit O&M funds. What do you do first? What advice would you provide?

Answer: If you are in the active component, your first step should be to contact the Contracting Officer. If you are in the National Guard, you should first contact the USPFO. You will be able to perform quick work with them to develop viable courses of action to present to the commander. Also, the judge advocates and commanders do not have a warrants authorizing them to obligate the Government. However, Contracting Officers and USPFOs do. Yes, it is true that absent specific authority, unit O&M funds are for the operation and maintenance of the unit. Thus, on the surface, it would appear that the commander is about to commit a Purpose Statute violation if funds were expended to purchase bottled water for the local community. However, simply telling the commander "No!" may not be the best answer. Ask yourself, "What is the commander's intent?" It is not to commit a violation of the law. It is to help local citizens get water during the disaster or emergency. Thus, a little more research may help answer the mail. By speaking with the Contracting Officer or USPFO, you may find that emergency procurement of bottled water has already been authorized. Thus, in the instant situation, usage of Federally appropriated funds to procure bottled water would not be a violation of the Purpose Statute. Further, many DoD, and National Guard units maintain water purification systems that are typically used during the conduct of missions overseas. Maybe the commander can deploy those systems. The U.S. Army Corps of Engineers (USACE) also maintains an inventory of already awarded contracts, pre-positioned to support major emergency response missions. There is yet another option. Many States maintain multi-agency response guidance to provide water to local citizens during emergency situations such as this one (*see, e.g.,* Multi-Agency Response Guidance for Emergency Drinking Water Procurement and Distribution," maintained by the California Office of Emergency Services.) In summation, you should first speak with the Contracting Officer or USPFO. After speaking with them, advise the commander of the options available that will help get water to the local community.

specific categories of support.[15] In 10 U.S.C. § 124, Congress assigned DoD the operational mission of detecting and monitoring international drug traffic (a traditional CLEA function). By authorizing DoD support to CLEAs at essentially no cost, Congress has authorized augmentation of CLEA appropriations.

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[14] *See* 10 U.S.C. § 377 (2012).

[15] *See* § 1004 of the 1991 National Defense Authorization Act (FY91 NDAA), as amended (10 U.S.C. § 374, note).

2. Time

The "time" control has two major elements: Appropriations have a definite life span; and appropriations normally must be used for the needs that arise during their period of availability. Most appropriations are available for a finite period. For example, Operation and Maintenance (O&M) funds, the appropriation most prevalent in an operational setting, are available for one year; procurement appropriations are available for three years; and construction funds have a five-year period of availability. If funds are not obligated during their period of availability, they expire and are unavailable for new obligations (e.g., new contracts or changes outside the scope of an existing contract). Expired funds may be used, however, to adjust existing obligations (e.g., to pay for a price increase following an in-scope change to an existing contract). The "bona fide needs rule" provides that funds are available only to satisfy requirements that arise during their period of availability, and will affect which fiscal year appropriation you will use to acquire supplies and services.[16] This is commonly referred to as using current year funds for current needs.

The bona fide need for supplies normally exists when the government actually will be able to use the items. Thus, a command would use a currently available appropriation for computers needed and purchased in the current fiscal year. Conversely, commands may not use current year funds for computers that are not needed until the next fiscal year. Year-end spending for computers that will be delivered within a reasonable time after the new fiscal year begins is proper However, the current year need must be documented. Note that there are "lead-time" and "stock-level" exceptions to the general rule governing purchases of supplies.[17] In any event, "stockpiling" items is prohibited.[18]

Normally, severable services are bona fide needs of the period in which they are performed. Grounds maintenance, custodial services, and vehicle/equipment maintenance are examples of recurring services considered severable. Use current year funds for recurring services performed in the current fiscal year. As an exception however, 10 U.S.C. § 2410a permits funding a contract (or other agreement) for severable services using an appropriation current when the contract is executed, even if some services will be performed in the subsequent fiscal year. Conversely, non-severable services are bona fide needs of the year in which a contract (or other agreement) is executed. Non-severable services are those that contemplate a single undertaking, e.g., studies, reports, overhaul of an engine, painting a building, etc. Fund an entire undertaking with appropriations current when the contract (or agreement) is executed.[19]

The issue in the performance of domestic operations is two-pronged. First, when it comes to major disasters and emergencies, the request for DoD assistance is normally unplanned. Thus, it is likely that no funds with a period of availability were appropriated for this specific purpose. Second,

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[16] *See* 31 U.S.C. § 1502(a) (2012).

[17] *See* DEP'T OF DEFENSE, DEFENSE FINANCE AND ACCOUNTING SERVICE, DFAS-IN Reg. 37-1, DEFENSE FINANCE AND ACCOUNTING SERVICE REG. INDIANAPOLIS 37-1 ch. 8 (Jan. 2010) [hereinafter DFAS-IN 37-1].

[18] *See* Mr. H.V. Higley, B-134277, Dec. 18, 1957, *available at* http://redbook.gao.gov/6/fl0029466.php.

[19] *See* DFAS-IN 37-1, *supra* note 17, ch. 8.

hurricanes normally hit near the end of the fiscal year. In this case, there are two concerns that a judge advocate should remember: 1) Current year funds should be used for current year needs; and 2) Federal Acquisition Regulation (FAR) Part 18, *Emergency Acquisitions*, is a good resource to use.

Practice Scenario: You can barely hear the commander as you make your way up the stairs from the basement. You have never experienced a tornado before, and you are still a bit shaken. The commander is furious that the local Mayor refused some troops and equipment that the commander sent out to assist in the tornado clean-up efforts downtown. As a result, the commander wants to bill the Mayor for the fuel used in the vehicles to get to and from downtown. He also wants to send a bill for the food purchased for the local community. The food was on the vehicles carrying the Soldiers. The intent was to for the Soldiers to arrive downtown, participate in the clean-up, and give the food away to local citizens. What fiscal issues, if any, do you see?

Answer: Recall what you learned in the DSCA policy, DoDD 3025.18. "In response to a request for assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DoD officials [,including commanders,] may provide an immediate response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters." Here, there is no indication that the Mayor requested assistance from the commander. Thus, the commander had no authority to send troops and equipment downtown to assist in the tornado clean-up efforts. Without the proper authority, the commander may not seek reimbursement from the Mayor. Next, it appears that the commander may have purchased food in violation of the Purpose Statute. To make this determination, perform the 3-prong "Necessary Expense Test." First, the procurement must be necessary and incident to the appropriation. Second, the procurement must not be prohibited by law. Third, the procurement must not be otherwise provided for. Here, the first prong of the test cannot be satisfied because using O&M funds to procure food for the local community is not logically related to expending funds for the normal, day-to-day, operation and maintenance of the unit. However, this violation does not automatically mean that the commander has committed a violation of the anti-deficiency act (ADA). There is a 2-prong correction test that must be performed. To avoid a violation of the ADA in this instance, 1) the proper funds must have been available in the proper account, in the right amount, at the time of the expenditure, and 2) the proper funds must be available in the proper account, in the right amount, at the time of the correction. Here, the first prong of the correction test cannot be satisfied because, in general, commanders do not have accounts set up for the purposes of procuring food to give away to the local community. As a result, the commander may have committed a violation of the Purpose Statute and the ADA.

3. Amount

The Anti-Deficiency Act (ADA) prohibits any government officer or employee from making or authorizing an expenditure or obligation in advance of or in excess of an appropriation,[20] making or authorizing an expenditure or incurring an obligation in excess of a formal subdivision of funds, or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a);[21] or from accepting voluntary services, unless authorized by law.[22]

[20] *See* 31 U.S.C. § 1341 (2012).

[21] *See* 31 U.S.C. § 1517 (2012).

[22] *See* 31 U.S.C. § 1342 (2012).

Commanders must ensure that fund obligations and expenditures do not exceed amounts provided by higher headquarters. Although over-obligation of an installation O&M account normally does not trigger a reportable ADA violation, an over-obligation locally may lead to a breach of a formal O&M subdivision at the Major Command level.[23]

Commanders must investigate suspected violations to establish responsibility and discipline violators. Regulations require "flash reporting" of possible ADA violations.[24] If a violation is confirmed, the command must identify the cause of the violation as well as the senior responsible individual. Investigators file reports through finance channels to the office of the Assistant Secretary of the Army, Financial Management & Comptroller (ASA (FM&C)). Further reporting through Office of the Secretary of Defense (OSD), Office of Management and Budget (OMB), Government Accountability Office (GAO), President, and Congress is required if ASA (FM&C) concurs with a finding of a violation.

By regulation, commanders must impose administrative sanctions on responsible individuals. Criminal action also may be taken if a violation was knowing and willful.[25] In previous cases, lawyers, commanders, contracting officers, and resource managers all have been found to be responsible for violations. Common problems that have triggered potential ADA violations include the following:

- Without statutory authority, obligating (e.g., awarding a contract) current year funds for the bona fide needs of a subsequent fiscal year. This may occur when activities stockpile supply items in excess of those required to maintain normal inventory levels.
- Exceeding a statutory limit (e.g., funding a contingency construction project in excess of $2M with O&M; acquiring investment items in excess of an aggregate $250K with O&M funds).
- Obligating funds for purposes prohibited by annual or permanent legislation.
- Obligating funds for a purpose for which Congress has not appropriated funds (e.g., personal expenses where there is no regulatory or case law support for the purchase or where Congress has placed a funding prohibition).

C. Military Assistance to Civil Authorities

The Federal military's primary mission is to fight and win the nation's wars. From time to time, the DoD will provide support to civil authorities while the civil authorities retain primary responsibility for and control over the incident. The starting point for all DoD support to civil authorities is DoD Directive (DoDD) 3025.18, *Defense Support of Civil Authorities (DSCA)*. When speaking of the National Guard, it is important to separate National Guard Civil Support (NGCS) from DSCA. NGCS is, "[s]upport provided by the National Guard while in a State Active Duty status or Title 32 status to civil authorities for domestic emergencies, designated law enforcement, and other activities."[26] In contrast, DSCA is, "[s]upport provided by U.S. Federal military forces, DoD

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[23] *See* 31 U.S.C. § 1514(a) (2012) (requiring agencies to subdivide and control appropriations by establishing administrative subdivisions); 31 U.S.C. § 1517 (2013); DFAS-IN 37-1, *supra* note 17, ch. 4.

[24] *See* DEPARTMENT OF DEFENSE, DoD 7000.14-R, FINANCIAL MANAGEMENT REGULATION vol. 14 (May 2015) [hereinafter DoD 7000.14-R]; DFAS-IN 37-1, *supra* note 17, ch. 4.

[25] 31 U.S.C. §§ 1349 -1350 (2012).

[26] CHIEF, NAT'L GUARD BUREAU, INST. 3000.04, NATIONAL GUARD BUREAU DOMESTIC OPERATIONS GL-2 (24 Jan. 2018) [hereinafter CNGBI 3000.04].

civilians, DoD contract personnel, DoD Component assets, and National Guard forces [but, for the purposes of this definition, only in their 32 U.S.C. § 502(f)(2) status] . . . in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events."[27] The National Guard only performs DSCA when supporting a mission that has been assigned to the DoD by the Federal Emergency Management Agency (FEMA), and when performing this mission, the National Guard personnel are in their 32 U.S.C. 502(f)(2) status.[28] Otherwise, when providing civil support, the National Guard is performing NGCS where DoDD 3025.18 does not apply.

The Posse Comitatus Act (18 U.S.C. § 1385) provides limitations on the types of support that the Federal military may provide to civil authorities. The following are areas of common allowable military support and their governing policies and authorities:[29]

- Civil disasters and emergencies. Stafford Act (42 U.S.C. §§ 5121, *et seq*.), DoDD 3025.18
- Civil disturbances; Insurrection Act. 10 U.S.C. §§ 251-255, DoDI 3025.21
- Support to civilian law enforcement:
    - Sharing information. 10 U.S.C. § 271, DoDI 3025.21
    - Loan of equipment and use of facilities. 10 U.S.C. § 272, DoDI 3025.21
    - Training and provision of expert advice. 10 U.S.C. § 273, DoDI 3025.21
    - Maintenance and operation of equipment. 10 U.S.C. § 274, DoDI 3025.21
- Counterdrug support:
    - Detection and monitoring. 10 U.S.C. § 124
    - Training and other support. § 1004, Fiscal Year (FY) 91 NDAA, as amended by § 1021, FY 02, NDAA; CJCSI 3710.01B
- Innovative Readiness Training. 10 U.S.C. § 2012, DoDD 1100.20
- Department of Defense Support to Special Events to include support to International Supporting Events. 10 U.S.C. § 2564(a)-(c), DoDI 3025.20
- Support to Private Organizations. 10 U.S.C. § 2554 (Boy Scouts of America), 10 U.S.C. § 2555 (Girl Scouts of America), 10 U.S.C. § 2551 (National Veterans' Organizations), 10 U.S.C. § 2552 (American Red Cross), 10 U.S.C. § 2558 (National Military Associations), and 10 U.S.C. § 2556 (Homeless)
- Loan or Lease of Non-Excess Property of a Military Department. 10 U.S.C. § 2667 (to anyone), Army Regulation (AR) 700-131, Loan and Lease of Army Material, and 31 U.S.C. § 1535 (Agency Agreements)
- Military Assistance to Safety and Traffic (MAST). DoDD 3025.1-M
- Explosive Ordinance Disposal (EOD): AR 75-14, AR 75-15

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[27] U.S. DEP'T. OF DEF., DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES 19 (29 Dec. 2010) (C2, 19 Mar. 2018) [hereinafter DoDD 3025.18].

[28] U.S. DEP'T. OF DEF., DIR. 3025.22, THE USE OF THE NATIONAL GUARD FOR DEFENSE SUPPORT OF CIVIL AUTHORITIES paras. 3.d, and 3.e (26 Jul. 2013) (C2, 15 May 2018) [hereinafter DoDD 3025.22]; *see also* 32 U.S.C. 502(f)(2).

[29] *See generally* U.S. DEP'T. OF DEF., INS'T. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (27 Feb. 2013) [hereinafter DoDD 3025.21].

- Military Working Dogs. DoDD 5200.31E, AR 190-21
- Miscellaneous support:
    - Sensitive support. DoDD S-5210-36
    - Law enforcement detachments. 10 U.S.C. § 379
    - Emergencies involving chemical or biological weapons. 10 U.S.C. § 382

D. DoDD 3025.18

This Directive governs DoD military assistance provided to civil authorities within the 50 States, District of Columbia, Puerto Rico, and U.S. possessions and territories. This policy provides six criteria against which all requests for support shall be evaluated. Commanders at all levels should use these criteria when providing a recommendation up the chain of command. These criteria are commonly known as the CARRLL factors:

- **C**ost - who pays and the impact on DoD budget.
- **A**ppropriateness - whether conducting the requested mission is in the interest of DoD.
- **R**eadiness - impact on DoD's ability to perform its primary mission.
- **R**isk - safety of DoD forces.
- **L**egality - compliance with the law.
- **L**ethality - potential use of lethal force by or against DoD forces.

Per DoDD 3025.18, The Secretary of Defense (SecDef) is the approval authority for DoD assistance in civil disturbances, responses to chemical, biological, radiological, and nuclear events, defense assistance to civilian law enforcement agencies (except as authorized by DoDI 3025.21 as discussed below), and support that has the potential for lethality.

When Combatant Command-assigned forces are to be used, there must be coordination with the Chairman of the Joint Chiefs of Staff (CJCS). SecDef approval is not required when immediate response authority of the local commander under DODD 3025.18 is used, but a reassessment of the appropriateness of the use of this authority is required within the first 72 hours of a response.[30]

As noted above, DoDD 3025.18 is the DSCA policy for the DoD. Distinction must be made when considering the usage of the National Guard to support a DSCA mission assigned to the DoD by FEMA. At this juncture, DoDD 3025.22 must be reviewed because this policy and DoDD 3025.18 become applicable to members of the National Guard but only when serving in their 32 US.C. § 502(f)(2) status.[31]

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[30] DoDD 3025.21, *supra* note 27 (stating that "[t]he DoD official directing a response under immediate response authority shall reassess whether there remains a necessity for the Department of Defense to respond under this authority as soon as practicable but, if immediate response activities have not yet ended, not later than 72 hours after the request for assistance was received.").

[31] DoDD 3025.22, *supra* note 28.

E. Disaster and Emergency Relief[32]

The Stafford Act provides four means by which the Federal government may become involved in a disaster and relief effort: the President may declare the area a major disaster[33]; the President may declare the area an emergency[34]; the President may send in DoD assets on an emergency basis to "preserve life and property";[35] and the President may send in Federal assets where an emergency occurs in an area over which the Federal government exercises primary responsibility by virtue of the Constitution or Federal statute.[36]

The Department of Homeland Security (DHS), through FEMA, directs and coordinates the Federal response on behalf of the President. DHS has prepared the National Response Framework (NRF), which defines fifteen Emergency Support Functions (ESFs) for which certain Federal agencies have either a primary or supporting role. The Corps of Engineers is the primary agency for ESF #3, Public Works and Engineering. DoD is a supporting agency for all others.

FEMA appoints a Federal Coordinating Officer (FCO), typically the senior FEMA official on-scene. Because of the likelihood of DoD involvement, a Defense Coordinating Officer (DCO) is assigned to the FCO. The DCO, an O-6 or above, is identified from a Training Support Brigade (TSB). Training Support Brigades are located throughout the continental United States (CONUS). Training Support Brigade commanders are dual-hatted as DCOs. The DCO will be the FCO's single point of contact for DoD support. The FCO issues Mission Assignments, defining the task and maximum reimbursement amount, to the Federal agencies responding.

The Department of Defense is reimbursed by FEMA for the incremental costs of providing support pursuant to the DCO's tasking in response to the FEMA mission assignment. Incremental expenses are reimbursed, or those expenses incurred by the agency providing the military assistance that—but for the request for assistance—would not otherwise have incurred these expenses. The Department of Defense Financial Management Regulation (FMR) 7000.14-R, vol. 12, ch. 6, para. 060204, lists the following costs as eligible for reimbursement:

- Overtime, travel, and per diem of permanent DoD civilian personnel
- Wages, travel, and per diem of temporary DoD civilian personnel assigned solely to performance of services directed by the Executive Agent
- Travel and per diem of active duty military, and costs of reserve component personnel called to active duty by a Federal official who is assigned solely to the performance of services directed by the Executive Agent

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[32] *See generally* Disaster Relief Act Amendments of 1974 (Stafford Act), Pub. L. No. 93-288, 88 Stat. 143 (1974); DoDD 3025.18, *supra* note 27; U.S. DEP'T OF DEFENSE, MAN. DOD 3025.1-M, DOD MANUAL FOR CIVIL EMERGENCIES (Jun. 1994) [hereinafter DOD 3025.1-M]; CNGBI 3000.04, *supra* note 26; CHIEF OF NAVAL OPERATIONS, INSTR. 3440.16D; NAVY DEFENSE SUPPORT OF CIVIL AUTHORITIES PROGRAM (29 Jun 2009); U.S. DEP'T OF AIR FORCE, INSTR. 10-801, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (19 Sept. 2012) [hereinafter AFI 10-801].

[33] *See* 42 U.S.C. § 5170 (2012).

[34] *See* 42 U.S.C. § 5191 (2012) (same criteria as for a major disaster, except it also requires that the Governor define the type and amount of Federal aid required, and total Federal assistance may not exceed $5 million).

[35] *See* 42 U.S.C. § 5170b(c) (2012).

[36] *See* 42 U.S.C. § 5191(b) (2012).

- Cost of work, services, and material procured under contract for the purposes of providing assistance directed by the Executive Agent
- Cost of materials, equipment and supplies (including transportation, repair and maintenance) from regular stocks used in providing directed assistance
- All costs incurred which are paid from trust, revolving, or other funds, and whose reimbursement the law requires
- Other costs submitted with written justification or otherwise agreed to in writing by the Joint Director of Military Support or appropriate Service representative

Requests for reimbursement may be made through use of the SF-1080, Voucher for Transfers between Appropriations or Funds. It is important to note that Federal agencies which exceed the reimbursement amount, or execute tasks not within the Mission Assignment, may not be reimbursed.

For the DoD response, the Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD(HD&ASA)) is the DoD lead for disaster relief operations. As such, they are the approval authority for all such support, unless it involves Combatant Command-assigned forces. The Joint Director of Military Support (JDOMS) is the ASD(HD&ASA) agent. The JDOMS coordinates and monitors the DoD effort. The JDOMS normally produces the Execute Order and obtains the SECDEF's signature for a given mission. USNORTHCOM (CONUS, Alaska, Puerto Rico, and the Virgin Islands) and USPACOM (Hawaii, and Pacific possessions and territories) are responsible for developing disaster response plans and for the execution of those plans needed for a response. They may form a Joint Task Force for this purpose.

1. Immediate Response Authority (IRA)

Immediate response authority permits local military commanders to act immediately to save lives, prevent human suffering, and mitigate great property damage in imminently serious conditions when time does not permit approval from higher headquarters. Types of support authorized include rescue, evacuation, and emergency treatment of casualties; emergency restoration of essential public services; emergency removal of debris and explosive ordnance; and recovery and disposal of the dead. This type of support is provided on a reimbursable basis, but assistance should not be denied because the requester is unable or unwilling to commit to reimbursement.[37]

Immediate response authority is very limited and should be invoked only for bona fide emergencies. Contemporaneous coordination with JDOMS and ASD(HD&ASA) should always occur in these scenarios, and in any other case potentially involving this type of assistance to civil authorities. The need for immediate response should be reassessed not less than 72 hours after the civil authority submitted the request for assistance.[38] To obtain reimbursement for costs incurred as a result of an immediate response, DoD should request reimbursement from the State or local government to whom assistance was provided. In some cases, the State and local governments may not have the available funding to reimburse. With that said, all is not lost. "Ongoing [S]tate and local response activity may be reimbursed if a declaration is issued, including for evacuations, sheltering and other

[37] DoDD 3025.18, *supra* note 27, at para. 4.i.6.

[38] *Id.* at para. 4.i.5.

emergency protective measures."[39] Should the State have funding available to reimburse the DoD, funding is not send directly to a unit account. Instead, "States must reimburse the United States Treasury in accordance with section 9701 [Fees and Charges for Government Services and Things of Value] of [Title 31 of the United States Code]."[40] May the support be provided on a non-reimbursable basis? Yes, but it must be authorized by law, like under the Stafford Act for instance, and approved by the appropriate DoD official, such as SecDef or the President.[41] Even if the civil authority was unaware of this rule, and paid the money directly to the unit, Federal military personnel must still comply with the rules governing "money for the Government" more commonly referred to as the Miscellaneous Receipts Statute, 31 USC 3302(b). The same applies to mutual aid agreements. (*see* DoDM 3025.01 Vol 2; DoDI 6055.06 Encl 2; and 42 USC Section 1855(d))

2. Emergency Response Fund ERF

The ERF was created in the FY90 National Defense Appropriation Act, Pub. L. 101-165, in response to Hurricane Hugo. Under this provision, "the Fund is available for providing reimbursement to currently applicable appropriations of the [DoD] for supplies and services provided in anticipation of requests from other Federal Departments and agencies and State and local governments for assistance on a reimbursable basis to respond to natural and manmade disasters."

In FY94, § 8131 of the National Defense Appropriation Act, Pub. L. No. 103-139, amended the FY90 provision giving DoD the ability to request reimbursement from the ERF for its own disaster response efforts. Specifically, the language provides, "the Fund may be used, in addition to other funds available to DoD for such purposes, for expenses of DoD which are incurred in supplying supplies and services furnished in response to natural or manmade disasters."

Prior to November 2003, if the State and local government were unable or unwilling to reimburse the DoD, the command would forward a request for reimbursement to the ERF.[42] This fund was available for providing reimbursement to currently applicable appropriations of DoD for supplies and services provided in anticipation of requests from other Federal departments and agencies and from State and local governments for assistance on a reimbursable basis to respond to natural or manmade disasters.

Since November 2003, the ERF has been closed out.[43] The Act that closed out ERF provided that, effective November 1, 2003, adjustments to obligations that before such date would have been properly chargeable to the ERF shall be charged to current appropriations available for the same purpose.[44] Now, it may be possible to seek reimbursement through FEMA. In some instances, FEMA has provided reimbursement to the DoD for IRA assistance by "ratifying" the DoD action after the fact. Such ratification, however, is done on a case-by-case basis. What a commander may

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[39] Federal EMERGENCY MANAGEMENT AGENCY, DISASTER OPERATIONS LEGAL REFERENCE VER. 3.0 1-3 (20 Jan. 2017) [hereinafter Disaster Ops Legal Reference 3.0].

[40] DoDD 3025.18, *supra* note 27, at para. 4.d.

[41] *Id.*

[42] *See* DoD 7000.14-R, *supra* note 24, ch. 6.

[43] Closed out in § 1105 of the FY04 Emergency Supplemental Appropriations Act.

[44] *Id.*

find is the support previously provided under the commanders immediate response authority rolled under a mission assignment from FEMA for which reimbursement is available via the disaster relief fund in accordance with the Stafford Act. Another option is the usage of DoD resources to perform emergency work "during the immediate aftermath of an incident which may ultimately qualify for assistance under [the Stafford Act]."[45] The Governor may request the President to direct SecDef to use DoD assets to perform emergency work for up to 10 days before the formal declaration of a major disaster or emergency.[46] Thus, even though the ERF no longer exists, there are multiple ways for Federal military units to be properly reimbursed for support to civil authorities legally provided before a declaration or mission assignment.

F. Civil Disturbance Operations (CDOs)[47]

The maintenance of law and order is primarily vested in State and local officials. Involvement of military forces will only be appropriate in extraordinary circumstances. Use of the military under these authorities to conduct law enforcement activities is a specific exception to the Posse Comitatus Act (PCA). The probable order of employment of forces in response to a certain situation will be (1) local and State police; (2) National Guard in their SAD status; (3) Federal civil law enforcement officials; and (4) Federal military troops, to include, if necessary, National Guard personnel called to active Federal service.

The insurrection statutes permit the President to use the Federal armed forces domestically under certain circumstances. The Attorney General coordinates all Federal Government activities relating to civil disturbances. If the President decides to respond to the situation, he must first issue a proclamation to the insurgents, prepared by the Attorney General, directing them to disperse within a limited time.[48] At the end of that time period, the President may issue an Executive Order directing the use of Federal armed forces. The Attorney General appoints a Senior Civilian Representative of the Attorney General (SCRAG) as his action agent.

For the DoD response, SecDef has reserved the authority to approve support in response to civil disturbances.[49] Although the civilian authorities have the primary responsibility for civil disturbances, Federal military forces shall remain under Federal military command and control at all times. Federal military forces shall not be used for civil disturbances unless specifically directed by the President (pursuant to 10 U.S.C. §§ 251-255), except for emergency employment of Federal military forces in the following limited circumstances:

- To prevent the loss of life or wanton destruction of property or to restore governmental functioning, in cases of civil disturbances, if the duly constituted authority local authorities are unable to control the situation and circumstances preclude obtaining prior Presidential authorization.

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[45] 42 U.S.C. § 5170b c.1 (2012) [hereinafter Emergency Work].

[46] *Id.*

[47] U.S. CONST. art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence"; Insurrections, 10 U.S.C. §§ 251–255 (2012); DODI 3025.21, *supra* note 29.

[48] *See* 10 U.S.C. § 334 (2012).

[49] *See* DoDD 3025.18, *supra* note 27, para. 4.j.

- When duly constituted State or local authorities are unable or decline to provide adequate protection for Federal property or functions.

Although employment under these authorities permits direct enforcement of the law by military forces, the military's role in law enforcement should be minimized as much as possible. DoD's role is to support the civilian authorities, not replace them. Once the President directs the employment of Federal military forces, the DoD may use O&M funds to cover the cost.

G. Support to Civilian Law Enforcement[50]

Although certain activities could be considered law enforcement type activities, they do not violate the PCA because they do not involve use of Federal military personnel to provide direct assistance. With proper approval, DoD activities may make equipment (including associated supplies and spare parts) or facilities available to Federal, State, or local law enforcement officials for law enforcement purposes.

Under 10 U.S.C. § 274(a), SecDef may make DoD personnel available for the maintenance of equipment provided, to include equipment provided pursuant to 10 U.S.C. § 272. Under 10 U.S.C. § 274(b)(1), SecDef may, upon a request from the head of a Federal law enforcement agency, make DoD personnel available to operate equipment with respect to criminal violations of the Controlled Substances Act, the Immigration and Naturalization Act, the Tariff Act of 1930, the Maritime Drug Law Enforcement Act, and any law, foreign or domestic, prohibiting terrorist activities; a foreign or domestic counter-terrorism operation; or a rendition of a suspected terrorist from a foreign country to the United States to stand trial.

Under 10 U.S.C. § 274(b)(2), DoD personnel made available to a civilian law enforcement agency *may* operate equipment for the following purposes:

- Detection, monitoring, and communication of the movement of air and sea traffic
- Detection, monitoring, and communication of the movement of surface traffic outside of the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside the boundary
- Aerial reconnaissance
- Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with and directing said vehicle to a specific location
- Operating equipment to facilitate communications
- Subject to joint approval by SecDef and Attorney General:
    - Transportation of civilian law enforcement personnel along with any other civilian or military personnel who are supporting, or conducting, a joint operation with civilian law enforcement personnel
    - Operation of a base of operations
    - Transportation of suspected terrorists from foreign countries to the U.S. for trial (so

[50] *See generally* 10 U.S.C. §§ 272–274, 277; DODI 3025.21, *supra* note 29; CNGBI 3000.04, *supra* note 32; U.S. DEP'T OF NAVY, SEC'Y NAVY INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, para. 8 (26 Jan. 2006) [hereinafter SECNAVINST 5820.7C]; U.S. DEP'T OF ARMY, REG. 700-131, LOAN, LEASE, AND DONATION OF ARMY MATERIEL (24 Aug. 2004) [hereinafter AR 700-131]; AFI 10-801, *supra* note 32.

long as the requesting Federal law enforcement agency provides all security for such transportation and maintains custody over the suspect through the duration of the transportation).

1. Economy Act

Pursuant to 10 U.S.C. § 277, the support provided between Federal agencies under these authorities is reimbursable under the Economy Act, unless the support is provided in the normal course of training or operations, or the support results in a substantially equivalent training value. Under 31 U.S.C. § 1535, an Economy Act order may be placed by the head of an agency (delegable down to a warranted contracting officer) with another agency. The order may be a Military Interdepartmental Purchase Request (MIPR), a Memorandum of Understanding (MOU) for support, or an interagency agreement. Form is not the key—content is the critical matter. The definition of "agency" includes military departments.[51] The content defines the type of support to be rendered and the reimbursement to be provided.

2. Miscellaneous Receipts

The Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b), requires that any dollars received by an agency must go into the general treasury, without any deduction for any charges or claims, unless there is a positive legal authority, like the Economy Act, that allows an agency to retain the money. Currently, the Economy Act does not apply to National Guard in the performance of SAD missions. Further, although the language in 10 U.S.C. § 272 *et seq.* authorizes support to State and local civilian law enforcement agencies, the reimbursement provision in 10 U.S.C. § 277 provides no mechanism for reimbursement except for support between Federal agencies. If commanders loan equipment to State or local CLEAs under this authority, any reimbursement obtained would go to the U.S. Treasury as a Miscellaneous Receipt. It is important to note that reimbursement is required, unless the law allows a waiver. The only way to avoid this problem is for the commander to lease the equipment under 10 U.S.C. § 2667. The Leasing Statute provides a mechanism for reimbursement. If a loan is authorized, there must be no adverse impact on national security or military preparedness. (Specific details regarding the Leasing Statute are in Section L of this Chapter)

The Secretary of the Army has statutory authority to approve loans, leases, and donations of Army material. The Chief, Integrated Logistics Support Division (DALO-SMP) is responsible for acting on loan and lease request and loan and lease extensions forwarded for Headquarters, Department of the Army (HQDA) review by major Army Commands (MACOMs). AR 700-131 contains detailed procedures on the loan or transfer of Army property. For the Navy and Marine Corps, the Assistant Secretary of the Navy (SECNAV) (Manpower and Reserve Affairs) may approve requests for non-lethal equipment for more than sixty days. All other requests may be approved as specified in SECNAVINST 5820.7C. For the Air Force, AFI 10-801 states that in circumstances not immediately threatening to human life, causing human suffering, or threatening great property damage, requests for equipment or facilities for Federal, State, or local civilian officials (including include law enforcement) should be addressed in accordance with AFI 23-119 and AFI 32-9003. For the National Guard (NG), the loan of weapons, combat/tactical

[51] FAR, *supra* note 13, at pt. 2.101.

vehicles, vessels and aircraft require approval of the service secretary or their designee. Requests for loan/lease of NG equipment, which require HQDA or HQAF approval, will be reviewed by National Guard Bureau (NGB) (NGR 500-1/ANGI 10-8101); however, it must be remembered that SecDef is the approval authority for all DoD support to counterterrorism operations, emergency support to civil disturbances, and law enforcement agencies that will result in a planned event with the potential for confrontation with named individuals/groups or use of lethal force.

3. Excess Property

In addition to loan/lease authority, The National Defense Authorization Act of 1997 added a new section to Title 10. Section 2576a, "Excess Personal Property; Sale or Donation for law enforcement activities," permits DoD to provide excess personal property suitable for use in counter-drug and counter-terrorism activities to Federal and State agencies. The program is commonly referred to as the "1033 Program" because it fell under Section 1033 of the 1997 NDAA (PL 104-181). 10 U.S.C. § 2576 authorizes the surplus sale of military equipment to State and local law enforcement and firefighting agencies. 10 U.S.C. § 2576(a) authorizes the surplus sale of military equipment to Federal and State agencies suitable for carrying out law enforcement, firefighting, homeland security, and emergency management services. The State or local agency must initiate a request for the equipment. The program is managed by the Defense Logistics Agency Law Enforcement Support Office at Ft. Belvoir, VA. 10 U.S.C. § 2576a and § 2576b provide additional mechanisms for the transfer of excess property (without sale) to law enforcement and firefighting agencies.

4. Expert Advice and Training[52]

DoD components are authorized to give expert advice and/or training to Federal, State, and local law enforcement in certain cases. Overarching policy regarding the provision of this assistance is found at 32 C.F.R. § 182, and more specific policy is found in DoDI 3025.21.

DoD components may provide, subject to approval limitations in DoDI 3025.21, expert advice to Federal, State, or local law enforcement officials in accordance with 10 U.S.C. § 373. A specific example of this type of support is military working dog team support to civilian law enforcement. The dogs have been analogized to equipment, and their handlers to providers of expert advice.[53] Direct assistance by DoD personnel in activities that are fundamentally civilian law enforcement operations is not permitted, except as specifically authorized by DoDI 3025.21.[54]

DoD components may also provide, subject to approval limitations in DoDI 3025.21, training to Federal, State, and local civilian law enforcement officials. This does not permit large-scale or

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[52] *See generally* 10 U.S.C. §§ 273, 275, 277 (2012); 50 U.S.C. § 2316; DODI 3025.21, *supra* note 29, Encl. 5; SECNAVINST 5820.7C, *supra* note 50, paras. 9.a.(4)–(5); AFI 10-801, *supra* note 33.

[53] *See generally* U.S. DEP'T OF DEFENSE, DIR. 5200.31E, DOD MILITARY WORKING DOG (MWD) PROGRAM, (10 Aug. 2011) [hereinafter DODD 5200.31E]; U.S. DEP'T OF AIR FORCE, AFI 31-121, MILITARY WORKING DOG PROGRAM (17 Oct. 2012), 32 C.F.R. §182 (2017).

[54] Specific examples where direct assistance is permitted include the case of the execution of a quarantine under 42 U.S.C. § 97, when such actions are necessary to prevent significant loss of life and wanton destruction of property and are necessary to restoring governmental function, and when action is needed to protect national parks and other certain Federal lands, among many other instances. DODI 3025.21, *supra* note 29, Encl. 3.

elaborate DoD training, and does not permit regular or direct involvement of DoD personnel in activities that are fundamentally civilian law enforcement operations, except as otherwise authorized by DoDI 3025.21 (see footnote 41 *infra*).

Training can only be given when the use of non-DoD personnel would be unfeasible or impractical from a cost or time perspective, and when it would not otherwise compromise military preparedness of the United States. It may not involve DoD personnel participating in a law enforcement operation, unless specifically authorized under DoDI 3025.21. Training assistance must be provided at a location where there is not a reasonable likelihood of a confrontation between law enforcement personnel and civilians, unless otherwise authorized by law.

The provision of "advanced military training" is not allowed under DoDI 3025.21. Advanced military training includes advanced marksmanship training, sniper training, military operations in urban terrain (MOUT), advanced MOUT, close quarters battle/close quarters combat, and similar training. SECDEF policy on advanced military training in this context is discussed further in Deputy Secretary of Defense Memorandum "DoD Training Support to U.S. Civilian Law Enforcement Agencies," June 29, 1996, and Deputy Secretary of Defense Memorandum "Request for Exception to Policy," November 12, 1996 (both available from the Office of the Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD (HD & ASA), room 3D247, 2600 Defense Pentagon, Washington D.C. 20301).

The Secretary of Defense is the approval authority for requests for direct assistance in support of civilian law enforcement agencies, including those responding with assets with the potential for lethality, except for the use of emergency authority as provided for under DoDD 3025.18 or under one of the exceptions provided in DoDI 3025.21. Requests that involve Defense Intelligence and Counterintelligence entities are subject to approval by the Secretary of Defense and the guidance in DoDD 5240.01, DoD Intelligence Activities and DoD 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components That Affect U.S. Persons (see Chapter 9 *infra* for further guidance).

Otherwise, the Secretaries of the Military Departments and the Directors of the Defense Agencies may, in coordination with the ASD(HD&ASA), approve the use of DoD personnel:

- To provide training or expert advice in accordance with DoDI 3025.21
- For equipment maintenance in accordance with the specific provisions of enclosure 3 of DoDI 3025.21
- To monitor and communicate the movement of air and sea traffic in accordance with the specific provisions of enclosure 3 of DoDI 3025.21

All other requests, including those in which subordinate authorities recommend disapproval, shall be submitted promptly to the ASD(HD&ASA) for consideration by the Secretary of Defense, as appropriate.[55]

Support provided under these authorities to a Federal agency is reimbursable under the Economy Act, unless the support is provided in the normal course of training or operations, or the support

[55] DoDI 3025.21, *supra* note 29.

results in a substantially equivalent training value. It is important to note that pursuant to 31 U.S.C. § 6505, under the "Intergovernmental Cooperation Act," Federal agencies are authorized to provide to State and local governments "statistical and other studies and compilations, development projects, technical tests and evaluations, technical information, training activities, surveys, reports, and documents and other similar services that an executive agent is especially competent and authorized by law to perform."

31 U.S.C. § 6505 is very specific and does not include the type of operational assistance that State and local governments request from DoD. Two common requests DoD may encounter are for the provision of "technical information and training activities." OMB Circular A-97 defines these two as follows: 1) training of the type which the Federal agency is authorized by law to conduct for Federal personnel and others or which is similar to such training; and 2) technical information, data processing, communications, and personnel management systems services which the Federal agency normally provides for itself or others under existing authorities.

A reimbursement mechanism is provided under 31 U.S.C. § 6505 between the Federal and State/local level. Reimbursements received by the Federal agency for the costs of services provided will be deposited to the credit of the principal appropriation or other account from which the costs of providing the services have been paid or are to be charged. It is important to remember that these reimbursed dollars do not go into the Miscellaneous Receipts account.

5. Sharing Information[56]

Any information collected in the normal course of military operations may be provided to appropriate civilian law enforcement agencies. Collection must be compatible with military training and planning. To the maximum extent practicable, the needs of civilian law enforcement officials shall be taken into account in planning and execution of military training and operations.[57]

H. Counterdrug Support[58]

Counterdrug support operations have become an important activity within DoD. All DoD support is coordinated through the Office of the Defense Coordinator for Drug Enforcement Policy and Support (DEP&S), which is located within the Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD (SO/LIC)). DoD support to counterdrug operations is funded through annual DoD appropriations unlike other support provided by DoD, which must be reimbursed by the agency receiving support. The Office of the Defense Coordinator for Drug Enforcement Policy and Support channels this appropriated money to the providers of counterdrug support.

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[56] 10 U.S.C. § 371 (2012); DoDI 3025.21, *supra* note 34, Encl. 7; SECNAVINST 5820.7C, *supra* note 50, para. 7; AFI 10-801, *supra* note 32, Attachment 1, ch. 3.

[57] 10 U.S.C. § 371(b) (2012).

[58] 10 U.S.C. § 124 (2012); 32 U.S.C. § 112 (2012); Sec. 1004, FY91 NDAA as amended by sec. 1021, FY02 NDAA; sec. 1031, FY97 NDAA; sec. 1033, FY98 NDAA; OFFICE OF THE DEFENSE COORDINATOR FOR DRUG ENFORCEMENT POLICY AND SUPPORT, POLICY OF 26 JAN. 1995, PRIORITIES, POLICIES, AND PROCEDURES FOR DEPARTMENT OF DEFENSE COUNTERDRUG SUPPORT TO DOMESTIC DRUG LAW ENFORCEMENT AGENCIES (26 Jan. 1995); CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 3710.01B, DOD COUNTERDRUG SUPPORT (26 Jan. 2007) [hereinafter CJCSI 3710.01B]; NATIONAL GUARD BUREAU, REG. 500-2/ANGI 10-801, NATIONAL GUARD COUNTERDRUG SUPPORT (28 Aug. 2008).

1. Detection and Monitoring

DoD is the lead Federal agency for detection and monitoring (D&M) of aerial and maritime transit of illegal drugs into the United States.[59] D&M is therefore a DoD mission. Although a military mission, D&M is to be carried out in support of Federal, State, and local law enforcement authorities. Note that the statute does not extend to D&M missions covering land transit (i.e., the Mexican border). Interception of vessels or aircraft is permissible outside the land area of the United States to identify and direct the vessel or aircraft to a location designated by the supported civilian authorities. Detection and monitoring missions involve airborne (Airborne Warning and Control Systems (AWACS), aerostats), seaborne (primarily U.S. Navy (USN) vessels), and land-based radar (to include Remote Over The Horizon Radar (ROTHR)) sites. Federal funding for National Guard counterdrug activities, to include pay, allowances, travel expenses, and operations and maintenance expenses is provided pursuant to 32 U.S.C. § 112. The State must prepare a drug interdiction and counter-drug activities plan. The Office of the Defense Coordinator for Drug Enforcement Policy and Support reviews each State's implementation plan and disburses funds.

2. Additional Support

Congress has given DoD additional authorities to support Federal, State, local, and foreign governments that have counterdrug responsibilities. These are in addition to the authorities contained in 10 U.S.C. §§ 371–377 (discussed above). These have not been codified, however, so it is necessary to refer to the public laws instead. Many of these are reproduced in the notes following 10 U.S.C. § 374 in the annotated codes. Section 1004 of the 1991 NDAA, as amended, is the primary authority used for counterdrug operations. The statute permits broad support to Federal, State, and local as well as foreign authorities (when requested by a Federal counterdrug agency, typically the Drug Enforcement Agency (DEA) or a member of the State Department country team that has counterdrug responsibilities). These authorities are not exceptions to the Posse Comitatus Act, and any support provided must comply with the restrictions of the PCA. Additionally, any domestic training provided must comply with the Deputy Secretary of Defense policy on advanced training.

Types of permitted support include maintenance and repair of equipment; transportation of personnel (United States and foreign), equipment, and supplies CONUS/OCONUS; establishment of bases of operations CONUS/OCONUS; training of law enforcement personnel, to include associated support and training expenses; detection and monitoring of air, sea, surface traffic outside the United States, and within twenty-five miles of the border if the detection occurred outside the United States; construction of roads, fences, and lighting along U.S. border; linguist and intelligence analyst services; aerial and ground reconnaissance; and establishment of command, control, communication, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

Approval authorities are contained in CJCSI 3710.01B. Non-operational support—that which does not involve the active participation of DoD personnel—including the provision of equipment only, use of facilities, and formal schoolhouse training, is requested and approved in accordance with DoDI 3025.21 and implementing Service regulations, discussed above. For operational support, the

[59] 10 U.S.C. § 124 (2012).

Secretary of Defense is the approval authority. The approval will typically be reflected in a CJCS-issued deployment order.

The SECDEF has delegated approval authority for certain missions to Combatant Commanders, with the ability for further delegation, but no delegation lower than a flag officer. The delegation from SECDEF depends on the type of support provided, the number of personnel provided, and the length of the mission.[60] One example is: for certain missions along the southwest border of the U.S., the delegation runs from SECDEF to NORTHCOM to Joint Task Force North (JTF North). Requests for DoD support must meet the following criteria:

- Support request must have a clear counterdrug connection
- Support request must originate with Federal, State or local agency having counterdrug responsibilities
- Request must be for support DoD is authorized to provide
- Support must clearly assist with counterdrug activities of agency
- Support is consistent with DoD support of the National Drug Control Strategy
- DEP&S Priorities for the provision of support
- Multi-jurisdictional, multi-agency task forces that are in a high intensity drug trafficking area (HIDTA)
- Individual agencies in a HIDTA
- Multi-jurisdictional, multi-agency task forces not in a HIDTA
- Individual agencies not in a HIDTA
- All approved CD operational support must have military training value

Under § 1206, of the FY 1990 NDAA, Congress directed the armed forces, to the maximum extent practicable, to conduct training exercises in declared drug interdiction areas. In § 1031 of the FY 1997 NDAA, Congress authorized and provided additional funding specifically for enhanced support to Mexico. The support involves the transfer of certain non-lethal specialized equipment such as communication, radar, navigation, and photo equipment. Under § 1033, FY 1998 NDAA, Congress authorized, and provided additional funding specifically for, enhanced support to Colombia and Peru. Section 1021 of the FY 2004 NDAA, expands the list of eligible countries to include Afghanistan, Bolivia, Ecuador, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan. This authority is subject to extension by the annual National Defense Authorization Act; and was extended by § 1021 of the FY 2009 National Defense Authorization Act.

I. Innovative Readiness Training[61]

Innovative Readiness Training (IRT) is primarily a guard and reserve program and is similar in appearance to 10 U.S.C. § 401, Humanitarian and Civic Assistance (HCA) for overseas operations. IRT is military training conducted off base in the civilian community that utilizes the units and individuals of the armed forces under the jurisdiction of the Secretary of a military department or a combatant commander, to assist civilian efforts in addressing civic and community needs of the

[60] *See* CJCSI 3710.01B, *supra* note 58.

[61] 10 U.S.C. § 2012 (2012); U.S. DEP'T OF DEFENSE, DIR. 1100.20, SUPPORT AND SERVICES FOR ELIGIBLE ORGANIZATIONS AND ACTIVITIES OUTSIDE THE DEPARTMENT OF DEFENSE (12 Apr. 2004) [hereinafter DoDD 1100.20].

United States, its territories and possessions, and the Commonwealth of Puerto Rico as provided for within 10 U.S.C. § 2012.

Examples of IRT activities include constructing rural roads and aircraft runways, small building and warehouse construction in remote areas; transporting medical supplies, equipment and material to medically underserved areas of the country; and providing medical and dental care to Native Americans, Alaska Natives, and other medically underserved communities.

Any Federal, regional, State, or local governmental entity is eligible to receive the assistance, as are youth and charitable organizations specified in § 508 of Title 32, and any other entity as may be approved by SECDEF on a case-by-case basis. There must be a relationship to military training. Assistance may be provided only if: (1) the assistance provided accomplishes valid unit training requirements; or (2) the assistance provided by an individual involves tasks that directly relate to the specific Military Occupational Specialty (MOS) of the military member.

An exception exists if the unit assistance consists primarily of military manpower and the total amount of such assistance on a particular project does not exceed 100 man-hours. For most projects, the requests will be fulfilled by volunteers and any assistance other than manpower will be extremely limited. Government vehicles may be used, but only to provide transportation to and from the work site. The use of Government aircraft is prohibited.

Operations and Maintenance funding expenditures are authorized for expendable readiness training items only. These may include, but are not limited to, the following: fuel; equipment lease; travel; training supplies; and incidental costs to support the training not normally provided for a deployment. Innovative Readiness Training O&M funds are not authorized for the payment of civilian manpower contracts, e.g., contracting a civilian labor force to perform duties related to IRT activities.[62] DoD policy memorandum dated 24 Aug. 2000 provides guidance that annual National Defense Authorization and Appropriation Acts will authorize the transfer of a certain amount of defense-wide O&M funds ($20 million in FY03) to be transferred to fund pay and allowances for personnel working on IRT program projects. In April 2002, DoD issued additional guidelines to include the requirement for a Certification of Non-Competition with other public or private sector organizations. This comports with the statutory language that "the assistance is not reasonably available from a commercial entity." Innovative Readiness Training assistance is not authorized in response to natural or man-made disasters or in support of civilian law enforcement.

J. DoD Support to Special Events[63]

Upon the request of a Federal, State, or local government agency responsible for providing law enforcement services, security services, or safety services, the SECDEF may authorize the commander of a military installation or other DoD facility or a Combatant Commander to provide assistance for special events, including international sporting events such as World Cup Soccer Games, the Goodwill Games, the Olympics, and any other civilian sporting event. The Attorney General must certify that such assistance is necessary to meet essential security or safety needs.

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[62] 19 July 1999, DoD Policy Memorandum Regarding Innovative Readiness Training O&M Funds (on file with CLAMO).

[63] 10 U.S.C. § 2564 (2012); U.S. DEP'T OF DEFENSE, INST. 3025.20, DEFENSE SUPPORT OF SPECIAL EVENTS (6 Apr. 2012) [hereinafter DoDI 3025.20].

Additional conditions are that such assistance cannot reasonably be met by another source or agency, that there is no adverse impact on military readiness, and that the requesting agency agrees to reimburse DoD. It is important to note that the applicable statutory provision for these events does not apply to Special Olympics and The Paralympics because the assistance is authorized and funded under a different authority, the Support for International Sporting Competitions (SISC) account that funds support of International Sporting Competitions. Support provided under this statute, 10 U.S.C. § 2564, is reimbursable under the Economy Act, unless the support is provided in the normal course of training or operations, or the support results in a substantially equivalent training value.

The SISC account is a "no year" account that consolidated appropriations of previous events. As noted earlier, DoD transfers O&M into this account. Because the account is set up as a "no year use until expended account," that rule applies to any money transferred into the account. The account authorized the funding of logistical and security support (other than pay and non-travel-related allowances of members of the Armed Forces of the United States, except for members of the reserve components thereof called or ordered to active duty in connection with providing such support).

In the NDAA for fiscal year 2002, Pub. L. No. 107-107, § 302, Congress amended the law to include State Active Duty (SAD) and full-time National Guard (FTNG) to be included in the definition of "active duty." Under this change, the SISC account could fund the pay and non-travel-related allowances of these two groups of individuals when they provided essential security and safety support during the 2002 Winter Olympic Games and the 2002 Paralympic Games. In the same provision, Congress waived the requirement that the Attorney General had to certify that support was necessary for the 2002 Winter Olympic Games. It is important to note that this waiver was event-specific, and ordinarily certification by the Attorney General is required.

K. Support to Private Organizations and Individuals

1. Boy Scouts of America

10 U.S.C. § 2554 allows DoD to provide equipment and transportation to the Boy Scouts for National and World Jamborees. Support is provided on a no-cost basis to the U.S. government and requires bonding to ensure reimbursement.

2. Girl Scouts of America

10 U.S.C. § 2555 allows DoD to provide transportation only to Girl Scouts to support international Girl Scout events. Support is provided on a no-cost basis to the U.S. government and requires bonding to ensure reimbursement.

3. National Veterans' Organizations

10 U.S.C. § 2551 allows DoD to provide equipment and barracks to national veterans' organizations to support State and national conventions or national youth athletic tournaments. Support is provided on a no-cost basis to the U.S. government and requires bonding to ensure reimbursement.

4. American Red Cross

10 U.S.C. § 2552 allows DoD to provide equipment for instruction and practice to the American Red Cross. Support is provided on a no-cost basis to the U.S. government and requires bonding (twice value of equipment loaned) to ensure reimbursement.

5. National Military Associations

DoD is allowed by 10 U.S.C. § 2558 to provide specified support to designated "National Military Associations" for their national conventions. Specified support includes limited air and ground transportation, communications, medical assistance, administrative support, and security support. Support is provided under the following conditions: (1) the Service Secretary concerned has approved the support in advance; (2) the support is provided in conjunction with training in appropriate military skills; and (3) support can be provided within existing funds otherwise available to the Service Secretary concerned, i.e., O&M funds.

6. Homeless Individuals

10 U.S.C. § 2556 allows DoD to provide incidental services to shelter homeless individuals. These incidental services include utilities, bedding, security, transportation, renovation of facilities, minor repairs to make facility available, and property liability insurance. Support is on a non-reimbursable basis and may not have an adverse impact on military readiness or interfere with military operations.

L. Loan or Lease of Non-Excess Property of a Military Department[64]

1. Authorized Loan or Lease of Non-Excess Property

Generally, the Economy Act, 10 U.S.C. § 1535, governs the loan of DoD material to other Federal agencies. DoD may provide supplies and equipment to other Federal agencies on a reimbursable basis. The leasing statute, 10 U.S.C. § 2667, governs the lease of DoD property to organizations outside the government when a determination has been made that: (1) for the period of the lease, the materiel is not needed for public use; (2) it is not excess property; and (3) the lease will promote the national defense or be in the public interest.

The Army is the only service that has a regulation specifically governing the loan or lease of its materiel: AR 700-131. Army Policy is that Army materiel is intended for the Army mission. Army material will only be loaned or leased under compelling circumstances and when the material sought is not otherwise needed for mission requirements. Agencies loaning or leasing materiel from an Army activity are responsible for all costs associated with the loan or lease to include shipping, return, and repair of the materiel. Loans and leases are primarily approved on the basis of their purpose and duration. The following factors will be considered in determining whether to approve a loan or lease:

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[64] 10 U.S.C. § 2667 (2012); U.S. DEP'T OF ARMY, REG. 700-131, LOAN, LEASE, AND DONATION OF ARMY MATERIEL (23 Aug. 2004) [hereinafter AR 700-131]; U.S. DEP'T OF ARMY, REG. 725-1, SPECIAL AUTHORIZATION AND PROCEDURES FOR ISSUES, SALES, AND LOANS (17 Oct. 2003) [hereinafter AR 725-1].

- Military requirements and priorities
- Stocks and programmed Army requirements
- Type classification with pending changes
- Minimum diversion of Army stocks
- The adequacy of the borrower's resources
- The availability of alternative resources such as commercial leases
- The eligibility of the recipient

The approval authority for a loan or lease of Army materiel varies based on the category of equipment being requested. Table 2-1, AR 700-131 provides a comprehensive list of the categories of equipment that may be loaned or leased, and the proper approval authority. Army material loaned or leased in response to a natural or manmade disaster will be reported to JDOMS as soon as possible. The property officer who is accountable for the equipment loaned or leased will keep all records of loans of DoD material. Loans are made at no additional cost to the government. Borrowers are responsible for all incremental costs (costs above the normal Army operating expenses) and these will be identified and added into the loan agreement.

Agencies loaning or leasing materiel from an Army activity are responsible for all costs associated with the loan or lease to include shipping, return, and repair of the materiel. Reimbursable incremental costs include the following:

- Any overtime pay and pay of additional civilian personnel required to accompany, operate, maintain, or safeguard borrowed equipment
- Travel and per diem expenses of Army personnel (military and civilian)
- Packing, crating, handling, and shipping from supply source to destination and return, to include port loading and off loading
- All transportation, including return for repair and renovation
- Hourly rate for the use of Army aircraft
- Petroleum, oils, and lubricants (including aviation fuel)
- The cost of material lost, destroyed, or damaged beyond economical repair
- Utilities (gas, water, heat, and electricity)
- Any modification or rehabilitation or real property that affects its future use by the Army;
- Overhaul of returned material
- Repair parts used in maintenance and renovation
- Price decline of borrowed stock fund material at which returned property can be sold
- Issue and turn-in inspection labor costs
- Charges for the use of vehicles, except petroleum, oils, and lubricants and per diem costs
- Use of real property
- Restoration costs for historical property
- Lease fees

It is important to note that in addition to the above reimbursable costs, leases require the borrower to pay a lease fee equal to the fair market value of the lease interest in the property.

2. Emergency Exceptions

Emergency loans or leases are those made to prevent "loss of life, grave bodily harm, or major destruction of property, and when the lack of communications facilities prevents the use of normal procedures." Emergency loans and leases will not be withheld because a formal reimbursement agreement has not been negotiated and concluded. Additionally, loans or leases that would otherwise be permitted by service regulations may be approved under emergency conditions at the local level, vice the approval level designated in Table 2-1 of AR 700-131. Emergency requests for the loan or lease of Army materiel may be made verbally or electronically. The borrower must send a formal written request to the lending agency as soon as possible, and must complete a loan or lease agreement within five days of the original transaction.

3. Additional Requirements

Leases carry additional requirements under AR 700-131. Army materiel will not be leased if a reasonable counterpart can be purchased or leased in the commercial market. Leases are limited to a maximum five-year term unless the Secretary of the Army (SECARMY), or one of his designees, approves an extended lease term. The SECARMY also has the authority to revoke a loan or a lease at any time. Lessees must post a surety bond to cover damage or loss of the leased property and, if necessary, show proof of either vehicular or hull insurance. In an emergency a lease may be made without a bond, but the bond must be posted within five days of the lease. FAR Part 28 governs the bonding requirements. The SECARMY must approve any bond forfeiture. Bonds are normally forfeited when the materiel is not returned at the end of the lease period or the lessee refuses to pay for damage or other lease expenses.

Once a loan or lease is approved, a loan or lease agreement will be entered into before the materiel is delivered. The agreement will reflect the statutory basis for the loan or lease, and will describe in detail all terms of the loan or lease and the responsibilities of both parties. The official accountable for the property of the borrowing activity must sign the loan or lease agreement. The loan or lease agreement will be held by the activity that issues the material until final settlement. When DoD has made a lease of personal property, the costs associated with the lease are placed into a special account established for the respective defense agency whose property is subject to the lease. Amounts in the account are available solely for maintenance, repair, restoration or replacement of leased personal property.

M. Military Assistance to Safety and Traffic[65]

Under the MAST program, DoD provides aerial MEDEVAC services to civilian communities who have no comparable services or until such time as they can be established. The participating command pays for the funding of the program, i.e., it is funded by unit O&M funds. Also, participation in the MAST program shall not cause an increase in the funding required to operate the unit. The appropriate state or local officials provide special equipment and/or radios necessary to participate in the program at no cost to the U.S. Government. U.S. Government officials will provide supervision and technical assistance for the installation of radio equipment. Non-DoD physicians, nurses, and emergency medical personnel may be transported in conjunction with a

[65] DoD 3025.1-M, *supra* note 32.

MAST mission. Normally, one next-of-kin may be transported if necessary for the best interests of the patient. Any other transportation of non-DoD personnel is governed by service regulations.

N. Explosive Ordnance Disposal[66]

Explosive Ordnance Disposal (EOD) is the detection, identification, field evaluation, rendering safe, recovery, and final disposition of unexploded explosive ordnance (UXO).[67] Explosive Ordnance Disposal operations outside of DoD installations are primarily the responsibility of civil authorities. DoD may provide EOD assistance, in the form of EOD actions and/or advice, upon request from Federal agencies or civil authorities at any level, when the service concerned determines that such assistance is required or desirable in the interest of public safety.[68] Each service is responsible for all self-caused Explosive Ordnance contamination on its own installations and operation bases.[69] EOD assistance involving formerly used defense sites (FUDS) will be funded from the Environment Restoration Accounts.[70] Services must request reimbursement for EOD services rendered for non-DoD incidents from the requesting agency.[71]

O. Military Working Dogs[72]

Military working dogs include patrol dogs, and patrol dogs with specialized training in either narcotic/contraband detection or explosive detection. Explosive Detector Dog team assistance may be provided to Federal agencies or civil authorities. Upon a request from a Federal agency or State or local civilian authority at any level, the installation commander concerned will make a determination that such assistance is required in the interest of public safety.[73] Requests for assistance may only be honored from civilian authorities, *not* private citizens.[74] Requesting agencies must agree to meet reimbursement requirements and utilize DD Form 1926 (Explosive Ordnance Disposal Civil Release and Reimbursement Agreement).[75]

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[66] U.S. DEP'T OF ARMY, U.S. DEP'T OF NAVY, AND U.S. DEP'T OF AIR FORCE, REG. 75-14/INSTR. 8027.1G/MARINE CORPS ORDER 8027.1D/REG. 136-8, INTERSERVICE RESPONSIBILITIES FOR EXPLOSIVE ORDNANCE DISPOSAL (14 Feb. 1992) [hereinafter AR 75-14]; U.S. DEP'T OF ARMY, REG. 75-15, RESPONSIBILITIES AND PROCEDURES FOR EXPLOSIVE ORDNANCE (1 Nov. 1978) [hereinafter AR 75-15]; DODI 3025.21, *supra* note 29, Encl. 5.

[67] AR 75-14, *supra* note 66, para. 3f.

[68] *Id*. para. 7b(3).

[69] *Id.* at para. 7d(3)(a).

[70] *Id.* at para. 7d(3)(e).

[71] AR 75-15, *supra* note 66, para. 3-2d.

[72] DODD 5200.31E, *supra* note 53; U.S. DEP'T OF ARMY, REG. 190-12, MILITARY WORKING DOGS (11 Mar. 2013) [hereinafter AR 190-12].

[73] *Id*. at para. 4-11a(1).

[74] *Id*. at para. 4-11b(1).

[75] *Id*. at para. 4-11b(2).

P. Miscellaneous Support[76]

To respond to an emergency involving biological or chemical weapons of mass destruction that is beyond the capabilities of the civil authorities to handle, the Secretary of the Department of Homeland Security may request DoD assistance directly. Available assistance would include monitoring, containing, disabling, and disposing of the weapon. For weapons of mass destruction, Federal funding is provided to DoD to develop and maintain domestic terrorism rapid response teams (Civil Support Teams) to aid Federal, State, and local officials and responders. Civil Support Teams are composed of full time Army and Air National Guard members. These teams are Federally resourced, trained, evaluated, and they operate under Federal doctrine. They perform their missions, however, primarily under the command and control of State Governors. See Chapters 3 and 6 for more information on these teams.

Q. Miscellaneous Exceptions

DoDI 3025.21, Encl. 3, para. 1.b., contains a list of situations containing express authorization for the use of military forces to enforce the civil law. Among them are the protection of the President, Vice President, and other dignitaries; and assistance in the case of crimes against members of Congress, foreign officials, or involving nuclear materials.

R. Funding Issues Related to the Use of the National Guard in Domestic Operations

The National Guard is both an "organized militia" of a State, as well as a reserve component of both the Army and the Air Force. When referring to the National Guard's Federal reserve component status, the appropriate term is "National Guard of the United States." In terms of domestic operations, it is important to recognize that as a general rule, National Guard members are in one of three statuses: (1) Title 10, (2) Title 32 and (3) State Active Duty (SAD). When National Guard members are mobilized and placed on Title 10 orders, they are Federally funded and under a Federal chain of command like any other active component Airman or Soldier. Typically, this is seen when a National Guard unit is mobilized for OCONUS military operations. When they are serving in a Title 32 capacity, they are Federally funded, but operating under a "State" chain of command up to the State's Governor. The most typical use of National Guard members in a Title 32 status is when they are performing their required weekend training or their two-weeks of Annual Training. When they are serving in a SAD status, they are funded by the State, and are under a State chain of command. That is, often times when a National Guard unit is performing a State emergency response (e.g., flood, wildfires, etc.) they are often in a purely State status, and being paid out of that State's funding (as opposed to Federal funding).

In terms of Domestic Operations, there is a specific DoD Instruction that covers the employment of National Guard personnel in a Title 32 status—DoDI 3025.22, "The Use of the National Guard for Defense Support to Civil Authorities." That DoDI explains that the Secretary of Defense, with the concurrence of the affected Governors, is the "sole authority" to authorize DoD funding of the

[76] 10 U.S.C. §§ 379, 382 (2012); National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104–201, Title XIV (Defense Against Weapons of Mass Destruction), 110 Stat. 2422 (1996); U.S. DEP'T OF DEFENSE, DIR. S-5210.36, PROVISION OF DOD SENSITIVE SUPPORT TO DOD COMPONENTS AND OTHER DEPARTMENTS AND AGENCIES OF THE U.S. GOVERNMENT (U) (6 NOV. 2008) [hereinafter DoDD 5210.36].

National Guard for DoD operations or missions, including DSCA. If authorized by SECDEF to perform Federally-funded (Title 32) domestic operations, the National Guard personnel are typically performing such operations pursuant to 32 U.S.C § 502(f). Accordingly, the National Guard service-members performing such operations are paid out of the Army National Guard and Air National Guard personnel accounts. If this type of Title 32 duty is being carried out pursuant to a Mission Assignment from FEMA, those military personnel accounts may be reimbursed by FEMA under the Stafford Act. That is, assuming that SECDEF determines that the National Guard is the appropriate sourcing solution for a FEMA mission assignment, SECDEF would authorize the use National Guard service-members to perform the mission in a Title 32 status, to be reimbursed later by FEMA from Disaster Relief Funds. This use of Federal funding for a SECDEF-authorized use of the NG for DSCA should not be confused with the use of a State's National Guard in a SAD status. Again, when National Guard members are performing operations in a SAD status, the costs of that type of mission are borne by the State, and not by DoD.

Finally, in order to understand the Federal funding for the National Guard, it is important for judge advocates to understand the role of the National Guard Bureau (NGB), and NGB's United States Property and Fiscal Officers, (USPFOs). The National Guard Bureau is "Joint Activity of the Department of Defense," with statutory authority stemming from 10 U.S.C. § 10501-10508. The primary DoD-level implementation of that authority is set out in the NGB Charter—DoDD 5105.77. NGB is led by the Chief of NGB (CNGB) a four-star general and member of the Joint Chiefs of Staff. CNGB is responsible for planning and administering the budgets of the Army National Guard and the Air National Guard of the United States. CNGB is also responsible for supervising the acquisition/supply/accountability for Federal property issue to the National Guard through the USPFO. See 10 U.S.C. § 10503.

As applied to Domestic Operations (DOMOPs), the USPFOs (as the agents of SECARMY and SECAF through CNGB) play a central role at the State National Guard level in terms of providing oversight for the Federal funds and Federal equipment that is in the possession of their State's National Guard. During a SAD mission, the State's Adjutant General (Commander of that State's National Guard) has the authority to use Federal equipment for State emergency response as determined by the Governor. The USPFOs are responsible for ensuring that the Federal equipment (particularly vehicles and helicopters) are being tracked for reimbursement purposes. Following a SAD mission, the USPFO presents a bill to the State for reimbursement.

CHAPTER 13

CYBERSPACE OPERATIONS IN THE NATIONAL GUARD

KEY REFERENCES:

- Support and services for eligible organizations and activities outside Department of Defense, 10 U.S.C. §2012 *et seq*.
- The Computer Fraud and Abuse Act, 18 U.S.C. §1030 *et seq*.
- The Wiretap Act, 18 U.S.C. §2511 *et seq*.
- The Stored Communications Act, 18 U.S.C. §2701 *et seq*.
- The Pen Trap and Trace Act, 18 U.S.C. §3121 *et seq*.
- The Economy Act, 31 U.S.C. §1535 *et seq*.
- Executive Order (EO) 12333 - U.S. Intelligence Activities, December 4, 1981, as amended by EO 13284 (2003), EO 13355 (2004) and EO 13470 (2008).
- National Guard, 32 U.S.C. §502 *et seq*.
- Presidential Policy Directive 20, United States Cyber Operations Policy, 16 October 2012
- Presidential Policy Directive 41, United States Cyber Incident Coordination, 26 July 2016
- Department of Defense, *Cyber Strategy*, (Washington, D.C. 2015)
- Department of Defense Directive (DoDD) 1100.20, Support and Services for Eligible Organizations and Activities Outside the Department of Defense, 12 April 2004
- DoDD 3020.40, Mission Assurance, 29 November 2016
- DoDD 3025.18, Defense Support of Civil Authorities (DSCA), 29 December 2010, Incorporating Change 2, 19 March 2018
- DoDD 5240.01, DoD Intelligence Activities, 27 August 2007, Incorporating Change 1 and Certified Current Through 27 August 2014
- DoDD 5148.13, Intelligence Oversight, 26 April 2017
- Department of Defense Instruction (DoDI) 1215.06, Uniform Reserve, Training and Retirement Categories, 11 March 2014, Incorporating Change 1, Effective 19 May 2015
- DoDI 3025.22, The Use of National Guard for Defense Support of Civil Authorities, 26 July 2013, Incorporating Change 1, Effective 15 May 2017
- DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, 27 February 2013
- DoDI 4000.19, Support Agreements, 25 April 2013, Incorporating Change 1, 30 November 2017
- DoD Manual 5240.01, Procedures Governing the Conduct of Intelligence Activities, 8 August 2016
- DoD 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons, December 1982, Incorporating Change 2, Effective 26 April 2017
- Joint Publication 3-12(R), Cyberspace Operations, 5 February 2013
- Directive Type Memorandum (DTM) 17-007, Interim Policy and Guidance for Defense Support to Cyber Incident Response, 21 June 2017
- Deputy Secretary of Defense (DepSecDef) Policy Memorandum (PM) 16-002, Cyber Support and Service Provided Incidental to Military Training and National Guard Use of

DoD Information Networks, Software, and Hardware for State Cyberspace Activities, 24 May 2016

- SecDef Memorandum, Leveraging Military Training for Incidental Support of Civil Authorities, 16 Dec 2013
- National Guard Cyber Strategy, 5 Jan 2018
- National Guard Regulation (NGR) 5-2, National Guard Support Agreements, 14 Oct 2010
- NGR 500-5/ANGI 10-208, National Guard Domestic Law Enforcement Support and Mission Assurance Operations, 18 August 2010
- NGR 350-1, Army National Guard Training, 4 August 2009
- Chief, National Guard Bureau Instruction 2000.01C, National Guard Intelligence Activities, 14 August 2018
- Chief, National Guard Bureau Manual 2000.01, National Guard Intelligence Activities, 26 November 2012
- Air National Guard Instruction 36-2001, Management of Training and Operational Support within the Air National Guard, 19 October 2009, Certified Current 28 April 2014
- OpJAGAF 2005/36, 28 July 2005, AIR NATIONAL GUARD JAO
- Department of Homeland Security, *National Preparedness System*, (November 2011)
- Department of Homeland Security, *National Response Framework*, (June 2016)
- Department of Homeland Security, *National Cyber Incident Response Plan*, (December 2016)

A. Introduction

Cyber operations are not the future. They are now. The National Guard faces the same constraints in cyberspace as in the traditional kinetic realm. However, cyberspace presents some unique challenges. For instance, most military equipment is not governed by restrictive licensing agreements. However, software-licensing agreements may restrict who may use a cyber-tool kit and how that kit may be used. Additionally, cyberspace activities are generally not linear in nature. For example, one computer does not normally interact directly with another computer. Rather, the data is transferred through multiple routers and servers, all of which may not be in the same town, State or even country. As a result, actions intended to have a domestic effect in cyberspace could have international consequences. Additionally, attribution in cyberspace is not as clear as it is in the kinetic realm. What may appear to be an action taken by a local resident could very well be an action orchestrated by a foreign actor. This complex and evolving battle space requires legal practitioners to have both a basic understanding of how the cyberspace works as well as the laws and policies governing those actions.

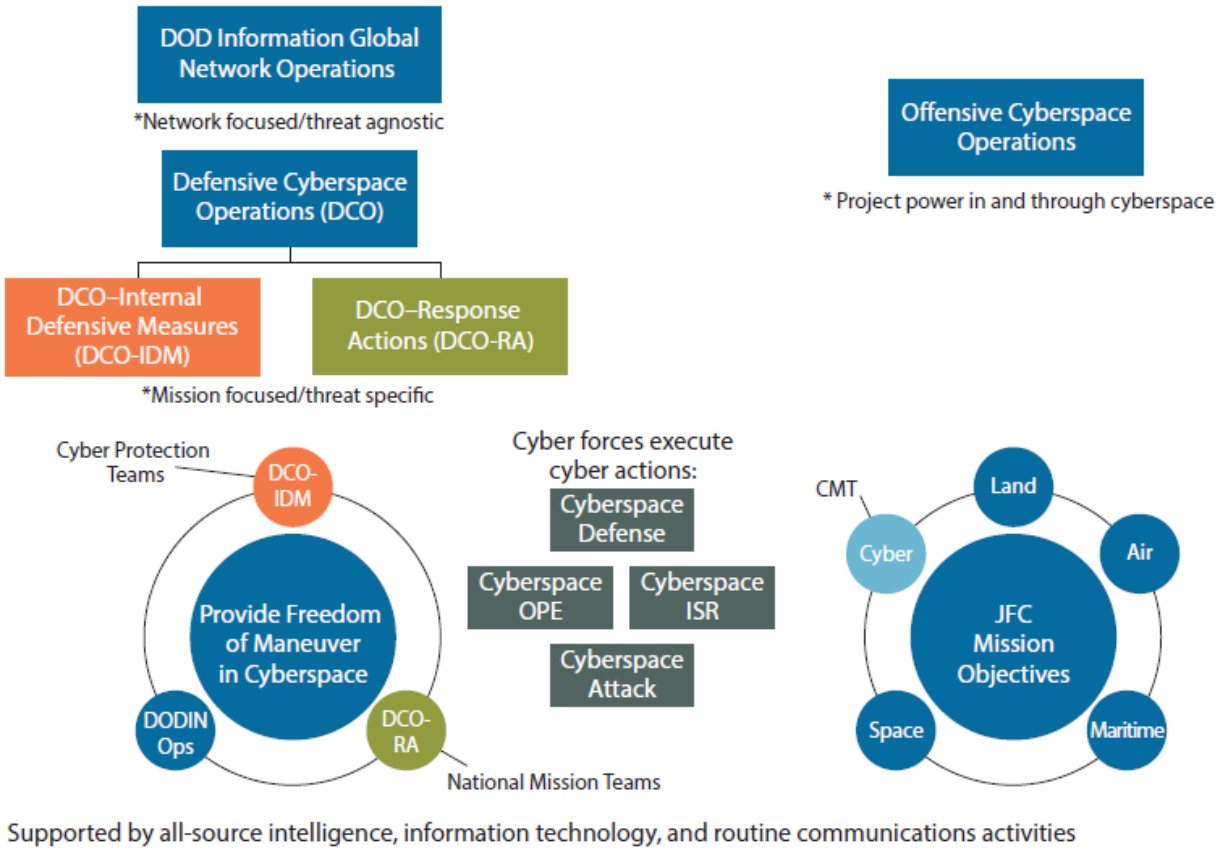
B. DoD Cyber Missions

The DoD has three primary cyber missions: (1) DoD must defend its own networks, systems, and information; (2) DoD must be prepared to defend the United States and its interests against

cyberattacks of significant consequences; (3) if directed by the President or SecDef, DoD must provide integrated cyber capabilities to support military operations and contingency plans. [1]

As depicted in Figure 1, DoD cyber missions can be categorized as defensive or offensive operations.[2] Categorization depends on the capability and the effects of that capability. It is important to note that capability does not mean authority. Understanding the effects of cyber capabilities is key to determining the authority necessary to perform the mission.

Figure 1. Cyberspace Operations



1. Protect the DoD Information Network (DODIN)

Protecting DODIN is defensive in nature and includes actions such as designing, building, configuring, securing, operating, maintaining, and sustaining the information environment relied upon for operations by activities, such as correcting known IT vulnerabilities, encrypting data, and ensuring user and administrative training and compliance.

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[1] U.S. DEP'T OF DEFENSE, CYBER STRATEGY (2015), https://dod.defense.gov/Portals/1/features/2015/0415_cyber-strategy/Final_2015_DoD_CYBER_STRATEGY_for_web.pdf [hereinafter CYBER STRATEGY].

[2] Brett T. Williams, *The Joint Force Commander's Guide to Cyberspace Operations*, 73 J. FORCE Q., 12, 14 (2d Q. 2014).

2. Defensive Cyberspace Operations (DCO)

The objective of DCO is to ensure freedom of maneuver in cyberspace. DCOs are both passive and active cyberspace defense activities[3] that allow the outmaneuvering of an adversary.[4] DCO provides the ability to discover, detect, analyze, and mitigate threats, to include insider threats.[5] DCO is prioritized against key cyber terrain to ensure data moves securely across the information environment. DCO is executed against specific threats that have both malicious capability and intent to affect key cyber terrain.[6]

DCO-Internal Defensive Measures (DCO-IDM) are those actions taken internally to friendly cyberspace.[7] The essential tasks for DCO-IDM are actively hunting for advanced internal threats as well as the internal responses to these threats.[8] DCO-IDMs respond to unauthorized activity or alerts/threat information within the DODIN, as well as leverage intelligence, counterintelligence, law enforcement, and other military capabilities as required.[9] In other words, DCO-IDMs include hunting on friendly cyber terrain for threats attempting to evade security protocols and directing appropriate internal responses.[10]

DCO-Response Actions (DCO-RA) are taken outside the DODIN to stop or block the attack. An example of DCO-RA is shutting down an external router from which malicious activity is emanating. The essential tasks for DCO-RA are deliberate, authorized defensive measures or activities taken external to the DODIN to defeat ongoing or imminent threats to defend DoD cyberspace capabilities or other designated systems.[11] DCO-RAs must be authorized in accordance with policy, procedures, and applicable standing rules of engagement and any applicable supplemental rules of engagement and may rise to the level of use of force.[12] In other words, DCO-RAs include activities outside friendly network space to stop an attack before it reaches our key cyber terrain.[13] To use a metaphor, we "catch arrows" with DCO-IDM and we "kill the archer" with DCO-RA.

3. Offensive Cyberspace Operations (OCO)

OCO "project power by the application of force in or through cyberspace."[14] An example is hacking an adversary's computer. Authorities governing OCO activities are classified and a

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[3] JOINT CHIEFS OF STAFF, JOINT PUB. 3-12(R), CYBERSPACE OPERATIONS II-2 (5 Feb. 2013) [hereinafter JP 3-12(R)].

[4] WILLIAMS, *supra* note 2, at 5.

[5] JP 3-12(R), *supra* note 3, at II-3.

[6] WILLIAMS, *supra* note 2, at 15.

[7] *Id.*

[8] JP 3-12(R), *supra* note 3, at II-3.

[9] *Id.*

[10] WILLIAMS, *supra* note 2, at 16.

[11] JP 3-12(R), *supra* note 3, at II-3.

[12] *Id.*

[13] WILLIAMS, *supra* note 2, at 16.

[14] JP 3-12(R), *supra* note 3, at GL-4.

detailed description is outside the scope of this chapter. However, briefly stated, OCO represents a synergy between Title 50 (national intelligence) authorities to collect signals intelligence, and Title 10 (military) authorities to apply force in the cyber realm. For full situational awareness and to advise on mission capability and authority, judge advocates must obtain the appropriate security clearance to fully understand the DoD cyber missions, responsibilities, authorities, laws and regulations, including classified materials related to those missions.

C. DoD Cyber Mission Force (CMF)

The active component CMF is comprised of cyber operators organized into 133 teams primarily aligned as follows: Cyber Protection Team (CPT), National Mission Team (NMT), Combat Mission Team (CMT), and support teams. Combatant commands integrate CMTs and CPTs into plans and operations and employ them in cyberspace, while the NMT operates under the Commander of USCYBERCOM. "[T]eams can also be used to support other missions as required by DoD."[15] Furthermore, the National Guard has Defensive Cyberspace Operations-Elements (DCO-Es), which by design do not have an active component CMF mission.

1. Cyber Protection Team (CPT)

The mission of CPTs is to "[d]efend priority DoD networks and systems against priority threats"[16] by augmenting traditional defensive measures through their unique capabilities.[17] In other words, CPTs provide mission assurance and threat mitigation support to U.S. Critical Infrastructure Key Resources (CIKR), U.S. military services, and key terrain of combatant commands.

While in Title 10 status, CPTs provide surge support to active duty cyber component (such as USCYBERCOM, AFCYBER, or ARCYBER) and support DCOs by removing adversary capabilities, defending the supported commander's key cyberspace terrain and critical assets, and preparing local cyberspace defenders to sustain advanced cyberspace defense tactics, techniques and procedures (TTP). CPTs are the forces tasked with the DCO-IDM mission under USCYBERCOM.[18]

While in a Title 32 status, CPTs train for the Federal mission.

2. National Mission Teams (NMT)

NMTs and their associated support teams defend the United States and its interests against cyberattacks of significant consequence.[19] NMTs are the forces tasked with the DCO-RA mission under USCYBERCOM.[20]

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[15] CYBER STRATEGY, *supra* note 1, at 6.

[16] U.S. DEP'T OF DEFENSE, https://dod.defense.gov/News/Special-Reports/0415_Cyber-Strategy/ (last visited Aug. 27, 2018).

[17] CYBER STRATEGY, *supra* note 1, at 6.

[18] WILLIAMS, *supra* note 2, at 16.

[19] CYBER STRATEGY, *supra* note 1, at 6.

3. Combat Mission Teams (CMT)

CMTs "support combatant commands by generating integrated cyberspace effects in support of operational plans and contingency operations."[21]

4. Support and Other Teams

Support teams "provide analytic and planning support to the [NMTs] and [CMTs]."[22] Other teams include Cyber Intelligence, Surveillance and Reconnaissance Squadrons; Information Aggressor Squadrons; Cyber Training Squadrons; and Data Processing Units. These teams have specific mission sets with a nexus to DoD's cyber mission.

5. DCO-E

Although not part of the CMF, DCO-Es are State assets serving as a military first responder for Governors and The Adjutants General (TAGs) for cyber emergencies. DCO-Es may provide surge capacity of the same capability of Title 10 assets but are prohibited from being mobilized, as a unit, for Title 10 missions.

D. Title 32 Cyberspace Activities

The National Guard must have both proper fiscal authority and an authorized mission to conduct cyberspace activities while in a Title 32 status.

Congress funds the National Guard to train for the Federal mission. Inactive Duty Training (IDT) and Annual Training (AT) are conducted under 32 U.S.C. §502(a) as part of a published training plan.[23] Chief, National Guard Bureau (CNGB) has the inherent authority to authorize additional training funds under 32 U.S.C. §502(f)(1). This broad statutory authority enables the conduct of training activities that also have a significant operational benefit. However, the broad nature of this authority warrants scrutiny, and cautious analysis, as further described herein. Finally, the President and the SecDef have authority to authorize operational missions under 32 U.S.C. §502(f)(2).[24]

When in their SAD or Title 32 statuses, the National Guard may not conduct DCO-RA and OCO.[25] These activities must be conducted in a Title 10 status.[26] Therefore, the National Guard

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[20] WILLIAMS, *supra* note 2, at 16.

[21] CYBER STRATEGY, *supra* note 1, at 6.

[22] U.S. DEP'T OF DEFENSE, https://dod.defense.gov/News/Special-Reports/0415_Cyber-Strategy/ (last visited Aug. 27, 2018).

[23] Training plans must be in accordance with National Guard Bureau (NGB) NGB 350-1 and Air National Guard Instruction (ANGI) 36-2001.

[24] Civil support teams, counterdrug, and homeland defense are operational missions authorized by statute under 32 U.S.C. §502(f)(2). There are currently no operational cyber missions.

[25] *See generally* U.S. DEP'T OF DEF., POL'Y MEM. 16-002, CYBER SUPPORT AND SERVICE PROVIDED INCIDENTAL TO MILITARY TRAINING AND NATIONAL GUARD USE OF DOD INFORMATION NETWORKS, SOFTWARE, AND HARDWARE FOR STATE CYBERSPACE ACTIVITIES (24 May 2016) [hereinafter PM 16-002]. This memorandum is also commonly

can train for the Federal mission in a Title 32 status but is limited to DODIN operations and DCO-IDM activities.

Nevertheless, commanders are not limited to computer-based training or exercises on their own systems. Title 32 training authorities can be leveraged to provide support to (1) active component, (2) civil authorities, and (3) other statutorily eligible entities.

1. Support to Active Component. The National Guard can provide an incidental operational benefit while conducting training.[27] The key is that the primary purpose of the activity must be military training. Enclosure 4, paragraph 1, of DoDI 1215.06, encourages maximum Reserve Component utilization to the extent that, "all training duty planned and performed by Reserve Components members shall capitalize on Reserve Components capabilities to accomplish operational requirements while maintaining their mission readiness for domestic and overseas operations. RC members may be employed to support active component mission requirements as part of conducting training duty."[28] Additionally, "support to mission requirements, (i.e., [operational support])," may occur "as a result of the training."[29] The following analysis is suggested to help commanders determine whether the conduct of training that provides an incidental operational benefit is authorized:

1. Is National Guard performance of the Federal operational mission consistent with the National Guard unit's formalized training program? If not, then the activity runs the risk of violating fiscal laws by the use of appropriated funds for an improper purpose.

2. Can the Federal mission be performed without support from the National Guard? If not, then the National Guard has moved beyond a support role into an operational role and is exceeding the scope of its authority.

3. Is the use of full-time National Guard (FTNG) personnel disproportionate? FTNG may participate in activities other than organizing, administering, recruiting, instructing, and training (OARIT) on a non-interference basis. Disproportionate use runs the risk of violating fiscal laws by the use of appropriated funds for an improper purpose.

In order to answer these questions, the facts must reveal the proposed task, duration, and scope. If the training is not within scope of the National Guard unit's formalized training program, then the question becomes whether the training will nevertheless benefit DoD. This analysis should consider policy issues with risk assessment and the appropriateness when using the National

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referred to as the "CTAA" memo. CTAA stands for coordinate, train, advise, and assist cyber support and services provided by members of the National Guard incidental to military training when using DoD information networks (DoDIN), software, and hardware for State cyberspace activities.

[26] PRESIDENTIAL POL'Y DIR. 20, UNITED STATES CYBER OPERATIONS POLICY (16 Oct. 2012) [hereinafter PPD 20].

[27] U.S. DEP'T OF DEF., INSTR. 1215.06, UNIFORM RESERVE, TRAINING AND RETIREMENT CATEGORIES (19 May 2015) [hereinafter DoDI 1215.06].

[28] *Id.* at encl. 4, para. 1.

[29] *Id.* at encl. 3, para. 2.a.1.

Guard similar to the CARRLL factors used when considering whether to support a request for assistance from civil authorities.

2. Support to Civil Authorities – Generally. The National Guard can provide defense support to civil authorities, commonly referred to as DSCA, when a qualifying entity requests assistance.[30] DoD publications on DSCA focus on a response in Title 10 or 32 U.S.C. §502(f)(2) status. Currently, Directive-Type Memorandum (DTM) 17-007 is the only publication on DSCA for cyber operations, or Defense Support to Cyber Incident Response (DSCIR).[31] DSCIR may be provided for a cyber incident in response to a request for assistance from a lead Federal department or agency for asset response or threat response outside DODIN as described in PPD-41.[32] This includes DSCIR for immediate response authority to save lives, present human suffering, or mitigate great property damage.[33] Based on the nature of support, liability waivers, memorandums of understanding or agreements (including permission from asset owner to access appropriate information and information systems), non-disclosure agreements, or other appropriate legal documents requested by DoD must be signed before providing DSCIR.[34] DSCIR does not preclude support to civil authorities in other statuses, such as training which provides an incidental operational benefit.

3. Support to Civil Authorities – Intelligence Support to Law Enforcement. Cyber teams likely have intelligence personnel assigned to them. Executive Order 12333 and associated Intelligence Oversight rules and procedures will apply if cyber intelligence personnel provide support to law enforcement.[35] While any domestic intelligence activities (including collection) must be done in a Title 10 or Title 50 status with proper mission and authority, SecDef approval is required for the use of intelligence assets for anything other than foreign intelligence, counterintelligence, or intelligence training.[36] These activities include the conduct of training with an incidental operational benefit. Intelligence support to law enforcement requires SecDef approval in accordance with Procedure 12 under DoD 5240.1-R.[37]

4. Support to Civil Authorities – Economy Act. The Economy Act allows Federal agencies to provide support to other Federal agencies on a reimbursable basis, unless the support

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[30] U.S. DEP'T OF DEF., INSTR. 3025.22, THE USE OF THE NATIONAL GUARD FOR DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 3 (26 July 2013) (ch. 1, 15 May 2017) [hereinafter DoDI 3025.22].

[31] Directive-Type Memorandum (DTM) 17-007 is set to expire on 21 June 2019 and will be converted to a new issuance.

[32] PRESIDENTIAL POL'Y DIR. 41, UNITED STATES CYBER INCIDENT COORDINATION (26 July 2016) [hereinafter PPD 41].

[33] U.S. DEP'T OF DEF., DIRECTIVE TYPE MEM. 17-007, INTERIM POLICY AND GUIDANCE FOR DEFENSE SUPPORT TO CYBER INCIDENT RESPONSE (21 June 2017) [hereinafter DTM 17-007].

[34] *Id.*

[35] *See generally* CHIEF, NAT'L GUARD BUREAU, INST. 2000.01C, NATIONAL GUARD INTELLIGENCE ACTIVITIES (14 Aug. 2018) [hereinafter CNGBI 2000.01C].

[36] *Id.* at encl. A, para. 13.c.6.

[37] *Id.*

is provided in the normal course of training or operations, or the support results in a substantially equivalent training value.[38]

5. Other Entities. Deputy Secretary of Defense Policy Memorandum (DepSecDef PM) 16-002, "Cyber Support and Services Provided Incidental to Military Training and National Guard Use of DoD Information Networks, Software and hardware for State Cyberspace Activities," commonly referred to as the "CTAA memo," provided guidance on the National Guard providing cyber support and services incidental to military training through Innovative Readiness Training (IRT) projects.[39] IRT projects have traditionally been used for engineering and construction (such as building a bike trail for a local government or fixing shelters for the Boy Scouts), or for providing medical care to underserved communities. The CTAA memo clarified that IRT includes cybersecurity projects. Specifically, the CTAA memo provides guidance that coordinating, training, advising, and assisting certain qualifying mission partners must be done in accordance with IRT eligibility and program requirements under 10 U.S.C. §2012 or, alternatively, with SecDef approval.[40] An example of a cybersecurity IRT project might be a request from a local government entity to enhance network security measures.

It is important to note that the CTAA memo does not preclude consultation or other methods of training under other authorities like the Economy Act or Stafford Act.[41]

E. National Cyber Incident Response Plan (NCIRP)

The National Preparedness System outlines an organized process for the whole of community to move forward with their preparedness activities and achieve the National Preparedness Goal.[42] The National Preparedness System integrates efforts across five areas – Prevention, Protection, Mitigation, Response, and Recovery. The NCIRP is part of the broader National Preparedness System under the Response Framework and establishes the strategic framework and doctrine for a whole-of-Nation approach to mitigating, responding to, and recovering from a cyber-incident. Presidential Policy Directive (PPD) 41, U.S. Cyber Incident Coordination, sets forth principles governing the Federal Government's response to any cyber incident, provides an architecture for coordinating the response to significant cyber incidents, and requires the Department of Homeland Security (DHS) to develop the NCIRP for the purpose of addressing cybersecurity risks to critical infrastructure.

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[38] 31 U.S.C. §1535 (2012) [hereinafter The Economy Act].

[39] On March 1, 2018, the expiration date of the CTAA memorandum was extended to March 1, 2019 or when the original guidance is incorporated into permanent issuances, whichever occurs first.

[40] PM 16-002, *supra* note 25.

[41] Outside of CTAA activities, the CTAA memorandum provides guidance that consulting with government entities and with public and private utilities, critical infrastructure owners, the Defense Industrial Base, and other non-governmental entities, as needed, in order to protect DODIN, software, and hardware, enhance DoD cyber situational awareness, provide for DoD mission assurance requirements, and provide cybersecurity unity of effort are outside the context of CTAA training activities.

[42] *See generally* DEP'T OF HOMELAND SECURITY, NATIONAL PREPAREDNESS SYSTEM (Nov. 2011) [hereinafter NPS 2011].

The Department of Justice (DoJ) is the lead Federal agency for threat response during a significant cyber incident, acting through the Federal Bureau of Investigation and National Cyber Investigative Joint Task Force.[43] DHS is the lead Federal agency for asset response during a significant cyber incident, acting through the National Cybersecurity and Communications Integration Center (NCCIC).[44] Threat response activities, asset response activities, and significant cyber incident are further discussed and defined in PPD 41.[45]

According to the NCIRP, the DoD is responsible for threat response to cyber incidents affecting DoD assets and DODIN.[46] DoD can also support civil authorities for cyber incidents outside the DODIN when requested by the lead Federal agency, and approved by the appropriate DoD official, or directed by the President. Such support would be provided based upon the needs of the incident, the capabilities required, and the readiness of available forces.

DHS, in coordination with the heads of other appropriate Federal departments and agencies and in accordance with the NCIRP is required to regularly update, maintain, and exercise the Cyber Incident Annex to the National Response Framework (NRF).[47] The NRF is part of the NPS and is a guide on how the Nation responds to all types of disaster and emergencies. The NRF contains 14 Emergency Support Functions (ESF) and annexes that describe the Federal coordinating structures to group resources and capabilities into functional area that are most frequently needed in a national response.[48] ESF #2 Communications addresses cyber security issues that result from or occur in conjunction with incidents. However, for incidents that are primarily cyber in nature, the Cyber Incident Annex is used and ESF #2 supports responses to cyber incidents as directed.[49]

F. State Active Duty (SAD)

Personnel in SAD status are under the command and control of their Governor. As such, State laws govern issues in discipline, ethics, information protection, privacy, and liability. However, certain Federal laws may apply in areas such as HIPAA and the Computer Fraud and Abuse Act. States cannot engage in international warfare, i.e. a State cannot attack a foreign country by cyber or kinetic means. Any attempts of activities that could be considered DCO-RA or OCO must be carefully reviewed and should receive a written opinion from the State Attorney General in order to set parameters of activities.

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[43] PPD 41, *supra* note 32, sec. V, para. B.c.1.

[44] *Id.* at sec. V, para. B.c.2.

[45] *Id.*

[46] DEP'T OF HOMELAND SECURITY, NATIONAL CYBER INCIDENT RESPONSE PLAN 11 (Dec. 2016) [hereinafter NCIRP 2016].

[47] *Id.* at 9.

[48] DEP'T OF HOMELAND SECURITY, NATIONAL RESPONSE FRAMEWORK (June 2016) [hereinafter NRF 2016].

[49] DEP'T OF HOMELAND SECURITY, EMERGENCY SUPPORT FUNCTION 2, COMMUNICATIONS ANNEX (June 2016), https://www.fema.gov/media-library-data/1473679033823-d7c256b645e9a67cbf09d3c08217962f/ESF_2_Communications_FINAL.pdf [hereinafter ESF 2].

DoD rules generally do not apply to SAD personnel, but will apply to use of equipment procured through a Federal trace, including reimbursement requirements for the use of USG equipment.[50] Licensing requirements may limit the use of Federal cyberspace equipment or programs to Federal use for Federal systems only and therefore would not be authorized for State use in a SAD status or outside of the DODIN. Executive Orders (EOs) 12968 and 13549, as amended, and DoD implementing guidance govern access and use of "DoDINs, software, hardware, systems, tools, tactics, techniques, and procedures beyond the classification level of SECRET."[51] Further, National Guard members serving in their SAD status are prohibited from using this equipment and software.[52]

G. Federal Laws Governing Cyber Activities

National Guard personnel may be subject to Federal criminal laws if they exceed the scope of their mission.[53] This is particularly important for non-Federalized National Guard personnel who may exceed the scope of authorized activities if performing other than DCO-IDM activities. National Guard personnel may only perform actions on a network when they have permission from the network owner to do so, otherwise, they may be subject to Federal and/or State criminal laws.

1. Computer Fraud and Abuse Act (18 U.S.C. §1030)

In 1984, the Computer Fraud and Abuse Act as related to fraud and related activity in connection with computers was added to Title 18, Chapter 47, Fraud and False Statements. The Act prohibits theft of information through unauthorized access or exceeded authorization on a "protected" computer.[54] A protected computer is a computer that is "(a) exclusively used by a financial institution or USG; or used by financial institute or USG and conduct that affects that use; or (b) used in or affecting interstate or foreign commerce or communication, including computers outside the US, and conduct that affects that use."[55]

The Computer Fraud and Abuse Act also prohibits damage by "(a) knowingly causing the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer; (b) intentionally accessing a protected computer without authorization, and as a result of such conduct, recklessly

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[50] U.S. DEP'T OF ARMY AND AIR FORCE, NAT'L GUARD REG. 500-5, NATIONAL GUARD DOMESTIC LAW ENFORCEMENT SUPPORT AND MISSION ASSURANCE OPERATIONS (18 Aug. 2010) [hereinafter NGR 500-5].

[51] PM 16-002, *supra* note 25, at 3.

[52] *Id.*

[53] The Computer Fraud and Abuse Act, Wiretap Act, Pen Trap and Trace Act, and Stored Communications Act are the most common Federal laws governing cyber activities. Other Federal laws that are relevant include the Privacy Act, the Health Insurance Portability and Accountability Act (HIPAA), and the Freedom of Information Act (FOIA). For further reading, *see* Congressional Research Service (CRS) Report R42507, Federal Laws Relating to Cybersecurity: Overview of Major Issues, Current Laws, and Proposed Legislation, by Eric. A Fischer.

[54] 18 U.S.C. §§ 1030(a)(1), (2) (2012).

[55] 18 U.S.C. § 1030(e) (2012).

causes damage; or (c) intentionally accessing a protected computer without authorization, and as a result of such conduct, causes damage and loss."[56]

2. Wiretap Act (18 U.S.C. §2511)

The Wiretap Act prohibits the "intentional interception of any wire, oral, or electronic communication."[57] It also prohibits "intentional disclosure or use of the contents of any wire, oral, or electronic communication while knowing or having reason to know that the information was obtained illegally."[58]

3. Pen Register and Trap and Trace Act (18 U.S.C. §3121)

The Pen Register and Trap and Trace Act prohibits the real-time interception of the non-contents of communications by a "pen register or a trap and trace device without first obtaining a court order."[59] However, the prohibition does not apply to a service provider for the "operations, maintenance, and testing" of the service.[60] It also does not apply to a service provider in the "protection of the rights or property of such service provider, or to the protection of users of that service from abuse of service or unlawful use of service."[61]

4. Stored Communications Act (18 U.S.C. §2701)

The Stored Communications Act governs unlawful access to stored communications by prohibiting "(a) intentionally accessing, without authorization, of a facility through which an electronic communication service is provided; or (b) intentionally exceeding an authorization to access that facility and thereby obtaining, altering, or preventing authorized access to a wire or electronic communication while it is in electronic storage in such system."[62]

H. Judge Advocate Responsibilities

Through the Economy Act or NRF, the National Guard can partner with Federal agencies, such as DHS, just like any other incident response preparation through the NPS. In the cyberspace domain, there are unique rules for the use of cyber that need to be reviewed and agreed upon by the National Guard and the asset owner through Memoranda of Understanding/Agreement and Nondisclosure Agreements. It is key to develop relationships with the State Attorney General's office to be aware of any State specific rules that may apply as well as the constraints that apply to Federal equipment. Some of the issues for JAs to consider are:

- written permission from asset/network owner to access their system

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[56] 18 U.S.C. §1030(a)(5) (2012).

[57] 18 U.S.C. §§ 2511(1)(a), (b) (2012).

[58] 18 U.S.C. § 2511(1)(c) (2012).

[59] 18 U.S.C. § 3121(a) (2012).

[60] 18 U.S.C. § 3121(b) (2012).

[61] 18 U.S.C. § 3121(b) (2012).

[62] 18 U.S.C. § 2701(a) (2012).

- scope of assistance to be provided (assessment and report finding; mitigation and remediation; responses outside scope of assistance)
- status of military personnel (SAD, Title 32), command and control, and legal basis for disciplinary actions
- destruction/storage of data obtained, to include privacy and security restrictions
- confidentiality of proprietary data or information (ie, certain Federal cyber equipment may report all data to USCYBERCOM)
- whether the system will only scan or actively respond to the adversary action (ie, hack or hackback which is prohibited outside of Title 10 status)
- privacy balanced with required disclosure of criminal/fraudulent activity
- privacy of network users (union, contractor, etc.)
- privacy of business to not publicize discovered activity requiring criminal investigation
- industry regulatory requirements to disclose incident
- liability for unintended impact to operations
- Intelligence Oversight requirements (ie, collection of USPI)
- payment for services (look to the FAR and DFARS for specific requirements)
- disputes resolution mechanism
- conflicts of interest (use of a proprietary tool in which a National Guardsman may have personal pecuniary interest)
- licensing limitations for use of a cyberspace capability and data rights for TTPs or software developed in conjunction with private entities as part of a cyber-response or exercise
- other relevant laws (State specific, Privacy, HIPAA, FOIA, FTCA, etc.)

The laws governing cyber activities are constantly changing in response to new technology and uses of cyber capabilities in warfare. It is critical to ensure the latest laws are examined when providing advice to commanders in this new and ever evolving area of the law. If you are addressing an issue involving the cyber law, you should seek out additional expertise to assist you in this complicated area.

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