DOMESTIC OPERATIONAL LAW

2011 Handbook for Judge Advocates

The Judge Advocate General's Legal Center and School
U.S. Army
Center for Law and Military Operations (CLAMO)
Charlottesville, Virginia 22903-1781

DOMESTIC OPERATIONAL LAW HANDBOOK

2011

FOR JUDGE ADVOCATES

CENTER FOR LAW AND MILITARY OPERATIONS

1 September 2011

2011 DOMESTIC OPERATIONAL LAW HANDBOOK

A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES

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EDITORS' NOTES

The Domestic Operational Law (DOPLAW) Handbook for Judge Advocates is a product of the Center for Law and Military Operations (CLAMO). Its content is derived from statutes, Executive Orders and Directives, national policy, DoD Directives, joint publications, service regulations and field manuals, and lessons learned by judge advocates and other practitioners throughout federal and state government. This edition includes a substantial revision of Chapter 3, it incorporates new guidance as set for forth Department of Defense Directive 3025.18, Defense Support of Civil Authorities (DSCA), it provides amplifying information on wildfire response, emergency mutual assistance compacts, the role of the National Guard and Army units such as Army North and Joint Task Force—Civil Support, and it discusses the 2010 Deepwater Horizon oil spill.

The Handbook is designed to serve as a working reference and training tool for judge advocates. However, this Handbook 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 samples provided in this Handbook are advisory only. 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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PREFACE

Cal Lederer[1]
Deputy Judge Advocate General, U.S. Coast Guard
and
23rd Commandant, The Judge Advocate General's School, U.S. Army

The Domestic Operational Law Handbook for Judge Advocates – the DOPLAW Handbook – was first published in April, 2001. As we in Charlottesville watched it develop, its focus was the activities of the Department of Defense. While it recognized the important role of the Federal Emergency Management Agency – FEMA, other Federal agencies, and the States, the DOPLAW Handbook was very much about the military departments and the National Guard and their authorities. While it recognized that the scope of Domestic Operations – or DOMOPS – was broad, the DOPLAW Handbook's focus was military support to law enforcement, natural disaster relief, and civil unrest.

That changed after 9/11. The second edition, published in July, 2006, reflected the dramatic evolution and expansion of DOMOPS into what was now called homeland security and homeland defense. It recognized the establishment of NORTHCOM and the Department of Homeland Security, it incorporated the *National Response Plan* and *Homeland Security Presidential Directive 5 – Management of Domestic Incidents*, and it reflected the wide range of national strategies and policies that were issued to address threats to the homeland. The 2006 edition also embraced lessons learned from Hurricanes Katrina and Rita that occurred the previous August and September.

The July, 2009, edition and its 2010 revision expanded to include a discussion of a Federal response to a pandemic and broadened the focus on Homeland Security operations. The 2011 edition continues that evolution and provides a more detailed look at some of the integral DoD agencies, including NORTHCOM, Army North, Joint Task Force–Civil Support, the vast capabilities of agencies like the National Guard Bureau and the Coast Guard, and the multitude of DOMOPS that DoD is tasked to support, such as major disaster or emergency response, counterdrug operations, and support to National Security Special Events. It also incorporates the lessons learned by the exceptionally diverse community of judge advocates, other attorneys, paralegals, and other legal professionals, who have practiced DOPLAW daily, frequently, or, for the novices thrust into this dynamic realm for a particular contingency, rarely or only once.

---

[1] Calvin M. Lederer was appointed to the Senior Executive Service and became Deputy Chief Counsel of the U.S. Coast Guard on June 2, 2002. In March 2003, he was designated the Deputy Judge Advocate General when the Coast Guard became part of the Department of Homeland Security. Mr. Lederer served as Acting Judge Advocate General during the *Deepwater Horizon* Response from April 2010 to January 2011. In his earlier Army career, Mr. Lederer's assignments included service as the Commandant of The Judge Advocate General's School; Executive Officer to The Judge Advocate General; Staff Judge Advocate, V Corps; the Army's Chief Legislative Counsel, Chief Environmental Counsel, and Chief Labor and Employment Law Counsel; Special Counsel to the Assistant Attorney General (Civil Division); and Deputy Staff Judge Advocate, 25th Infantry Division. Mr. Lederer was named a Presidential Distinguished Executive in 2008 and a Presidential Meritorious Executive in 2006, and his military awards include the Legion of Merit and Meritorious Service Medal – earning each award four times, and the Distinguished Service Medal. Mr. Lederer is a graduate of New York University, Hofstra University School of Law, the U.S. Army Command & General Staff College, and The Judge Advocate General's School. He was also an Army War College Fellow.

Since 2006, local, State and Federal assets have responded to a series of contingencies. These have included natural disasters like hurricanes, western wildfires, last year's tsunami, mid-west floods, and other events with widespread impact. Most recently, the sustained and massive release of oil from the Macondo well from April to July 2010, after the explosion of the Mobile Offshore Drilling Unit *Deepwater Horizon*, and its impacts that continue today, challenged the domestic incident response structure under HSPD-5 and the *National Oil and Hazardous Substances Pollution Contingency Plan* to an unprecedented extent. The pace of events is reflected in publication of this edition not quite a year after the 2010 edition. That tempo and the rapid evolution of authorities that shape DOPLAW have also increased demand, resulting in CLAMO distributing over 2,000 copies of the Handbook since 2009.

What all DOMOPS contingencies have in common is that each is unique in some or many respects. What DOMOPS contingencies and DOPLAW have in common is that no other activity in which members of the military legal community engage so reflects the constitutionally-based character and structure of the nation we serve. The Department of Homeland Security's *National Response Framework*, which superseded the *National Response Plan*, DoD authorities and policies regarding defense support of civil authorities, and other DOMOPS authorities, policies, and doctrine reflect fundamental principles of federalism by establishing protocols that place the Federal government in a supporting role to State and local authorities for most response contingencies.

The nature, scope, and complexity of particular contingencies drive who leads and who supports, who has the right or best tools, who has enough of the right resources, and whose authorities will best support the decision maker and responder. Whether the DOMOPS issue for the judge advocate on the ground involves the Posse Comitatus Act, DoD support to counter-drug operations or National Security Special Events, how best a Defense Coordinating Officer can facilitate DoD support to a FEMA-led response to a major disaster or emergency, or an agency's specific use of force policy, DOPLAW issues arise in every contingency.

Today, we understand that the instruments of national power that reside in the five armed forces cannot invariably solve every crisis, or may not be available always to the degree they may be needed. We understand that some institutions, like the National Guard, remain an essential element of national and State response. We understand that the civilian agencies of the Federal government provide essential expertise, capacity, and authorities. We understand that the private sector, reflecting the wealth, innovation, diversity, and depth of America, is unequalled in its potential. We understand that every Federal response must take account of, partner with, and respect State and local authorities. And we understand that individual Americans are resilient, resourceful, and reliable partners in every response—they will invariably go where they are needed most and, when they are survivors, they are truly the first responders.

There are overarching principles that apply to DOPLAW. First, every opinion and action must be consistent with the Constitution, the system of government it prescribes, and the prerogatives, responsibilities, and constraints that flow from it to Federal and State government. Second, we function best when we understand each other and the authorities we bring with us, regardless of the uniform, emblem, or overalls we wear. The invitation to me to write this preface, as a representative of a sister service and one of DoD's many partner agencies, reflects that principle. Third, and especially in the midst of crisis, we must ensure that timely, actionable legal advice is provided to support decision makers and responders.

The Principles of Coast Guard Operations, adapted to DOPLAW and incorporating these overarching principles, provide useful guidance to DOPLAW judge advocates and other lawyers, and those who support them:

- ***Clear Objective***: Understand the mission overall and the legal task at hand, remembering that legal counsel should drive to a desirable and desired outcome that supports the mission and is consistent with the Constitution and key authorities and policies;

- ***Effective Presence***: Be active and not passive, providing actionable legal advice on time, advice that's right and precise at the place it's needed most, and remembering that there is no substitute for physical presence at the point of decision;

- ***Unity of Effort***: Integrate the authorities, capabilities, and perspectives of all partners, frequently assembling and relying on diverse legal teams and the power of collaboration, and helping decision makers understand that sometimes there is greater strength in unity of effort than unity of command;

- ***On-Scene Initiative***: Act deliberately and decisively when recourse to remote senior counsel is not possible;

- ***Flexibility***: Adjust past experience, knowledge, and abilities to the contingency at hand, remembering that rapid linear or parallel change in the character and demands of a response is the rule and not the exception;

- ***Managed risk***: Base advice on the best facts and law available, accepting legal risk to achieve the mission without placing the decision maker or others in significant jeopardy, and remembering that the decision maker, not the attorney, decides with a sound understanding of the risks;

- ***Restraint***: Provide an accurate and honest appraisal of applicable law – even if it may constrain operations, providing advice that respects the role of other partners, and remembering to preserve and respect the civil liberties and dignity of Americans and others at all times.

In the response to Deepwater Horizon, attorneys from throughout the Federal government advised decision makers and responders at all levels. Coast Guard judge advocates, civilian counsel, documentation specialists, and other professionals paced their incident commanders; documented the incident and preserved evidence for future investigation, prosecution, and litigation; participated in incident investigations and inquiries; were integral to litigation teams; and supported the National Incident Command, cabinet officials, and Congress. National Guard judge advocates helped State officials adapt to a response paradigm far different from the *Stafford Act* responses they were used to. Agency counsel huddled with principals in Washington D.C. and in regional offices to find solutions to novel problems. DOPLAW was practiced by lawyers in the White House as much as judge advocates in the parishes and counties or on the beaches, whether they knew it or not. In this response as in every other response since 2001, the DOPLAW Handbook has been an invaluable companion. Carry it. Read it. Apply it. Improve it.

Cal Lederer
July 29, 2011

CHAPTER 1

OVERVIEW OF DOMESTIC SUPPORT OPERATIONS

A. Background

Traditionally, the foremost task of the U.S. military has been to fight and win the nation's wars.[1] It has done so primarily by the projection of military power overseas. Since the terrorist attacks of September 11, 2001, however, the Department of Defense's (DoD) highest priority has been the protection of the homeland from direct attack.[2] Additionally, the extraordinary destruction wrought by Hurricane Katrina in 2005 reminded us that threats to our homeland, people, property, and economy are not always the result of acts of man.[3]

Since September 11, 2001, the federal government has taken aggressive and wide ranging steps to better address the threat of direct attacks on the United States and to prepare for and respond to 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, the Federal Emergency Management Agency (FEMA), the Immigration and Naturalization Service, the Transportation Security Administration, and the Secret Service, among others.[5] As required by law, DHS immediately began an effort to develop a coordinated system of response by civil authorities at all levels of government. The National Response Framework, published in January 2008, is the result of that effort.[6]

In 2002, DoD created the first Combatant Command, U.S. Northern Command (USNORTHCOM), with direct responsibility for the defense, protection and security of the continental United States, Alaska, and the territorial waters including the Gulf of Mexico and the Straits of Florida. In conjunction with U.S. Pacific Command (USPACOM) and U.S. Southern Command (USSOUTHCOM), DoD now has Combatant Commands whose combined geographic responsibilities cover all States and territories of the United States. In June 2005, DoD published the Strategy for Homeland Defense and Civil Support, setting out DoD's vision for transforming homeland defense and support to civil authorities.[7]

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[1] National Military Strategy, p. 3, 2004, *available at* http://www. http://www.defense.gov/news/Mar2005/d20050318nms.pdf [hereinafter National Military Strategy].

[2] Strategy for Homeland Defense and Civil Support, Foreward, June 2005, *available at* http://www.defenselink.mil/news/Jun2005/d20050630homeland.pdf.

[3] Federal analysis indicates that the direct toll in lives and treasure from natural disasters in recent decades far outweighs that from terrorist attacks. *See* Financing Recovery from Large-Scale Natural Disasters, CRS, February 9, 2009; 9/11 Terrorism: Economic Global Costs, CRS, October 5, 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, NATIONAL RESPONSE FRAMEWORK, Jan. 2008[hereinafter NRF], *available at* http://www.fema.gov/emergency/nrf,or DOPLAW Handbook, Supp. App. 2-18. The NRF superseded the National Response Plan (NRP) published in 2005.

[7] *See* Strategy for Homeland Defense and Civil Support, *supra* note 2, Foreword, p. iii.

B. Purpose of This Handbook

DoD organized its mission of homeland defense and civil support into three complimentary categories: Lead, Support, and Enable.[8] "Lead" refers to DoD's mission to "dissuade, deter, and defeat attacks upon the United States."[9] "Support" reflects DoD's mission to assist civil authorities in recovering from an attack or disaster.[10] And, "Enable" sets out DoD's mission to improve the "security contributions of domestic and international partners" and its own capabilities.[11] While each represents a distinct category of activities contained in the Strategy for Homeland Defense and Civil Support, the functions performed within the categories act in concert to strengthen the nation, prepare for any incident, defend against any attack, and recover from any disaster.

This handbook focuses on the latter two categories, Support and Enable. Circumstances involving the exercise of homeland defense (HD) authority and capabilities, i.e. "dissuade, deter, and defeat," are beyond the scope of this handbook. Nevertheless, actions taken within the HD function may directly impact DoD's civil support (CS) mission once an event has occurred. Likewise, for ongoing events or continuing attacks, CS actions may contribute immediately to HD capabilities.

C. DoD's Role in Civil Support

Military civil support operations are neither new nor limited to a single service. The military has long provided assistance in times of disaster and has routinely provided support to state and territorial governors, even historically having administered governmental affairs until local governance was established.[12] During the final year of the Civil War, Army officers provided disaster relief through the Freedman's Bureau.[13] 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. Similar support continued throughout the Twentieth Century to the present.

National Guard (NG) units, under the control of their respective state governor and their "The Adjutants General" (TAGs),[14] have traditionally been the primary military responders in domestic operations and emergencies. 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 resources are exhausted or overwhelmed and federal assistance has been requested by state officials.

DOD has capabilities and resources uniquely suited to support U.S. civil authorities. DoD consists of trained, disciplined personnel, and organizations capable of rapidly responding on short notice to

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[8] *Id.* at 2.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] U.S. DEP'T OF ARMY, FIELD MANUAL 3-07 STABILITY OPERATIONS AND SUPPORT OPERATIONS, 6-1 (20 February 2003) [hereinafter FM 3-07]. This publication supersedes FM 100-20/AF Pam 3-20; 5 December 1990, FM 100-23; December 1994, FM 90-29; 17 October 1994, and FM 100-19/FMFM 7-10; July 1993.

[13] U.S. Bureau of Refugees, Freedmen, and Abandoned Lands.

[14] In "state status," National Guard personnel are under the control of the particular Governor and TAG. "State status" includes "state active duty (SAD)" and Title 32—traditional Guard status. *See infra* Chapter 10, Reserve Components – Special Issues, for further discussion of National Guard status.

a broad spectrum of emergencies. Military personnel and their associated equipment, although organized to conduct combat operations, can often be effectively employed in civil support operations. Consequently, DoD will continue to be called upon to assist civil authorities.[15] In these instances, DoD's role is one of support—*civilian authorities retain primary responsibility for domestic operations.*[16]

U.S. domestic law, Presidential Decision Directives (PDDs),[17] National Security Presidential Directives (NSPD) and Homeland Security Presidential Directives (HSPDs), [18] Presidential Policy Directives (PPDs),[19] Executive Orders (EOs), and DoD regulations provide the framework for, and set limits on, the use of military forces to assist civil authorities. While the types of domestic support operations vary widely, two forms of statutory restrictions as well as policy concerns may limit the scope of support. First, judge advocates must carefully consider whether the Posse Comitatus Act.[20] Second, fiscal law constraints[21]—as well as policy limitations—apply when reviewing a proposed domestic support operation.

While HD authority and capabilities are beyond the scope of this publication, it is important to recognize how DoD contributes to this larger strategic construct in addition to providing necessary civil support.

On September 11, 2003, U.S. Northern Command (USNORTHCOM) reached full operational capability. USNORTHCOM's current mission statement states:

> USNORTHCOM anticipates and conducts Homeland Defense and Civil Support operations within the assigned area of responsibility to defend, protect[,] and secure the United States and its interests.[22]

This mission statement recognizes the unique dual roles for USNORTHCOM in HD and CS, in addition to standard Geographic Combatant Commander-assigned responsibilities.[23] Because of USNORTHCOM's responsibility for operations in the homeland, USNORTHCOM is engaged in nearly constant liaison with our national leadership and with the federal agencies that would lead civil support operations.

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[15] U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL (29 DEC 10) [hereinafter DoDD 3025.18].

[16] *See* Strategy for Homeland Defense and Civil Support, *supra* note 2, Executive Summary, p. 2.

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

[18] 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.

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

[20] 18 U.S.C. § 1385. *See infra* Chapter 4.

[21] *See infra* Chapter 13.

[22] The geographic area of responsibility for USNORTHCOM also contains Mexico, Canada, Bermuda, and portions of the Caribbean. The exact dimensions of this geographic area are contained in the Unified Command Plan.

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

Acknowledging the value of civil support that DoD can offer, Congress has enacted laws allowing federal agencies to request support from the military during domestic operations. These laws emphasize DoD's *supporting* role in civil support operations. Further, these laws acknowledge that the National Guard, while in state status, has primary responsibility for providing initial support to state and local civil authorities.[24]

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)[25] is designed to maximize unity of effort when federal agencies work together to respond to domestic emergencies.

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[26] and under the command of their respective Governors, have primary responsibility for providing military assistance to local governments. Only when state and local government resources are exhausted or inadequate, and support is requested by the state, will the federal government provide the necessary support.

D. Defense Support of Civil Authorities (DSCA)[27]

The primary reference for all DoD support to domestic operations is DoD Directive (DoDD) 3025.18, *Defense Support of Civil Authorities*.[28] As seen in Figure 1-1, this umbrella directive governs provisions of all DoD military assistance to U.S. civil authorities, and it encompasses a variety of specific types of support.[29]

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[24] FM 3-07, *supra* note 12, 6-14.

[25] National Response Framework, *supra* note 6.

[26] *See infra* Chapter 10, Reserve Components - Special Issues, for further discussion of National Guard status.

[27] MACA and MSCA now come under the term Defense Support of Civil Authorities (DSCA) in the National Response Framework (NRF). *See* National Response Framework, *supra* note 6.

[28] DoDD 3025.18, *supra* note 15.

[29] The types of military support to domestic operations include defense support of civil authorities (DSCA), military assistance for civil disturbances (MACDIS), continuity of operations plan (COOP), sensitive support (SS), counterdrug (CD), counter-terrorism (CT) and consequence management (CM).

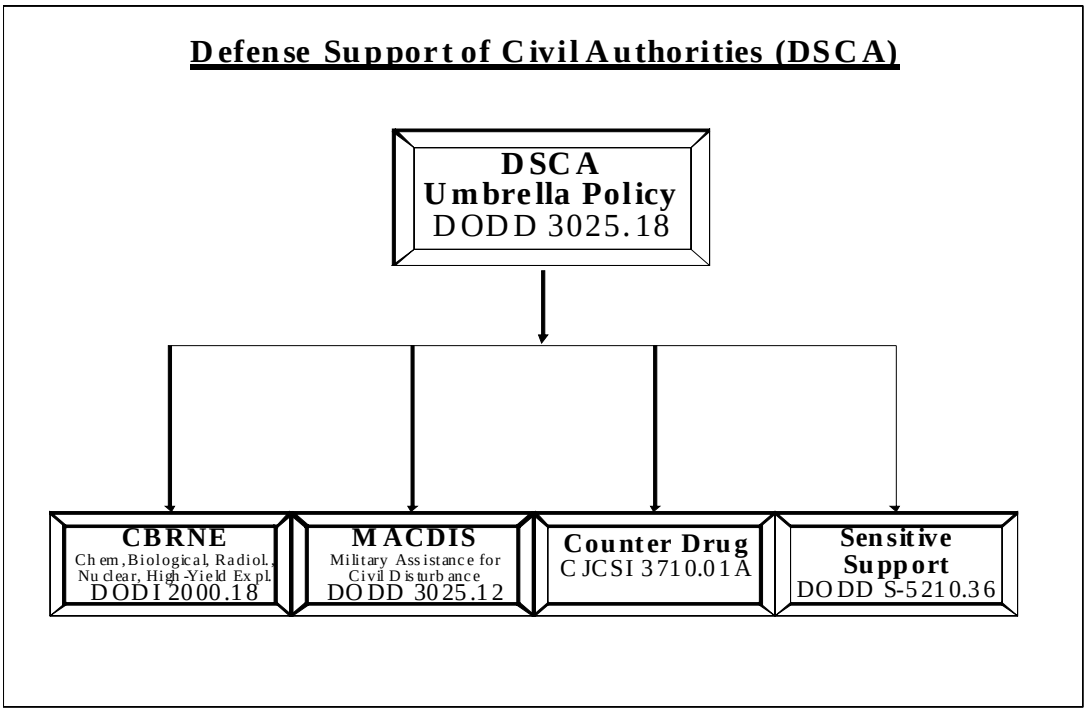

Figure 1-1. Defense Support of Civil Authorities

DoDD 3025.18 was promulgated on December 29, 2010. DoDD 3025.18 incorporates and cancels DoDD 3025.1 (Military Support to Civil Authorities) and DoDD 3025.15 (Military Assistance to Civil Authorities) and supplements DoDD 5525.5 (DoD Cooperation with Civilian Law Enforcement Officials). 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."

DoDD 3025.18 provides criteria against which all requests for support must be evaluated. The criteria are addressed to approval authorities, but commanders at all levels should be cognizant of these requirements when forwarding a recommendation for military support through the chain of command. The criteria are:

- Legality – Compliance with the law.
- Lethality – Potential use of lethal force by or against DoD forces.
- Risk – Safety of DoD forces.
- Cost – Who pays and the impact on DoD budget.
- Appropriateness – Whether it is in the interest of DoD to provide the requested support.
- Readiness – Impact on DoD's ability to perform its primary mission.

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 Directives and Instructions set out in this Handbook's respective chapters.

E. Handbook Organization

The phrase "domestic support operations" covers a broad category of DoD operations within the United States. This handbook will address all aspects of DoD's civil support mission. However, in order to understand the context of that support, it is necessary to begin with an appreciation of the Federal government's approach in preparing for and responding to any major domestic emergency or disaster, whether the result of a terrorist attack, an industrial accident, or the forces of nature.

We begin that discussion in this handbook with an explanation of the National Security Strategy and its implementation by key federal agencies. In particular, chapter 3 provides an initial discussion of the National Response Framework and the Department of Homeland Security since, in the majority of emergency and disaster response operations, it will serve as the LFA to which DoD lends its support. From there, the handbook covers DoD's strategy for civil support, and then chapter by chapter, discusses DoD's role in the various forms of domestic support operations.

Each chapter stands on its own and can be used by judge advocates to develop an understanding of specific types of operations, authorities, and limitations. However, each chapter is best understood in the context of the other chapters. Consequently, the handbook is organized in a manner so that the chapters relate to one another. Chapter 3, the National Plan for Consequence Management, leads into chapter 4, CBRNE Consequence Management, covering DoD's capabilities, organization, and authority to respond to a CBRNE event of any origination. Likewise, chapter 4 relates to chapters 5 & 6, Military Support to Civilian Law Enforcement, and Military Assistance for Civil Disturbances, operations and consequences likely to flow from a major CBRNE event, etc. The handbook concludes with chapters that impact all domestic operations, intelligence law, rules for the use of force, and fiscal law.

CHAPTER 2

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

KEY REFERENCES:

- The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.,* as amended.
- Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) as amended.
- Pollution Control Act of Oct. 18, 1972, as amended, and the Oil Pollution Act of 1990 (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 (1988) 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.
- 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.
- 42 U.S.C. § 9605 – National Contingency Plan.
- 50 U.S.C. § 2061, *et seq*. – Defense Production Act of 1950.
- DoDD 3025.18, Defense Support of Civil Authorities, December 29, 2010.
- DoD 3025.1-M, Manual for Civil Emergencies.
- National Response Framework (NRF), January 2008
- National Incident Management System (NIMS).
- National Oil and Hazardous Substances Pollution Contingency Plan.
- FM 3-28, Civil Support Operations, September 2, 2010.

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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.

A. The Federal Response Structure

In the two decades that began in 1988 when President George H.W. Bush promulgated Executive Order (EO) 12656, through March 2008 and the implementation of the National Response Framework, the Federal Government significantly changed its approach to preventing, preparing for, and responding to a major domestic incident. The changes came in fits and starts; at times they were incremental, at others, monumental. This chapter addresses the Federal Government's current system for domestic all-hazard incident management, as well as the vital role of the Stafford Act as the primary authority for the use of federal resources to assist States and local governments.

1. HSPD-5

Homeland Security Presidential Directive 5 (HSPD-5), "Management of Domestic Incidents," established a new means to federal emergency management.[3] It centers on the practical necessity that all levels of government across the nation 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 (subsequently, the National Response Framework (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 capabilities to work together 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.[4] Table 2-1 summarizes the roles and responsibilities established by HSDP-5.

HSPD-5 also eliminates the previous distinction, established in PDD-39, between crisis management and consequence management, instead treating the two "as a single, integrated function, rather than as two separate functions."[5] Whereas under the old Federal Response Plan (FRP) the Attorney General was the overall lead federal official for the government's response until the crisis management phase of the response was over; now, under the NRF, the Secretary of

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[3] Homeland Security Presidential Directive 5, Management of Domestic Incidents, February 28, 2003.

[4] *Id.*

[5] *Id.*

Homeland Security remains the lead federal official for the duration of the period involving federal assistance. Despite HSPD-5 erasing the distinction between crisis management and consequence management, the Directive reaffirms the Attorney General's authority as the lead official for conducting criminal investigation of terrorist acts or terrorist threats.[6]

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 (subsequently titled 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 2-1. Roles and Responsibilities Established by HSPD-5.

2. PPD-8 and National Preparedness Guidelines

On March 30, 2011, President Obama promulgated PPD-8 to update and replace HPSD-8 "National Preparedness." Separately, PPD-8 complements HSPD-5—which remains in effect. The purpose of PPD-8 is described as:

> 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.[7]

PPD-8 specifies that the Secretary of Homeland Security is responsible for coordinating the domestic all-hazards preparedness efforts of all executive departments and agencies, in consultation with State, local, tribal, and territorial governments, nongovernmental organizations, private-sector partners, and the general public; and for developing the national preparedness goal. 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, organization, equipment, training, exercises, employment, or other activities of DoD forces, or the allocation of DoD resources.[8]

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[6] *Id.*

[7] PPD-8, National Preparedness, March 30, 2011.

[8] *Id.*

3. Executive Order 12656: Emergency Preparedness and Response Responsibilities

Executive Order 12656 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.[9]

This executive order identifies several departments/agencies, *e.g.*, Defense, Energy, Health and Human Services, that have an active, and potentially overlapping, role regarding nuclear, biological, and chemical (NBC) 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.

The Executive Order establishing the Office of Homeland Security[10] amended EO 12656 to account for the responsibilities of the new office within the functional and legal structure of emergency preparedness. This Executive Order 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. Table 2-2 highlights some of the major areas of responsibility for several of the agencies identified in EO 12656, as amended by EO 13286.[11]

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[9] 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.

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

[11] Exec. Order No. 13286, 68 Fed. Reg. 10619 (Mar. 5, 2003) transferred key functions of FEMA to DHS.

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: Military response; national mobilization; damage assessment; support to civil and private sector, including law enforcement within authority; respond to all hazards related to nuclear weapons, materials, and devices; stockpile and store critical materials. Support Responsibilities: Coordinate military support with civilian agencies.
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: **A**dvise, 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 to develop 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, technological disasters; coordinate with the other agencies and with state and local governments to implement national security emergency preparedness policies. Support Responsibilities: Prepare plans and programs, to include plans and capabilities for related to nuclear emergencies; promote programs for Federal buildings and installations.
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: 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 to with transportation of energy materials.

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

4. The National Response Framework (NRF)[12]

On March 22, 2008, the NRF became effective. The NRF superseded the National Response Plan. The NRF establishes a comprehensive, national, all-hazards approach to domestic incident management across a spectrum of activities. It 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 addresses the principles, participants, roles, and structures of local, tribal, state, and federal governments—and each entity's respective agencies.

The NRF builds upon and complements the National Incident Management System (NIMS).[13] 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.

a. NRF Organization

The NRF is made up of the core document, fifteen Emergency Support Functions (ESFs), eight Support Annexes, seven Incident Annexes, and several Partner Guides.

- ***Core Document.*** The Core Document describes the doctrine that guides national response, roles and responsibilities, response actions, response organizations, and planning requirements.
- ***Emergency Support Function (ESF).*** The ESFs provide the necessary structures for coordinating interagency support in response to disasters and emergencies. ESFs describe the mission, policies, concept of operations, and responsibilities of the primary support agencies involved in the implementation of response functions. There are fifteen ESFs in the NRF (see Table 2-3).
- ***Support Annexes.*** The eight support annexes describe essential supporting aspects that are overarching in nature and which apply to all types of incidents. They provide the roles and responsibilities for these supporting aspects. The support annexes 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.
- ***Incident Annexes.*** The incident annexes describe the policies and structures to address specific situations. There are seven incident annexes: biological;[14] catastrophic; cyber; food and agricultural; mass evacuation; and nuclear/radiological and terrorism.[15]

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[12] A copy of the complete NRF is located at DOPLAW Handbook, Supp., App. 2-18 or online at: http://www.fema.gov/emergency/nrf/ (last visited Jun. 28, 2011).

[13] National Incident Management System; http://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf (last visited Jun. 28, 2011).

[14] HSPD-10 recommended a biological response annex be included as part of the NRP. This was subsequently included in the NRF, titled Homeland Security Presidential Directive 10, "Biodefense for the 21st Century," April 28, 2004.

[15] Four of the seven Incident Annexes original to the NRP have been updated under the NRF. Two of the remaining annexes are still in effect; the third was replaced by ESF #10. An additional annex, "Mass Evacuation" was added in

- ***Partner Guides.*** The partner guides provide references for describing the key roles and actions for local, tribal, state, Federal, and private-sector response partners.

b. Roles and Responsibilities

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

- Local chief elected, or chief appointed official
- Local emergency manager
- Individuals and households
- Private sector organizations and businesses
- Nongovernmental organizations (NGOs)
- Tribal leader
- Governor
- Secretary of Homeland Security
- Attorney General
- Secretary of Defense
- Secretary of State
- Director of National Intelligence

c. Emergency Support Functions (ESFs)

The NRF establishes a coordination mechanism to provide assistance to state, local, and tribal governments and to federal departments and agencies conducting missions of primary federal responsibility. The ESFs may be selectively activated for both Stafford Act and non-Stafford Act incidents. Table 2-3 lists the ESFs and the designated lead federal agencies.

June 2008. The current Incident Annexes can be found at DOPLAW Handbook, Supp., App. 2-19 through 2-25, or online at: http://www.fema.gov/emergency/nrf/incidentannexes.htm (last visited Jun. 28, 2011).

ESF #	ESF	Lead Federal Agency
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
5	Emergency Management	Department of Homeland Security/FEMA
6	Mass Care, Emergency Assistance, Housing, and Human Resources	Department of Homeland Security/FEMA
7	Logistics Management and Resource Support	General Services Administration
8	Public Health and Medical Services	Department of Health and Human Services
9	Urban 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
13	Public Safety and Security	Department of Justice
14	Long Term Community Recovery and Mitigation	Department of Homeland Security/FEMA
15	External Affairs	Department of Homeland Security

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

d. NRF Coordinating Structures

The following are several of the key NRF coordinating structures used to manage declared emergencies or disasters.

(1) *Local/State Emergency Operations Center (EOC/SEOC).* 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.

(2) *Incident Command Post (ICP).* The field location at which the primary tactical-level, on-scene incident command functions are performed. The ICP may be collocated with the incident base or other incident facilities and is normally identified by a green rotating or flashing light.

(3) *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.

(4) *National Operations Center (NOC).* The NOC is the primary national hub for situational awareness and operational coordination across the Federal Government. The NOC is a

standing 24/7 interagency operations center that monitors threats and hazard information and fuses law enforcement, national intelligence, emergency response, and private-sector reporting. The NOC facilitates homeland security information-sharing and operational coordination with other federal, state, local, tribal, and nongovernmental EOCs.

(5) *National Response Coordination Center (NRCC).* The NRCC is one of two operational components of the NOC. It is FEMA's primary operations management center and the focal point for national resource coordination. The NRCC resolves federal resource support conflicts and other implementation issues forwarded by the Joint Field Office (JFO).

(6) *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 resources sectors.

(7) *Strategic Information and Operations Center (SIOC).* The FBI SIOC is the focal point and operational control center for all federal intelligence, law enforcement, and investigative law enforcement activities related to domestic terrorist incidents or credible threats, including leading attribution investigations. The SIOC serves as an information clearinghouse to help collect, process, vet, and disseminate information relevant to law enforcement and criminal investigation efforts in a timely manner.

(8) *Regional Response Coordination Center (RRCC).* The RRCC is a 24/7 coordination center operated by each of FEMA's nine regions. The RRCC is capable of quick expansion through staffing ESFs in anticipation of, or immediately following, a serious incident. The RRCC coordinates federal regional response efforts, establishes federal priorities, and implements local federal program support. The RRCC operates until a JFO is established in the field and/or the Principal Federal Officer, Federal Coordinating Officer, or Federal Resource Coordinator can assume their NRF coordination responsibilities.

(9) *Joint Field Office (JFO). T*he JFO is the primary federal incident management field structure. It is a temporary federal facility established locally to coordinate operational federal assistance activities to the affected jurisdiction(s) during "Incidents of National Significance." The JFO is a multi-agency center that provides a central location for coordination of federal, state, local, tribal, nongovernmental, and private-sector organizations with primary responsibility for threat response and incident support. The JFO adapts to the magnitude and complexity of the situation, and incorporates the NIMS principles regarding span of control and organizational structure: management, operations, planning, logistics, and finance/administration. Although the JFO uses an incident command system structure, the JFO does not manage on-scene operations. Instead, the JFO focuses on providing support to on-scene efforts and conducting broader support operations that may extend beyond the incident site. In the event of multiple incidents, multiple JFOs may be established at the discretion of the Secretary.

(10) *Joint Operations Center (JOC).* When established, the JOC is a branch of the JFO. It is established by the Senior Federal Law Enforcement Officer (SFLEO) (e.g., the FBI Special Agent-in-Charge (SAC) during terrorist incidents) to coordinate and direct law enforcement and criminal investigation activities related to the incident. The emphasis of the JOC is on prevention as well as intelligence collection, investigation, and prosecution of a criminal act. This emphasis includes managing unique tactical issues inherent to a crisis situation (e.g., a hostage

situation or terrorist threat). When this branch is included as part of the JFO, it is responsible for coordinating the intelligence and information function (as described in NIMS) which includes information and operational security, and the collection, analysis, and distribution of all incident-related intelligence. Accordingly, the Intelligence Unit within the JOC serves as the interagency fusion center for all intelligence related to an incident.

e. Federal Field-Level Organizations and Associated Federal Officers

(1) JFO Coordination Group

The following are potential members of the JFO Coordination Group:

- *Principal Federal Official (PFO).* By 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 individual to serve as his or her primary representative to ensure consistency of federal support and the overall effectiveness of the federal incident management. When appointed, such an individual serves in the field as the PFO for the incident. The PFO provides a primary point of contact and situational awareness locally for the Secretary of Homeland Security.
- *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. The FCO assists the Unified Command and/or the Area Command and works closely with the Principal Federal Official (PFO), Senior Federal Law Enforcement Official (SFLEO), and other Senior Federal Officials (SFOs).
- *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).
- *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.
- Governor's Authorized Representative. The GAR, who is in most cases also the State Coordinating Officer (SCO), represents the governor of the state. The GAR/SCO is most often a senior leader in the state's emergency response organization. Local area representatives may also be members of the JFO coordination group.

(2) JFO Coordination Staff

The JFO structure will normally include a Coordination Staff. The JFO Coordination Group determines the extent of this staffing based on the type and magnitude of the incident. The roles and responsibilities of the JFO Coordination Staff are summarized below:

- *Chief of Staff.* The JFO Coordination Staff may include a Chief of Staff and representatives providing specialized assistance, which may include support in the following areas: safety; legal counsel; equal rights; security; infrastructure liaison; and other liaisons.

- *External Affairs Officer.* The External Affairs Officer provides support to the JFO leadership in all functions involving communications with external audiences. External Affairs includes: Public Affairs, Community Relations, Congressional Affairs, State and Local Coordination, Tribal Affairs, and International Affairs, when appropriate. Resources for the various External Affairs Functions are coordinated through ESF #15. The External Affairs Officer is also responsible for overseeing operations of the Federal Joint Information Center (JIC) established to support the JFO.
- *Defense Coordinating Officer (DCO).* If appointed by DoD, the DCO serves as DoD's single point of contact at the JFO. With few exceptions, requests for Defense Support of Civil Authorities (DSCA) 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.)

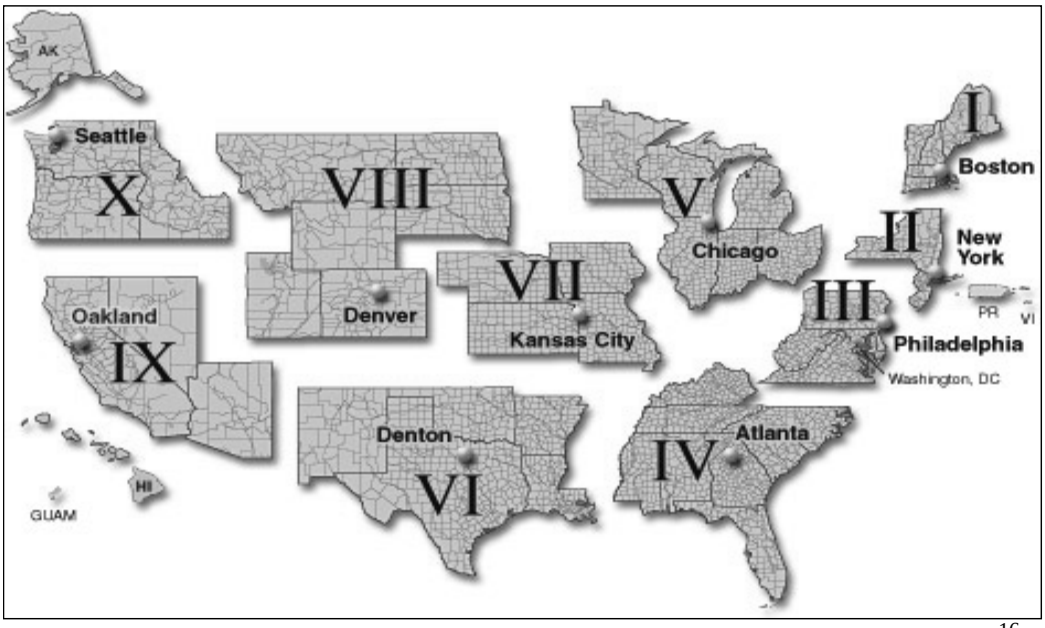

Figure 2-1. Map of FEMA Regions with Embedded DCOs in Each Region.[16]

f. Utilization of the NRF

After the President has declared a major disaster or emergency, he may direct any federal agency to use its authorities and resources in support of state and local response efforts to the extent that provision of the support does not conflict with other agency emergency missions. Under the Stafford Act, FEMA serves as the lead federal agency (LFA) for disaster response and recovery activities. The authority to direct federal agencies to use their resources in support of state and local

[16] FEMA, *Regional Contacts*, http://www.fema.gov/about/contact/regions.shtm (last visited July 26, 2011).

response efforts has been delegated from the President to the Secretary of DHS.[17] Under the NRF, the President, upon the recommendation of the Secretary of DHS and the FEMA Administrator, can appoint a Federal Coordinating Officer (FCO)[18] who is responsible for coordinating the delivery of federal assistance to the affected state(s) and local government(s) and any disaster victims. The FCO works closely with the SCO, appointed by the governor, to oversee disaster operations for the state. The SCO also serves as the Governor's Authorized Representative (GAR) and is generally empowered to execute all necessary documents for disaster assistance on behalf of the state.

5. The National Incident Management System (NIMS)

Since it was first published, NIMS has subsequently been revised to reflect input from a broad variety of stakeholders (*e.g.*, federal, state, tribal, local, private sector, and nongovernmental organizations).[19] In addition, lessons learned from Katrina and other recent incidents were considered in the new version. The December 2008 revision "focused on clarifying concepts and principles, and refines processes and terminology throughout the document . . . no major policy changes were made to the document during the revision."[20]

NIMS is comprised of five key components:

- **Preparedness.** NIMS focuses on the following elements of preparedness: planning; procedures and protocols; training and exercises; personnel qualifications and certification; and, equipment certification.[21] NIMS also stresses a unified approach to management and response activities, and that all levels of governments and organizations must identify their capabilities before incidents occur.
- **Communication and Information Management.** NIMS emphasizes that well-planned, established, and utilized communications are critical for enabling the dissemination of information during an incident.[22] Common plans, standards and communication architecture help to facilitate interoperability and maintain a constant flow of information during an incident.[23] 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 five principles:[24]

    - Planning;
    - Use of agreements;
    - Categorizing resources;
    - Resource identification and ordering; and,
    - Effective management of resources.

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[17] DEP'T OF HOMELAND SECURITY, NATIONAL RESPONSE FRAMEWORK, Jan. 2008 [hereinafter NRF].

[18] *Id.* at 67.

[19] NIMS can be viewed at http://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf.

[20] *Id.*

[21] *Id.* at 9.

[22] *Id.* at 23.

[23] *Id.* at 24.

[24] *Id.* at 32–33.

- **Command and Management.** NIMS plans to incorporate 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.[25] The ICS works at the tactical level, organizing the on-scene operations.[26] 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.[27]
- **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.[28] As part of this process, NIMS notes the continued development of science and technology as playing a critical role in improving response capabilities.

As with the Stafford Act, NIMS is based upon the premise that most incidents begin and end at the local level, and are managed on a daily basis at the lowest level.[29] There are, however, incidents which require the involvement of higher levels of government and response.

Like the Stafford Act and its progeny, the draft NIMS is based upon the premise that most incidents begin and end at the local level with few incidents requiring assistance from federal, state, and local authorities.[30]

6. PPD-8, National Planning Replaces HSPD 8, Annex I.

President Obama promulgated PPD-8 on March 30, 2011 to replace both HSPD-8 (discussed above) and HSPD-8, Annex I, National Planning, which was originally promulgated in 2007, to "further enhance the preparedness of the United States by formally establishing a standard and comprehensive approach to national planning."[31] Most notably, PPD-8 mandates:

- SECDHS, in coordination with other executive departments and agencies, must develop and submit to the President a "National Preparedness Goal" by September 30, 2011. The National Preparedness Goal shall be informed by the risk of specific threats and vulnerabilities, accounting for regional variations, and shall include concrete, measurable and prioritized objectives to mitigate risks. It must also define core capabilities necessary to prepare for specific types of incidents that present the greatest risk to national security and must emphasize achievement of an integrated, layered and "all-of-Nation" preparedness approach to optimize available resources.

- SECDHS, in coordination with other executive departments and agencies, shall submit to the President by November 30, 2011 a National Preparedness System consisting of an

[25] *Id.* at 45.
[26] *Id.* at 46.
[27] *Id.* at 64.
[28] *Id.* at 75.
[29] *Id.* at 5.
[30] *Id.* at 17.
[31] HSPD-8, Annex I (2007) Purpose.

integrated set of guidance, programs, and processes that will enable the Nation to meet the National Preparedness Goal. The National Preparedness System shall be designed to help guide the domestic efforts of all levels of government, the private and nonprofit sectors, and the public to build and sustain the capabilities outlined in the National Preparedness Goal. The National Preparedness System shall include guidance for planning, organization, equipment, training, and exercises to build and maintain domestic capabilities. It shall provide an all-of-Nation approach for building and sustaining a cycle of preparedness activities over time. The National Preparedness System shall include a series of integrated national planning frameworks, covering prevention, protection, mitigation, response, and recovery. The frameworks shall be built upon scalable, flexible, and adaptable coordinating structures to align key roles and responsibilities to deliver the necessary capabilities.

- Individual plans developed under HSPD-8 and Annex I remain in effect until rescinded or otherwise replaced.

HSPD-8, Annex I required the development of National Planning Scenarios.[32] Consequently, the Homeland Security Counsel developed fifteen scenarios depicting "a diverse set of high-consequence threat scenarios of both potential terrorist attacks and natural disasters."[33] USNORTHCOM subsequently developed CONPLANs that address each of the scenarios where DoD support is necessary. These CONPLANs can be accessed with permission of USNORTHCOM.[34]

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[32] HSPD 8, Annex I, para. 34.

[33] In 2006, the Department of Homeland Security released National Planning Scenarios, an in-depth analysis of fifteen potential disasters that face the nation.

Scenario 1: Nuclear Detonation – 10-kiloton Improvised Nuclear Device

Scenario 2: Biological Attack – Aerosol Anthrax

Scenario 3: Biological Disease Outbreak – Pandemic Influenza

Scenario 4: Biological Attack – Plague

Scenario 5: Chemical Attack – Blister Agent

Scenario 6: Chemical Attack – Toxic Industrial Chemicals

Scenario 7: Chemical Attack – Nerve Agent

Scenario 8: Chemical Attack – Chlorine Tank Explosion

Scenario 9: Natural Disaster – Major Earthquake

Scenario 10: Natural Disaster – Major Hurricane

Scenario 11: Radiological Attack – Radiological Dispersal Devices

Scenario 12: Explosives Attack – Bombing Using Improvised Explosive Devices

Scenario 13: Biological Attack – Food Contamination

Scenario 14: Biological Attack – Foreign Animal Disease (Foot-and-Mouth Disease)

Scenario 15: Cyber Attack

See DEP'T OF HOMELAND SECURITY, NATIONAL PLANNING SCENARIOS (Apr. 2006). Two of the scenarios represent natural disasters, major earthquake and major hurricane; a third highlights economic and social complications resulting from a cyber attack; the remaining twelve scenarios focus on chemical, biological, radiological, nuclear, or high-yield explosive (CBRNE) incidents.

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

7. Interplay between the NRF and Other Plans Applicable to WMD Response and Recovery

When DHS initiates the response mechanisms of the NRF, including the ESFs, Support Annexes, and Incident Annexes, the 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. Other interagency response plans include the National Emergency Communications Plan (NECP)[35] and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).[36] The NRF represents a significant effort to integrate the federal government's inter-agency emergency and disaster plans and may affect certain agency's responsibilities in the event of a major disaster or emergency.

The NECP was developed pursuant to the Homeland Security Act of 2002[37] to promote the ability of emergency response providers and relevant government officials to continue to communicate in the event of natural disasters, acts of terrorism, and other man-made disasters, and to ensure, accelerate, and attain interoperable emergency communications nationwide.[38] Emergency Support Function 2 of the NRF 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.

The NCP was developed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended.[39] It sets out procedures for managing oil spills into navigable waters and releases of hazardous substances, pollutants, and contaminants into the environment. Inland, the Environmental Protection Agency (EPA) is the lead agency for coordinating the federal response. In coastal areas, the U.S. Coast Guard is the lead agency for coordinating the federal response. Generally, DoD or Department of Energy (DOE) will be the lead agency 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. Finally, the EPA takes the lead for hazardous materials with respect to incidents that have not yet been determined to be related to terrorism, or for incidents when the NRF has not yet been activated.

Once the NRF is activated, FEMA has the lead for incident management and EPA has the lead agency role for ESF 10, Oil and Hazardous Materials Response, incorporating the NCP. Executive

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[35] National Emergency Communications Plan, July 2008. It serves as a basis of planning and use of national communications resources in support of Stafford Act provisions during a non-wartime emergency [hereinafter NECP].

[36] National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. 300 (2002) [hereinafter the National Contingency Plan or NCP]. The NCP provides the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants.

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

[38] *Id.* at "Message from the Secretary."

[39] 42 U.S.C. § 9605, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99–499, [hereinafter CERCLA] and by § 311(d) of the Clean Water Act (CWA), 33 U.S.C. § 1321(d), as amended by the Oil Pollution Act of 1990 (OPA), Pub. L. No. 101–380. Executive Orders 12580 and 12777 delegated to the EPA responsibility to amend the NCP as necessary.

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.[40]

The Nuclear/Radiological Incident Annex (NRIA) of the NRF supersedes the Federal Radiological Emergency Response Plan (FRERP) of 1996.[41] 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 to address the consequences of the event. 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.

"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.

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 nuclear facilities owned or operated by DoD, materials shipped by or for DoD, nuclear weapons, and DOD satellites contain radioactive materials that impact within the United States.[42]

National Security Presidential Directive 46 (NSPD-46)/Homeland Security Presidential Directive 15 (HSPD-15)[43] detail the policy of the United States in combating terrorism and reaffirm the lead agencies for the management of various aspects of the counterterrorism effort. They recognizes that states have primary responsibility in responding to terrorist incidents, including events, and the Federal Government provides assistance as required.

8. Impact of the Homeland Security Act on the Federal Response Structure and Process

The Homeland Security Act of 2002 represented a watershed in the manner in which the federal government organizes to respond to WMD terrorism.[44] The Act established the DHS, and consolidated the consequence management missions, assets, and personnel of numerous federal departments and agencies into a single department.[45] The primary missions of DHS include: preventing terrorist attacks within the United States; reducing the vulnerability of the United States

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[40] Exec. Order No. 12580, (Superfund Implementation), 23 Jan. 1987, as amended.

[41] Nuclear/Radiological Incident Annex, June 2008, p. 4.

[42] *Id.* Table 1.

[43] National Security Presidential Directive 46/Homeland Security Presidential Directive 15, "U.S. Strategy and Policy in the War on Terror" (classified), March 6, 2006.

[44] Homeland Security Act, *supra* note 37.

[45] *Id.* § 101.

to terrorism; and minimizing the damage and assisting in the recovery from terrorist attacks that occur within the United States.[46] DHS is comprised of various directorates and components including the Coast Guard, Customs and Border Protection, Citizenship and Immigration Services, Immigration and Customs Enforcement, and the Federal Emergency Management Agency.

The Federal Emergency Management Agency (FEMA) maintains responsibility for "reduc[ing] the loss of life and property and protect[ing] the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters."[47] Activities pursuant to this responsibility include managing the response; directing the strategic response assets that were transferred to DHS; overseeing the Metropolitan Medical Response System; and coordinating other federal response resources outside of DHS in the event of a terrorist attack or major disaster. The Homeland Security Act also directed the development of a National Incident Management System 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.[48] 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 federal agency. Further, it served as the legal impetus for a revised approach to incident management, as later set forth in Homeland Security Presidential Directive 5, discussed below.

9. Defense Against Weapons of Mass Destruction Act

Title 50 of Chapter 40 of the U.S. Code deals with 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.[49] 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. 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) is directed to designate an Executive Agent for its nuclear, chemical, and biological response. The DoD and DOE Executive Agents are responsible for coordinating assistance with federal, state, and local officials in responding to threats involving nuclear, chemical, and biological weapons.[50]

B. The Stafford Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (The Stafford Act) provides for assistance by the federal government to the states in the event of natural and other disasters and emergencies.[51] 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

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[46] *Id.* § 101(b).

[47] FEMA mission as stated on the FEMA website located at: http://www.fema.gov/about/index.shtm#0 (last visited on Jun. 28, 2011).

[48] Homeland Security Act, *supra* note 37, § 502.

[49] Title 10 U.S.C. §12304 provides the federal authority for the mobilization of Reserve Components in response to the use or threatened use of a weapon of mass destruction.

[50] 50 U.S.C. §§ 2301–2369 (2006).

[51] The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.*, as amended by Pub. L. No. 109-295 (2007) [hereinafter The Stafford Act].

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."[52] 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 he may exercise in the event of a major disaster or emergency. Generally, Stafford Act assistance is rendered upon request from a state governor[53] provided certain conditions are met, primarily that the governor certifies that the state lacks the resources and capabilities to manage the consequences of the event without federal assistance. FEMA operates under the Stafford Act, focusing its efforts on managing the consequences of disasters and emergencies. FEMA's actions generally are driven by requests from state and local governments. Figure 2-1, below, provides an overview of the process of providing federal support to states under the Stafford Act.

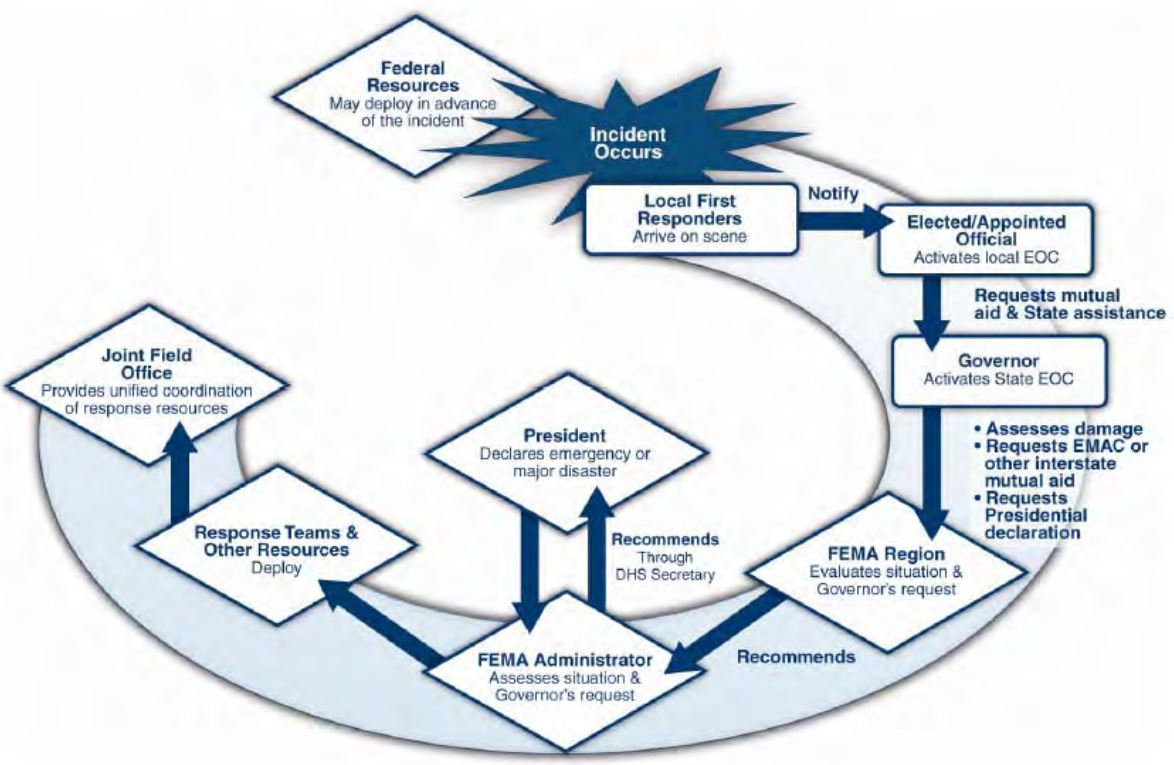

Figure 2-1.

[52] *Id.* § 5121.

[53] Section 5170(a) of the Stafford Act was amended in 2006 authorizing the President, in the absence of a State request, to provide Federal assistance.

The Stafford Act lists the roles and responsibilities of federal agencies and departments in providing both major disaster and emergency assistance; the Stafford Act also outlines the types of assistance that affected state(s) may receive from the federal government. (See Table 2-4 below.)

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.[54] 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, e.g., housing. The FCO may coordinate all relief efforts; however, states, localities, and relief organizations must agree. The President is also authorized to form Emergency Support Teams (EST) of federal personnel to be deployed to the area of the disaster or emergency.[55] By delegation, the FCO may activate ESTs composed of federal program and support personnel, to be deployed into an area affected by a major disaster or emergency.[56] These teams may also be called Emergency Response Teams (ERTs). The ERT is the principal interagency group that supports the FCO in coordinating the overall federal disaster assistance.

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, among others, Executive Order 12656.	
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.

[54] 42 U.S.C. § 5143.

[55] *Id.* § 5144.

[56] 44 C.F.R. 206.24 (2003).

FEMA[57]	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.

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. 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.[58]

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 also furnish information on the measures that have been taken at the state and local levels to mitigate the effects of the disaster.

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[57] Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295 (2007), § 506. FEMA retained all functions assigned to it under the Stafford Act and remains the lead federal agency for Stafford Act responses.

[58] 42 U.S.C. § 5122(2).

In addition, the President must certify that state and local government obligations and expenditures comply with all applicable cost-sharing requirements of the Stafford Act.[59]

The President's powers after the declaration of a major disaster include the authority to provide the following, among others, 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.[60] In addition, the President is authorized to direct federal agencies in providing essential assistance to meet immediate threats to life and property and to coordinate all disaster relief assistance.[61]

b. Emergencies

The Stafford Act defines "emergency" as follows:

> [A]ny occasion or instance for which, in the determination of the President, [f]ederal 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.[62]

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 (CBRNE)–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, 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.[63]

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.[64] The President may coordinate all emergency relief assistance and provide technical and advisory assistance to affected state and local governments for: 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

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[59] *Id.* § 5170.

[60] *See id.* §§ 5171–5186.

[61] *Id.* § 5170(b).

[62] *Id.* § 5122(1).

[63] *Id.* § 5193.

[64] *Id.* § 5192.

with 42 U.S.C. § 5174; and assist state and local governments in the distribution of food, medicine, and other consumable supplies.[65]

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."[66]

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.[67]

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. Section 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.

3. Main Takeaways concerning the Stafford Act

First, response to a disaster or emergency is primarily the responsibility of the state and local governments. Second, if the state or local government is overwhelmed by the incident or there is an independent federal nexus to the event, the President may authorize major disaster assistance or declare a federal emergency, respectively. When an emergency involves a facility for which the federal government exercises exclusive or primary authority, the President may unilaterally direct the provision of federal assistance under the Act. Third, when a disaster or emergency overwhelms state and local capabilities, a governor may request the President to make a major disaster or emergency declaration under the Stafford Act. A presidential declaration is contingent on the joint findings of a local/state/DHS preliminary damage assessment, indicating that damages are of sufficient severity to warrant assistance under the Stafford Act.[68] Finally, an incident of WMD terrorism is quite likely to be of sufficient severity to warrant an emergency declaration.

C. Subordinate Commander's 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

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[65] *Id.* § 5192(a).

[66] *Id.* § 5191(a).

[67] *Id.* § 5170b(c).

[68] NRF, *supra* note 14, Overview of Stafford Act Support to States, p. 1.

assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DoD officials (most typically installation commanders) 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.

- However, 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 Chapter 4: Military Support to Civilian Law Enforcement and Chapter 5: Civil Disturbance Operations).

- Separately, per DoDD 3025.18.4.G.1, any decision by an Immediate Response Authority to temporarily deploy resources requires notification to the National Joint Operations and Intelligence Center (NJOIC).

- Finally, commanders may not normally continue support under immediate response authority beyond seventy-two hours.

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

- Legality (compliance with laws)
- Lethality (potential use of lethal force by or against DOD Forces)
- Risk (safety of DOD Forces)
- Cost (including the source of funding and the effect on the DOD budget)
- Appropriateness (whether providing the requested support is in the interest of the Department) and
- Readiness (impact on DoD's ability to perform its primary mission)[69]

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); however, National Guard personnel will not be placed in or extended in Title 32 status to conduct State immediate response activities. 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 NRF and NIMS are a paradigmatic 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. For example, it is possible that DoD personnel or assets

[69] These factors are colloquially known as the CARRLL factors (cost, appropriateness, risk, readiness, legality, lethality).

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 2-2 below outlines different processes by which local requests for assistance would be handled following a Stafford Act declaration and under immediate response authority.

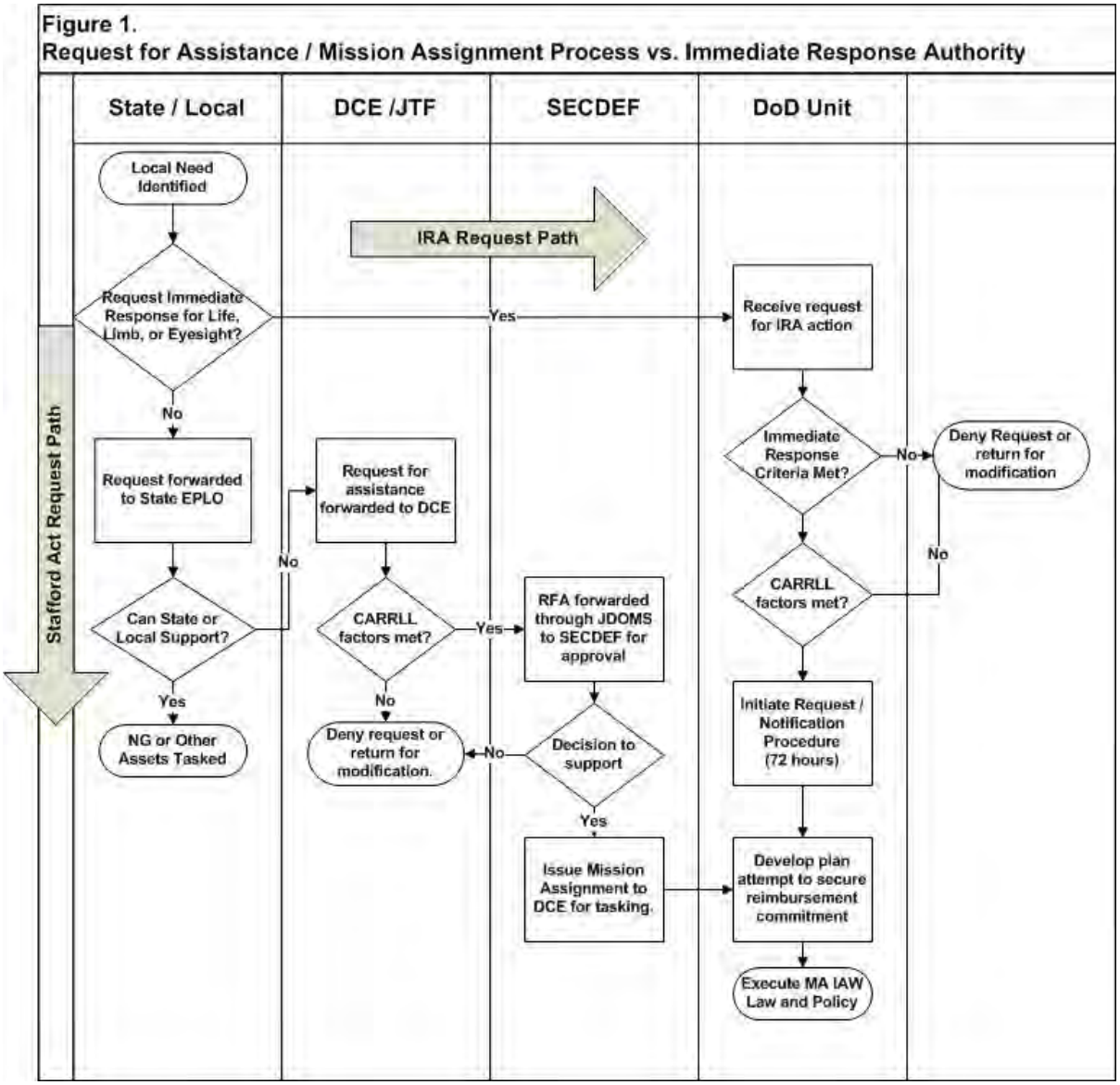

Figure 2-2.

CHAPTER 3

DOD RESPONSE FOR CHEMICAL, BIOLOGICAL, RADIOLOGICAL, NUCLEAR, AND HIGH-YIELD EXPLOSIVES (CBRNE) CONSEQUENCE MANAGEMENT

KEY REFERENCES:

- Robert T. Stafford Disaster Relief and Emergency Assistance Act (as amended), Pub. L. No. 93-288, 42 U.S.C. §§ 5121–5207.
- The Defense Against Weapons of Mass Destruction Act, 50 U.S.C. §§ 2301–2368 (2007).
- EO 13527 Establishing Federal Capability for the Timely Provision of Medical Countermeasures Following a Biological Attack, December 30, 2009.
- National Response Framework, January 2008.
- DoDD 3025.18, Defense Support of Civil Authorities (DSCA), December 29, 2010.
- DoDD 3025.12, Military Assistance for Civil Disturbances (MACDIS), February 4, 1994.
- DoDD 3150.08, DOD Response to Nuclear and Radiological Incidents, January 20, 2010.
- DoDD 5525.5, DOD Cooperation with Civilian Law Enforcement Officials, January 15, 1986, incorporating change 1, December 20, 1989.
- CJCSI 3125.01A, "Military Assistance to Domestic Consequence Management Operations in Response to a Chemical, Biological, Radiological, Nuclear, or High-Yield Explosive Situation," March 16, 2007.
- Joint Pub 3-29, Counterterrorism, November 13, 2009.
- Joint Pub 3-28, Civil Support, September 14, 2007.
- Joint Pub 3-41, Chemical, Biological, Radiological, Nuclear, or High-Yield Explosive Consequence Management, October 2, 2006.
- FM 3-28, Civil Support Operations, September 2, 2010.

A. Introduction

In the wake of 9/11 and Hurricane Katrina, the Department of Homeland Security (DHS) developed the National Response Framework.[1] This document evolved from the National Response Plan (NRP), which, in turn, was mandated under Homeland Security Presidential Directive (HSPD-5), Management of Domestic Incidents. The intent of HSPD-5 was to develop a single, comprehensive approach to domestic incident management[2] built on the template of the National Incident Management System (NIMS).[3] The NRF provides national-level policy and operational direction

[1] The National Response Framework (NRF) is addressed in more detail in Chapter 2.

[2] The term "Incident Management" was introduced, under the National Response Plan (NRP), with a view toward eliminating the distinction between crisis and consequence management. Although NRF also uses incident management to denote both crisis and consequence management, for the purposes of this chapter, the distinctions between crisis and consequence management remain important, especially in the response to any incident that may result from terrorist activity. Crisis management is predominantly a law enforcement response and involves measures to identify, acquire, plan, and employ the use of resources needed to anticipate, prevent, and/or resolve a threat or act of terrorism. Consequence management are those actions taken to maintain or restore essential services and manage and mitigate problems resulting from disasters and catastrophes, including natural, manmade, or terrorist incidents.

[3] The National Incident Management System (NIMS) provides a doctrinal framework for incident management designed to provide consistency at all jurisdictional levels. NIMS includes a core set of concepts, principles,

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 contemplate the needs that must be met when the responding jurisdiction's capabilities are overwhelmed by the magnitude of a catastrophic incident.

The NRF is designed to ensure timely and effective federal support in response to state, tribal, and/or local requests for assistance (RFAs). 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,[4] and its activities are referred to as Defense Support to Civilian Authorities (DSCA), or simply "civil support."[5]

The NRF and NIMS provide broad direction for any type of disaster, in what is characterized as an "all-hazards" approach.[6] Consequently, the framework applies equally to natural disaster relief, the handling of an unintentional or negligent industrial accident, or the Federal government's response to a terrorist's potential domestic employment of a Chemical, Biological, Radiological, Nuclear, and high-yield Explosives (CBRNE) weapons of mass destruction (WMD).[7] Although the various levels of government have experience in responding to natural disasters, CBRNE events pose some of the greatest challenges facing the United States today[8] and underscore the importance of maintaining a DoD force that is ready and able to respond to the specialized threats.

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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.

[4] Joint Chiefs of Staff, Joint Pub. 3-28, Civil Support, at vii (14 September 2007) [hereinafter Joint Pub. 3-28].

[5] U.S. DEP'T OF DEFENSE, DIR. 3025.18, Defense Support to Civil Authorities, 29 Dec. 10, at 16 (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. Also known as civil support.

[6] Federal consequence management was traditionally focused on natural disasters. Following the attacks of 9/11, emergency planning and consequence management experts advocated for a single, "all-hazards" process for planning and responding to both natural disasters and man-made events, including acts of terrorism. *See* NRF *supra* note 1, at 2.

[7] It is important to note that while the employment of any weapon of mass destruction (WMD) will constitute a CBRNE incident, not all CBRNE incidents are 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 would most likely result in DoD-assisted CBRNE CM operations.

[8] In 2006, DHS released National Planning Scenarios, an in-depth analysis of fifteen potential disasters that face the nation.

> Scenario 1: Nuclear Detonation – 10-kiloton Improvised Nuclear Device
>
> Scenario 2: Biological Attack – Aerosol Anthrax
>
> Scenario 3: Biological Disease Outbreak – Pandemic Influenza
>
> Scenario 4: Biological Attack – Plague

B. CBRNE CM Overview and Authorities

A CBRNE incident is any accident or intentional event involving chemical agents, biological agents, radiological sources, nuclear devices, or high-yield explosives, and/or industrial materials that are hazardous by themselves or when mixed with other material, including hazards from industrial pollutants and waste, and will produce a toxic effect to an exposed person. Any action taken to address the consequences of any inadvertent or deliberate release of a chemical, biological, radiological, or nuclear agent constitutes a CBRNE CM operation.[9] As a general proposition, a catastrophic CBRNE event would quickly exceed the capabilities of local, state, and tribal governments; consequently, CBRNE CM[10] is normally managed at the federal level, with DoD in a supporting role.[11]

The principle of "unity of effort" dictates that a single authority control the efforts of the various responding federal assets; while DoD forces may be fully committed to CBRNE CM, they are not, however, directed by the LFA they support. The Secretary of Defense always retains command of federal (Title 10) military forces providing CBRNE CM. 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.

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

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Scenario 5: Chemical Attack – Blister Agent

Scenario 6: Chemical Attack – Toxic Industrial Chemicals

Scenario 7: Chemical Attack – Nerve Agent

Scenario 8: Chemical Attack – Chlorine Tank Explosion

Scenario 9: Natural Disaster – Major Earthquake

Scenario 10: Natural Disaster – Major Hurricane

Scenario 11: Radiological Attack – Radiological Dispersal Devices

Scenario 12: Explosives Attack – Bombing Using Improvised Explosive Devices

Scenario 13: Biological Attack – Food Contamination

Scenario 14: Biological Attack – Foreign Animal Disease (Foot-and-Mouth Disease)

Scenario 15: Cyber Attack

See DEP'T OF HOMELAND SECURITY, NATIONAL PLANNING SCENARIOS, April, 2006. Two of the scenarios represent natural disasters, major earthquake and major hurricane; a third highlights economic and social complications resulting from a cyber attack; the remaining 12 scenarios focus on chemical, biological, radiological, nuclear or high-yield explosive (CBRNE) incidents.

[9] 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* ESF 10; DoD 3150.8-M, "NUCLEAR WEAPON ACCIDENT RESPONSE PROCEDURES (NARP)," February 22, 2005.

[10] CBRNE CM includes those measures and methods of responding to CBRNE events to alleviate damage, loss of life, hardship or suffering caused by the incident, protect public health and safety, emergency restoration of essential government services and infrastructure, and provide emergency relief to governments, businesses, and individuals affected by the consequences of a CBRNE situation.

[11] For example, 10 U.S.C. § 382 (2006) 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 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.

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 small scale CBRNE incidents, and during the initial stages of larger incidents, a state's Emergency Operations Center (EOC) may forward requests to the 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)).[12] If the incident exceeds the capabilities of the state and local responders, and the President has issued an emergency or disaster declaration at the Governor's request, 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 Executive Secretary of the Department of Defense, who forwards them to the ASD(HD&ASA) and the Joint Director of Military Support (JDOMS) for validation and order processing, respectively. Once SecDef approves a request for DOD assistance, JDOMS prepares an order and coordinates with necessary force providers, legal counsel, and ASD(HD&ASA) to ensure asset priority and concurrence. The order is then issued to the appropriate combatant command to execute the mission.

[12] 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 (2006).

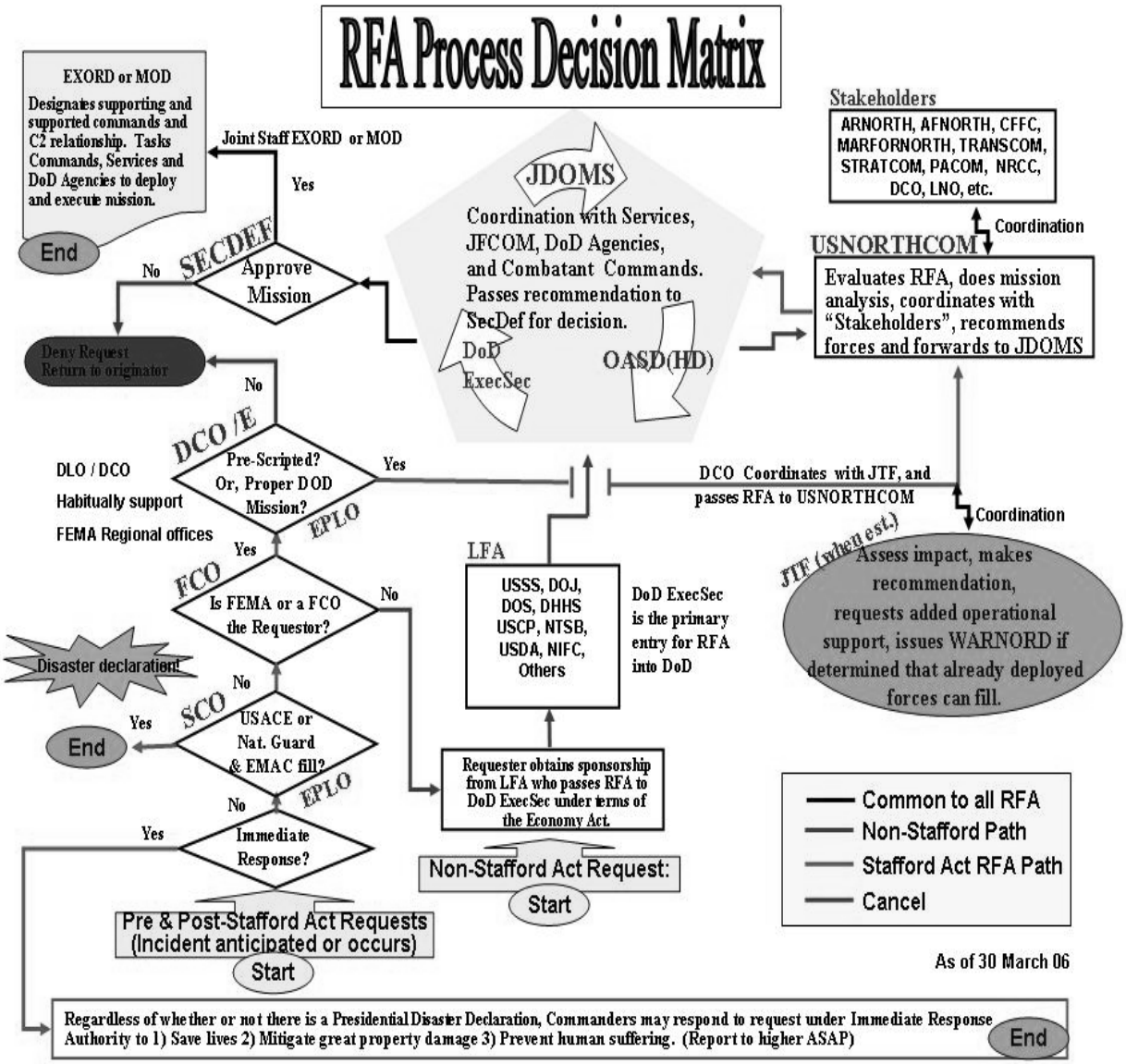

Figure 3.1. RFA Process Decision Matrix.

Figure 3-1, above, illustrates the flow of a request for military response to a CBRNE event from the LFA to DoD. The request is submitted to ASD(HD&ASA) for approval, who then forwards the request to the Joint Staff for execution. JDOMS issues an Execute Order (EXORD) to Commander, USNORTHCOM, Commander, USSOUTHCOM or Commander, USPACOM, depending upon which Area of Responsibility encompasses the CBRNE event. The Combatant Commander then orders the Commander, JTF-CS, to conduct consequence management operations.

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:

- Legality (compliance with laws);
- Lethality (potential use of lethal force by or against DOD forces);
- Risk (safety of DOD forces);
- Cost (who pays, impact on DOD budget);

- Appropriateness (whether the requested mission is in the DOD's interest); and
- Readiness (impact on the DOD's ability to perform its primary mission).

Military missions require legal authority. DoD's CBRNE CM operations are generally executed under the provisions of The Robert T. Stafford Disaster Relief and Emergency Assistance Act.[13] The Stafford Act authorizes the Federal Government to assist local and state governments alleviate the suffering and damage caused by disasters.[14]

Occasionally, the legal authority to use DoD forces for CBRNE incidents arises from other sources:

- For instance, DoDD 3025.18 delegates Immediate Response authority to DoD component, military commanders and State officials to temporarily employ resources under their control—subject to any supplemental direction provided by higher headquarters—to provide immediate assistance to civil authorities to save lives, prevent human suffering, or mitigate great property damage in the event of imminently serious conditions resulting from any civil emergency or attack.[15] It is important to note that this authority is extremely fact specific and expires immediately when the facts no longer meet the threshold. It is "important for commanders to understand that the policy is limited, restrictive, and conditional."[16] There is both a temporal and proximity aspect to immediate response. Furthermore, current DoD and NGB policy requires a reassessment no later than 72 hours after commencement of the response.

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[13] 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].

[14] 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 a state of emergency but require federal assistance to adequately manage the incident and consequently request federal assistance.

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.

Thus, a CBRNE incident could easily fit under this category.

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.

Thus, a fire, flood, or explosion would have to occur to trigger a major disaster declaration for a CBRNE incident.

[15] DoDD 3025.18, *supra* note 5, paras. 4.g & f.

[16] JOINT PUB 3-28, *supra* note 19, II-7.

- DoDD 3025.18 provides federal military commanders with "emergency authority" to engage temporarily in "activities that are necessary to quell large-scale, unexpected civil disturbances…"[17]

- Executive Order 13527, "Establishing Federal Capability for the Timely Provision of Medical Countermeasures Following a Biological Attack," provides authority for designated federal agencies to include the DoD to provide support to operations that leverage the U.S. Postal Service to distribute "medical countermeasures" to the general population.[18]

- Joint Publication 3-28 sanctions immediate response authority for various CBRNE incident-related operations, such as search and rescue missions and debris removal.[19]

C. DoD Entities Responsible for CBRNE CM Operations

The National Defense Authorization Act of Fiscal Year 2003[20] 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 for federal, state, and local officials in responding to domestic threats or events involving nuclear, chemical, and biological weapons. As a result, this office oversees defense support of civilian authorities (DSCA), including CBRNE CM.

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[17] DoDD 3025, *supra* note 6, para 4.h.

[18] EO 13527, Establishing Federal Capability for the Timely Provision of Medical Countermeasures Following a Biological Attack (Dec. 30, 2009).

[19] *See* JOINT CHIEFS OF STAFF, JOINT PUB 3-28, CIVIL SUPPORT, (14 Sep 07) [hereinafter JOINT PUB. 3-28], at II-7. A commander engaged in CBRNE CM operations:

> responding to a SecDef approved DSCA mission and/or execute order (EXORD), is like any other DoD military commander and may find the need to exercise his/her immediate response authority with available forces. This is particularly relevant in the event of a second terrorist attack . . . within the JOA, since trained medical and specialized CBRNE assessment/response teams are on the scene and able to rapidly respond to time-sensitive requests from the civil sector. . . . As soon as practical, the military commander, or responsible official of a DoD component or agency rendering such assistance, shall report the request, the nature of the response, and any other pertinent information through the chain of command to the National Military Command Center, so that the information is received within a few hours of the local commander's decision to provide immediate response support. Immediate response requests in the event of a CBRNE incident may include, but are not limited to:
>
> 1. Rescue, evacuation, and emergency medical treatment of casualties, maintenance or restoration of emergency medical capabilities, and safeguarding the public health.
>
> 2. Emergency clearance of debris, rubble, and explosives ordnance from public facilities and other areas to permit rescue or movement of people and restoration of essential services.
>
> 3. Detection, assessment, and containment (initial steps taken to facilitate emergency evacuation and public awareness warnings).
>
> 4. Roadway movement control and planning.
>
> 5. Emergency restoration of essential public services (including fire-fighting, water, communications, transportation, power, and fuel).

but see, 32 C.F.R. § 185.3.

[20] The Bob Stump National Defense Authorization Act of 2003, Pub. L. No. 107-314, § 902.

The Joint Director of Military Support (JDOMS) is an action agency subordinate to ASD(HD/ASA) that is located at the Pentagon. For DSCA, 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. For Special Events, e.g. National Special Security Events, international sport competitions, JDOMS plans, coordinates, and facilitates DoD support to federal, state, and local agencies and organizers for significant international and domestic events.

In 2002, DoD also established the USNORTHCOM to consolidate under a single unified command all existing missions previously executed by other military organizations.[21] The specific mission of USNORTHCOM, headquartered in Colorado Springs, Colorado, is to "conduct[] homeland defense, civil support, and security operations within the assigned area of responsibility to defend, protect, and secure the United States and its interests."[22] USNORTHCOM is designated as the command to conduct CBRNE CM operations in support of a LFA in the forty-eight contiguous states, the District of Columbia, Alaska, and U.S. territorial waters.[23] Based upon the magnitude of the CBRNE incident and required response, USNORTHCOM determines the appropriate level of command for, and composition of, the DoD CBRNE Consequence Management Response Force (CCMRF).

In 2008, USNORTHCOM designated U.S. Army North (ARNORTH) as the Joint Force Land Component Commander (JFLCC) for domestic CM operations. ARNORTH, located at Fort Sam Houston, Texas, is responsible for developing and unifying the military response capability for CBRNE incidents.[24] As the JFLCC, ARNORTH now has operational control of Joint Task Force Civil Support (JTF-CS), which had previously been directly subordinate to USNORTHCOM.

JTF-CS is a standing joint task force comprised of active, reserve, and National Guard members from the Army, Navy, Air Force, Marines, and Coast Guard, as well as civilian personnel, and is commanded by a Federalized Army National Guard General Officer. The unit's purpose is to save lives, prevent injury, and provide temporary critical life support during a CBRNE incident in the United States or its territories and possessions. The JTF-CS is the *only* military organization dedicated solely to planning and integrating DoD forces for CBRNE CM support to civil authorities in such a situation.

D. Specialized DoD CBRNE Responders

1. Joint Task Force Civil Support

Joint doctrine divides civil support (CS) operations into three broad categories:[25] domestic emergencies; designated law enforcement support;[26] and other activities,[27] based on the CS

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[21] Unified Command Plan 2002.

[22] USNORTHCOM, http://www.northcom.mil/About/index.html (last visited Jun. 29, 2011).

[23] CDRUSNORTHCOM CONPLAN 3500-08 (CHEMICAL, BIOLOGICAL, RADIOLOGICAL, NUCLEAR AND HIGH-YIELD EXPLOSIVES CONSEQUENCE MANAGEMENT OPERATIONS (CBRNE CM), paras. 1b(1) and 1e(1) (22 Oct. 08)(U).

[24] USNORTHCOM, *About NORTHCOM*, http://www.northcom.mil/About/index.html (last visited July 26, 2011).

[25] JOINT PUB. 3-28, *supra* note 4, III-1.

[26] 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

definition. Although Joint Task Force Civil Support (JTF-CS) is nominally linked to broader mission areas, the organization's focus is far narrower; JTF-CS' specific mission is CBRNE CM.

JTF-CS is a standing joint task force headquarters presently located at Fort Monroe, Virginia.[28] It is a deployable command and control headquarters for DoD units and personnel executing CM operations in response to CBRNE incidents, and a source of response plans for essential DoD support to the LFA. The unit's mission is to plan and integrate DoD support to the designated LFA (usually DHS/FEMA) for domestic CBRNE CM. When directed, JTF-CS will deploy to the incident site and establish command and control of designated DoD forces to provide defense support of civil authorities to save lives, prevent further injury, and provide temporary critical life support. The NRF provides the coordinating framework under which JTF-CS performs its mission.

An Army or Air Force National Guard 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 to include operations, logistics, intelligence, planning, communications, and medical services. Created by the Unified Command Plan for 1999,[29] JTF-CS provides both an operational capability and an oversight mechanism that can anticipate support requirements for responding to a catastrophic CBRNE incident, undertake detailed analysis, conduct exercises, and ultimately respond in support of civil authorities. The unit's focus is entirely on CBRNE consequence management.

On October 1, 2008, JTF-CS received operational control over various units assigned to the CCMRF, or CBRNE Consequence Management Response Force. These units possess the military occupational specialties required to staff DoD's initial CBRNE CM entry force. The CCMRF is

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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 4,, Executive Summary, at x.

[27] These 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 of responsibility in which they are conducted. *See infra*, chapter 7.

[28] Due to Base Realignment and Closure (BRAC), JTF-CS anticipates moving from Fort Monroe, Virginia to Fort Eustis, Virginia during the fourth quarter of fiscal year 2011. *See* JOINT TASK FORCE CIVIL SUPPORT, http://www.jtfcs.northcom.mil/ (last visited Jul. 26, 2011).

[29] 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 that would have 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.

comprised of approximately 4,700 service members but may be augmented as necessary by force packages tailored to the particular type of incident and response required. The CCMRF forces are configured into subordinate task forces with specific response missions, such as medical, aviation, and operational support. When called upon to perform its mission, JTF-CS and the CCMRF will quickly deploy to mitigate the effects of a CBRNE incident.[30]

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 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 CBRNE 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 CBRNE or other incidents in their immediate area of responsibility. JPACs are tailored to fit the type of support requested by the supported organization.

2. National Guard Weapons of Mass Destruction Civil Support Teams

Pursuant to the Defense Against Weapons of Mass Destruction (WMD) Act, and additional authorizations by Congress, DoD is authorized a total of 55 WMD-CSTs.[31] Recognizing that the National Guard is "forward-deployed for civil support,"[32] the Secretary of Defense determined that the CSTs would be most effective if established in the National Guard. Consequently, each WMD-CST is composed of twenty-two full-time National Guard Soldiers and Airmen and contains five elements: command, operations, administrative/ logistics, medical, and survey.

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[30] JOINT TASK FORCE CIVIL SUPPORT, *CCMRF*, http://www.jtfcs.northcom.mil/CCMRF.aspx (last visited Jul. 26, 2011).

[31] The number of authorized CSTs is the culmination of legislative actions during the last decade. For a current account overview of CSTs, see http://www.army.mil/aps/09/information_papers/national_guard_weapons.html (last visited 19 July 2011).

[32] U.S. Secretary of Defense Report to Congress pursuant to FY00 National Defense Authorization Act § 1036, 2 (24 Feb. 2000).

The teams are designed to deploy rapidly to assist local first responders in the event of an intentional or unintentional CBRNE incident.[33] 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)[34] for nuclear, biological, and chemical (NBC) detection and the Unified Command Suite (UCS) vehicle for communications.[35]

WMD-CST capabilities are specifically designed to complement civilian responders.[36] Community and state emergency management plans may directly incorporate WMD-CST capabilities.

WMD-CSTs will 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.[37] If the teams are called to federal active duty, they will normally be attached with operational control to JTF-CS.[38]

In addition, WMD-CSTs assigned to one state are authorized to operate in another state when one or more of the following conditions are met:

- State-to-State Emergency Management Assistance Compacts (EMACs);
- State-to-State Memoranda of Agreement; or,
- Activation under Title 10.[39]

3. NG CBRNE Enhanced Response Force Package (NG CERFP)

The CERFP is a response capability comprised of 186 traditional and 5 Title 32 Active Guard and Reserve (AGR) National Guard members. CERFP can be utilized in state active duty, Title 32, or Title 10 status. There are currently 17 CERFPs in the United States. CERFP's mission is to respond to CBRNE incidents and assist local, state, and federal agencies in conducting consequence management by providing capabilities to conduct patient and mass casualty decontamination, emergency medical services, and casualty search and extraction.

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[33] *Id*.

[34] *Id.* at 3. MALS is based on system used by the Marine Corps' Chemical Biological Incident Response Forces with enhanced biological detection capability.

[35] *Id.* The UCS, built by the Navy, provides communication interface across the ICS frequencies, military command and control elements, and technical support assets.

[36] *Id.* at 4.

[37] *Id.* at 5.

[38] *Id*.

[39] *Id.* at 6. *See infra* Chapter 10, Reserve Components, for a detailed discussion of EMACs.

4. National Guard Homeland Response Force (HRF)

Presently under development, the HRF is a regional response capability. There are projected to be ten HRFs (one per FEMA region), each with 5,660 personnel. Each HRF is essentially a CERFP-plus security and regional C2 element. HRFs, as contemplated, will conduct command and control; security; search and extraction; decontamination; and medical triage as needed in order to save lives and mitigate human suffering.

E. Special Legal Considerations During CBRNE CM Operations

The parameters under which DoD operates domestically vary greatly from those in traditional military activities. DoD domestic CBRNE CM activities raise legal issues not usually found in more typical military operations. Depending on the circumstances, and the location of the incident, the scope and complexity of potential legal issues will greatly vary. Of specific note, the following four legal issues may arise in the context of a CBRNE CM operation. As 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 on the operational and tactical levels should receive primary guidance concerning these issues through appropriate mission EXORDs and FRAGOs. Judge advocates should also become familiar with the primary federal and state authorities discussed below.

1. Quarantine/Isolation

Quarantine[40] and isolation[41] enforcement issues may arise most typically in pandemic scenarios. State and local health authorities are most commonly 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.[42] Federal power to impose quarantine and isolation measures arises concerning 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."[43]

Regardless of whether the quarantine and isolation measures are imposed at the federal, state, or local level, DoD enforcement actions will likely be subject to the Posse Comitatus Act,[44] absent an alternative statutory or constitutional authority. One such exception would be DoD enforcement of a quarantine or isolation under circumstances that have given rise to Presidential invocation of the Insurrection Act.[45] Typically, however, any DoD support provided to quarantine and isolation

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[40] "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).

[41] "Isolation" is defined as the "[s]eparation of infected individuals from those individuals that are not infected." *Id*. at 208.

[42] U.S. Congressional Research Service. Federal and State Quarantine and Isolation Authority 2 (RL33201; Jan. 23, 2007), by Kathleen S. Swendiman and Jennifer K. Elsea.

[43] 42 U.S.C. § 264(a). 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.

[44] 18 U.S.C. § 1385.

[45] 10 U.S.C. §§ 331–335.

support will be limited to logistical, communications, medical, and other support commonly envisioned by the Stafford Act.

2. Environmental Compliance

Judge advocates planning for CBRNE CM operations should assume that federal, state, and local environmental laws and regulations will remain in place, at least insofar as they pertain to DoD response operations. For example, the Stafford Act specifically states that NEPA applies to actions undertaken pursuant to the Act. In the context of CBRNE CM operations, NEPA provides for an exception to NEPA's environmental impact statement requirement when such an action is intended to "restore a facility substantially to its condition prior to the disaster or emergency." Specifically, such actions are deemed NOT a major federal action significantly affecting the quality of the human environment.[46]

Although the Stafford Act does contain a blanket waiver authority of "administrative conditions for assistance" for federal agencies,[47] this authority does not overcome statutory requirements. Additionally, the EPA or appropriate ESF 10 agencies, rather than DoD, would normally issue any environmental waivers.

The handling and disposal of waste from CBRNE CM 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.[48] Additionally, coordination with state authorities regarding the state's environmental laws and regulations is essential. Judge advocates should ensure that appropriate staff sections and levels of command have ascertained whether the decontamination and decontaminated waste disposal procedures outlined in FM 3-11.5[49] are sufficient for CBRNE CM operations, or whether those procedures should be modified pursuant to guidance from appropriate state and federal regulatory agencies.

3. Health Care Licensure

In a domestic CBRNE event, non-fatality casualties may range from minimal to overwhelming. The National Planning Scenarios' casualty numbers for domestic CBRNE events range from a few hundred (radiological dispersal device) through hundreds of thousands (improvised nuclear device) to nearly ten million (pandemic influenza).[50] The greater the number of casualties, the more likely that any requested DoD support will include 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. 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

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[46] 42 U.S.C. § 5159.

[47] 42 U.S.C. § 5141.

[48] Dep't of Homeland Security, National Response Framework, Emergency Support Function #10 (Oil and Hazardous Materials Response Annex), Jan. 2008.

[49] U.S. Dep't of Army, Field Manual 3-11.5, Multiservice Tactics, Techniques, and Procedures for Chemical, Biological, Radiological, and Nuclear Decontamination (4 Apr. 06) [hereinafter FM 3-11.5].

[50] Dep't of Homeland Security, National Planning Scenarios (6 Apr. 2006).

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) of 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.[51] DoD has promulgated qualification and coordination requirements to this statutory portability provision as it pertains to off-base duties.[52] 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.

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 is 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.[53] 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 so requests.[54] 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 chain, 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 look to either the applicable state's Emergency Management Assistance Compact (EMAC)[55] or Article VI of the Model EMAC legislation, which states:

> If a person or entity holds a license, certificate or other permit issued by a participating political subdivision or the state evidencing qualification in a professional, mechanical or other skill and the assistance of that person or entity is requested by a participating political subdivision, the person or entity shall be

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[51] 10 U.S.C. § 1094(d)(1).

[52] "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 (Jun. 11, 2004).

[53] Fla. Stat. § 252.36(3)(c)1.

[54] Cal. Bus. & Prof. Code § 900.

[55] EMAC is governed by the National Emergency Management Association (NEMA), a non-profit organization. *See* NAT'L EMERGENCY MGMT ASS'N, *What is NEMA*, http://www.nemaweb.org/index.php?option=com_content&view=article&id=44&Itemid=357 (last visited Jul. 26, 2011).

> deemed to be licensed, certified or permitted in the political subdivision requesting assistance for the duration of the declared emergency or authorized drills or exercises and subject to any limitations and conditions the chief executive of the participating political subdivision receiving the assistance may prescribe by executive order or otherwise.[56]

Even if the state has passed the model EMAC legislation without alteration, however, judge advocates must be cognizant of the particular state Governor's limitations on this portability provision.[57]

4. Mortuary Affairs

As with non-fatality casualties, the number of fatalities in a CBRNE event may quickly overwhelm state and local capabilities. The National Planning Scenarios contain fatality numbers from those low enough to be handled at the state level with federal, though not necessarily DoD, support (100 fatalities from an improvised explosive), through fatality numbers that are catastrophic (over a quarter of a million for a improvised nuclear device, and nearly two million for pandemic influenza).[58] 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,[59] but 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.[60] DoD personnel who are not MA-skilled may require training and oversight from DoD mortuary affairs personnel prior to engaging in mortuary affairs-related missions or activities.[61]

Guidance on DoD personnel's handling of human remains and their interface with the civilian authorities will most likely be published in the form of a "fragmentary order" (FRAGO) to an "execute order" (EXORD). For example, during Hurricane Katrina, DoD forces assisting in the recovery effort were prohibited from touching human remains; instead, DoD forces were permitted only to mark the locations of remains.[62] Nevertheless, 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

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[56] NAT'L EMERGENCY MGMT ASS'N, *Intrastate Mutual Aid Legislation*, http://www.emacweb.org/?150, then click the link for "2004 Model Intrastate Mutual Aid Legislation" and scroll to Article VI of the template. (last visited Jul. 26, 2011) [hereinafter Mutual Aid].

[57] For a list of the fifteen states with intrastate mutual assistance agreements in effect or pending state congressional approval, see Mutual Aid, *supra* note 57.

[58] DEP'T OF HOMELAND SECURITY, National Planning Scenarios (6 Apr. 2006).

[59] DEP'T OF HOMELAND SECURITY, National Response Framework, Emergency Support Function #8 (Public Health and Medical Services), 8-2, January, 2008.

[60] Joint Chiefs of Staff, Joint Pub 4-06, Mortuary Affairs in Joint Operations (Jun. 5, 2006), para. II-4h.

[61] *Id*.

[62] FORSCOM FRAGO 7 TO JTF KATRINA EXORD, 06XXXXZSEP05, para. 3.b.2.

the various points of contact involved in mortuary affairs operations, including the local medical examiner/coroner, local law enforcement, and the FBI.

CHAPTER 4

MILITARY SUPPORT TO CIVILIAN LAW ENFORCEMENT

KEY REFERENCES:

- 10 U.S.C. §§ 371–382 - Military Support for Civilian Law Enforcement.
- 18 U.S.C. § 1385 - The Posse Comitatus Act (PCA).
- DoDD 5525.5 - DoD Cooperation with Civilian Law Enforcement Officials, January 15, 1986.
- DoDD 3025.12 - Military Assistance for Civil Disturbances, February 4, 1994.
- DoDD 3025.18 – Defense Support of Civil Authorities, December 29, 2010.
- 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.
- SECNAVINST 5820.7C - Cooperation with Civilian Law Enforcement Officials, January 26, 2006.
- AFI 10-801 - Assistance to Civilian Law Enforcement Agencies, April 15, 1994.

A. Introduction

Military support to civilian law enforcement agencies has undergone significant growth in recent years. In the wake of the events of September 11, 2001, Hurricane Katrina in 2005, and the U.S.–Mexico border security mission beginning in June 2006, the need for support and coordination with local, state, and federal law enforcement agencies has increased markedly. The necessity of defending the homeland from emerging threats generated a renewed emphasis for the DoD's role and responsibilities in domestic operations.

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 with 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. Chapter 6 covers counterdrug support.

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.

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. Possibly as a result of President Grant's actions, Hayes won the electoral votes of these hotly contested states.[3] Consequently, 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, in the enforcement of the laws of the United States.[5] The PCA is a criminal statute and violators are subject to fine and/or imprisonment. 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.

In addition to the PCA, 10 U.S.C. ch. 18, *Military Support for Civilian Law Enforcement Agencies*[6] and Department of Defense Directive (DoDD) 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, also provide guidance in this area.[7] Both authorities, discussed below,

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[1] Posse Comitatus Act, 18 U.S.C. § 1385. 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).

[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] United States v. Red Feather, 392 F. Supp. 916, 922 (W.D.S.D. 1975).

[6] *See* Hayes v. Hawes, 921 F.2d 100, 103 n.3 (7th Cir. 1990) (noting that 10 U.S.C. ch. 18 specifically incorporates 18 U.S.C. § 1385 and provides the primary restriction on military participation in civilian law enforcement activities).

[7] U.S. Dep't of Defense, Dir. 5525.5, DoD Cooperation with Civilian Law Enforcement Officials (Jan. 15, 1986) [hereinafter DoDD 5525.5].

provide additional guidance regarding restrictions the PCA places on the military when supporting civilian law enforcement agencies.[8]

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.[9] However, 10 U.S.C. § 375 directs 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."[10] The Secretary of Defense subsequently prohibited these activities in DoDD 5525.5.[11] As a result, the restrictions placed on Army and Air Force activities through the PCA apply to the Navy and Marine Corps.[12] The PCA does *not* apply to the Coast Guard unless it is operating under the command and control of the Department of Defense.[13]

The PCA also applies to Reserve[14] 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,[15] active duty for training, or inactive duty training ***in a Title 32 duty status*** are not subject to the PCA. Only when members of

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[8] Service regulations that implement DoDD 5525.5 are: U.S. Dep't of Navy, Secretary of the 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, Secretary of the Air Force Instr. 10-801, Assistance to Civilian Law Enforcement Agencies (15 Apr. 1994) [hereinafter AFI 10-801].

[9] *See, e.g.*, 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).

[10] Hayes, *supra* note 6, at 102–103 (10 U.S.C. § 375 makes the proscriptions of 18 U.S.C. § 1385 applicable to the Navy). *See also* Yunis, *supra* note 9, at 1094 ("Regulations issued under 10 U.S.C. § 375 require Navy compliance with the restrictions of the Posse Comitatus Act . . . .").

[11] *See* DoDD 5525.5, *supra* note 7, para. E4.3; SECNAVINST 5820.7C, *supra* note 8, para. 8(a); AFI 10-801, *supra* note 8, ch. 2.1. 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 also* Yunis, *supra*, note 10, at 1094 (affirming that DoDD 5525.5 requires the Navy to comply with the restrictions of the Posse Comitatus Act).

[12] SECNAVINST 5820.7C, *supra* note 8, para. 8(b).

[13] 14 U.S.C. § 2.

[14] The Reserve includes Reservists in the: Selected Reserve (SelRes), Guard/Reserve Units Individual Mobilization Augmentees (IMAs), Active Guard/Reserve Personnel Individual Ready Reserve (IRR), and Inactive National Guard (ING).

"The Ready Reserve consists of units or individuals, or both, liable for active duty under the provisions of 10 U.S.C. §§ 12301–12302. The Ready Reserve is comprised of the Selected Reserve and the Individual Ready Reserve (IRR) / Inactive National Guard(ING)." 10 U.S.C. § 10142.

The SelRes is comprised of: Reserve/Guard Units: Unit members are Guard/Reserve personnel assigned to Reserve organizations and perform in drill periods and annual training as a minimum. Individual Mobilization Augmentees consist of Reserve personnel assigned to Active component organizations who perform in drill periods and annual training. Active Guard/Reserve (AGR) is comprised of Reserve personnel on full-time active duty or full-time National Guard duty to provide support to the Reserve Components. All Members of the SelRes are in an active status. *Id.* § 10143.

[15] 32 U.S.C. § 502(f).

the National Guard are ***in a Title 10 duty status (federal status)*** are they subject to the PCA. Members of the National Guard also perform additional duties in a State Active Duty (SAD) status and are not subject to PCA in that capacity.[16] Civilian employees of DoD are only subject to the prohibitions of the PCA if they are under the direct command and control of a military officer.[17]

Finally, the PCA does not apply to a member of the Army, Navy, Air Force, or Marine Corps when they are off-duty and acting in a private capacity. A service member is not in a private capacity when assistance is rendered to civilian law enforcement officials under the direction or control of DoD authorities.[18]

2. Where Does the PCA Apply?

Federal courts have generally held that the PCA places no restrictions on the use of the armed forces 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. §§ 371–381 have no extraterritorial application.[21] However, in *United States v. Kahn*[22] the 9th U.S. Circuit Court of Appeals indicated that the extraterritorial application of the PCA remains an open question.[22] While recognizing that several courts held that the PCA only applies within the territory of the United States, the *Kahn* court maintained that the issue has not been definitively resolved, since the PCA imposes restrictions on the use of the armed forces abroad through 10 U.S.C. §§ 371–381.[23]

Nevertheless, DoD implementing policy contained in DoDD 5525.5 applies to all members of the armed forces wherever located. Therefore, PCA restrictions must be considered even when contemplating military assistance to 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.[24]

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[16] *See infra* ch. 10, Reserve Components - Special Issues, for a detailed discussion of National Guard and Reserve status.

[17] DoDD 5525.5, *supra* note 7, para. E.4.2.

[18] *Id.*

[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).

[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, subject: Extraterritorial Effect of the Posse Comitatus Act (3 Nov. 1989).

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

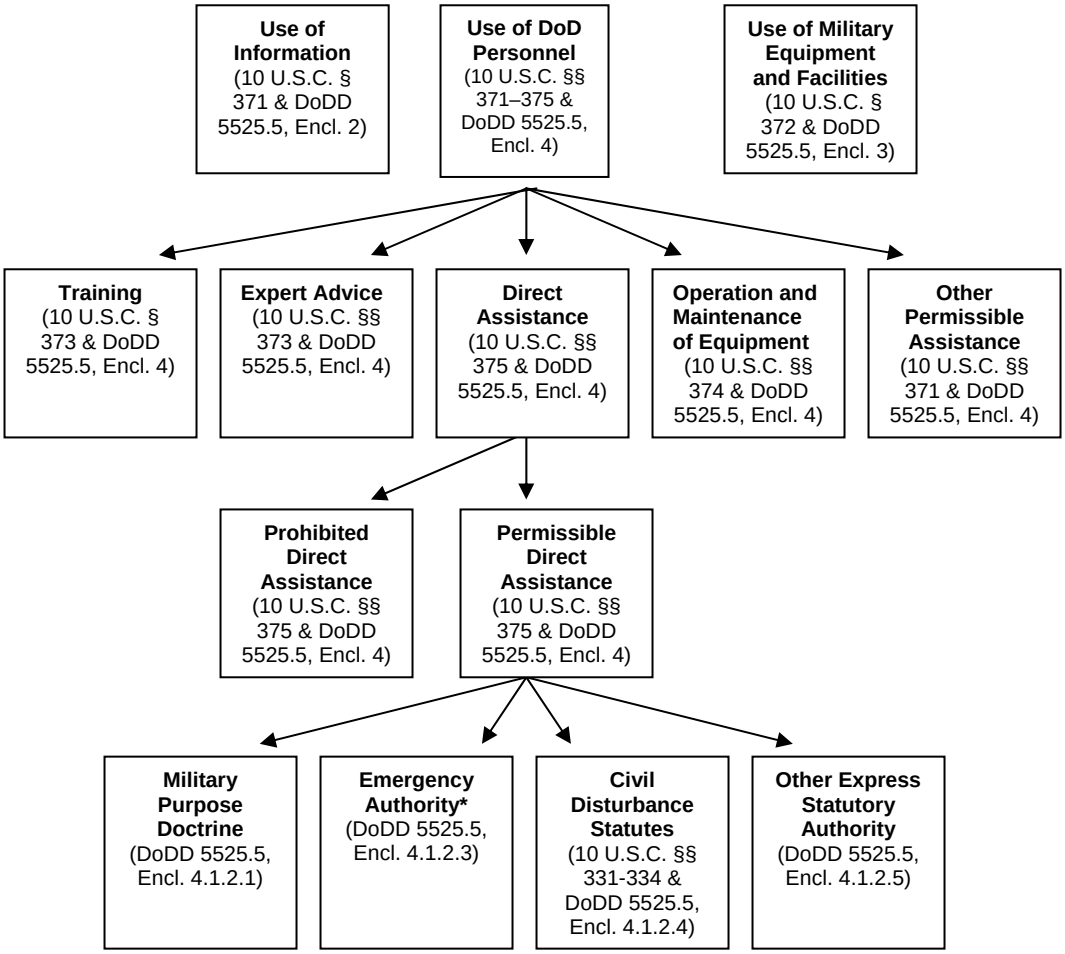
[23] *Id.* The *Kahn* court cites 10 U.S.C. § 374(b)(2)(F) (mentioning "law enforcement operations outside of the land area of the United States"), § 379(a) (mentioning "naval vessels at sea"), and § 379(d) (mentioning "area outside the land area of the United States") as examples of limitations placed on the use of the armed forces abroad.

[24] DoDD 5525.5, *supra* note 7, para. 8.1 provides:

> With regard to military actions conducted outside the territorial jurisdiction of the United States, however, the Secretary of Defense or the Deputy Secretary of Defense will consider for approval, on a case by case basis, requests for exceptions to the policy restrictions against direct assistance by

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. These restrictions are divided into three major categories: (1) use of information, (2) use of military equipment and facilities, and (3) use of military personnel. DoDD 5525.5 further divides the restrictions on the use of DoD personnel in civilian law enforcement activities into categories of direct assistance, training, expert advice, operation or maintenance of equipment, and other permissible assistance.[25] See Figure 4-1, below.



******See* DoDD 3025.12 to distinguish Emergency MACDIS Authority from Immediate Response Authority.

Figure 4-1. PCA Restrictions Contained in 10 U.S.C. §§ 371–375 and DoDD 5525.5.

In addition to the above categories, 10 U.S.C. §§ 376–377 provide further limitations on the provision of military support to civilian law enforcement. 10 U.S.C. § 376 provides an overarching

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military personnel to execute the laws. Such requests for exceptions to policy outside the territorial jurisdiction of the United States should be made only when there are compelling and extraordinary circumstances to justify them.

[25] DoDD 5525.5, *supra* note 7, para. E.4.1; SECNAVINST 5820.7C, *supra* note 8, para. 8; AFI 10-801, *supra* note 8, ch. 2.1.

restriction in the event "such support will adversely affect the military preparedness of the United States."[26] The Secretary of Defense directed the Secretaries of the Military Departments and the Directors of the Defense Agencies to ensure that approval authority for the disposition[27] of equipment to civilian law enforcement agencies is vested in those officials who can properly assess the impact the disposition will have on military preparedness and national security.[28]

10 U.S.C. § 377 requires civilian law enforcement agencies to reimburse DoD for support provided as required by the Economy Act[29] 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.[30] Waiver authority for reimbursements 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.[31]

For a brief recap 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.

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[26] 10 U.S.C. § 376 (1998). 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.

[27] DoDD 5525.5, *supra* note 7, para. E.3.1 states: "Military Departments and Defense Agencies may make equipment, base facilities, or research facilities available to federal, State, or local civilian law enforcement officials for law enforcement purposes in accordance with this enclosure."

[28] *Id.* para. E.4.4; SECNAVINST 5820.7C, *supra* note 8, para. 6(b); AFI 10-801, *supra* note 8, ch.3.

[29] 31 U.S.C. § 1535.

[30] 10 U.S.C. § 377.

[31] DoDD 5525.5, *supra* note 7, para. E.5.2; SECNAVINST 5820.7C, *supra* note 8, para. 9; AFI 10-801, *supra* note 8, 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 detailees are not considered part of the Army or Air Force for PCA purposes.
Protection of federal property	Constitutional exception to the PCA.
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 CBRNE 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.
Federalized National Guard in Title 10 Status	PCA Applies. See Title 10, above.
OTHER UNIFORMED SERVICES	**APPLICABILITY OF THE PCA**
United States Navy	PCA does not apply by statute, but by regulation.
United States Marine Corps	PCA does not apply by statute, but by regulation
United States Coast Guard	PCA does not apply.
United States Public Health Service	PCA does not apply.
National Oceanic & Atmospheric Administration	PCA does not apply.

a. Use of DoD Information Collected During Military Operations

The sharing of intelligence information has taken on crucial importance after September 11, 2001. The Homeland Security Act of 2002 tasked the Secretary of the Department of Homeland Security with establishing procedures to share information between local, state, and federal entities.[32] The President is to ensure that the procedures apply to "all agencies of the Federal Government."[33]

The use of information collected during military operations is codified in 10 U.S.C. § 371 and implemented by the Secretary of Defense in Enclosure 2 of DoDD 5525.5. Under 10 U.S.C. § 371, 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 under the jurisdiction of these officials. The Secretary of Defense shall, to the maximum extent possible, take into account the needs of civilian law enforcement officials when planning and executing military training and operations. Further, § 371 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. 10 U.S.C. § 371, et seq., is included at *Appendix 4-2.*

Enclosure 2 of DoDD 5525.5 implements 10 U.S.C. § 371 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 criminal violation. 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. § 371, the planning or creation of missions or training *for the primary purpose of aiding civilian law enforcement official intelligence-gathering efforts is prohibited.* Law enforcement officials may accompany regularly scheduled training flights as observers, but point-to-point transportation and training flights for civilian law enforcement officials solely for the purpose of information sharing are not authorized.[34] Additionally, the handling of all such information must comply with DoDD 5240.1, *Activities of DoD Intelligence Components that Affect U.S. Persons*;[35] DoDD 5200.27, *Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense*;[36] and DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons*.[37] (For additional information concerning the use of DoD information collected during domestic operations, see chapter 9 infra.)

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[32] Homeland Security Act of 2002, § 891(c), Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified primarily at 6 U.S.C. §§ 101–557) [hereinafter HSA 2002].

[33] *Id.* § 892(a).

[34] *See* U.S. DEP'T OF DEFENSE, REG. 4515.13-R, AIR TRANSPORTATION ELIGIBILITY (1 Nov. 1994) for guidance on this type of assistance. This rule does not apply to counter-drug operations. *See infra* ch. 6, Counterdrug Operations.

[35] U.S. DEP'T OF DEFENSE, DIR. 5240.1, ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT U.S. PERSONS (27 Aug. 2007) [hereinafter DoDD 5240.1].

[36] 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).

[37] 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 July 2011,

b. Use of DoD Military Equipment and Facilities

The loan or lease of military equipment to civilians is a difficult legal area. Each military service has implemented its own regulations in addition to DoDD 5525.5. The Army Regulation on point is AR 700-131.[38] 10 U.S.C. § 372 and Enclosure 3 of DoDD 5525.5 address the use of military equipment and facilities by civilian law enforcement authorities. Section 372(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 3 of DoDD 5525.5 implements this provision 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 national security or military preparedness.

Approval authority under DoDD 5525.5 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]

- Approval authority for military assistance in civil disturbances is governed by DoDD 3025.12, *Military Assistance for Civil Disturbances* (MACDIS);[42]
- Approval authority for assistance to the government of the District of Columbia is governed by DoDD 5030.46, *Assistance to the District of Columbia Government in Combating Crime*;[43]
- Approval authority for training, expert advice, and personnel to operate and maintain equipment shall be made in accordance with Enclosure 4 of DoDD 5525.5;
- Approval authority for assistance from DoD intelligence components is governed by DoDD 5240.1 and, upon release, the revised DoD 5240.1-R;[44]
- Approval authorities for loan or lease of other equipment or facilities are the Secretaries of the Military Departments and the Directors of the Defense Agencies unless the authority has been retained at a higher level. The authority of the Secretaries of the Military Departments and the Directors of the Defense Agencies may be delegated.[45]

DoDD 5240.1-R is currently undergoing revision; consequently, practitioners citing this reference should first ensure DoDD 5240.1-R is still in effect.)

[38] U.S. DEP'T OF ARMY, REG. 700-131, LOAN, LEASE, AND DONATION OF ARMY MATERIEL (23 Aug. 2004).

[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 may be made to entities outside the federal Government.

[41] Since many of the applicable military regulations predate their corresponding DoD Directives, care must be exercised in applying authority or procedures from military regulations without verifying currency of the information.

[42] U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) (4 Feb. 1994)[hereinafter DODD 3025.12].

[43] U.S. DEP'T OF DEFENSE, DIR. 5030.46, ASSISTANCE TO THE DISTRICT OF COLUMBIA GOVERNMENT IN COMBATING CRIME (26 Mar. 1971).

[44] *See also* U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (3 May 2007).

[45] DoDD 5525.5, *supra* note 7, para. E3.4; SECNAVINST 5820.7C, *supra* note 8, para. 6(b); AFI 10-801, *supra* note 8, ch.3. *See also* DEP'T OF DEFENSE, DIR. 3025.18, MILITARY DEFENSE SUPPORT OF CIVIL AUTHORITIES (29 Dec 2010), which withholds approval authorities for some types of support.

Of note, recently promulgated DoDD 3025.18.4.j reserves approval authority to the Secretary of Defense for the assistance with assets with potential lethality, e.g. arms, vessels or aircraft, or ammunition. (Previously, DoDD 5525.5 provided service secretaries and the directors of defense agencies with such authority.)

Additionally, service regulations supply further guidance. For example, security bonds are often required before the loan or lease of equipment. Approval authorities may vary depending upon the implementing service regulation. A chart depicting Army and National Guard approval authorities for the loan or lease of military equipment is included at *Appendix 5-7, Loan, Lease and Donation of Army Material*.

10 U.S.C. § 372 provides additional guidance for chemical and biological incidents. Under § 372(b), the Secretary of Defense may make training facilities, sensors, protective clothing, antidotes and similar items available to federal, state, or local law enforcement or emergency response agencies to prepare for or respond to an emergency involving chemical or biological agents. Before making these materials available, however, the Secretary of Defense must make a determination that the items are not reasonably available from another source.[46]

Further, EO 13527 *Establishing Federal Capability for the Timely Provision of Medical Countermeasures Following a Biological Attack* provides additional authority for DoD to be integrated into plans to support the delivery of "medical countermeasures" as part of a response to a biological attack. EO 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."[47]

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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[46] *See also* 10 U.S.C. § 382 for further guidance on emergency situations involving chemical or biological weapons of mass destruction.

[47] EO 13527, *Establishing Federal Capability for the Timely Provision of Medical Countermeasures Following a Biological Attack* (Dec. 30, 2009).

[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. Haw. 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. 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

- 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]

As previously mentioned, in implementing the guidance contained in 10 U.S.C., ch. 18, DoDD 5525.5 divides the PCA restrictions regarding the use of *military personnel* to assist civilian law enforcement into five categories: (1) direct assistance; (2) training; (3) expert advice; (4) use of DoD personnel to operate or maintain equipment; 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 Alcohol, Tobacco, and Firearms during its standoff with the Branch Davidians in Waco, Texas. In advising commanders on the permissible use of military personnel in support of civilian law enforcement activities, judge advocates must also consider possible legal ramifications of PCA violations. Evidence may be excluded from use at trial and the military may be sued.[53]

(1) Direct Assistance

(a) Prohibited Direct Assistance

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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. §§ 371, 374(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] 18 U.S.C. § 1385.

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] Impermissible direct assistance by military personnel in civilian law enforcement activities is codified in 10 U.S.C. § 375 and is implemented as DoD policy by DoDD 5525.5.[55] Prohibited direct assistance by military personnel includes:

- Interdiction of a vehicle, vessel, aircraft, or other similar activity;
- A search or seizure;
- An arrest, apprehension, stop and frisk, or similar activity; or
- Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.

(b) Permissible Direct Assistance

(i) Military Purpose Doctrine

Conversely, 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 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;
- Protection of DoD personnel, DoD equipment, and official guests of the DoD; and
- 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

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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] DoDD 5525.5, *supra* note 7, para. E.4.1.3; SECNAVINST 5820.7C, *supra* note 8, para. 8(b); AFI 10-801, *supra* note 8, ch. 2.

[56] DoDD 5525.5, *supra* note 7, para. E.4.1.2; SECNAVINST 5820.7C, *supra* note 8, para. 8(c)(1); AFI 10-801, *supra* note 8, ch. 2.

[57] DoDD 5525.5, *supra* note 7, para. E.4.1.2; SECNAVINST 5820.7C, *supra* note 8, para. 8(c)(1); AFI 10-801, *supra* note 8, ch. 2.

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. Further, it will only be used under the guidance of DoDD 3025.12, *Military Assistance for Civil Disturbances* (MACDIS).[59] DoDD 3025.12 states: "Military Forces shall not be used in MACDIS unless specifically authorized by the President, except in the following emergency circumstances:"[60]

- When the use of military forces is necessary to prevent loss of life or wanton destruction of property, or to restore governmental functioning and public order. That "emergency authority" applies when sudden and unexpected civil disturbances (including civil disturbances incident to earthquake, fire, flood, or other such calamity endangering life) occur, if duly constituted local authorities are unable to control the situation and circumstances preclude obtaining prior authorization by the President,[61] or
- When duly constituted state or local authorities are unable or decline to provide adequate protection for federal property or federal governmental functions, federal action (including the use of military forces) is authorized, as necessary, to protect the federal property or functions.[62]

Presidential approval is not a prerequisite to the use of military forces in these two limited circumstances. However, DoD officials and military commanders must use all available means to obtain Presidential authorization through their appropriate chains of command while applying emergency authority.[63]

(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. §§ 331–334.[64] This statute contains express exceptions to the Posse Comitatus Act[65] that allows for the use of military forces to repel insurgency, domestic violence, or conspiracy that hinders the execution of state or

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[58] *See* 32 C.F.R. § 215.4.

[59] DoDD 3025.12, *supra* note 42.

[60] *Id.* para. 4.2.2.

[61] *Id.* para. 4.2.2.1.

[62] *Id.* para. 4.2.2.2.

[63] *Id.* para. 4.2.2.

[64] For more detailed guidance, see DoDD 3025.12, para. 4.

[65] Insurrection Act, 10 U.S.C. §§ 331–334 (1998).

federal law in specified circumstances. Actions under this authority are governed by DoDD 3025.12. 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;[66]
- A rebellion makes it impracticable to enforce the federal law through ordinary judicial proceedings;[67] 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.[68]

10 U.S.C. § 334 requires the President to issue a proclamation ordering the insurgents to disperse within a certain time before he can use the military to enforce the laws. The President issued such a proclamation during the Los Angeles riots in 1992.

(iv) Other Statutory Authority

There are several statutes, other than the Insurrection Act, that provide statutory authority for the military to assist civilian law enforcement agencies in executing the laws.[69] These statutes 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);
- Emergency situations involving chemical or biological weapons of mass destruction (10 U.S.C. § 382) (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. § 382);
- 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);

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[66] *Id.* § 331.

[67] *Id.* § 332.

[68] *Id.* § 333.

[69] DoDD 5525.5, *supra* note 7, para. E.4.1.2.5; SECNAVINST 5820.7C, *supra* note 8, para. 9(c)(5).

- 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); and
- Actions in support of certain customs laws (50 U.S.C. § 220).

(2) Training

The second category of restrictions on military involvement in civilian law enforcement is training. DoD is prohibited from providing *advanced* military training to civilian law enforcement agencies.[70] "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.[71]

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.[72]

10 U.S.C. § 373 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. § 372. The Secretary of Defense has implemented this guidance in DoDD 5525.5.[73]

DoDD 5525.5 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 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 unlikely.[74]

(3) Expert Advice

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[70] Memorandum, Deputy Secretary of Defense, subject: DoD Training Support to Civilian Law Enforcement Agencies (29 June 1996) [hereinafter Training Memorandum] (emphasis added).

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

[72] Training Memorandum, *supra* note 70.

[73] DoDD 5525.5, *supra* note 7, para. E.4.1.4; SECNAVINST 5820.7C, *supra* note 8, para. 8(c)(7).

[74] *Id*.

The third category of military assistance to civilian law enforcement under DoDD 5525.5 is the provision of expert advice. 10 U.S.C. § 373 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., ch. 18. The Secretary of Defense has directed that military departments and defense agencies may provide expert advice in accordance with this statute as long as military personnel are not directly involved in activities that are fundamentally civilian law enforcement operations.[75]

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

10 U.S.C. § 374 and DoDD 5525.5, enclosure 3, address the use of DoD personnel for the operation or maintenance of equipment, including but not limited to equipment provided under § 372, for federal, state, or local law enforcement officials. 10 U.S.C. § 374(a) allows the Secretary of Defense to make DoD personnel available for the maintenance of equipment. 10 U.S.C. § 374(b) allows the Secretary of Defense, upon the request of the *head* of a *federal* law enforcement agency, to make DoD personnel available to operate equipment with respect to:

- A criminal violation of certain specified laws;[76]
- 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.

DoD personnel made available under 10 U.S.C. § 374(b) 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 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. § 374(4)(b)(1);
- 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):

[75] DoDD 5525.5, *supra* note 7, para. E.4.1.5; SECNAVINST 5820.7C, *supra* note 8, para. 8(c)(6).

[76] Controlled Substances Act, 21 U.S.C. §§ 801–904 (2006); Controlled Substances Import and Export Act, 21 U.S.C. §§ 951–971 (2006); Immigration and Nationality Act, 8 U.S.C. §§ 1324–1328 (2006); 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; Maritime Drug Law Enforcement Act, 46 U.S.C. app. § 1901 (2006); or any foreign or domestic law prohibiting terrorist activities.

- 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 purpose 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.[77] Lastly, 10 U.S.C. § 374(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. § 374(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.[78]

Not all of the provisions of 10 U.S.C. § 374 have been implemented by the Secretary of Defense through DoDD 5525.5.[79] Generally, under DoDD 5525.5, 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 because of time or cost to use non-DoD personnel. The assistance cannot involve DoD personnel in a direct law enforcement role unless otherwise authorized by law, and the assistance should be provided at a location where there is not a reasonable likelihood of a law enforcement confrontation. Requests for the use of personnel to operate or maintain equipment must come from the head of the civilian law enforcement agency making the request. 10 U.S.C. § 374, however, specifically requires that requests for the operation of equipment come from the head of a *federal* law enforcement agency.[80] Use of military aircraft for point-to-point transportation and training flights for civilian law enforcement personnel is governed under the authority of DoD 4515.13-R.

Like 10 U.S.C. § 374(b), DoDD 5525.5 provides additional guidance concerning drug, customs, immigration, and other laws. Per DoDD 5525.5, DoD personnel made available at the request of the head of a civilian agency empowered to enforce the laws enumerated in 10 U.S.C. § 374(b)(2) may provide the following assistance:

- Operate or maintain equipment to the extent that the equipment is used for monitoring and communicating to civilian law enforcement officials the movement of sea and air traffic with

[77] 10 U.S.C. § 374(b)(3) (2006).

[78] *See* DOPLAW Handbook, Supp., App. 4-8, *Support to DOJ.*

[79] DoDD 5525.5, *supra* note 7, para. E.4.1.6. DoDD 5525.5 was last updated in 1989 while 10 U.S.C. §§ 371–382 have been updated several times since 1989. Consequently, judge advocates must be aware that DoDD 5525.5 may not accurately reflect the state of the law regarding military support to civilian law enforcement as it stands today.

[80] The U.S. Code does not mention state and local law enforcement agencies. However, under 10 U.S.C. § 374(b)(1)(B), DoD personnel may operate equipment for a state or local law enforcement agency, but only if the request comes from the head of a federal law enforcement agency and this support is of the type the federal law enforcement agency is authorized to provide to the state or local law enforcement agency.

respect to any criminal violation of a law enumerated in paragraph E.4.1.2.5,[81] including communicating information concerning the relative position of civilian law enforcement officials and other sea and air traffic; or

- Operate equipment (by, or with the assistance of DoD personnel) in an emergency situation outside the land area of the United States (or any Commonwealth, territory, or possession of the United States) as a base of operations by federal law enforcement officials to facilitate the enforcement of a law enumerated in 10 U.S.C. § 374(b)(1) and to transport such law enforcement officials in connection with such operations subject to the following limitations:

  - equipment operated by or with the assistance of DoD personnel may not be used to interdict or interrupt the passage of vessels or aircraft, except when DoD personnel are otherwise authorized to take such action with respect to civilian law enforcement operations; and
  - there must be a joint determination by the Secretary of Defense and the Attorney General that an emergency situation exists. An emergency situation may be determined to exist for purposes of this subparagraph only when the size and scope of the suspected criminal activity in a given situation poses a serious threat to the United States. This emergency authority may be used only with respect to large-scale criminal activity at a particular point in time or over a fixed period. It does not permit use of this authority on a routine or extended basis.

The key authorities addressing requests for maintenance and operation of equipment in support of law enforcement agencies investigating drug, customs, and immigration violations are different. Under 10 U.S.C. § 374, requests for DoD personnel to *maintain* equipment may come from federal, state, or local authorities; however, requests for DoD personnel to *operate* equipment must come from the head of a *federal* law enforcement agency.

DoDD 5525.5, on the other hand, does not distinguish between a request for personnel to *operate* or to *maintain* equipment. DoDD 5525.5 only requires that the request come from the head of a *civilian* law enforcement agency charged with enforcing specified federal laws.

Also, the purposes listed in 10 U.S.C. § 374(b)(2) for which DoD personnel may operate equipment are more expansive than those listed in DoDD 5525.5. Operations such as aerial reconnaissance and intercepting vessels outside the land area of the United States in order to direct them to a certain area are permitted under § 374, but not under DoDD 5525.5. A judge advocate must be aware of these discrepancies and work through the requirements closely in order to provide the best legal advice.

(5) Other Permissible Assistance

The last category of military assistance to civilian law enforcement under DoDD 5525.5 is the overarching category of "other permissible assistance."[82] Under 10 U.S.C. § 371, the transfer of

[81] The laws enumerated in DoDD 5525.5, *supra* note 7, para. E.4.1.2.5 pertaining to the operation and maintenance of equipment are the same laws listed in paragraph 3.c(1)(b)(iv) Other Statutory Authority, above, regarding the use of the DoD personnel to enforce laws under specific statutory authority.

[82] DoDD 5525.5, *supra* note 7, para. E.4.1.7; SECNAVINST 5820.7C, *supra* note 8, para. 9(d); AFI 10-801, *supra* note 8, ch. 4.

information acquired in the normal course of military operations to civilian law enforcement agencies is not a violation of the PCA.[83] Additionally, DoDD 5525.5 provides that other actions which are approved by the Secretaries of the Military Departments or the Directors of Defense Agencies that do not subject civilians to the regulatory, prescriptive, or compulsory use of military power are not violations of the PCA.

[83] Transfer of information is discussed in greater detail in this chapter at B.3.a., *Use of DoD Information Collected During Military Operations*.

CHAPTER 5

CIVIL DISTURBANCE OPERATIONS[1]

KEY REFERENCES:

- 10 U.S.C. § 331–335 - 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 (PCA)
- 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
- EO 13527 - Establishing Federal Capability for the Timely Provision of Medical Countermeasures Following a Biological Attack, December 30, 2009.
- DoDD 3025.12 - Military Assistance for Civil Disturbances, February 4, 1994.
- DoDD 3025.18 - Defense Support of Civil Authorities, December 29, 2010.
- DoDD 5111.13 - Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs, January 16, 2009.
- DoDD 5525.5 - DoD Cooperation with Civilian Law Enforcement Officials, January 15, 1986.
- 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 - Civil Support, September 14, 2007.
- Army Regulation 700-131 - Loan and Lease of Army Materiel, August 23, 2004.
- National Guard Regulation 500-1/ANGI 10-8101 - National Guard Domestic Operations, June 13, 2008.
- FM 3-07 - Stability Operations and Support Operations, October 6, 2008.
- FM 3-19.15 - Civil Disturbances, April 18, 2005.
- USNORTHCOM CONPLAN 3502 (S)
- USNORTHCOM CONPLAN 3600 (S)
- USPACOM CONPLAN 7502 (S)

A. Introduction

Within civilian communities in the United States, the local government and the state have the primary responsibility for protecting life and property and maintaining law and order. 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 policy reflects the Founding Fathers' hesitancy to raise a standing army and their desire to

[1] The National Response Framework (Jan. 2008) uses the phrase Defense Support of Civil Authorities (DSCA). A copy of the National Response Framework is located at DOPLAW Handbook, Supp., App. 2-18.

render the military subordinate to civilian authority.[2] The basic policy is rooted in the Constitution[3] and laws of the United States,[4] and allows for exception only under extreme, emergency conditions.

The Constitution guarantees to the states that the Federal Government will aid in suppressing civil disturbances (Civil Disturbance Operations (CDO)) and empowers Congress to create laws that provide Federal forces for that purpose.[5] Other emergency conditions, which are outside the constitutionally and congressionally prescribed conditions, may also allow for CDO.

B. Civil Disturbance Statutes

Title 10, Chapter 15 of the United States Code,[6] entitled "Insurrection," allows the use of federal forces to restore order during times of civil disturbance. DoD and the courts use one phrase, "civil disturbance," to encompass the various situations allowing the use of military assistance under the Insurrection Act.

DoD defines civil disturbances as "group acts of violence and disorders prejudicial to public law and order in the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. possessions and territories, or any political subdivision thereof."[7] The phrase "civil disturbance" includes all circumstances requiring the use of force under the conditions set out in the Insurrection Act. The Insurrection Act is the authority that allows the President, in certain domestic conditions, to use federal forces under DoDD 3025.12.[8] Courts use similar language when defining "insurrection."[9]

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[2] Among the several grounds stated in the Declaration of Independence for severing ties with Great Britain includes 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), in 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.

[3] The Constitution divides authority over the Armed Forces between the President as Commander in Chief, U.S. CONST. art. II, § 2, para. 1, 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." *Id.* art. I, § 8, para. 11.

[4] *See, e.g.*, Posse Comitatus Act, 18 U.S.C. § 1385. The Posse Comitatus Act is discussed fully infra at Chapter 4, Military Support to Civilian Law Enforcement.

[5] 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.

[6] 10 U.S.C. §§ 331–335.

[7] U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) (4 Feb. 1994) [hereinafter DODD 3025.12].

[8] *Id.* para. E.2.1.4 *See also* U.S. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-28, CIVIL SUPPORT, Part II – Terms and Definitions (14 September 2007) [hereinafter JP 3-28].

[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.) (An insurrection is a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in city or state.).

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 statute, the proscriptions of the Posse Comitatus Act (PCA) are inapplicable.[10] The Insurrection Act permits the commitment of U.S. forces by the President under three circumstances:

- To support a request from a state or territory;
- To enforce federal authority; or
- To protect constitutional rights.[11]

1. Supporting a State or Territorial Request

The Federal Government has an obligation to protect every state in the union, upon request, from domestic violence.[12] Pursuant to this obligation, Congress included in the Insurrection Act a provision allowing the President to use federal forces to assist state governments. 10 U.S.C. § 331 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.[13]

A request from a state for the assistance of federal armed forces is made to the President. The President has designated the Attorney General of the United States to receive and coordinate preliminary requests from the states for federal military assistance under this provision.[14] (See DOPLAW Handbook, Supp., App. 2-4, *Executive Order 12656, Emergency Preparedness.*) 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. The commander must also inform the Chairman of the Joint Chiefs of Staff of the request and all known material facts pertaining to the request.[15]

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[10] Posse Comitatus Act, 18 U.S.C. § 1385, makes it unlawful to use any part of the Army or Air Force in a civilian law enforcement capacity to execute local, state, or federal laws. The language of the act itself specifies that activities expressly authorized by the Constitution or by statute are exempt from the act's restrictions. For a more complete discussion of the Posse Comitatus Act, see infra Chapter 4, Military Support to Civilian Law Enforcement.

[11] 10 U.S.C. §§ 331–335.

[12] U.S. CONST. art. IV, § 4.

[13] 10 U.S.C. § 331.

[14] *See* Exec. Order No. 12,656, 53 Fed. Reg. 47,491, § 1101(8) (18 Nov. 1998) [hereinafter EO 12,656]; DODD 3025.12, *supra* note 7, para. 4.6.1; JP 3-28, *supra* note 8, para. 1b (1). A copy of the Executive Order is located at DOPLAW Handbook, Supp., App. 2-4.

[15] U.S. DEP'T OF DEFENSE, DIR. 5111.13, ASSISTANT SECRETARY OF DEFENSE FOR HOMELAND DEFENSE AND AMERICAS' SECURITY AFFAIRS, (16 Jan. 2009)[hereinafter DoDD 5111.13], appointed Assistant Secretary of Defense for Homeland Defense & Americas' Security Affairs as DoD Executive Agent and transferred the Director of Military Support function from the Army to the Chairman of the Joint Chiefs of Staff .

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,[16] should have been brought to bear on the civil disturbance.[17]

On 1 May 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.[18] In accordance with the order of President Bush, the Secretary of Defense ordered the federalization of the California National Guard and the deployment of Soldiers of the 7th Infantry Division from Fort Ord and Marines from Camp Pendleton to assist in restoring order in Los Angeles.[19] (See DOPLAW Handbook, Supp., App. 5-9, *Presidential Proclamation and Executive Order 12804;* App. 5-10, *Acting SECDEF Memorandum "Execution of Operations to Assist in Restoring Civil Order to Los Angeles and Other Districts in California;* and App. 5-11, *JTF LA Report.*)

2. Enforcing Federal Authority

The President has a constitutional duty to see that the laws of the United States are faithfully executed.[20] Within the Insurrection Act, Congress gave the President the authority to commit the U.S. military to enforce federal law.[21] 10 U.S.C. § 332 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.[22]

During the 1950s and 1960s, this statute was used to enforce public school desegregation in Arkansas[23] and Alabama[24] and to control civil rights protests in Mississippi[25] and Alabama.[26]

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[16] *See infra* Chapter 10, Reserve Components - Special Issues, which discusses the mobilization and activation of National Guard forces.

[17] *See* NATIONAL GUARD BUREAU, REG. 500-1/ANGI 10-8101, NATIONAL GUARD DOMESTIC OPERATIONS, PARA. 4-2d (13 June 2008) (which anticipates that state national guard forces would exercise their primary responsibility for providing military assistance to state and local government agencies while in state active duty status).

[18] Proclamation No. 6427, 57 Fed. Reg. 19,359 (May 5, 1992).

[19] Exec. Order No. 12,804, 57 Fed. Reg. 19,361 (May 5, 1992).

[20] U.S. CONST. art. II, § 3.

[21] 10 U.S.C. § 332 (2006).

[22] *Id.*

[23] *See* Exec. Order No. 10,730, 22 Fed. Reg. 7,628 (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.).

[24] *See* Exec. Order No. 11,118, 28 Fed. Reg. 9,863 (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.).

3. Protecting Constitutional Rights

Citizens of the United States are guaranteed equal protection under the law.[27] 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.[28] 10 U.S.C. § 333 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.[29]

Under 10 U.S.C. § 333, President Kennedy sent military troops to Alabama in April 1963 during the civil rights protests in Birmingham, Alabama.[30]

C. Procedural Issues

Prior to committing 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.[31] 10 U.S.C. § 334 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.

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[25] *See* Exec. Order No. 11,053, 27 Fed. Reg. 9,681 (Sept. 30, 1962) (Army and Air National Guard units federalized to enforce federal court orders issued in Mississippi.).

[26] *See* Exec. Order No. 11,111, 28 Fed. Reg. 5,709 (June 11, 1963) (Army and Air National Guard units federalized to remove obstructions of justice and to suppress unlawful assemblies, conspiracies, and domestic violence that opposes the laws of Alabama.).

[27] 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."

[28] 10 U.S.C. § 333 (2006).

[29] *Id.*

[30] *See* Alabama v. U.S., 373 U.S. 545 (1963).

[31] 10 U.S.C. § 334.

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 necessary to restore order.[32] Decisions of the President to issue Presidential Proclamations and Executive Orders pursuant to the Insurrection Act are final[33] and cannot be compelled by the courts.[34] An example of such a Presidential Proclamation and Executive Order (for the deployment of military forces to Los Angeles during the 1992) can be found in the 2011 Documentary Supplement at *Appendices 5-9 through 5-11*.

D. DoD Considerations concerning the Insurrection Act

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.

- Legality - compliance with the law.
- Lethality - potential use of lethal force by or against DoD forces.
- Risk - safety of DoD forces.
- Cost - who pays, impact on DoD budget.
- Appropriateness - whether DoD is the proper source.
- Readiness - impact on DoD's ability to perform its primary mission.[35]

The decision to employ armed forces is made at the cabinet level in coordination with the President, the Secretary of Defense, and the Attorney General. However, the above-criteria are helpful to local commanders and their judge advocates when forwarding formal assistance requests to higher headquarters for consideration.

The Secretary of Defense retains approval authority for all military support in response to civil disturbances.[36] However, the Secretary of Defense, through the Secretary of the Army—as the "DoD Executive Agent," has delegated certain authority to plan for and commit DoD resources in response to requests from civil authorities.

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[32] *See* Exec. Order No. 10,703, 22 Fed. Reg. 7,628 (Sept. 24, 1957) (order authorizing use of military forces for desegregation in Arkansas); Exec. Order No. 11,053, 27 Fed. Reg. 9,681 (Sept. 30, 1962) (order authorizing use of military forces during riots in Mississippi); Exec. Order No. 11,111, 28 Fed. Reg. 5,709 (June 11, 1963) (order authorizing use of military forces during riots in Alabama); Exec. Order No. 11,118, 28 Fed. Reg. 9,863 (Sept. 10, 1963) (order authorizing use of military forces for desegregation in Alabama).

[33] *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).

[34] *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).

[35] U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES, para. 4.e (29 Dec 2010) [hereinafter DODD 3025.18]; *see also supra* note 7.

[36] DODD 3025.18, *supra* note 35, para. 4.j.1, retains approval authority for civil disturbance operations to no lower than the Secretary of Defense level.

E. Other Authority

In addition to the Insurrection Act, authority to use federal troops in a law enforcement capacity to quell civil disturbances can be found in two other major areas.[37]

1. Protection of Federal Property Authority

The United States has the right to protect federal property or functions through the use of federal armed forces. The use of federal armed forces in this manner is warranted only where the need for protection exists, and the duly constituted State or local civil authorities cannot or will not give adequate protection.[38] A military installation commander, exercising "inherent authority,"[39] may take such actions as are reasonably necessary and lawful to protect military installations. This could include ejection from the installation or denial of access to an installation of those who threaten or are involved in civil disturbances.[40]

2. Emergency Authority

Per DoDD 3025.18, *Defense Support of Civil Authorities*, responsible DoD officials and commanders may approve the use of military forces in a law enforcement capacity to support civilian authorities, during sudden and unexpected civil disturbances beyond the control of local civilian authorities when circumstances preclude seeking prior approval from the President. The use of military forces must be necessary to prevent the loss of life or wanton destruction of property, or to restore governmental functioning 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 government functions.[41] This emergency provision should be used with great caution. The

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[37] In addition to these two major areas, there are other numerous statutory authorizations that allow the use of troops in a law enforcement capacity to quell various civil disturbances. *See infra* Chapter 4, Military Support to Civilian Law Enforcement, which discusses the Posse Comitatus Act and its exceptions.

[38] DODD 3025.12, *supra* note 7, para. 4.2.2.2.

[39] 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.").

[40] 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).

[41] U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES, para. 4.i.1–2; 3025.12, *supra* note 7, para. 4.2.2.1; U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, PARA. E.4.1.2.3.1 (15 JAN. 1986) [hereinafter DODD 5525.5].

authority granting the use of federal forces in this manner clearly states that it would be difficult to justify such action, without prior approval, while communications facilities are operating.[42]

Historically, authority in these circumstances has been granted to officers of the "active Army in command of troops" allowing them to take prompt and vigorous action designed to preserve law and order and to protect life and property until they receive instruction from a higher headquarters.[43] 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 at (719) 554-2361 by the most expeditious means of communication available. 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.

F. Responsibilities and Relationships of Parties Involved in Civil Disturbance Operations

1. Attorney General

The Department of Justice is the primary federal agency for coordinating the Federal Government response to restore law and order.[44] 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. Finally, the Attorney General appoints the Senior Civilian Representatives of the Attorney General (SCRAG), who will be located in each city where federal forces are committed.

2. Senior Civilian Representative of the Attorney General

Appointed by the Attorney General, the SCRAG is the Attorney General's on-scene agent. 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. The SCRAG has the authority to assign missions to federal military forces and the authority to resolve disputes arising between local law enforcement agencies and the joint task force commander concerning the types of missions military forces may undertake.

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

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[42] DODD 3025.12, *supra* note 7, para. 4.2.2., JP 3-28, *supra* note 8, chapter II, para. 3.

[43] JP 3-28, *supra* note 8, Chapter III; U.S. DEP'T OF ARMY, FIELD MANUAL 3-19.15, CIVIL DISTURBANCES, para B-45 (18 Apr. 2005) [hereinafter FM 3-19.15].

[44] EO 12,656, *supra* note 14, § 1101(3), 1101(8).

Justice for Civil Disturbance Operations.[45] ASD(HD&ASA) is responsible for all training, planning, and operations relating to the employment of any military resources in the event of a civil disturbance.[46]

4. Chairman, Joint Chiefs of Staff, Joint Director of Military Support (JDOMS)

The Chairman, Joint Chiefs of Staff (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 civil disturbance operation. JDOMS is the point of contact within DoD for civil disturbance matters.[47]

5. Combatant Commanders, U.S. Northern Command and U.S. Pacific Command

The Combatant Commanders of U.S. Northern Command (CDRUSNORTHCOM) and U.S. Pacific Command (CDRUSPACOM) have responsibility for planning and executing civil disturbance plans within their areas of operation. In total, these areas cover the 50 states, Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, and all U.S. territories, possessions, and territorial waters.[48] The Combatant Commander, in coordination with the SCRAG, will determine the organization and forces required to accomplish the civil disturbance mission.

CDRUSNORTHCOM is responsible for federal civil disturbance operations in the 48 contiguous states, Alaska, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

CDRUSPACOM is responsible for civil disturbance operations in Hawaii, and U.S. possessions and territories in the Pacific.[49]

6. Commander, U.S. Army North

U.S. Army North (ARNORTH) is currently the lead operational authority for federal civil disturbance response within the 48 contiguous states. The Commander, ARNORTH, designates a Commander, Joint Civil Disturbance Task Force, receives civil disturbance units, ensures 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 the Commander for all federal forces, including National Guard forces in Title 10 status, in a civil disturbance area of operations. He is

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[45] DoDD 5111.13, *supra* note 15.

[46] *Id.*

[47] *Id.*; DoDD 3025.12, *supra* note 7, para. 5.6.4; *see also* FM 3-19.15, *supra* note 43, Appendix B.

[48] DoDD 3025.12, *supra* note 7, para. 4.3.3.

[49] *Id.* DoDD 3025.12 was promulgated in 1994 and assigned responsibilities based on the geographical responsibilities of the Combatant Commands applicable at the time of promulgation. Pursuant to CHAIRMAN, JOINT CHIEFS OF STAFF, UNIFIED COMMAND PLAN 2002 (30 Apr. 2002) (classified Secret) [hereinafter UCP 02], the Chairman, Joint Chiefs of Staff (CJCS), reassigned geographical responsibilities for the Commanders of the Combatant Commands. This change is not reflected in DoDD 3025.12, which has not been updated.

the DoD representative in the civil disturbance area and performs civil disturbance missions assigned by the SCRAG. ***Civilian officials remain in charge of civil disturbance operations***.

8. National Guard Bureau

The Chief of the National Guard Bureau (CNGB) is the channel of communication for all National Guard matters between (1) 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 (2) the States.[50] In that capacity, CNGB facilitates and deconflicts the use of National Guard forces to ensure that adequate and balanced forces are available for domestic and foreign military operations.[51]

9. The National Guard

National Guard units have primary responsibility to respond to a civil disturbance, and will initially deploy in a State Active Duty (SAD) status or under Title 32.[52] In either capacity, they are not subject to the prohibitions of the PCA and can freely support state or federal law enforcement missions.[53] National Guard forces remain under the command of state NG officers, and missions are conducted through the NG chain of command, after coordination with civil authorities. NG operations are normally conducted according to the unity of effort paradigm. In extreme circumstances, National Guard units may be federalized under Title 10 pursuant to a Presidential order.[54] Once federalized, the NG conducts its mission in accordance with federal law and CONPLANs, as discussed in the next section.

The NG's use of force while in SAD or Title 32 status is governed by the laws of the state where the operation occurs. Multi-state operations therefore may involve separate "Rules for the Use of Force" (RUF) for each receiving state. One instance where a regional RUF for Title 32 NG forces occurred was during Operation Jump Start, a border security mission conducted during 2006–2007;[55] another instance where a regional RUF was signed occurred during the POTUS Inauguration Ceremony in 2009.[56]

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[50] U.S. DEP'T OF DEFENSE, DIR. 5105.77, NATIONAL GUARD BUREAU (NGB) (21 May 2008) [hereinafter DODD 5105.77].

[51] *Id.* para. 5.1.11.2.

[52] With SecDef approval, the National Guard may conduct operational missions under 32 U.S.C. § 502(f)(2) "operational support" authority.

[53] *See infra,* Chapter 2, Military Support to Civilian Law Enforcement, for a complete discussion on the Posse Comitatus Act.

[54] *See infra* Chapter 10, Reserve Components, for a complete discussion of National Guard status.

[55] *See* Memorandum of Agreement Between the States of Arizona, California, New Mexico, Texas, and the Department of Defense, subj: OPERATION JUMP START (June 2006).

56 *See* Greg Rudl, *Guardmembers flow in for inauguration support; first stop – in-processsing,* NAT'L GUARD (Jan. 16, 2009), http://www.ng.mil/news/archives/2009/01/011809-Inprocess.aspx.

G. The Department of Defense Civil Disturbance Plans

Formerly, DoD's Civil Disturbance Operations (CDO) plan was known as "GARDEN PLOT."[57] Since the creation of the Department of Homeland Security and USNORTHCOM however, DoD has delegated to geographic combatant commanders responsibility for developing CDO Contingency Plans (CONPLANs). These geographic commanders' CONPLANs provide guidance and direction for planning, coordinating, and executing military operations during domestic civil disturbances.

1. Civil Disturbance Operations Mission

Broadly stated, the CDO mission assists civil authorities in restoring law and order in the United States and its territories.[58] This mission statement, while not duplicating the language in the Insurrection Act allowing for the use of federal forces to "suppress" insurrection, provides wide latitude to the President to use federal forces to assist civil law enforcement in "restoring" law and order.

The restoration of law and order must be distinguished from the preservation of law and order.[59] CDO mission statements do not allow the joint civil disturbance task force commander to undertake preservation missions.[60] 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.[61] Care should be taken before a military commander accepts missions that are routine maintenance of civil order.

2. Combatant Commanders' CONPLANs

The 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.[62] The concept of a civil disturbance operation is multi-phased: Phase 0, Shape; Phase I, Anticipate; Phase II, Respond (deployment can occur in either Phase I or Phase II); Phase III, Operate; Phase IV, Stabilize; and Phase V, Transition (redeployment). Prior to

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[57] GARDEN PLOT was published in 1991. The creation of the Department of Homeland Security and U.S. Northern Command required a change to the plan. The UCP in 2002 moved this responsibility to the regional combatant commands. Changes to the UCP in 2008 resulted in USNORTHCOM and USPACOM having sole responsibility for CDO planning. Thus, GARDEN PLOT has been replaced by COCOM CONPLANs for the respective theaters.

[58] JP 3-28, *supra* note 8, para. 3(1)(b).

[59] The preservation of law and order is the responsibility of state and local governments and law enforcement authorities. DODD 3025.12, *supra* note 7, para. 4.1.3; FM 3-19.15, *supra* note 47, I-8, para. 5(a)(2).

[60] *See* DODD 3025.12, *supra* note 7, para. 4.2.7, which states, "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."

[61] FM 3-19.15, *supra* note 47.

[62] In most of the United States, USNORTHCOM CONPLAN directs how the Joint Civil Disturbance Task Force would plan, train, and conduct operations. *See* NORTHCOM CONPLAN 3502 (S) (limdis) [hereinafter NORTHCOM CONPLAN 3502]. To review this CONPLAN, contact the NORTHCOM Staff Judge Advocate.

deployment, military forces maintain five preparedness postures, called Civil Disturbance Conditions (CIDCONS) in order to alert and react to potential civil disturbance operations. Changes in the CIDCON level are directed by the JDOMS.[63]

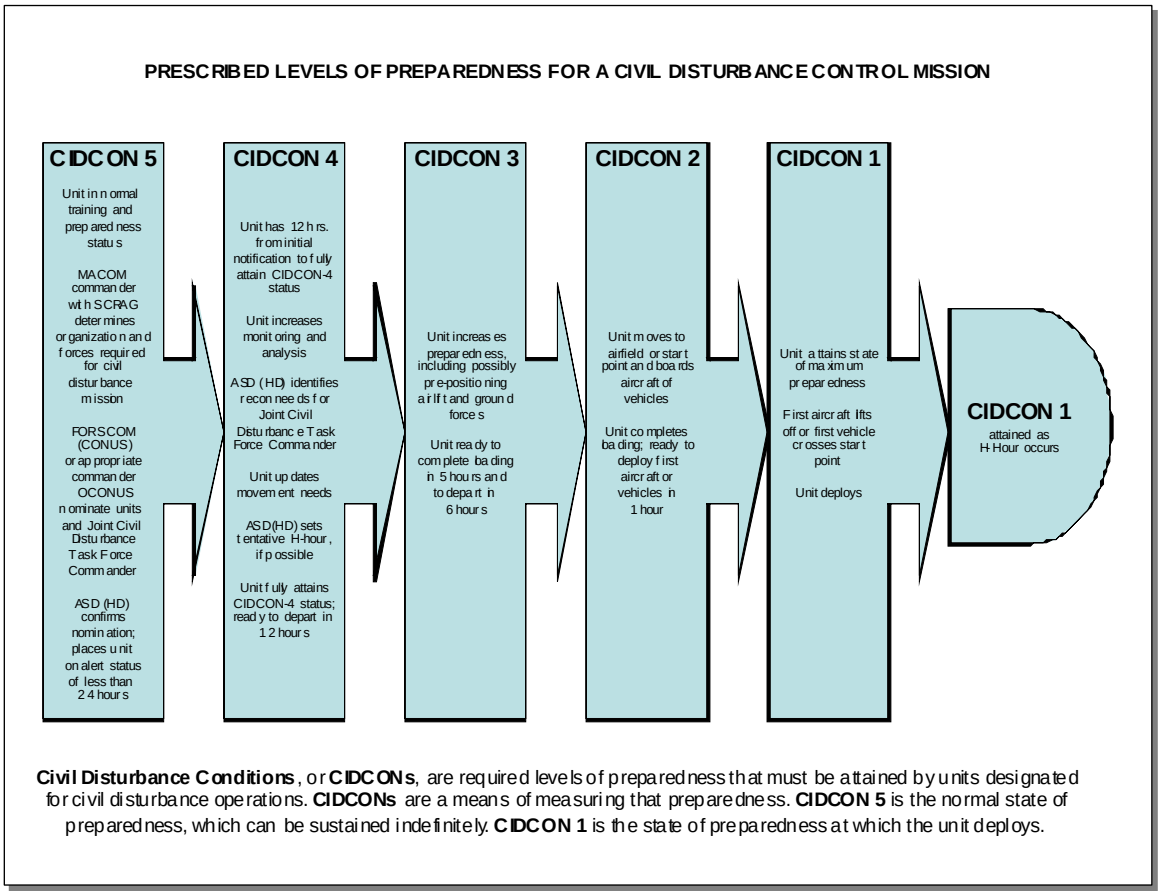

Figure 4-2. CIDCON Levels of Preparedness.

CIDCON 5 is a state of normal preparedness that is sustainable indefinitely. Forces may be designated for a civil disturbance operation.

CIDCON 4 is declared once a civil disturbance has developed. The Joint Civil Disturbance Task Force commander may establish reconnaissance and information requirements and may initiate detailed planning. Upon attaining CIDCON 4, designated units are prepared to cross the start point at home station in twelve hours.

CIDCON 3 represents an increase in preparedness. Military forces may be pre-positioned. The President or ASD(HD&ASA) issues orders to be prepared to deploy within six hours.

[63] A commander cannot unilaterally increase the CIDCON of forces under his operational control above CIDCON 4. A commander cannot decrease the CIDCON posture without approval from JDOMS.

CIDCON 2 reflects that the deployment of federal forces is probable. All designated units will be moved to airfields and will have completed movement planning. CIDCON 2 is fully attained when units are prepared to deploy in one hour.

CIDCON 1 is directed one hour prior to time for deployment (H-hour). CIDCON 1 is attained simultaneously with H-hour, when the first units have deployed.

Once military forces are within the civil disturbance area of operations, they fall under the operational control of the Joint Task Force commander. The Joint Civil Disturbance Task Force commander receives missions from the SCRAG and is responsible for accomplishing the Task Force mission.[64]

Throughout the employment of military forces, the Commander will maintain liaison with the SCRAG, state law enforcement representatives, and municipal authorities. Normally, this liaison is through the Defense Coordinating Officer from ARNORTH. The liaison will be maintained until termination of the civil disturbance mission. The Joint Civil Disturbance Task Force Commander will accept missions from the SCRAG, and, if reasonably possible, within the framework of his orders, comply with requests from civil authorities.[65]

The SCRAG designates a single state or federal law enforcement coordinating officer, through whom requests are typically passed. Validated requests are transmitted to the Joint Civil Disturbance Task Force Commander for staffing. Approved missions are assigned through the military chain of command to the appropriate unit for execution. The supported combatant commander or SCRAG resolves discrepancies when the Joint Civil Disturbance Task Force Commander is unable to fulfill requests from the civil authorities.

Except in a direct support relationship approved and ordered through the military chain of command, units should not accept taskings 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.[66]

On order, commitment of federal forces will be terminated at a specified date and time. Forces redeploy to home station where they return to the control of their respective commands.

3. The Standing Rules for the Use of Force for U.S. Forces

Civil disturbance operations are conducted in accordance with Appendix L of the Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces (SRUF). Guidance on how and

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[64] It is important to remember that civilian authorities retain primary authority over the employment of military forces. *See supra* notes 1-4 and accompanying text; DoDD 3025.12, *supra* note 7, para. 4.1.5; *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.").

[65] JP 3-28, *supra* note 8, Chapter III.

[66] *Id.*

when forces can use force in a CDO mission are detailed in that annex. Although the CJCSI is classified, Annex L is not and can be shared with our mission partners.

a. Custody and Detention

All apprehensions should be made by the civil police force unless they are not available or require assistance. Military forces have the authority to detain rioters, looters, or other civilians committing criminal offenses.[67] Civilians taken into custody should be transferred to civilian law enforcement authorities as soon as possible.

All members of the force must remember that state and federal criminal law and procedure govern apprehension. Apprehension is justified only on the basis of probable cause to believe that an offense has been committed and that the person to be apprehended committed the offense. *Soldiers should not question detainees beyond basic pedigree such as name and address.* If formal questioning of an offender is necessary, civilian police should conduct the interview. If civilian police are not available, CID agents or military police may conduct interviews only if the interview is essential to the civil disturbance mission. Actions taken by Soldiers that do not conform to criminal law constitutional standards could jeopardize future prosecution and subject Soldiers and their Commanders to criminal and/or civil liability.[68]

b. Search and Seizure

CDO CONPLANs anticipate that military forces will generally not be involved in searches unless there is "an immediate danger of violence, destruction of evidence, or escape of violent persons unless the search is conducted without delay." In all other cases, local authorities should conduct searches. When required to perform searches, federal armed forces may conduct warrantless searches under the same constitutional parameters imposed upon law enforcement officials. Joint Civil Disturbance Task Force forces conducting a warrantless search will fully document the reasons for the search as soon as is reasonably convenient.[69] Generally these searches are limited to the following incidents.

(1) Stop and Frisk

If there is a reasonable suspicion based upon articulable facts that a person has committed, is committing, or is about to commit a crime, that person may be temporarily stopped and questioned about his activities. The stop must be limited in duration to that which is reasonably necessary to investigate the suspicion. If there is a reasonable suspicion based on articulable facts that a person is armed or is carrying instruments of violence and that the individual presents an immediate risk of harm, members of the armed force may conduct a "frisk" (an external "patdown" of the clothing) for weapons. Any weapons found during a frisk may be removed from the individual and seized.[70]

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[67] JP 3-28, *supra* note 8, Chapter III.

[68] *See* FM 3-19.15, *supra* note 47, Chapter 3.

[69] *Id.*

[70] *Id.*

(2) Search Incident to Lawful Apprehension

A person lawfully detained may be searched for weapons or destructible evidence. A search for weapons or destructible evidence may also be conducted in the area where the detained person could reach with a sudden movement to obtain a weapon or destroy evidence.[71]

(3) Exigent circumstances

Military forces assisting law enforcement may make a search without a warrant when they have reason to believe (probable cause) that weapons, objects related to criminal activity, or persons believed to have committed an offense, are in the place to be searched; and they have reason to believe that the delay necessary to obtain a search warrant would result in removal of the weapons or destruction of the objects related to criminal activity. For example, Joint Civil Disturbance Task Force forces may stop and search an automobile without a warrant when there is reason to believe that the automobile contains weapons or instruments of violence and/or contains an individual reasonably believed to have committed violence.[72]

(4) Emergency

Military forces in a civil disturbance operation may make an immediate entry into a building when there is reason to believe that entry is necessary to prevent injury to persons, serious damage to property, loss of evidence, to protect public safety, or to render aid to someone who is in danger.[73]

(5) Hot pursuit

Military forces pursuing a person who they have reason to believe has just committed a serious crime, may enter a vehicle or building believed to be entered by the suspect and search the building or vehicle for the person or any weapons that might be used to further his escape.[74]

(6) Plain View

During the course of otherwise lawful activity, military forces may seize any unlawful weapons or objects related to criminal activity which they observe in plain view.[75] When conducting warrantless searches that require a probable cause determination, military forces can obtain advice from a judge advocate; however, the probable cause determination must be made personally by the individual desiring to conduct the search.

If a search warrant is required, local civil authorities should obtain judicially issued search warrants. If local civilian authorities are not available, judge advocates need to be prepared to provide advice on probable cause to military authorities before they approach a local judge or magistrate for a search warrant.

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*

When feasible, all searches conducted by military personnel will be conducted by two personnel with the actual search performed by someone of the same sex.[76] A hand receipt or some similar document should be prepared when items of personal property are seized from an individual.[77]

c. Confinement Facilities

The Joint Civil Disturbance Task Force should not operate a detention facility.[78] Any person apprehended should be turned over to the police for detention. Military correctional facilities cannot be used to detain civilians. If available civilian detention facilities cannot accommodate the number of detained persons who are awaiting arraignment,[79] the Joint Civil Disturbance Task Force commander must seek the approval of the SCRAG and Combatant Commander to set up a temporary detention facility.[80]

Should the Task Force be required to operate a detention facility, the detention facility standards and operations should conform, to the maximum extent possible, to current DoD confinement facility operations and will be under the professional supervision and control of Military Police personnel.[81] The establishment and operation of military detention facilities is a temporary expedient and is authorized only until such time as the custody of detained persons can be transferred to civil authorities.[82]

d. Riot Control Agents

Normally, for CDO the deployment and use of riot control agents is allowed as a matter of U.S. policy.[83] However, initial approval authority for its deployment and use may be retained at a level higher than the Joint Civil Disturbance Task Force Commander and may require a specific request.[84]

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[76] *Id.* para. 3-20 to 3-37 requires the application of common sense when evaluating options to search a person of the opposite gender and recommends that searches of the person be performed by a member of the same sex.

[77] U.S. DEP'T OF ARMY, FIELD MANUAL 3-19.1, MILITARY POLICE OPERATIONS, ch. 9 (22 Mar. 2001) [hereinafter FM 3-19.1] and U.S. DEP'T OF ARMY, FIELD MANUAL 3-19.13, LAW ENFORCEMENT INVESTIGATIONS (10 JAN. 2005) [hereinafter FM 3-19.13] contain extensive information on conducting searches and processing suspects and witnesses.

[78] FM 3-19.15, *supra* note 47, paras. 3-38–3-40; *see generally*, DODD 3025.12, *supra* note 7, para. 4.2.7 ("DoD Components shall not take charge of any function of civil government unless absolutely necessary under conditions of extreme emergency.").

[79] The Task Force Commander is responsible for verifying the fact that available federal, state, and local confinement facilities can no longer accommodate the number of persons apprehended. USNORTHCOM CONPLAN 3502, *supra* note 62. CONPLAN 3502 (or Commander U.S. PACIFIC COMMAND CONPLAN 7502) specifies that detention facilities be under the control of U.S. Army MP Corps personnel. Due to base closure and increased joint nature of operations it is possible that U.S. Navy and U.S. Air Force confinement facilities could be used.

[80] USNORTHCOM CONPLAN 3502, *supra* note 62; JP 3-28, *supra* note 8; FM 3-19.15, *supra* note 47.

[81] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM (6 June 2006); *see also* FM 3-19.1, *supra* note 77.

[82] USNORTHCOM CONPLAN 3502, *supra* note 62.

[83] USNORTHCOM CONPLAN 3502, *supra* note 62; Exec. Order No. 11,850, 40 C.F.R. 16,187 (Apr. 8, 1975); CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3110.07A, NUCLEAR, BIOLOGICAL, CHEMICAL DEFENSE; RIOT CONTROL AGENTS; AND HERBICIDES (15 Dec. 1998) (classified Secret); FM 3-19.15, *supra* note 47.

[84] *See* USNORTHCOM CONPLAN 3502, *supra* note 62, Appendix 4 to Annex E (Legal).

4. Other Legal Considerations

a. 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 these locations are not practical, state and other local government property should be sought for use. Locating assembly areas on public property can reduce property damage claims, contract costs, and adverse perceptions about the military operation.

b. Intelligence

See Chapter 9, Intelligence Law and Policy Considerations During Domestic Support Operations.

c. 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).[85] In order for claims under the FTCA to be compensable, 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.[86]

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.[87] The ACO in whose geographical area a claims incident occurs is primarily responsible for investigating and processing the claim.[88] 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.[89]

Even though primary claims investigating responsibilities fall to the ACO, judge advocates deployed as part of a civil disturbance task force can assist in the investigation by insuring that potential claims are documented and available information concerning the claims collected. Judge advocates assisting the Joint Task Force can also assist by collecting information concerning the status of National Guard troops operating within the area.[90]

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[85] 28 U.S.C. §§ 1346, 2671–2680.

[86] USNORTHCOM CONPLAN 3502, *supra* note 62.

[87] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 1-11k (8 Feb. 2008).

[88] *Id.* para. 2-2.

[89] *Id.* para. 1-17(c).

[90] Detailed information on claims arising during disasters can be accessed at http://www.jagcnet.army.mil/Claims, then click the hyperlink for "Disaster Claims SOP."

d. Medical Support

Typically, medical personnel wear the distinctive medical arm brassard when performing medical duties. The primary mission of medical support personnel deployed with a Joint Civil Disturbance Task Force is to treat military personnel requiring medical care. Civilian personnel should be seen by the civilian health care system. Military treatment facilities may be used to treat civilians only in cases of emergency when undue suffering or the loss of life or limb is a possibility. Civilians admitted to military treatment facilities should be transferred to a civilian hospital as soon as medically feasible.

Military personnel should be admitted to civilian hospitals only in an emergency and should be transferred to a military facility as soon as medically possible. In some locations military and civilian hospitals have patient sharing agreements which would allow civilians to use the military facility.

e. Civil Law, Ordinances, Restrictions, and Interference with Federal Forces

Federal law makes it a crime to interfere with law enforcement officers engaged in controlling civil disorders.[91] Included in the definition of "law enforcement officers" are members of the National Guard, in both state and federal status, and members of the armed forces.[92]

Close coordination with local governmental authorities can assist the Joint Civil Disturbance Task Force Commander in accomplishing the mission. Except in the unlikely event of martial law, federal forces are unable to impose restrictions on the civil population. However, local governments may be able to implement such restrictions to aid in the control of lawlessness. The Joint Civil Disturbance Task Force Commander may make recommendations to local governments concerning the appropriateness of various restrictions and then assist local authorities in carrying them out.[93]

f. Loan and Lease of Military Equipment

Approval authorities for the loan and lease of DoD materiel to federal, state, and local law enforcement authorities and the National Guard historically has been determined 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

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[91] 18 U.S.C. §§ 231–233.

[92] *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.

[93] FM 3-19.15, *supra* note 47.

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.[94] All loans or leases of U.S. Army materiel will be for a period of fifteen days with the possibility of an additional fifteen day extension.[95] Commanders are authorized to approve the loan or lease of equipment as required to save human life, prevent human suffering, or reduce large-scale property damage or destruction.

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.[96] Equipment for non-federal law enforcement agencies must be leased under the leasing statute, which requires both a lease agreement and a surety bond.[97] The leasing statute also includes the requirement for the payment of a lease fee, which may be waived by the Assistant Secretary of the Army (Installation, Logistics and Environment) (ASA(I, L&E)). When commanders approve emergency loans or leases, follow-up action will be taken within five days to formalize the action by completing a loan or lease agreement.[98] (See DOPLAW Handbook, Supp., App. 5-7, *Loan, Lease and Donation of Army Material.*)

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[94] U.S. DEP'T OF ARMY, REG. 700-131, LOAN AND LEASE OF ARMY MATERIEL, para. 2-6b (1 Sept. 1996) [hereinafter AR 700-131]. DoDD 3025.12, *supra* note 7, identifies MACDIS operations as unprogrammed emergency requirements. Procedures for financing and reporting costs associated with civil disturbance operations are prescribed in DoD Instruction 7200.9. *See also* NGR 500-1, *supra* note 17, Chap. 3-1, which governs the loan or lease of National Guard property.

[95] AR 700-131, *supra* note 94, at Table 2-1.

[96] 31 U.S.C. § 1535.

[97] 10 U.S.C. § 2667; *see also* AR 700-131, *supra* note 94, paras. 2-7, 2-8 (discussing loan/lease agreements and surety bonds).

[98] AR 700-131, *supra* note 94, para. 2-7a.

CHAPTER 6

COUNTERDRUG OPERATIONS

KEY REFERENCES:

- 10 U.S.C. § 124 - Detection and Monitoring of Aerial and Maritime Transit of Illegal Drugs.
- 10 U.S.C. § 371-381 - Military Support for Civilian Law Enforcement Agencies.
- 10 U.S.C. § 379 - Coast Guard Law Enforcement Detachments.
- 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 Funding.
- National Defense Authorization Act of 1991, Pub. L. No. 101-510, § 1004 (1991) (as amended).
- DoD Financial Management Regulation, Vol. 2B, ch. 14, Drug Interdiction and Counter Drug Activities, June 2004.
- DepSecDef Memo, Department of Defense Counternarcotics Policy, July 31, 2002.
- DepSecDef Memo, Department of Defense International Counternarcotics Policy, December 24, 2008.
- DepSecDef Memo, Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities, October 2, 2003.
- DASD/CN Memo, Policy Definition of "Counterdrug Activities", October 23, 2002.
- DASD/CN Memo, Policy Definition of "Narcoterrorism", April 12, 2004.
- DASD/CN Memo, Counter Drug Support to Counter-Narcoterrorist Activities (Memo to Chief, NGB) August, 26, 2005.
- DASD/CN Memo, Procedures for Handling Requests for Counterdrug Narcoterrorist Support, 2006.
- DoDD 5525.5, DoD Cooperation with Civilian Law Enforcement Officials, January 15, 1986.
- 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.
- NGR 500-2 - National Guard Counterdrug Support, August 28, 2008.
- 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 (2010).

A. Introduction

In the 1980s, Congress determined that 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 mandate now includes both active components and National Guard forces engaged full-time in the mission. DoD counterdrug operations are coordinated by the Deputy Assistant Secretary of Defense, Counter Narcotics (DASD/CN), 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 CD program is

administered through NGB-CD. 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*.[1] 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.[2]

In 1989, Congress took additional steps, assigning specific counterdrug missions to DoD. As part of the National Defense Authorization Act (NDAA) for Fiscal Years (FY) 1990 and 1991,[3] Congress designated DoD as the single "lead" agency for the "detection and monitoring" of aerial and maritime transit of illegal drugs into the United States.[4] 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."[5]

Finally, in FY 1991,Congress provided specific counterdrug authority to DoD by passing Section 1004 of the NDAA.[6]

In addition to providing statutory authority for counterdrug support, Congress annually appropriates funds to DoD specifically for these operations.[7] The money is disbursed through DASD/CN 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 1991

Congress annually gives DoD authority to support federal, state, local, and foreign agencies that have counterdrug responsibilities. This authority has not been codified, but can be found in Section 1004 of the National Defense Authorization Act for FY 1991.[8] Section 1004 is the primary authority for DoD support to counterdrug operations.

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[1] 10 U.S.C.A. §§ 371–382 (2006). *See infra* Chapter 2, Military Support to Civilian Law Enforcement.

[2] *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. 3207-74.

[3] National Defense Authorization Act of 1990, Pub. L. No. 101-189, 103 Stat. 1563 [hereinafter FY90 NDAA].

[4] 10 U.S.C. § 124 (2006).

[5] FY90 NDAA, *supra* note 3, § 1206.

[6] National Defense Authorization Act of 1991, Pub. L. No. 101-510, § 1004, as amended, 104 Stat. 1629 [hereinafter FY91 NDAA]. *See also* generally DOPLAW Handbook, Supp., App. 6. Statutes Governing DoD Support to Counterdrug Operations.

[7] 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 2009, Congress appropriated $1.06 billion for counterdrug operations. National Defense Appropriations Act, 2009, Pub. L. No. 110-417 (2008).

[8] *Id.* Since 1991, these authorities have been continuously amended. Many of these authorities are also reproduced in the notes following 10 U.S.C.A. § 374 in the annotated codes.

Under Section 1004, the Secretary of Defense may provide support for the counterdrug activities of any federal, state, local or foreign law enforcement agencies if the support is requested by:

- The official with counterdrug responsibilities for the requesting federal department or agency;
- The appropriate state or local official for state or local support; or
- The appropriate official of a federal department or agency with counterdrug responsibilities for foreign support.[9]

The following types of support may be provided by the Secretary of Defense under § 1004.

- The maintenance and repair of equipment made available by DoD for the purpose of:
    - preserving the future utility of the equipment for DoD; and
    - upgrading such equipment to ensure the compatibility of such equipment with other equipment used by DoD.
- The maintenance, repair, or upgrading of equipment, other than equipment referred to in subsection (a), for the purpose of:
    - ensuring that the equipment being maintained or repaired is compatible with equipment used by DoD; and
    - upgrading such equipment to ensure compatibility of that equipment with equipment used by DoD.
- The transportation of personnel of the United States and foreign countries (including per diem costs associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counterdrug activities within or outside the United States.
- The establishment and operation of bases of operations and training facilities for the purpose of facilitating counterdrug activities of DoD or any federal, state, local law enforcement agency within or outside the United States, or counterdrug activities of a foreign law enforcement agency outside the United States.[10]
- Counterdrug related training of law enforcement personnel of federal, state, or local governments, or of foreign countries, including associated support expenses for trainees and the provision of materials necessary to carry out such training.
- The detection, monitoring, and communication of the movement of:
    - air and sea traffic within 25 miles of, and outside the geographic boundaries of the United States; and

[9] FY91 NDAA, *supra* note 6, § 1004(a).

[10] Section 1004(h) requires notification by the Secretary of Defense to the congressional defense committees when military construction under this subsection is to be carried out. The project may not commence until twenty-one days after the date written notice was received by Congress. This requirement only applies to construction projects that will modify or repair DoD facilities for the purpose set forth in this subsection, and whose estimated cost is more than $500,000. *See id.* § 1004(h).

- surface traffic outside the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary.

- Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.

- Establishment of command, control, communication, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

- The provision of linguist and intelligence analyst services.

- Aerial and ground reconnaissance.[11]

The Secretary of Defense may contract for equipment and services to provide the above types of support if DoD would normally acquire such equipment and services via contract to support similar DoD activities.[12]

Section 1004 also provides statutory exceptions to the Posse Comitatus Act. Section 1004 counterdrug support is not subject to the requirements of 10 U.S.C., Chapter 18, with the exception of 10 U.S.C. §§ 375 and 376.[13] Further, the Secretary of Defense may provide support that will adversely affect military preparedness in the short term in contravention of 10 U.S.C. § 376 if the Secretary determines that the importance of providing such support outweighs the short-term adverse impact.[14] For example, § 1004(f) allows the Secretary of Defense to plan and execute otherwise valid military training and operations for the primary purpose of aiding civilian law enforcement agencies, which contradicts the guidance contained in Enclosure 2 of DoDD 5525.5.

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. 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.[15]

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

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[11] *Id.* § 1004(b). CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 3710.01B, DOD COUNTERDRUG SUPPORT (26 January 2007) [hereinafter CJCSI 3710.01B], provides a detailed listing and discussion of approval authorities for certain types of DoD support to counterdrug operations.

[12] FY91 NDAA, *supra* note 6, para. (d).

[13] *Id.* § 1004(g).

[14] *Id.* § 1004(e).

[15] 10 U.S.C. § 124(a)(2).

- Directing that vessel or aircraft to go to a location designated by appropriate civilian officials.[16]

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.[17] 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. § 375.

3. Chairman of the Joint Chiefs of Staff Implementation (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 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).[18]

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, engineering support, and more. 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, contains significant guidance and guidelines on permissible counterdrug support to LEAs and should be consulted whenever reviewing a proposed operation.[19]

On 31 July 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.

A year later on 2 October 2003, the Deputy Secretary of Defense published the policy on domestic counternarcotics activities. This policy established a goal of reducing the operational stress on Title 10 forces that conduct domestic counternarcotics activities through utilization of Title 32 National Guard forces; concentrating DoD's support on those unique military skills and capabilities that domestic law enforcement agencies lack, or cannot practically replicate and employ those measures designed to detect, interdict, disrupt, or curtail any activity that is reasonably related to narcotics trafficking. This policy directed that 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:

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[16] *Id.* § 124(b).

[17] 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) (2006).

[18] CJCSI 3710.01B, 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 his authority to Commander, Joint Task Force-North (JTF-N).

[19] A copy of CJCSI 3710.01B is located at DOPLAW Handbook, Supp., App. 6-6.

- there must be a valid counterdrug activities nexus;
- there must be a proper request;[20]
- 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.

For all domestic counternarcotics support, requests are sent to USNORTHCOM. Commander, USNORTHCOM, will first ensure a National Guard unit cannot provide the support. If not, USNORTHCOM will 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. All other requests will be forwarded through the Joint Staff deployment order process, to the DASD/CN and Under Secretary of Defense for Policy for consideration.

Requests sent directly to DoD will first be referred to the National Guard Bureau. If the NGB determines that Title 32 National Guard forces cannot provide the support, the request will be referred through the Joint Staff to Commander, USNORTHCOM, for review. If feasible and supportable, the Commander, USNORTHCOM, will request Title 10 forces through the Joint Staff from the appropriate service.

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 Southern Command (USSOUTHCOM)), JIATF West, located in Hawaii, (under the command and control of Pacific Command (USPACOM)), and Joint Task Force North (JTF-N), located in El Paso, Texas (under the command and control of USNORTHCOM.) While the two JIATFs do provide some support to LEAs in their Areas of Responsibility (AORs),[21] their primary focus is on operations in the source and transit zones of South and Central America and in Southeast and Southwest Asia and in international waters and airspace. This focus on

[20] 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 will assist the requesting agency in accomplishing its counternarcotics activities within the United States. Third, the support is consistent with DoD's implementation of the national Drug Control Strategy. Finally, the support is limited to those activities that are militarily unique and significantly benefit the DoD or essential to national security goals. Memorandum, Deputy Secretary of Defense, Subject: Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities (2 Oct 2003).

[21] For example, Hawaii falls within PACOM's AOR, and Puerto Rico and the Virgin Islands fall within NORTHCOM's AOR.

interdiction in the source and transit zones is consistent with priorities outlined in the President's National Drug Control Strategy – 2010.[22]

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.[23] 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,[24] was designated 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.[25] On 28 September 2004, Joint Task Force Six was officially renamed Joint Task Force North. JTF-N's mission includes synchronizing and integrating DoD operational, technological, training, and intelligence support to 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. The command relies entirely on volunteer units to perform its operational support missions. 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, 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) in requesting 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 components of DoD, DHS, and DOJ in other senior leadership positions. JIATF-S conducts detection & monitoring operations in the Caribbean and Eastern Pacific source and transit zones.[26] JIATF-W combats drug-related transnational organized crime to reduce threats

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[22] The National Drug Control Strategy is available at http://www.whitehousedrugpolicy.gov/publications/policy/ndcs10/index.html.

[23] Memorandum, Assistant Secretary of Defense, Special Operations/Low Intensity Conflict, Subject Joint Interagency task Force (JIATF) Area Responsibilities (1 Aug 2003).

[24] Message, 152330Z Oct 89, Commander in Chief, Forces Command (CINCFOR), subject: Operations Order–Counternarcotics Operations (15 Oct 1989).

[25] Message, 212255Z Aug 95, Commander in Chief, Forces Command (CINCFOR), subject: Commander Joint Task Force Six Expansion of Area of Responsibility for Counterdrug Support for Domestic Drug Law Enforcement Agencies (21 Aug 1995). The AOR was expanded to include CONUS, Puerto Rico, and the Virgin Islands.

[26] 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 operations. In cases in which evidence of maritime drug trafficking or other illegal activity is discovered,

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 the war on drugs. 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. The Coast Guard conducts extensive maritime counterdrug operations. These operations range from enforcing drug possession and use laws during routine recreational and other vessel boardings in all areas in which 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,[27] 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 organic 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.[28]

To capitalize on the Coast Guard's expertise and uniquely broad maritime law enforcement authority, 10 U.S.C. § 379 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.[29] See DOPLAW Handbook, Supp., App. 6-12, *JP 3-07.4, Appendix E, LEDETS.*

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 § 379 will perform functions which are agreed to by the Secretary of

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JIATF-S and the Coast Guard coordinate case disposition with DOJ and 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.

[27] United States v. Chaparro-Almeida, 679 F.2d 423 (5th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1982).

[28] 14 U.S.C. § 89(a) states:

> 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.

[29] 10 U.S.C. § 379(a). 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.

Defense and Secretary of Homeland Security and which are otherwise within the Coast Guard's jurisdiction.[30] No fewer than 500 active duty Coast Guard personnel will be assigned duties under10 U.S.C. § 379, 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. § 374(b)(4)(A).[31]

Specific rules governing the use of Coast Guard LEDETs are provided in Commandant, United States Coast Guard Instruction (COMDTINST) M16247.1D, *Maritime Law Enforcement Manual*.[32] Chapter Five of the Maritime Law Enforcement Manual addresses the roles and responsibilities of the Coast Guard in counterdrug operations. The primary federal statute that the Coast Guard enforces in counterdrug operations is the Maritime Drug Law Enforcement Act (MDLEA).[33] The MDLEA prohibits any person on board an U.S. vessel, or a vessel subject to the jurisdiction of the U.S., to knowingly or intentionally manufacture or distribute, or to possess with the intent to manufacture or distribute, a controlled substance.[34] 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.[35]

"Vessel subject to U.S. jurisdiction" includes a foreign vessel if located:

- In U.S. customs waters;

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[30] 10 U.S.C. § 379(b).

[31] *Id.* § 379(c).

[32] U.S. COAST GUARD MARITIME LAW ENFORCEMENT MANUAL, COMDTINST M16247, series (2010) (For Official Use Only manual) (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 from Commander, Atlantic Area, U.S. Coast Guard, to Commanding Officers, Regional TACLETs North, South, and Gulf, subject: Memorandum of Agreement Concerning Deployment of Law Enforcement Detachment (5 Aug. 1993) (on file with CLAMO).

[33] 46 U.S.C. §§ 70501–70507 (2006). 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 a drug-trafficking statute, *per se*, the Coast Guard enforces this new law to combat the threat posed by maritime drug traffickers who have been increasingly resorting to the use of semi-submersible vessels to transport multi-ton loads of cocaine to avoid detection. Many of the jurisdictional provisions and definitions in the MDLEA are included in the DTVIA as well.

[34] *Id.* § 1903.

[35] *Id.* § 1903(b).

- 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.[36]

U.S. Navy ships with Coast Guard LEDETs aboard remain under the operational control (OPCON) of the Unified Commander in whose area of responsibility the DoD asset is operating. OPCON is defined as "the authority to direct the activities of a unit in the performance of its operational mission and such additional tasks as may be assigned by competent authority; the organizational element with OPCON of a unit is the operational commander of that unit."[37]

When an U.S. Navy ship enters the boarding phase of a law enforcement operation, the U.S. Navy ship shifts tactical control (TACON) to the Coast Guard until the boarding phase is complete. TACON is defined as "the temporary authority to direct activities of a specific unit on a specific mission for a specific period of time; this authority is assigned by the operational commander and an organizational element with TACON of a unit is the tactical commander of that unit."[38] 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.[39]

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.[40]

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 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, and flag State authorization to board, search, seize, 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

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[36] *Id.* § 1903(c).

[37] See MLEM, *supra* note 32, para. 2.E.1.e.

[38] *Id*.

[39] CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 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* 10 U.S.C. § 637 (2006), Stopping vessels; immunity from firing at or into vessels.

[40] For a list of current counterdrug bilateral agreements, see USCG OPLAW FAST ACTION REFERENCE MATERIALS, series (2009) (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).

only be negotiated with authorization from the U.S. Department of State.[41] (See DOPLAW Handbook, Supp., App. 6-13, *Sample LEDET MOA*, for a sample bilateral agreement.)

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.[42]

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 ADA violation was based on the fact that the operation's primary purpose was to investigate potential federal firearms violations—not narcotics violations.[43]

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.[44]

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 to the Secretary of Defense.[45] A state drug interdiction and counterdrug activities plan shall:

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[41] *See* MLEM, *supra* note 32, para. 5.B. & Encl. 4.

[42] Procurement of equipment cannot exceed $5,000 per purchase order unless approval is granted by the Secretary of Defense. 32 U.S.C.A. § 112(a)(3) (2006). 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. U.S. DEP'T OF ARMY, NAT'L GUARD BUREAU REG. 500-2, NATIONAL GUARD COUNTERDRUG SUPPORT, paras. 7-10, 7-11 (28 August 2008) [hereinafter NGR 500-2].

[43] DA (FM&C) Report of Antideficiency Act Violation Case #95-09, 11 March 1997.

[44] Joint Pub 3-07.4, Joint Counterdrug Operations (13 June 2007) (defining narcoterrorism); NGR 500-2, *supra* note 42, glossary (defining counternarcoterrorism); CNGB Memo, Implementation of Procedures for Handling Requests for Counterdrug Narcoterrorist Support, 2 June 2006.

[45] State drug interdiction and counterdrug support plans must be submitted through the Counterdrug Office of the National Guard Bureau. NGR 500-2, *supra* note 42, para. 2-5.

- 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;[46]
- 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 that 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.[47]

The National Guard Counterdrug Coordinators for each state or territory must submit their State Plan to the National Guard Bureau for review. The National Guard Bureau submits the State Plan, complete with original certifying signature from the respective Adjutant General, Attorney General, and Governor, to DASD/CN. DASD/CN reviews the State Plan and, in coordination with the Comptroller, ASD (HD & ASA), the Joint Staff, the Commander, NORTHCOM, and other appropriate offices within the department, recommends approval or rejection to the Secretary of Defense.[48]

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:

- 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.[49]

The Secretary of Defense will examine the state drug interdiction and counterdrug activities plan in consultation with the Director of National Drug Control Policy. However, 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

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[46] *See* 32 U.S.C. § 502 (2006) (addressing annual drill and field exercise requirements of National Guard personnel).

[47] *Id.* § 112(c).

[48] Memorandum, Deputy Secretary of Defense, Subject: Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities (2 Oct 2003).

[49] 32 U.S.C. § 112(b)(2)(C).

missions approved by the Secretary of Defense in the state drug interdiction and counterdrug activities plan.

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." However, 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[50] coverage.[51] 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.[52] Conversely, for actions not cognizable under the FTCA, such as a constitutional or *Bivens*[53] 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. § 50.15 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 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.[54]

The Posse Comitatus Act 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.[55] This allows Title 32 National Guard personnel more flexibility than Title 10 forces in conducting counterdrug missions. However, the National Guard Bureau has imposed several policy restrictions on National Guard counterdrug operations in NGR 500-2.[56] As

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[50] 28 U.S.C. §§ 2671–2680.

[51] *See id.* § 2671 (defining "employee of the government").

[52] *See id.* § 2679(b). *See also* NGR 500-2, *supra* note 42, 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.").

[53] *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[54] *See* 32 C.F.R. § 50.15(a)(8).

[55] Gilbert v. United States, 165 F.3d 470, 473–474 (6th Cir. 1999) (Where a state used National Guardsmen for purpose of carrying out drug interdiction and counterdrug activities, in accordance with federal statute, the Guardsmen 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 held not in 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).

[56] This regulation does not address National Guard counterdrug activities performed under the authority of Title 10, United States Code.

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 of any evidence, except in exigent circumstances, or when otherwise authorized.[57] 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; to prevent the loss or destruction of evidence; or to prevent the escape of a suspect already in custody.[58]

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 sonobuoys 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;
- 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;
- Maintenance/Logistical Support – Providing maintenance/logistical support of LEA vehicles and equipment to enhance the counterdrug effectiveness of the supported agency;
- Cargo/Mail Inspection – Assisting LEAs by inspecting cargo and mail;
- 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,

[57] NGR 500-2, *supra* note 42, para. 2-1e.

[58] *Id*.

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;[59]
- 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.[60]

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.[61]

Since National Guard personnel providing counterdrug support under 32 U.S.C. § 112 are acting under State command and control, each State National Guard promulgates its own Rules for the Use of Force (RUF), as they are now generally called in domestic operations. CJCSI 3121.01B, Encl. O, Counterdrug Support Operations Within U.S. Territory, is not applicable to the National Guard unless they are in federal service (Title 10 status). A sample National Guard RUF card is located in the DOPLAW Handbook, Supp., App. 6-11, *California National Guard Counterdrug Task Force Standing Rules of Engagement.* Consequently, judge advocates must be aware of the application of the law of the state in which operations are being conducted.[62]

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

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[59] 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. *Id.* para. 5-17.

[60] *See* NGR 500-2, para. 2-7 for a detailed description of what each mission entails.

[61] *Id.* para. 3-6. This authority may be delegated in accordance with para. 3-6(b).

[62] 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.

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.[63]

[63] NGR 500-2, *supra* note 42, para. 3-6.

CHAPTER 7

MILITARY SUPPORT TO SPECIAL EVENTS

KEY REFERENCES:

- 10 U.S.C. § 422 - Use of Funds for Certain Incidental Purposes.
- 10 U.S.C. § 2012 - Support and Services for Eligible Organizations and Activities Outside the Department of Defense.
- 10 U.S.C. § 2554 - Equipment and other services: Boy Scout Jamborees.
- PDD 62 - Protection Against Unconventional Threats to the Homeland and Americans Overseas, May 22, 1998.
- HSPD 7 - Critical Infrastructure Identification, Prioritization, and Protection, December 17, 2003.
- HSPD 15/NSPD 46 - U.S. Strategy and Policy in the War on Terror (Classified), March 6, 2006.
- DoDD 1100.20 - Support and Services for Eligible Organizations and Activities Outside the Department of Defense, April 12, 2004.
- DoDD 2000.15 - Support to Special Events, December 8, 2003.[1]
- Reese, Shawn, Congressional Research Service, RS 22754, *National Special Security Events*, March 19, 2008.

A. Introduction

The Department of Defense (DoD) supports a wide variety of special events held within the United States. There are two general types of support: 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)" such as major sporting events, e.g. the Olympics, Presidential inaugurations, and international meetings like the G-8 summit.[2] The IRT program allows commanders to conduct training in the civilian community, but benefit to the community must be incidental to the training.[3] IRT support must provide a training benefit to the participating unit or individual.

B. Designated Special Events

10 U.S.C. § 2554 permits support for Boy Scout Jamborees.[4] This provides the Secretary of Defense authority to lend or otherwise provide the Boy Scouts of America (BSA) with a variety of equipment to include cots, flags, tents, and other equipment to include expendable medical supplies without reimbursement. This support may be provided to the BSA in support of both national and world scout jamborees.[5] Further, if the Jamboree is conducted on a military installation, the

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[1] As of July 2011, the Department of Defense was finalizing a revision and replacement of DoDD 2000.15 with an Instruction, tentatively numbered DoDI 3025.gg.

[2] REESE, SHAWN, Cong. Research Serv., RS 22754, NATIONAL SECURITY SPECIAL EVENTS (2008), at 3-4.

[3] Memorandum, Assistant Secretary of the Army (Manpower and Reserve Affairs), subject: Innovative Readiness Training (IRT), Encl. 1 (28 Mar. 2000) [hereinafter IRT Policy].

[4] 10 U.S.C. § 2554. Note that the section previously numbered as 2554 has been changed to 10 U.S.C. § 2564 and relates to the provisioning of DoD support to certain athletic events. These events are discussed *infra*.

[5] *See id.* § 2554(a.).

Secretary may authorize logistical and personnel support on the military installation.[6] 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.[7] Aside from Jamborees, other military support to the Boy Scouts is authorized under 10 U.S.C. § 508. This more generalized assistance, which also extends to other youth and charitable organizations, is discussed in Chapter 8 *infra*.

Congress has also authorized military support to certain sporting events, such as the Olympics or World Cup soccer.[8] In addition to sporting events, other special events may be designated by the Secretary of Defense for support.[9] Such support may be provided on a reimbursable basis or may be funded by specific appropriations.[10]

1. Types of Events

a. Sporting Events

Support to certain sporting events is specifically authorized by 10 U.S.C. § 2564. Sporting events are planned programs of athletic competition and related activities.[11] The authorizing legislation specifically mentions the World Cup Soccer Games, the Goodwill Games, and the Olympics, but other events may be authorized when special security and safety needs exist.[12] Other sporting events previously supported include the World Alpine Ski Championships and the Special Olympics. Military forces also provided extensive support during the 1996 and 2002 Olympic Games held in Atlanta, Georgia and Salt Lake City, Utah, respectively.[13]

On January 16, 2001, Commander, U.S. Joint Forces Command (JFCOM) formed Joint Task Force-Olympics (JTF-O) in support of the Salt Lake City Winter Games.[14] JTF-O received requests for assistance from the U.S. Olympic Planning Committee and the Salt Lake Olympic Planning

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[6] *See id.* § 2554(g).

[7] 10 U.S.C. § 2554(b–f).

[8] 10 U.S.C. § 2564 (a) 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.

Note. This section was previously numbered as § 2554 until 2000.

[9] U.S. DEP'T OF DEFENSE, DIR. 2000.15, SUPPORT TO SPECIAL EVENTS, *para.* 3.1 (21 Nov. 1994) [hereinafter DoDD 2000.15]. As noted in note 1, this Directive is currently pending revision and may be replaced in the near future.

[10] *Id.* para. 4.4.

[11] DoDD 2000.15, *supra* note 9, para. 4.4.

[12] 10 U.S.C. § 2564(a).

[13] *See* U.S. Forces Command, Slide Presentation, 2001 Winter Olympic Games, Joint Task Force-Olympics FORSCOM Augmentation (22 Feb. 2001) [hereinafter FORSCOM Presentation].

[14] Message, 181815Z Jan 01, Commander in Chief, Joint Forces Command, subject: USCINCJFCOM JTF-Olympics Stand Up Announcement (18 Jan. 2001).

Committee.[15] Routine support approved by the Secretary of the Army for this event included aviation, communications, explosive ordnance disposal, physical security, and temporary facilities.[16] With the establishment of U.S. Northern Command (USNORTHCOM) on September 11, 2003, similar future support missions are now assigned to USNORTHCOM.

b. Non-athletic Events

The Secretary of Defense may also designate non-athletic events to receive support. Non-athletic events include large events, such as the World's Fairs, the Universal Postal Union Congress, and the International Special Olympics.[17] Aside from the Boy Scouts Jamboree, DoD may also support Department of Homeland Security-designated "national special security events" when tasked to do so.

(1) Events Not Declared National Special Security Events

The Secretary of Defense may designate "non-athletic international or national events to receive support."[18] The International Monetary Fund and World Bank Group meeting of April 2000 was a non-athletic event approved for support but not designated a national special security event.[19] The G-8 meeting of 2004 was also designated to receive such support.

(2) National Special Security Events

Pursuant to Homeland Security Presidential Directive 7 (HSPD-7), the Secretary, DHS, makes the final determination as to whether to designate an event as a *national special security event* (NSSE).[20] This determination is made after consultation with the Homeland Security Council.[21] Other events may be categorized through the use of the Special Events Assessment Rating (SEAR) process used by the Department of Homeland Security to determine other events that may require federal support. With respect to NSSEs, the U.S. Secret Service is the lead federal agency responsible for coordinating, planning, exercising, and implementing security for NSSEs.[22] Military assets provided in support of NSSEs may include explosive ordnance disposal (EOD) teams, technical escort units (TEU),[23] geospatial intelligence support,[24] and Chemical/Biological Immediate Response Forces (C/BIRF).[25]

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[15] FORSCOM Presentation, *supra* note 13.

[16] Message 141555Z Mar 00, Commander in Chief, Joint Forces Command, subject: USCINCJFCOM 2000 XIX Olympics PLANORD Feedback (14 Mar. 2000).

[17] DoDD 2000.15, *supra* note 9, para. 3.1.

[18] *Id*.

[19] U.S. Forces Command, Operational Briefing, International Monetary Fund and World Bank Group Spring Meeting 11-17 April 2000 (14 Apr. 2000) (classified FOUO).

[20] HSPD-7, Critical Infrastructure Identification, Prioritization, and Protection, para. 26 (December 17, 2003).

[21] *Id*.

[22] *U.S. Secret Service Statement Before the House Committee on the Judiciary, Subcommittee on Crime* (24 June 1999) (Brian L. Stafford, Director, U.S. Secret Service). *See also* REESE, SHAWN, Cong. Research Serv., RS 22754, NATIONAL SECURITY SPECIAL EVENTS (2009), at summary; UNITED STATES SECRET SERVICE, National Special Security Events, *available at* http://www.secretservice.gov/nsse.shtml (last visited Jun. 30, 2011).

[23] TEU teams are capable of detecting, rendering safe, and transporting chemical and biological devices.

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 to include the event's historical, political, or symbolic importance.[26] Examples of NSSEs receiving DoD support include the NATO 50th Anniversary Summit, the 1999 visit to the United States by Pope John Paul II, and the World Trade Organization (WTO) meeting held in Seattle in 1999, and the Republican and Democratic National Conventions in 2004 and 2008, respectively.[27]

Further, state operational plans may be triggered by such a designation. For example, prior to the 1999 WTO meeting in Seattle, the Washington National Guard conducted activities pursuant to the Washington State Comprehensive Emergency Management Plan in support of the WTO.

For a list of designated NSSEs in recent years, see Figure 7-1 below.

Event	**Location**	**Date**
World Energy Council Meeting	Houston, TX	Sept.13–17, 1998
NATO 50th Anniversary Celebration	Washington, DC	Apr. 23–25, 1999
World Trade Organization Meeting	Seattle, WA	Nov. 29–Dec. 3, 1999
State of the Union Address	Washington, DC	Jan. 27, 2000
International Monetary Fund Meeting	Washington, DC	Apr. 14–17, 2000
International Naval Review (OpSail)	New York, NY	Jul. 3–9, 2000
Republican National Convention	Philadelphia, PA	Jul. 29–Aug. 4, 2000
Democratic National Convention	Los Angeles, CA	Aug. 14–16, 2000
Presidential Inauguration	Washington, DC	Jan. 20, 2001
Presidential Address to Congress	Washington, DC	Feb. 27, 2001
United Nations General Assembly 56	New York, NY	Nov. 10–16, 2001
State of the Union Address	Washington, DC	Jan. 29, 2002
Super Bowl XXXVI	New Orleans, LA	Feb. 3, 2002
Winter Olympic Games	Salt Lake City, UT	Feb. 8–24, 2002
Super Bowl XXXVII	San Diego, CA	Jan. 26, 2003
State of the Union Address	Washington, DC	Jan. 20, 2004
Super Bowl XXXVIII	Houston, TX	Feb. 1, 2004
Sea Island G8 Summit	Sea Island, GA	Jun. 8–10, 2004
President Reagan State Funeral	Washington, DC	Jun. 11, 2004
Democratic National Convention	Boston, MA	Jul. 26–29, 2004

[24] 10 U.S.C. § 442, National Geospatial-Intelligence Agency, Missions.

[25] For an excellent overview of the process from an interagency perspective, *see* Briefing, "National Special Security Events," prepared by USNORTHCOM and the FBI, Miami, Florida (4 March 2008) (on file with CLAMO).

[26] Reese, *supra* note 2, at 2.

[27] *See, e.g.*, Message, 180715Z Oct 99, Department of the Army, subject: World Trade Organization (WTO) Ministerial Conference (18 Oct. 1999).

Republican National Convention	New York, NY	Aug. 30–Sep. 2, 2004
Presidential Inauguration	Washington, DC	Jan. 20, 2005
State of the Union Address	Washington, DC	Feb. 2, 2005
Super Bowl XXXIX	Jacksonville, FL	Feb. 6, 2005
Super Bowl XL	Detroit, MI	Feb. 5, 2006
President Ford State Funeral	Washington, DC	Jan. 3, 2007
Super Bowl XLI	Miami Gardens, FL	Feb. 4, 2007
State of the Union Address	Washington, DC	Jan. 28, 2008
Democratic National Convention	Denver, CO	Aug. 25–28, 2008
Republican National Convention	Minneapolis-St. Paul, MN	Sept. 1–4, 2008
G-20 Economic Summit	Washington, DC	Nov. 14–15, 2008
Presidential Train Stop Tour	Philadelphia, PA	Jan. 17, 2009
Presidential Train Stop Tour	Wilmington, DE	Jan. 17, 2009
Presidential Train Stop Tour	Baltimore, MD	Jan. 17, 2009
Lincoln Memorial Rally	Washington, DC	Jan. 18, 2009
Presidential Inauguration	Washington, DC	Jan. 20, 2009
State of the Union Address	Washington, DC	Feb. 24, 2009
Super Bowl XLIII	Tampa Bay, FL	Feb. 1, 2009
G-20 Summit	Pittsburgh, PA	Sept. 24–25, 2009
State of the Union Address	Washington, DC	Jan. 27, 2010
The Nuclear Summit	Washington, DC	Apr. 12–13, 2010
State of the Union Address	Washington, DC	Jan. 25, 2011

Figure 7-1. National Special Security Events from 1998 to January 25, 2011.[28]

2. Requests for Support

a. Processing Requests for Support

There are a variety of special events, each with their own legal support authorities and policies. Judge advocates must carefully analyze requests, approvals, and types of support when advising commanders on these kinds of operations.

Requests for military support to sporting-related special events are made by the federal, state, or local agency responsible for providing law enforcement, security, or safety services for the event.[29] Often, this means that local police or a FBI field office requests the military support. The Attorney General must then certify that the specific categories of support are "necessary to meet essential

[28] Information in Figure 7-1 was collected from two sources. *See* Reese, *supra* note 2; E-mail from Natalie Lundin, Congressional Affairs Liaison, U.S. Secret Service, to Lieutenant Benedict Gullo, Ctr. for Law and Military Operations, U.S. Army (Jun. 30, 2011, 10:01 EST) (on file with CLAMO).

[29] 10 U.S.C. § 2554(a).

security and safety needs."[30] Once a request is certified, the support is coordinated through the Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD(HD & ASA)) and the Joint Director of Military Support (JDOMS). A 2003 Deputy Secretary of Defense Memorandum transferred management and coordination of DoD support for these missions from the Secretary of the Army to ASD(HD & ASA).[31]

Further, upon the designation of an NSSE by the DHS Secretary, security support for the event is coordinated through a "unified command model" that includes representatives of all agencies at all levels of government.[32] Lessons learned from these events is collected by the U.S. Secret Service and used to train federal, state, and local law enforcement and public safety officials who respond to NSSEs.[33] DoD support to NSSEs are authorized pursuant to DoDD 2000.15 and may include support such as equipment, personnel, technical, or managerial advice or guidance.[34]

b. Types of Support

In addition to security or safety based assistance that is most commonly requested, other types of military support may also be authorized.[35] Some of the other types of assistance that may be authorized include equipment, personnel, technical support, managerial advice, or guidance.[36] This "logistically-focused" assistance is provided only to the extent such assistance cannot be reasonably provided by an outside source and such assistance does not adversely affect military preparedness.[37] Security or safety-related support has precedence over logistical assistance.[38]

c. Funding Support

Military support may be provided on a reimbursable or non-reimbursable basis. Logistical and security support for international sporting competitions may be paid, in part, from the support for international sporting competitions (SISC) defense account.[39] Organizations requesting logistically focused assistance for other types of special events must agree to reimburse DoD.[40] Such assistance must be reimbursed in accordance with applicable laws.[41]

Since FY2006, Congress has provided specific appropriations to fund support to NSSEs. Further, in additional to general funding for NSSEs that began in FY2006, Congress has also designated funds

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[30] *Id.*

[31] Memorandum, Deputy Secretary of Defense, subject: Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense (25 Mar. 2003).

[32] CRS Report, *National Security Special Events*, *supra* note 2, at 3.

[33] *Id.*

[34] DoDD 2000.15, Support to Special Events, at para. 3.1 to 3.2 (November 21, 2004). Although the focus of the Directive is primarily sporting events, it also specifically includes "non-athletic special events" at paragraph 3.1.

[35] 10 U.S.C. § 2564(b).

[36] DoDD 2000.15, *supra* note 9, para. 3.2.

[37] 10 U.S.C. § 2564 (b)(1) & (2).

[38] DoDD 2000.15, *supra* note 9, para. 4.3.

[39] Pub. L. 104-208, div. A, title V, § 5802, 110 Stat. 3009-522 (2006).

[40] 10 U.S.C. § 2564 (b)(3).

[41] 10 U.S.C. § 377; U.S. DEP'T OF DEFENSE, REG. 7000.14-R, DEPT. OF DEFENSE FINANCIAL MANAGEMENT REGULATION (June 2000).

for specified NSSEs since 2004. NSSEs receiving specific appropriations include the Presidential Nominating Conventions for both parties in 2004 and 2008.

C. 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.[42] IRT provides the military the opportunity to satisfy valid unit and individual training requirements that relate to the military skills of requested individual military members and which provide a direct and lasting benefit to our communities.[43] Secondary purposes includes building unit and individual morale, generating positive public support for the military and its capabilities, and enhancing recruiting and retention efforts.

The IRT Program is the predominate way for commanders to conduct military training in the civilian community while simultaneously providing support and services to civil authorities and other eligible civilian organizations and activities.[44] IRT is usually conducted by local combat support units and individuals off-base and within the requesting communities throughout. Although IRT missions simultaneously support the unit and the local community, the 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."[45]

IRT projects include, but are not limited to, constructing rural roads, providing medical and dental care to medically underserved communities, and small building and warehouse construction or re-assembly. While active components may conduct IRT programs, the National Guard and Reserve elements primarily provide such support.

1. Innovative Readiness Training Procedures

Military units may provide support and services to certain eligible organizations in the United States, its territories and possessions, and the Commonwealth of Puerto Rico.[46] Such assistance must be provided incidental to training or be otherwise authorized by law.[47] Assistance is primarily

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[42] 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], para. 4.1. DoDD 1100.20 implements 10 U.S.C. § 2012.

[43] *Id.* paras. 4.4.2.1.1–4.4.2.1.2.

[44] 10 U.S.C. § 2012; *implemented by* DODD 1100.20, *supra* note 42. For an excellent overview of this program and its procedures, 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. 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, DIR. 3025.17, CIVIL-MILITARY ASSISTANCE FOR CERTAIN YOUTH AND CHARITABLE ORGANIZATIONS (16 DEC 2004), discussed further in Chapter 8.

[45] DoDD 1100.20, *supra* note 42, paragraph 4.4.1.2.

[46] 10 U.S.C. § 2012 (2006); DoDD 1100.20, *supra* note 42.

[47] 10 U.S.C. § 2012(a).

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.[48]

a. Requests for Assistance

Requests for assistance must come from a "responsible official" of an "eligible organization."[49] A responsible official is "an individual authorized to represent the organization or activity regarding the matter of assistance to be provided."[50] There are three categories of eligible organizations. Any federal, regional, state, or local government entity is an eligible organization.[51] 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.[52]

The request for IRT assistance must specify that the requested assistance is not reasonably available from a commercial entity.[53] 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."[54] If commercial assistance is reasonably available, the requesting individual must certify the commercial entity agrees to the provision of such services by the military.[55] An outstanding resource for current materials to support an IRT request can be accessed via the internet at http://irt.defense.gov/. This site maintains current forms and other materials of interest to those seeking to process an IRT application.

b. IRT Program Assistance-Nature and Requirements

An organization may request Innovative Readiness Training assistance from a military unit or individual members. However, the 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).[56] Innovative Readiness Training projects must support a unit's wartime METL. In the case of assistance by an individual military member, the requested assistance must involve tasks directly related to the individual's military occupational specialty (MOS).[57] Second, providing the assistance cannot adversely affect the quality of training or otherwise interfere with a unit or its

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[48] DoDD 1100.20, *supra* note 42, para. 4.2.

[49] 10 U.S.C. § 2012(c)(1).

[50] DoDD 1100.20, *supra* note 42, para. 4.4.1.1.

[51] 10 U.S.C § 2012(e)(1).

[52] *Id.* § 2012(e)(3).

[53] *Id.* § 2012(c)(2).

[54] DoDD 1100.20, *supra* note 42, para. 4.4.1.2.

[55] 10 U.S.C. § 2012(c)(2); DoDD 1100.20, *supra* note 42, para. 4.4.1.2.

[56] *Id.* § 2012(d)(1)(A)(i).

[57] *Id.* § 2012(d)(1)(A)(ii).

members' abilities to perform military functions.[58] Third, providing the assistance cannot result in a significant increase in training costs.[59]

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.[60] In such cases, volunteers will meet manpower requests, and assistance other than manpower will be extremely limited.[61] Military vehicles may only be used, for instance, to provide transportation of personnel to and from the work site.[62] The use of military aircraft is prohibited in these instances. The second and third requirements must still be met.

2. Legal Considerations for IRT Projects

a. Approval Authority for IRT Projects[63]

The Office of Assistant Secretary of Defense, Reserve Affairs (OASD/RA) retains approval for all IRT projects that involve additional funding from OASD/RA, and all projects that require Office of the Secretary of Defense General Counsel's review of eligibility.[64] All IRT project requests received directly from requestors that lack military unit sponsors must also be forwarded to OASD/RA.[65] Major Commands (MACOMs) generally approve other IRT projects. For projects that do not require additional funding or OSD review, the Office, Chief Army Reserve and the Army National Guard are considered MACOMs. A general officer or equivalent approval signature is required for all IRT requests.[66] Additional requirements may exist if the proposed IRT project crosses multiple fiscal years.[67]

b. Processing Requests for IRT Projects

(1) How the IRT Project Request Process Begins

A representative from an eligible organization approaches 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 evaluates the project to determine whether it is compatible with unit or individual METL training requirements. If the project is compatible, the commander than must determine the feasibility of using the project as a training exercise.

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[58] *Id.* § 2012 (d)(1)(B).

[59] *Id.* § 2012 (d)(1)(C).

[60] *Id.* § 2012 (d)(2).

[61] DoDD 1100.20, *supra* note 42, para. 4.4.2.1.3.

[62] *Id.*

[63] IRT Policy, *supra* note 3, encls. 1 & 2.

[64] IRT projects requiring OSD/RA approval include those which seek additional funding from OSD, seek to reallocate IRT funds to another IRT project, or involve requesting entities that need to be assessed for eligibility on a case-by-case basis.

[65] IRT Policy, *supra* note 3, encls. 1 & 2.

[66] *Id.* encls. 1 & 3.

[67] *Id.*

(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 the event would cost if it were conducted independent of an IRT project. The IRT project request must contain a certification of non-competition. The certification of non-competition states 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. IRT medical project proposals have additional submission requirements.[68]

(3) IRT Project Requests--The Review Process

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, a U.S. Property and Fiscal Officer or Federal Budget Officer, and Plans, Operations and Training officials.[69] Depending on the nature of assistance requested, additional endorsements may be required from medical, dental, or nursing officials. If applicable, the command may inform and request endorsement from the State Adjutant General of the project state or intergovernmental agencies.[70]

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.[71] Community assistance undertaken by National Guard units that are not IRT projects is accomplished in a state active duty (SAD) status. Claims generated incident to projects accomplished in SAD status are solely a state responsibility.

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[68] *See* Memorandum, Office of the Assistant Secretary of Defense for Reserve Affairs, Subject: Innovative Readiness Training (IRT) Requirements for Certification of Non-Competition (dated 30 April 2002), attached guidelines, at 2.

[69] *Id.* attached guidelines, at 1.

[70] *Id.* attached guidelines, at 2.

[71] *Id.* attached guidelines, at 1.

CHAPTER 8

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

KEY REFERENCES:

- 10 U.S.C. § 422 - Use of Funds for Certain Incidental Purposes
- 10 U.S.C. § 2012 - Support and Services for Eligible Organizations and Activities Outside DoD
- 32 U.S.C. § 508 - Assistance for Certain Youth and Charitable Organizations
- 50 U.S.C. § 404e - National Mission of National Geospatial-Intelligence Agency
- HSPD-7 - Critical Infrastructure, Identification, Prioritization, and Protection, December 17, 2003.
- EO 12241 - National Contingency Plan (NCP)
- EO 12333 - United States Intelligence Activities
- EO 12580 - Superfund Implementation
- EO 12656 - Assignment of Emergency Preparedness Responsibilities
- EO 12657 - Federal Emergency Management Agency Assistance In Emergency Preparedness Planning At Commercial Nuclear Power Plants
- Director of Central Intelligence Directive (DCID)1/8 - Management of National Imagery, Imagery Intelligence, Geospatial, March 21, 2001.
- DoDD 3020.26 - Department of Defense Continuity Programs, January 9, 2009
- DoDD 3020.36 - Assignment of National Security Emergency Preparedness, November 2, 1988. Responsibilities to DoD Components, November 2, 1988 (amended by Change 1, March 12, 1993).
- DoDD 3025.13 - Employment of Department of Defense Resources in Support of the United States Secret Service, September 13, 1985.
- DoDD 3025.18 – Defense Support of Civil Authorities, December 19, 2010.
- DoDD 3150.8 - DoD Response to Radiological Accidents, June 13, 1996.
- DoD 3150.8-M - Nuclear Weapon Accident Response Procedures (NARP), February 22, 2005.
- DoDD 4500.9E - Transportation and Traffic Management, September 11, 2007.
- DoDD 5030.50 - Employment of Department of Defense Resources in Support of the United States Postal Service, April 13, 1972.
- DoDD 5105.60 - National Geospatial-Intelligence Agency (NGA), July 29, 2009.
- DoDD 5230.16 - Nuclear Accident and Incident Public Affairs (PA) Guidance, December 20, 1993.
- DoDD 6000.12 - Health Services Operations and Readiness, April 29, 1996.
- National Military Strategy to Combat Weapons of Mass Destruction (CJCS), February 13, 2006.
- AR 95-1 - Flight Regulations, November 12, 2008.
- 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.
- Defense Threat Reduction Agency, *Preliminary Report on Literature Search for Legal Weapons of Mass Destruction Seminars*, March 26, 2002.

A. Introduction

Domestic support operations supplement the efforts and resources of state and local governments, and include a variety of lesser-known types of support. While Field Manual 3-07, *Stability*

Operations and Support Operations,[1] includes responses to natural and man-made disasters, military assistance to civil disturbances, counterdrug activities, combating terrorism, and support to law enforcement, this chapter focuses on support missions not previously discussed in this Handbook.

B. Disaster and Domestic Emergency Assistance

Disaster assistance may include any emergency which endangers life and property, disrupts normal governmental functions, or results in suffering and damage, of such a magnitude that state and local resources are overwhelmed.[2] An emergency is any occurrence, including natural disaster, military attack, technological emergency, or other emergency that seriously threatens U.S. national security.[3] Emergencies include man-made emergencies, such as chemical spills, nuclear incidents, large explosions, postal strikes, mass immigration, and prison riots or other form of civil disturbance. Some of these emergencies are discussed below.

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."[4] Further, the Secretary of the Army serves as the DoD Executive Agent for the MAST program.[5] DoD support to MAST is governed by DoD Directive (DoDD) 4500.9E, *Transportation and Traffic Management*.[6] 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 to respond to emergencies.[7] Circumstances for which military support is envisioned are:[8]

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[1] U.S. DEP'T OF ARMY, FIELD MANUAL3-07, STABILITY OPERATIONS (Oct. 2008) [hereinafter FM 3-07]. Upon release which is expected during 2010, judge Advocates should consult, U.S. DEP'T OF ARMY, FIELD MANUAL3-28, CIVIL SUPPORT OPERATIONS.

[2] *Id.*

[3] Exec. Order No. 12656, 3 C.F.R. 585 (1988) [hereinafter EO 12656], in pertinent part states:

> Section 101. National Security Emergency Preparedness Policy: (a) The policy of the United States is to have sufficient capabilities at all levels of government to meet essential defense and civilian needs during any national security emergency. A national security emergency is any occurrence, including natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States. Policy for national security emergency preparedness shall be established by the President. Pursuant to the President's direction, the National Security Council shall be responsible for developing and administering such policy. All national security emergency preparedness activities shall be consistent with the Constitution and laws of the United States and with preservation of the constitutional government of the United States.

See also 42 U.S.C. § 5121(2).

[4] U.S. Dep't of Defense, Dir. 4500.9E, Transportation and Traffic Management at E4.2.1 (11 Sept. 2007) [hereinafter DoDD 4500.9E]. Note that U.S. Dep't of Army, Reg. 500-4/U.S. Dep't of Air Force, Reg. 64-1, Military Assistance to Safety and Traffic (MAST) (15 Jan. 1982) has been rescinded.

[5] *Id.* para. 1.4.

[6] *Id.*

[7] *Id.* para. E.4.2.1.

[8] *Id.* para. E.4.3.1.

- 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;
- Medical evacuations pursuant to the provisions of DoDD 6000.11, "Patient Movement," September 9, 1998;[9] and,
- As authorized and funded pursuant to DoDD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs), Volumes 11A, 11B, and 15.[10]

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 for providing such assistance.
- Assistance may be provided only to the extent that it does not interfere with the performance of the military mission.
- 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.[11]

Military units shall not perform emergency medical evacuation missions if support can be provided by civilian contractors.[12]

DoD assets provide interim support until civilian assets become available.[13] Medical helicopter units must operate within their allocated training hour program.[14] The Secretary of Defense or his designee is the final decision authority for commitment of resources to the MAST program.[15] DoDD 4500.09E provides that assistance "may be provided only to the extent that it does not interfere with the performance of the military mission."[16]

2. Search and Rescue Operations

To the extent possible, the armed forces traditionally provide aviation assistance to civilians *only* during times of disaster or distress. For example, during a Stafford Act incident, DoD may provide search and rescue (SAR) support following a request by FEMA, directed by JDOMS, and approved

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[9] *Id.* para. E.4.3.3.1.

[10] *Id.* para. E.4.3.2.

[11] *Id.* paras. E.4.2.3.1–E4.2.3.6.

[12] *Id.* para. E.4.2.1.

[13] *Id.* E.4.2.2.

[14] *Id.* E.4.2.3.6.

[15] *Id.* E.4.2.3.5.

[16] *Id.* E.4.2.3.3.

by SECDEF.[17] However, 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.[18]

The Civil Air Patrol (CAP), a volunteer civilian SAR organization, provides SAR services as an official auxiliary of the U.S. Air Force and represents the primary SAR resource available to the civil sector. Under the National Response Framework (NRF), FEMA is the primary agency for Emergency Support Function (ESF) 9, Urban Search & Rescue.[19]

3. Employment of DoD Resources in Support of the U.S. Postal Service

When a postal work stoppage disrupts mail service on a national, regional, or local basis, DoD may be directed to support the U.S. Postal Service (USPS) through an interdepartmental transfer of services.[20] When ordered by the President, DoD may be called upon to provide sufficient materials, supplies, equipment, services, and personnel to enable the USPS to safeguard, process, and deliver the mail in areas affected by postal work stoppages.[21]

Authority to support the USPS rests in the President's authority to use the armed forces to prevent interference with transporting the mail[22] and the authority for interdepartmental transfer of services and equipment prescribed by the Economy Act[23] and implemented by DoD Instruction 4000.19, *Interservice and Intragovernmental Support*.[24] Upon Presidential declaration of a national emergency, selective mobilization of the RC to support the USPS is authorized by 10 U.S.C. § 12301.[25] Army and Air National Guard units may be called under authority granted in 10 U.S.C. § 12406. 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 in delivering medical countermeasures in the event of biological attack.[26]

4. National Disaster Medical System

A major natural disaster can produce casualties far beyond the treatment capability of local medical support. Additionally, medical and health facilities and assets may not escape the effects of a catastrophic natural disaster. The National Disaster Medical System (NDMS), a national medical

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[17] DoDD 4515.13-R Air Transportation Eligibility, (Nov. 1994), through change 3, April 9, 1998, para. C5.7; *see also* ESF #9.

[18] *Id.* at C.10.11.

[19] U.S. Dep't of Homeland Security, National Response Framework (Jan. 2008) [hereinafter NRF].

[20] U.S. Dep't of Defense, Dir. 5030.50, Employment of Department of Defense Resources in Support of the United States Postal Services, para. 1 (13 Apr. 1972) [hereinafter DoDD 5030.50].

[21] *Id.* para. 4. ("POLICY AND RESPONSIBILITIES; 4.1. Authority. Legal authority for the employment of military resources at the direction of the President to reestablish and maintain essential postal service may be found in Section 686 of Title 31, U.S. Code, and Section 411 of Title 39, U.S. Code.").

[22] *In re* Debs, 158 U.S. 564 (1895).

[23] The Economy Act of 1932, 31 U.S.C.A. § 1535 (2006), implemented by 39 U.S.C. § 411 (Cooperation with other Government Agencies).

[24] U.S. Dep't of Defense, Instr. 4000.19, Interservice and Intragovernmental Support, para. 4.4 (9 Aug. 1995).

[25] 10 U.S.C. §§ 12301–12304; *see also* DoDD 5030.50, *supra* note 20, para. 4.4.1.

[26] Exec. Order No. 13527, 75 Fed. Reg. 737 (Jan. 6, 2010).

response system to supplement and assist state and local medical resources during disasters, is outlined in DoDD 6000.12, *Health Services Operations and Readiness*.[27] The NDMS is a joint partnership sponsored by DoD, the Department of Veterans Affairs (DVA), HHS, and FEMA and it is activated by the Assistant Secretary of Defense for Health Affairs (ASD(HA)).[28] Upon activation, DoD components "shall participate in relief operations to the extent compatible with U.S. national security" in response to a U.S. domestic disaster.[29]

Under the National Response Framework, Emergency Support Function (ESF) Number 8, Public Health and Medical Services Annex,[30] HHS is the primary agency.[31] The Public Health Service (PHS), an agency of the DHS, leads this effort by directing the activation of the NDMS.[32] Upon activation, ESF #8 is coordinated by the Secretary of Health and Human Services through the Office of the Assistant Secretary for Preparedness and Response (ASPR).[33] HHS is responsible for assisting with the assessment of health hazards at a response site and the health protection of both response workers and the general public. Support is categorized as follows:

- Assessment of health and medical needs;
- Health surveillance;
- Medical personnel;
- Health/medical/veterinary equipment and supplies;
- Patient evacuation;
- Patient care;
- Safety and security of drugs, biologics, and medical devices;
- Blood and blood products;
- Food safety and security;
- Agriculture safety and security;
- All-hazard public health and medical consultation, technical assistance, and support;
- Behavioral health care;
- Public health and medical information;
- Vector control;
- Potable water/wastewater and solid waste disposal;
- Mass fatality management, victim identification, and decontaminating remains;
- Veterinary medical support.[34]

The NDMS may be activated by the Director, FEMA, or the Assistant Secretary of Health, HHS, in response to a U.S. domestic disaster.[35] The federal government will respond to the crisis by using

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[27] U.S. Dep't of Defense, Dir. 6000.12, Health Services Operations and Readiness, para. 4.9 (April 29, 1996) [hereinafter DoDD 600.12].

[28] *Id.*

[29] *Id.*

[30] NRF, Emergency Support Function #8, Public Health and Medical Services Annex (January 2008) [hereinafter ESF #8].

[31] *Id.* at 8-1.

[32] *Id.* at 8-3.

[33] *Id.*

[34] *Id.* at 8-1–8-2.

the NDMS to supplement state and local medical resources. DoD components participate to the extent compatible with U.S. national security. The NDMS Operations Support Center (OSC), once activated, responds to medical tasks from the Federal Coordinating Officer (FCO) at the Disaster Field Office (DFO). The DFO includes the Continental United States Army Defense Coordinating Officer, along with the regional point of contact from the PHS and the NDMS Liaison Officer. The NDMS OSC assigns Disaster Medical Assistance Teams (DMATs) to the disaster site to help local authorities with medical management of casualties. The Emergency Management Group (EMG) at the HHS Secretary's Operation Center (SOC) coordinates the overall response and maintains constant communications with the National Operations Center (NOC).[36] ESF #8 may request support from DoD in the form of immediate medical response capabilities. This request may include DoD support for casualty clearing and staging, patient treatment, and support services such as surveillance and laboratory diagnostics.[37] Further assets that are available from the strategic national stockpile include: medical equipment and supplies, radiation detection equipment, ambulance support under the national ambulance contract, transportation support, patient care, and mortuary services and support.[38]

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 and food security.[39] The DoD is also tasked to support this function 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.[40] The National Guard maintains National Guard Expeditionary Medical Support (EMEDS) packages that can support these missions with proper authority.[41] The National Guard also maintains the Fatality & Services Recovery Response Team (FSRT).[42]

6. Mass Immigration Emergency

The Department of Homeland Security (DHS) is charged, in addition to other responsibilities, to enforce the laws of the United States dealing with immigration.[43] The majority of this responsibility is fulfilled by the routine daily operations of the U.S. Immigration and Customs Enforcement (ICE)[44] of DHS. When individuals enter the United States illegally, they are subject

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[35] DoDD 6000.12, *supra* note 27, para. 4.9.

[36] ESF #8, *supra* note 30, at 8-2.

[37] *Id.* at 8-5.

[38] *Id.* at 8-5– 8-8; *see also* Chart at ESF #8-11–8-12.

[39] *Id.* at 8-10–8-11.

[40] *Id.* at 8-11.

[41] National Guard Bureau Regulation 500-1, National Guard Domestic Operations, para. 5-11a (13 June 2008) [hereinafter NGR 500-1].

[42] *Id.* para. 5-11b.

[43] *See* 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]. § 101(B).

[44] 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

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 ICE. Although not addressed in the NRP, the policies and procedures for a mass immigration emergency are very similar to NRP emergencies.

DoD may be tasked to assist in initial reception, transportation, housing, and the full range of support services required. 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 operations in the continental United States. Further, the National Guard supports domestic emergencies such as mass immigration emergencies in a Civil Support role while in a Title 10 status.[45] "National Guard Civil Support," however, is conducted in a Title 32 status.[46]

7. Improvised Nuclear Device Incidents

The Nuclear/Radiological Incident Annex of the National Response Framework provides national policy and assigns responsibility to designated federal departments for the release of nuclear or radiologic materials, whether purposeful or inadvertent.[47] 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.[48] In the event of a deliberate attack, DHS is the coordinating agency and DOJ is the lead law enforcement authority.[49]

8. DoD Response to Radiological Accidents

Radiological accidents are defined as a "loss of control over radiation or radioactive material that presents a hazard to life, health, or property or that may result in any member of the general population exceeding exposure limits for ionizing radiation."[50] These accidents are not included in DoDD 3025.18, *Defense Support of Civil Authorities*. DoDD 3150.8, *DoD Response to Radiological Accidents*, outlines DoD support for the FEMA Federal Radiological Emergency Response Plan (FRERP).[51] The FRERP establishes an organized and integrated capability for timely, coordinated response by federal agencies to peacetime radiological emergencies.[52] The Defense Nuclear Agency is assigned the lead role in coordinating plans with other federal

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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.

[45] NGR 500-1, *supra* note 41, para. 4-2.d.

[46] *Id.* para. 4-2d(1-2).

[47] U.S. Dep't of Homeland Security, Nuclear/Radiological Incident Annex, p.1 (June 2008) [hereinafter NRIA].

[48] *Id.* at 8.

[49] *Id.* at 9.

[50] U.S. Dep't of Defense, Dir. 3150.8, DoD Response to Radiological Accidents, E2.1.5 (24 Mar. 1987, certified current as of 8 Mar. 2003) [hereinafter DoDD 3150.8].

[51] *Id.* para. 1.2.

[52] U.S. Commander in Chief, Joint Forces Command, Functional Plan 2504-00, Response to CBRNE Incidents/Accidents, Annex A (TASK ORGANIZATION), para. 1a(3) (1 May 2000).

agencies.[53] JFCOM provides assistance to an affected area in support of the LFA and under the overall coordination of a Senior Federal Official, such as a FCO.

The President, through Executive Order (EO) 12241, instructed the Director of FEMA to publish a plan to protect public health and safety in the event of an accident at a nuclear power plant as part of the National Contingency Plan.[54] EO 12241 is located at DOPLAW Handbook, Supp., App. 2-1. Pursuant to EO 12657, FEMA is required to provide assistance in emergency preparedness planning at commercial nuclear power plants.[55] (EO 12657 is located in the DOPLAW Handbook, Supp., App. 2-5.) FEMA is to ensure that plans and procedures are in place to respond to radiological emergencies at commercial nuclear power plants in operation. FEMA is also charged with coordinating the use of Veterans Affairs and military medical facilities. In the event of an accident, DoD may be required to provide medical and other support.

9. DoD Support to Wildfires

State and local governments have the primary responsibility to prevent and control wildfires.[56] DoD policy is to provide emergency assistance to federal agencies in the form of personnel, equipment, supplies, or fire protection service in cases where a forest or grassland fire emergency is beyond the capabilities of available resources.[57] DoD provides support pursuant to a memorandum of understanding (MOU) between DoD, the U.S. Department of Agriculture (USDA), and the Department of the Interior (DOI).[58] A copy of the MOU is located at DOPLAW Handbook, Supp., App. 8-13.

The primary federal agency responsible for coordinating the federal response to wildfires is the National Interagency Fire Center (NIFC). The NIFC, located in Boise, Idaho,[59] is the nation's support center for wildland firefighting[60] and is a joint operation of the DOI and USDA.[61] Seven

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[53] DoDD 3150.8, *supra* note 50, para. 5.1.1.

[54] Exec. Order No. 12241, 3 C.F.R. 282 (1980).

[55] Exec. Order No. 12657, 3 C.F.R. 611 (1988).

[56] U.S. Dep't of Defense, 3025.1-M, Manual for Civil Emergencies, ch. 1 (General) para. E.8, and ch. 3 (Disasters) para. B.3.a. (June 1994) [hereinafter DoD 3025.1-M]; Memorandum of Understanding Between the Department of Defense and the Departments of Agriculture and the Interior, III (Policy) (1975) [hereinafter MOU-USDA/DOI]; *see also* NRF, *supra* note 19, at Emergency Support Function #4 (Firefighting Annex), I. Introduction, para. B. (Scope), IV. Concept of Operations, A (General), para. 1, and C (Other Organizations); U.S. Commander in Chief, Forces Command, Functional Plan 2501-00, Military Support to Civil Authorities (MSCA), Annex C (operations), Appendix 27 (wildfire fighting plan), para. 1d(1)(U) (1 May 2000) [hereinafter COMFORSCOM Func Plan 2501-00]; Federal Wildland Fire Management Policy and Program Review, 21 (18 Dec. 1995) *available at* http://www.nwcg.gov/branches/ppm/fpc/archives/fire_policy/mission/1995_fed_wildland_fire_policy_program_report.pdf.

[57] DoDD 3025.1-M, *supra* note 56, ch. 3 (Disasters), para. B3a.

[58] MOU-USDA/DOI, *supra* note 56; COMFORSCOM Func Plan 2501-00, *supra* note 56, App. 27, para. 1e(1).

[59] NRF, *supra* note 19, Emergency Support Function #4 (Firefighting Annex), II. Policies, para. B, VII. Terms and Definitions, para. D; *see also* COMFORSCOM Func Plan 2501-00, *supra* note 56, App. 27, para. 1c(1).

[60] DoDD 3025.1-M, *supra* note 56, para. B.3.a, b; MOU-USDA/DOI, *supra* note 56, at II. RESPONSIBILITIES, para. D, and IV. OPERATIONAL PROCEDURES AND FUNDING, para. A1; *see also* National Interagency Fire Center (NIFC) and Its Mission *at* http://www.nifc.gov/nifcmiss.html.

[61] DoDD 3025.1-M, *supra* note 56, para. B.3.b.

federal agencies operate from the NIFC and work together to coordinate and support wildland fire and 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) [62]

The NIFC evolved from the "Boise Interagency Fire Center" which was established in 1965. The Boise Interagency Fire Center began from separate efforts by BLM and USFS to improve fire and aviation support throughout much of the Great Basin and Intermountain West.[63] In early 1993, the name was changed to the National Interagency Fire Center to reflect a national mission.

If a national fire situation becomes severe, the National Multi-Agency Coordinating (MAC) Group is activated.[64] This group consists of representatives of each of the federal wildland 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 MAC group helps set priorities for critical, and occasionally scarce, equipment, supplies, and personnel.

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. However, because NICC is an "all-risk" coordination center, it also provides 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 is staffed jointly by BLM and USFS.[65] When activity warrants, the NICC operates 24 hours a day, seven days a week.[66]

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.

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[62] *See* NAT'L INTERAGENCY COORDINATION CTR., *About Us*, http://www.nifc.gov/nicc/about/about.htm (last visited Jun. 30, 2011) [hereinafter NICC]; *see also* COMFORSCOM Functional Plan 2501-00, *supra* note 55, App. 27, para., 1c(1).

[63] *See* NIFC History at http://www.nifc.gov/nifcmiss.html ("'Boise' Interagency Fire Center" is the phrase referred to MOU-USDA/DOI, *supra* note 56, rather than NIFC).

[64] *See* NIFC Multi-Agency Coordinating Group *at* http://www.nifc.gov/nifcmiss.html.

[65] *See* COMFORSCOM Func Plan 2501-00, *supra* note 55, App. 27, para. 1c (1).

[66] *See* NICC Organization *at* http://www.nifc.gov/nifctour/nicc.html.

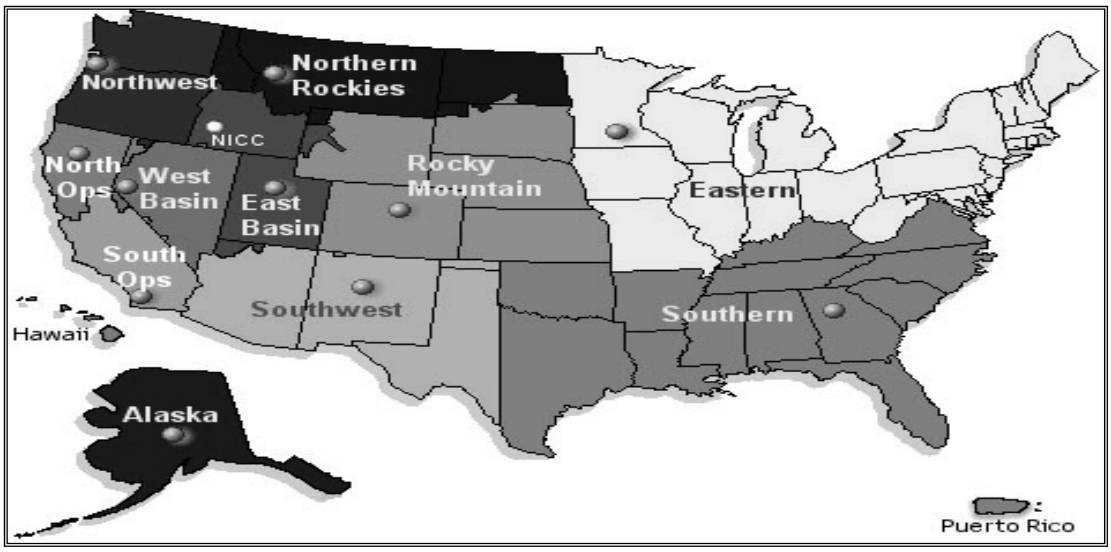

Figure 8-1. Map of Geographical Area Coordination Centers.[67]

The NICC uses a three-tiered coordination system to respond to wildland fires.[68] First, a wildland fire is initially managed by the local agency that has fire protection responsibility for that area.[69] 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 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 the 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. See DOPLAW Handbook, Supp., App.8-14, *NIFC Area Coordination Centers*.

The NIFC can request DoD assistance in one of two ways.[70] First, for wildland fires outside federal land (on state or private lands), state officials submit their requests for suppression assistance to the FEMA Regional Director or FCO. The FEMA Regional Director or FCO then requests military assistance. When the NIFC requires military assistance under its own authorities, it contacts the Director of Military Support (DOMS). Second, if the response is to an emergency under the Stafford Act,[71] the NIFC requests military assistance from FEMA, which coordinates with DOMS.

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[67] GEOGRAPHIC AREA COORDINATION CTRS, *About Us*, http://gacc.nifc.gov/admin/about_us/about_us.htm (last visited Jun. 30, 2011).

[68] *See* NICC, *supra* note 62.

[69] *Id.*

[70] DoD 3025.1-M, *supra* note 56, para. B.3.a; MOU-USDA/DOI, *supra* note 56, III. POLICY, paras. A-B.

[71] Under the Stafford Act, an "emergency" is defined as "any 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 protect property and public health and safety, or to lesson or avert the threat of catastrophe in any part of the United States. The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.*, as amended by Public L. No. 106-390 (2000), § 5170 [hereinafter The Stafford Act].

DOMS notifies the supported COCOM, who in turn tasks the appropriate component command or supporting Combatant Command. All requests for military support will then be handled by the command designated by the supported COCOM.[72] The 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.[73] For example, during the summer of 2000, ten states provided more than 1,500 NG Soldiers and Airmen who served in SAD status.[74] The NG 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 Soldiers, Marines and Airmen 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.

The ANG and AFR use the USFS-owned Modular Airborne Fire Fighting System (MAFFS), when requested, to assist with wildland firefighting during extreme conditions.[75] Congress established the MAFFS Program in the early 1970s as a wildland fire program, not a military program. The objective of the MAFFS program is to provide emergency capability to supplement the existing commercial air tanker support on wildfires. The NICC can activate the MAFFS when all other contract air tankers are committed, or are otherwise unable to meet requests for air operations. The request for MAFFS activation is approved by the national MAFFS liaison officer, who is the USFS director at NIFC. This request is then formally submitted to DOMS. 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.

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[72] DoD 3025.1-M, *supra* note 56, para. B.3.d.

[73] This is distinguished from Title 32 and Title 10 status for NG personnel. *See infra* Chapter 10, Reserve Components.

[74] *See* DoD News Release, *More Troops Tabbed to Battle Montana Wildfires*, Aug. 23, 2000, http://osd.dtic.mil/news/Aug2000/n08232000_20008231.html (last visited Jun. 30, 2011).

[75] DoD 3025.1-M, *supra* note 56, ch. 3 (Disasters), para. B.3.f.; *see also* Modular Airborne Fire Fighting System (MAFFS) Fact Sheet *at* http://www.fs.fed.us/fire/aviation/fixed_wing/maffs/index.html (last visited Jun. 30, 2011). 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.

There are currently eight MAFFS units in the system. Two are positioned at each of the following Air National Guard and Air Force Reserve locations:

- 153rd Airlift Wing (AW), Cheyenne, WY (ANG);
- 146th AW, Port Hueneme, CA (ANG);
- 145th AW, Charlotte, NC (ANG); and,
- 302nd AW, Peterson AFB, Colorado Springs, CO (AFR)

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. Payments are governed by the appropriate Memorandum of Understanding–Collection Agreements. These agreements are among the military authority and the Forestry Service.[76]

C. Environmental Missions

The military services and DoD carry out an environmental program focused on DoD facilities. However, DoD may also be called upon to provide environmental assistance during an emergency or for domestic contingency operations involving a major federal response to an environmental disaster. The military is a member of the national and regional response teams responsible for preparing for and responding to hazardous substance spills under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the National Oil and Hazardous Substances Contingency Plan (the NCP).[77]

The NCP is the federal government's plan for emergency response to discharge of oil into the navigable waters of the United States and to releases of chemicals into the environment. The NCP was developed to ensure that the resources and expertise of the federal government would be immediately available for those oil and hazardous substance incidents requiring national or regional response.

Under the NRF, the Environmental Protection Agency (EPA) has primary responsibility for ESF-10, Hazardous Materials.[78] DOMS coordinates the DoD response in support of FEMA and the NCP.[79] The scope of operations includes detection, identification, containment, and cleanup or disposal of released hazardous materials. Other operations under ESF-10 include actions such as household hazardous waste collection, permitting and monitoring of debris disposal, water and air quality monitoring and protection, and protection of natural resources.

Executive Order 12580 directs the NCP to provide for a National Response Team (NRT) for national planning and coordination of preparedness and response actions. The NRT is composed of

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[76] *See* U.S. FIRE AND AVIATION MGMT., *Modular Airborne Firefighting System*, http://www.fs.fed.us/fire/aviation/fixed_wing/maffs/system.html (last visited Jun. 30, 2011).

[77] Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601-9675 (2006); The National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300, et. seq. (1997) [hereinafter NCP].

[78] NRF, *supra* note 19, Emergency Support Function #10, Hazardous Materials Annex.

[79] U.S. Dep't of Defense, Dir. 5030.41, Oil and Hazardous Substances Pollution Prevention and Contingency Program (1 June 1977, C1, 26 Sept. 1978) [hereinafter DoDD 5030.41].

representatives of appropriate federal departments and agencies, including DoD.[80] See DOPLAW Handbook, Supp., App. 2-3, *EO 12580.* Regional response teams (RRTs), the regional counterpart to the NRT, plan and coordinate regional preparedness and response actions. EPA chairs the standing NRT.

The NRF ESF #10 Hazardous Materials Annex, *Relation to Existing Response under the NCP, the National Response System, and the National and Regional Response Teams*, sets forth the tiered levels and responsibilities for response.[81] DoD provides expertise through the U.S. Army Corps of Engineers (USACE) and the U.S. Navy. DoD provides the Federal On-Scene Coordinator (FOSC) for all hazardous substance releases, except oil spills, that originate from DoD facilities or vessels.[82]

The Regional Response Teams (RRTs) provide regional planning and preparation before a pollution incident as well as coordination and advice after an incident occurs.[83] The two principal components of the RRT are the Standing RRT and the Incident Specific RRT. The Standing RRT is comprised of all the departments and agencies of the NRT plus the involved states, and is co-chaired by EPA and the Coast Guard. The USACE is the principal agency for the Army's environmental response and appoints Army representatives to the RRT. The Incident Specific RRT is comprised of RRT members who have specific expertise or equipment that could assist the FOSC in responding to an incident. Either EPA or the Coast Guard chairs the incident specific RRT, depending on the location of the spill.[84]

The operational level of environmental response management is performed by the FOSC. The FOSC ensures a timely, effective response is conducted which minimizes damage to the environment. The FOSC and either EPA, for inland areas, or the USCG, for coastal areas, are the principal participants for federal response actions. DoD and the Department of Energy provide the FOSC when there is a hazardous release from their facilities or vessels, and respond to their own authorities. The FOSC coordinates all federal containment, removal, and disposal efforts, and federal resources. The FOSC is also the point of contact for the coordination of federal efforts with those of the local response community.[85]

1. The Deepwater Horizon Oil Spill

Major environmental contingency operations within the United States may be handled 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.

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[80] Exec. Order No. 12,580, 3 C.F.R. 193 (1987); *see also* DoDD 5030.41, *supra* note 79, para. 5.4.

[81] NRF, *supra* note 19, ESF# 10, Relation to Existing Response under the NCP, the National Response System, and the National and Regional Response Teams.

[82] NCP, *supra* note 77, § 30.5, Definition.

[83] NRF, *supra* note 19, ESF# 10.

[84] *Id*.

[85] NAT'L RESPONSE CTR., *National Response System*, http://www.nrc.uscg.mil/nrsinfo.html (last visited Jun. 30, 2011).

Despite the magnitude of that emergency, all operations were conducted under the President's delegable authorities under the Clean Water Act[86] and the NCP. Those authorities specifically provide mechanisms by which the "Responsible Parties" for the discharge[87] directly pay all removal costs and certain damages arising from the discharge.[88] 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,[89] Admiral Thad Allen, U.S. Coast Guard, and the FOSC (a position occupied during 2010 by several Coast Guard flag and senior-level officers) coordinated the response and directed BP's activities in close coordination with state and local leaders.

However, 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 may have been directed for those contingencies in addition to the environmental response already ongoing pursuant to the Clean Water Act and the NCP. In such a scenario, all response activities would have been jointly coordinated from a Unified Command.

D. Missions in Support of Law Enforcement

1. Support of United States Secret Service

DoDD 3025.13, *Employment of Department of Defense Resources in Support of the United States Secret Service,* provides for reimbursable support of the Secret Service and identifies reimbursement accounting procedures.[90] Requests for assistance go through the White House Military Office or DoD Executive Secretary.[91]

2. Imagery Intelligence and Geospatial Support

The National Geospatial-Intelligence Agency (NGA) has a mission to support domestic operations through the use of its organic assets. DCID 1/8 provides that NGA will use its products "from national satellite and airborne reconnaissance systems . . . in support of [f]ederal departments and agencies."[92] Although the use of intelligence assets are subject to extensive regulation (see chapter 9), this capability provides appropriate federal agencies access to real-time and near real-time imagery and geospatial support.

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[86] 33 U.S.C. §1321(c).

[87] Among the Responsible Parties in DEEPWATER HORIZON were BP (formed after the merger of British Petroleum and Amoco in 2001) and Transocean.

[88] 33 U.S.C. § 2702(a). 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.

[89] 40 C.F.R. § 300.323(c) 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.

[90] U.S. DEP'T OF DEFENSE, DIR. 3025.13, EMPLOYMENT OF DEPARTMENT OF DEFENSE RESOURCES IN SUPPORT OF THE UNITED STATES SECRET SERVICE, PARAS. 3.1, 3.2 (13 Sept. 1985).

[91] *Id.* para. 3.4.2.

[92] DIRECTOR OF CENTRAL INTELLIGENCE DIRECTIVE (DCID)1/8 – MANAGEMENT OF NATIONAL IMAGERY, IMAGERY INTELLIGENCE, GEOSPATIAL (21 March 2001), D.2b.ii. *See also* U.S. DEP'T OF DEFENSE, DIR. 5105.60, NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY, PARAS. 6.(a).(6).(b) (29 July 2009).

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.[93] EO 12333, however, grants broad authority to U.S. intelligence agencies to provide direct support to other federal agencies. This support can be extended to local law enforcement in circumstances where lives are at risk.[94] Such support, however, requires approval of the General Counsel of the Supporting Agency.

The NGA under its various authorities provides imagery and geospatial support in a variety of domestic support operations. These operations include homeland security, civil support, and support to law enforcement missions. NGA's support to homeland security includes support to special events (see chapter 7) and to exercises in support of homeland security training. NGA provides civil support in natural disasters and in other agency and DoD missions to include vulnerability studies. Support to law enforcement can include the use of imagery to provide situational awareness or other forms of assistance.

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. Security emergencies may result from natural disasters, military attack, or any other event that seriously degrades the security of the United States.[95]

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.[96] DoDD 3020.26, *Continuity of Operations Policy and Planning*, implements EO 12656 by tasking all DoD components to prepare plans for the continuity of operations and of government during an emergency.[97] (See DOPLAW Handbook, Supp., App. 2-4, *EO 12656, Emergency Preparedness.* See also *Appendix 8-16, PDD-NSC-67*. DoDD 3020.36, *Assignment of National Security Emergency Preparedness (NSEP) Responsibilities to DoD Components*, overlaps DoDD 3020.26. Under DoDD 3020.36, each DoD component shares the general responsibilities for emergency preparedness, mobilization planning, and crisis management in ensuring the continuity of government in any national security or domestic emergency situation.[98] DoDD 3020.36 also requires the identification of alternate headquarters, emergency relocation sites, and other permanent facilities to be used during emergencies.[99]

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[93] *See* Exec. Order No. 12333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401.

[94] *Id.* at para. 2.6(c).

[95] EO 12656, *supra* note 3, sec.204.

[96] EO 12656, *supra* note 3, sec.202.

[97] U.S. DEP'T OF DEFENSE, DIR. 3020.26, CONTINUITY OF OPERATIONS POLICY AND PLANNING, para. 4.1 (Oct. 1988).

[98] U.S. DEP'T OF DEFENSE, DIR. 3020.36, ASSIGNMENT OF NATIONAL SECURITY EMERGENCY PREPAREDNESS (NSEP) RESPONSIBILITIES TO DOD COMPONENTS, PARA. 4.2 (2 Nov. 1988).

[99] *Id.*

5. Explosive Ordnance Disposal

DoDD 5160.62, *Single Manager Responsibility for Military Explosive Ordnance Disposal Technology and Training,* establishes the Navy as the single agency for service support of the non-nuclear explosive ordnance disposal (EOD) program.[100] 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.[101]

The EOD mission within the Department of the Army is defined in AR 75-15, *Responsibilities and Procedures for Explosive Ordnance*. The mission includes providing "assistance to public safety and law enforcement agencies" and conducting "explosive ordnance disposal 'bomb and sabotage' training for civil preparedness, law enforcement, fire protection[,] and other public officials."[102] 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."[103] The Army should primarily provide training or advice, rather than physical assistance. AR 75-15 provides:

> The Department of the Army is not responsible for responding to, or disposing of, nonmilitary commercial-type explosives, chemicals, or dangerous articles in the possession of, or controlled by commercial concerns or civilian agencies. Assistance may be provided, when requested by federal agencies or civil authorities, in the interest of preserving public safety. Where a delay in responding to a request for assistance from other activities would endanger life or cause injury, commanders may authorize assistance to that extent necessary, to prevent injury or death. EOD personnel may act as technical consultants or advisors, or they may render safety and disposal procedures if requested.

Thus, EOD forces should only provide physical assistance when the explosive is a DoD munitions or when necessary under immediate response authority to save lives.

E. Community Assistance

The most frequently conducted domestic support operations involve community assistance. These missions include public works, education, training, minor construction projects, and providing color guards for local events. Intended to address unmet needs, they should avoid duplication or competition with the civilian sector. Activities vary widely, ranging from individual Soldier

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[100] U.S. DEP'T OF ARMY, REG. 75-15, RESPONSIBILITIES AND PROCEDURES FOR EXPLOSIVE ORDNANCE, para. 1-7 (22 Feb. 2005). AR 75-15 does not apply to the Army Reserves or Army National Guard.

[101] *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.

[102] *Id.* para. 1-4.

[103] *Id.*

involvement to full Army participation, and are characterized by detailed coordination between the military command and community authorities.

1. National Guard Assistance for Certain Youth and Charitable Organizations

National Guard (NG) members and units, in conjunction with required military training,[104] may provide services to certain eligible youth and charitable organizations.[105] 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.[106]

The Secretary of Defense is authorized to designate other youth or charitable organizations for support. Authorized services include ground transportation, administrative support, technical training, emergency medical assistance, and communications services. The Special Olympics are specifically authorized air transportation.[107]

In providing authorized services, NG facilities and equipment including vehicles leased to the NG and the DoD may be used.[108] As with other types of domestic support operations, the provision of services must not adversely affect the quality of NG training or otherwise interfere with the member or unit's ability to perform military functions. Further, training costs should not significantly increase, and NG personnel should enhance their military skills as a result of their participation. Lastly, the requested services must not be commercially available. If available commercially, the commercial entity affected can waive this requirement in writing.[109]

2. Support and Services for Eligible Organizations and Activities Outside DoD

The military departments are also authorized to provide services and support to certain non-DoD eligible organizations.[110] See *Chapter 7, Military Support to Special Events* for a discussion of the relevant authorities.

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[104] 32 U.S.C. § 502.

[105] *Id.* § 508.

[106] *Id.* § 508(d).

[107] *Id.* § 508(b).

[108] *Id.* § 508(c).

[109] *Id.* § 508(a).

[110] 10 U.S.C. § 2012(a).

3. National Guard Civilian Youth Opportunities Program

The SECDEF, acting through the Chief, National Guard Bureau, conducts a National Guard civilian youth opportunities program, known as the "National Guard Challenge Program."[111] 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.[112] 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.[113] 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.[114] Usually, the governor will delegate the establishment, organization and administration of the Program to the state Adjutant General (TAG).

The Challenge Program is not cost-free.[115] Beginning in 2001, a state must now provide at least 40 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 in carrying out the Challenge Program.[116] 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.[117]

Individuals selected for training in the NG 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 upon the successful completion of the training (GS-2 minimum rate of pay under 5 U.S.C. § 5332).[118] 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.[119]

4. Additional Assistance Programs

Field Manual 100-19 authorizes Army involvement in a wide variety of national assistance programs focusing on economic and social issues,[120] For example, Army involvement can be found

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[111] 32 U.S.C. § 509.
[112] *Id.* § 509(a).
[113] *Id.* § 509(g).
[114] *Id.* § 509(c).
[115] *Id.* § 509(d).
[116] *Id.* § 509(h).
[117] *Id.* § 509(j).
[118] *Id.* § 509(g).
[119] *Id.* § 509(h).
[120] *See* FM 3-07, *supra* note 1, ch. 8.

in the Civilian Community Corps, the Drug Demand Reduction Program, the Science and Technology Academies Reinforcing Basic Aviation and Space Exploration (STARBASE) program, the Youth Physical Fitness Clinic Program, and the Medical Readiness Program.[121]

F. 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.[122] Although H5N1 has not emerged as a pandemic, the World Health Organization declared on 11 June 2009 that the H1N1 influenza had become a pandemic.[123] 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.[124] 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.[125] 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.[126]

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[121] *Id.*

[122] Homeland Security Council, *National Strategy for Pandemic Influenza* (November 2005).

[123] The end of this 2009 Pandemic was declared by the World Health Organization (WHO) International Health Regulations Emergency Committee on 10 August 2010. *See* http://www.cdc.gov/h1n1flu/, last visited 12 June 2011.

[124] CTRS. FOR DISEASE CONTROL AND PREVENTION, *Statements by HHS Secretary Kathleen Sebelius and DHS Secretary Janet Napolitano on WHO Decision to Declare H1N1 Virus Outbreak a Pandemic*, http://www.cdc.gov/h1n1flu/statement061109.htm (last visited Jul. 5, 2011).

[125] ASD, HD, MEMORANDUM FOR SECRETARIES OF MILITARY DEPARTMENTS, *Subject: Department of Defense Implementation Plan for Pandemic Influenz*a (12 September 2006) [hereinafter "Implementation Plan"].

[126] *Id.* at 8–9.

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;
- 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.[127]

This Handbook provides an overview of many of the authorities necessary to support the above-referenced categories. However, if a H1N1 pandemic evolves into one characterized by both high mortality and strike rates, the magnitude of the support requested from DoD may challenge existing authorities and resources.

The Congressional Research Service has also developed a CRS Report for Congress that outlines key legal issues raised by Pandemic Influenza outbreak.[128] 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.[129] As discussed above, DoD planning guidance directs consideration be given to the potential for DoD to provide quarantine support to U.S. authorities.[130] 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."[131] 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.[132] Further, DHS provides support

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[127] *Id.* at 10–11.

[128] KATHLEEN S. SWENDIMAN & NANCY LEE JONES, *The 2009 Influenza A (H1N1) Outbreak: Selected Legal Issues*, CRS REP'T TO CONG. (May 4, 2009) [hereinafter "CRS REP'T"].

[129] *Id.* summary.

[130] *See* Implementation Plan, *supra* note 125, at 11, Category 13.

[131] 42 U.S.C. 264(a).

[132] *See* CRS REP'T, *supra* note 128 at 6–7.

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.[133]

This authority provided to DoD will be secondary to the States which have primary quarantine and isolation authorities under state law.[134] However, upon request, or upon the determination that local efforts are inadequate, the federal government may assume primary responsibility for such activity.[135] 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. Request for support could be necessary in some cases because of outdated state laws[136] that do not reflect a modern understanding of disease and could hamper stated efforts to contain outbreaks.[137] Such requested support may prove unpopular. Further, the situation in affected areas may trigger broad requests or directions of DoD support to other federal or non-federal entities.[138] Such support could also involve the detailing of military law enforcement personnel to augment civilian federal law enforcement pursuant to the Emergency Federal Law Enforcement Assistance Act (EFLEAA).[139] 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.[140]

Although the WHO declared an H1N1 Pandemic in 2009, this did not translate in and of itself into support from DoD. DoD has established a Pandemic Influenza Watchboard that tracks the DoD Phases from 0 to 5. These phases are part of the DoD Global CONPLAN to synchronize DoD's response to a pandemic influenza.[141] The Secretary of Defense considers several factors in decisions to change the DoD Pandemic Phase. These are: operational; efficiency of virus transmission; and, geographic distribution. This multifaceted approach differs from the methodology used by the WHO which focuses primarily upon the efficiency of transmission. For example, on 1 October 2009 the WHO Phase was level 6 while the DoD Phase was 0.[142] Consistent with the operational focus of the DoD phasing, a DoD Phase 4 Pandemic occurs when there is "receipt of information that a highly lethal pandemic influenza virus is spreading globally from human to human, signaling a breach in containment and failing interdiction efforts."[143] In contrast, the WHO Pandemic Phase 6 does not focus upon lethality and related impacts, but the efficiency of the influenza's transmission among humans.

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[133] *Id.* at 7.

[134] *Id.*

[135] *See id.* at 8, n.41; *see also* 42 U.S.C. § 264(c); 42 C.F.R. 70.2.

[136] For a survey of state quarantine and isolation authorities, see NAT'L CONFERENCE OF STATE LEGISLATURES, *State Quarantine and Isolation Studies*, http://www.ncsl.org/?TabId=17104 (last visited Jul. 5, 2011).

[137] KATHLEEN S. SWENDIMAN & JENNIFER K. ELSEA, *Federal and State Quarantine and Isolation Authority*, CRS REP'T TO CONG. at CRS-9 (August 16, 2006) [hereinafter "CRS QUARANTINE REP'T"].

[138] *See* Implementation Plan, *supra* note 125 at 10–11, Categories 1, 2, 4–5, 7–8, 10–17 & 19.

[139] 42 U.S.C. § 10501 *et seq*.

[140] OAG Memorandum for the President, *Summary of Legal Authorities for use in Response to an Outbreak of Pandemic Influenza* (April 25, 2009), *at* Attachment Page 4.

[141] *See* DEP'T OF DEF., *Pandemic Influenza Watchboard*, http://fhp.osd.mil/aiWatchboard/pandemicflu.jsp (last visited Jul. 5, 2011).

[142] *Id.*

[143] *Id.*

CHAPTER 9

INTELLIGENCE OVERSIGHT AND INFORMATION HANDLING DURING DOMESTIC AND DOMESTIC SUPPORT OPERATIONS

KEY REFERENCES:

- National Security Act of 1947 (as amended), 50 U.S.C. § 401 *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*.
- EO 12333 - U.S. Intelligence Activities, as amended, December 4, 1981.
- EO 13526, *Classified National Security Information*, December 23, 2009.
- DoDI 5210.52 - Security Classification of Airborne Sensor Imagery and Imaging Systems, May 18, 1989.
- DoDD 5143.01, Undersecretary of Defense for Intelligence (USD(I)), November 23, 2005.
- DoDD 5240.1 - DoD Intelligence Activities, August 27, 2007.
- DoD 5240.1-R - Procedures Governing the Activities of DoD Intelligence Components That Affect U.S. Persons, December, 1982.
- 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, April 14, 2005.
- AFI 14 series on Intelligence.
- AR 381-10 - Army Intelligence Activities, May 3, 2007.
- AR 381-20 - The Army Counterintelligence Program, November 15, 1993.
- 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 21, 2005.
- Marine Corps Warfighting Pub 2-1 - Intelligence Operations, September 10, 2003.
- Marine Corps Warfighting Pub 2-14 - 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.

KEY REFERENCES FOR INFORMATION HANDLING:

- 5 U.S.C. § 552a - The Privacy Act (as amended)
- DoDD 5400.11-R - DoD Privacy Program, May 17, 2007.
- DoDD 5200.27 - Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense, January 7, 1980.

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. Domestic missions are no different than overseas missions in that a key requirement for mission success is situational awareness—the commander must be aware of the situation on the ground and have a complete picture of the "battle space" within which the unit is operating. Overseas, intelligence assets normally provide such a picture. How, then, can these same assets be used in the homeland to support DoD missions while at the same time complying with applicable U.S. laws and policies? The judge advocate's role is especially important during domestic operations utilizing intelligence assets and components. Judge advocates must recognize that collecting domestic intelligence by necessity entails collecting information on U.S. persons. Therefore, the rules regarding intelligence collection in the United States must comply with constitutional protections against unlawful search and seizure. As a result, policies and procedures for collection of intelligence in the United States require careful application to ensure protection of the rights of U.S. persons.

As noted above, military commanders' need for information and intelligence within the homeland is on the rise—they expect force protection information and intelligence to be integrated into domestic operations due to a heightened awareness of potential terrorist threats. These needs and expectations pose unique issues in the information and intelligence-gathering arena. This chapter provides a broad overview of collecting information on U.S. persons. If you are addressing an issue of collecting information in the homeland, you should seek out expertise to assist you in this complicated area.

Before discussing the details of collecting information or intelligence on U.S. persons, it is important to understand first that there are two distinct groups of people that collect information in the homeland.

- The first group is DoD intelligence components, as defined in EO 12333. In simple terms these are the Title 10 intelligence specialists—J2s, G2s, A2s, etc. This group of people—and the assets they use—are subject to one set of rules referred to as intelligence oversight.[1] (Title 32 National Guard intelligence specialists—though not technically members of the intelligence community—follow National Guard policies concerning intelligence oversight.)

- The second group of people is everyone else in DoD, including various security and police forces. This group is subject to a different set of rules governed by DoDD 5200.27.

Therefore, the commander must direct his need for information or intelligence to the right component—the component with the capability and authority to achieve the commander's intent. Intelligence is the domain of the DoD intelligence component; information comes from non-intelligence DoD components. Figuring out the nature of the data and the right unit to gather it are areas that often require judge advocate input. Therefore you must ensure that the very first question you ask when discussing collection in the homeland is "who is doing the collecting? Intelligence

[1] *See* U.S. DEP'T OF ARMY, REG. 381-10 ARMY INTELLIGENCE ACTIVITIES (3 May 2007) [hereinafter AR 381-10].

assets or non-intelligence assets?" Once you answer this question, you will know what rules to apply.

Section B of the chapter examines the proper use of DoD intelligence components during domestic support operations. Section C examines collection of information on U.S. persons by DoD non-intelligence components. Section D 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[2] are governed by four primary references. The National Security Act of 1947 establishes a comprehensive program for national security and defines the roles and missions of the intelligence community and accountability for intelligence activities. Executive Order (EO) 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.[3] Presently, DoD Directive (DoDD) 5240.1, *DoD Intelligence Activities*[4] and DoD Regulation 5240.1-R[5] implement the guidance contained in EO 12333—as it pertains to DoD. Finally, each Service has its own regulation and policy guidance.

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[2] DoD intelligence components are defined in DoD 5240.1 as are all DoD Components conducting intelligence activities (defined as foreign intelligence or counterintelligence), including the following:

a. The National Security Agency/Central Security Service (NSA/CSS).
b. The Defense Intelligence Agency (DIA).
c. The offices within the Department of Defense for the collection of specialized national foreign intelligence through reconnaissance programs.
d. The Office of the Deputy Chief of Staff for Intelligence (ODCSINT), U.S. Army.
e. The Office of Naval Intelligence (ONI).
f. The Office of the Assistant Chief of Staff, Intelligence (OACSI), U.S. Air Force.
g. Intelligence Division, U.S. Marine Corps.
h. The Army Intelligence and Security Command (USAINSCOM).
i. The Naval Intelligence Command (NIC). [No longer in existence]
j. The Naval Security Group Command (NSGC).
k. The Air Force Intelligence Agency (AFIA).
l. The Electronic Security Command (ESC), U.S. Air Force.
m. The counterintelligence elements of the Naval Security and Investigative Command (NSIC). [Now called the Naval Criminal Investigative Service (NCIS)]
n. The counterintelligence elements of the Air Force Office of Special Investigations (AFOSI).
o. The 650th Military Intelligence Group, Supreme Headquarters Allied Powers Europe (SHAPE).
p. Other intelligence and counterintelligence organizations, staffs, and offices, or elements thereof, when used for foreign intelligence or counterintelligence purposes. The heads of such organizations, staffs, and offices, or elements thereof, shall, however, not be considered as heads of the DoD intelligence components for purposes of this Directive.

[3] *Id.*

[4] U.S. DEP'T OF DEFENSE, DIR. 5240.1, DOD INTELLIGENCE ACTIVITIES (25 Apr. 1988) [hereinafter DoDD 5240.1].

[5] U.S. DEP'T OF DEFENSE, REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT U.S. PERSONS (Dec. 1982) [hereinafter DoD 5240.1-R]. As of July 2011, DoD 5240.1-R is undergoing major revisions; thus, practitioners citing DoD 5240.1-R must ensure that the 1982 regulation is in effect.

These authorities establish the operational parameters and restrictions under which DoD intelligence components may conduct "intelligence activities," defined in 5240.01 as "the collection, analysis, production, and dissemination of foreign intelligence and counterintelligence pursuant to [DoDD 5143.01 and EO 12333]." Therefore intelligence activities are limited to those including foreign intelligence (FI) and counterintelligence (CI).[6] In general, this requirement translates to a requirement that such intelligence relate to 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 in coordination with the Federal Bureau of Investigation (FBI), which has primary responsibility for intelligence collection within the United States.[7]

When DoD Intelligence Components are conducting FI or CI, intelligence oversight (IO) rules apply. These rules govern the collection, retention, and dissemination of information concerning U.S. persons.[8] A U.S. person includes many unincorporated associations and U.S. corporations (e.g., "Joe's Diner").[9] 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[10] of any U.S. person. Questionable intelligence activities that run afoul of these and other restrictions must be reported in accordance with Procedure 15 of DoDD 5240.1-R under the procedures outlined in AR 381-10.[11]

DoD 5240.1-R is divided into fifteen 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.[12] 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

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[6] "Foreign intelligence" means information relating to the capabilities, intentions, and activities of foreign powers, organizations, or persons, but not including counterintelligence except for information on international terrorist activities. Exec. Order No. 12,333, U.S. Intelligence Activities, para. 3.4(d) (Dec. 4, 1981) [hereinafter EO 12333]. "Counterintelligence" means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, or persons, or international terrorist activities, but not including personnel, physical, document, or communications security programs. *Id.* para. 3.4(a).

[7] *Id.* para 1.14(a); Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation (5 April 1979); and Supplement to 1979 FBI/DoD Memorandum of Understanding: Coordination of Counterintelligence Matters Between the FBI and DoD (20 June 1996).

[8] Judge advocates must read these authorities before advising a commander on the collection of information in a domestic support operation. Further, AR 381-10 should be consulted when advising members of the intelligence community or if a questionable intelligence activity is identified.

[9] "United States person" means 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. EO 12333, *supra* note 7, para. 3.4(i).

[10] "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. DoD 5240.1-R, supra note 5, Procedure 2, para. B3.

[11] Evidence of questionable intelligence activities related to United States Persons must be reported to the TIG (SAIG-IO) though there are several approved channels for reporting the information to include the DoD General Counsel. *See* paragraphs 15-2 through 15-4 of AR 381-10.

[12] *Id.* at 4.2.1.

the use of certain collection techniques to obtain information for foreign intelligence and counterintelligence purposes. Procedures 11 through 15 govern other aspects of DoD intelligence activities, including the oversight of such activities. In addition to the procedures themselves, the Defense Intelligence Agency, 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. In the absence of any foreign nexus, DoD intelligence components generally perform non-intelligence activities. A non-intelligence activity would be any activity that is conducted by or with a DoD Intelligence Component 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. When a Title 10 DoD intelligence component asset or capability is needed for a non-intelligence activity, specific authorization from the Secretary of Defense is required for both the mission and use of the DoD intelligence Component capability or asset. The intelligence oversight (IO) rules do not apply to non-intelligence activities so the SECDEF authorization must be sure to include any restrictions placed upon the assets or capabilities used in the domestic or domestic support operation.

Whether DoD Intelligence Components 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, DoDD 5210.52, *Security Classification of Airborne Sensor Imagery and Imaging Systems*, and DIA Regulation (DIAR) 50-30, *Security Classification of Airborne Sensor Imagery*, provide specific guidance on mandatory security classification review of all data collected by airborne sensor platforms to determine whether it can be disseminated.

In providing guidance to commanders on authorized use of DoD Intelligence Component capabilities and assets, and the products derived from the data collected, it is also important for judge advocates to understand the various platforms, their sensors, and how they operate. 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, a UAV may transmit data by live feed only to a line-of-sight receiver, or by satellite to a remote location.

Evidence of a criminal act "incidentally" collected during an authorized mission using DoD Intelligence Component capabilities can be forwarded to the appropriate law enforcement agency (LEA); however, altering the course of an airborne sensor (such as an UAV) from an approved collection track to loiter over suspected criminal activities would no longer be incidental collection, and could result in a Posse Comitatus Act (PCA) violation unless specifically approved in advance. 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 planning on where it is positioned, considering the intended use. A domestic support operation using DoD Intelligence Component capabilities which includes support to law enforcement agencies (LEAs) will probably require a separate mission authority approval by SECDEF and will need to consider whether the data is to be exclusively transmitted to the LEA,

and where the LEA agents are located to control or direct use of the assets. Whether the collection platform and data transmission is wholly owned, operated, and received by a DoD Intelligence Component, a DoD non-Intelligence Component, or a combination of both will require careful consideration by judge advocates of the applicable rules and operational parameters and restrictions applicable for the mission.

C. Information Handling and the Role of DoD Non-Intel Components

DoD non-intelligence components also have 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 components, other than the intelligence components, may 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.* 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. Those circumstances include the acquisition of information essential to accomplish the following DoD missions: protection of DoD functions and property, personnel security, and operations related to civil disturbances.

The most commonly used exception in the Directive deals with the circumstance of protection of DoD functions and property. Initially this seems like a broad exception that would allow for the collection of information on U.S. persons in many situations. However, the Directive further defines an activity that threatens defense personnel, activities, and installations as "direct" threats to DoD personnel in connection with their official duties. Understanding the difference is crucial, and an example may assist in that understanding. 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. However, further analysis is first required in order to determine if this group poses a **direct** threat to the installation. If the group is quietly and calmly protesting, it's unlikely they are a direct threat, and therefore information should not be collected on them by name.[13]

Finally, note that it is a very rare situation when relevant information cannot be collected in some form by some entity. If an intelligence component cannot collect information because it is not FI or CI, then it may be possible for a non-intelligence component, such as the military police to collect the information. Therefore when analyzing the collection of information concerning USPERs, ensure that you consider both avenues of authorized collection.

[13] 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 (GAM) is protesting outside the front gate," one could report all the necessary information without naming the group and therefore collecting on its activities. One could report that "a group who is not in support of the military is protesting outside the front gate" without losing relevant information.

D. 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. Notwithstanding, the National Guard does not generally conduct domestic intelligence operations. Primarily, domestic intelligence involving USPER is a law enforcement matter and is the responsibly of state / local law enforcement and the FBI. This activity, however, is not considered to be conducted by an intelligence entity so it falls outside of Army Regulation 381-10. However, the activity is governed by DoDD 5200.27.[14]

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 IG-IO in reviewing all intelligence plans, proposals and concepts, to include Proper Use Memoranda (PUMs), 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. For this reason the NG judge advocate needs to determine four facts: 1) the status of the 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: Title 32 or Title 10

National Guard Soldiers can serve in three statuses, State Active Duty, Title 32, or Title 10, as explain in detail in Chapter 10. A Soldier's status has a direct impact on the authorities at issue regarding the collection of information on USPER. This determination is therefore the first that must be answered.

The National Guard may be called up for active duty by state governors or territorial Adjutants General to help respond to domestic emergencies and disasters, such as those caused by hurricanes, floods, and earthquakes. This status is commonly referred to as "state active duty" or SAD. The National Guard may also be called up for active duty by the Federal Government under Title 32 of the U.S. Code to perform training or other duties with or without the consent of the Soldiers. This status is traditionally referred to as Title 32. Finally, the National Guard may be federalized and fall under federal command and control, a status referred to as Title 10.

Members of the NG intelligence community serving in a SAD or Title 32 status are not included in the definition of DoD intelligence component and as such are technically not regulated by intelligence oversight. However, the Chief of the National Guard Bureau established intelligence oversight policy that applies to all members of the National Guard serving in a Title 10 or Title 32 status. This intelligence oversight policy requires that National Guard intelligence personnel operating in either a Title 10 or Title 32 status comply with all federal IO rules without exception. Furthermore, the policy recognizes that while National Guard intelligence personnel operating in a State Active Duty status are not members of the DoD intelligence community, they are limited by

[14] AR 380-10, para. 17-1(f).

their State law—to include state privacy laws—and are prohibited from engaging in what would be a DoD intelligence or counterintelligence mission while in a SAD status. 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 NG members cannot collect information on U.S. Persons.[15]

Additionally, SAD personnel are prohibited from using DoD intelligence resources and equipment while in a SAD status. National Guard personnel in a SAD status are not authorized to engage in DoD intelligence operations nor are they authorized to access DoD classified systems (SIPRnet / JWICS -Joint Worldwide Intelligence Communication System) or equipment (MQ-1, border sensors) for a SAD mission without authorization from the NGB J2.

2. Collection via an Intelligence Activity

The responsibilities of the Soldier, not the MOS or duty title per se, determine whether the Soldier is 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 Intelligence Oversight as provided in section B. 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 USPERS information as provided in section C.

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 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 foreign intelligence purpose must request authorization from the NGB J2. Legal review by NGB JA is required prior to such authorizations. Some Military Intelligence Equipment includes, but is not limited to, SIPRnet, JWICS (Joint Worldwide Intelligence Communication System), and ASAS-L (All Source Analysis System-Light).

[15] This policy memorandum is undergoing revision and will soon be published in a National Guard regulation titled, "Intelligence Oversight." Until the new issuance is released, the current guidance entitled "All States Memorandum P08-0004, NGB Policy for Handling of U.S. Person Information (18 Jun. 2008)" remains in effect.

The National Guard has a variety of Incident Awareness and Assessment[16] 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. The RC-26 in most states is a counter drug asset—not an intelligence asset even though it is capable of collecting imagery of USPERS. 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. However, 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, provide damage assessments, obstacle and hazard assessments, and other such non-intelligence purposes that incidentally collect information on USPERS and is not a per se violation, but 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 through careful planning of aerial surveillance routes and when possible, by avoiding populated areas. Any incidental collection of USPER 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.

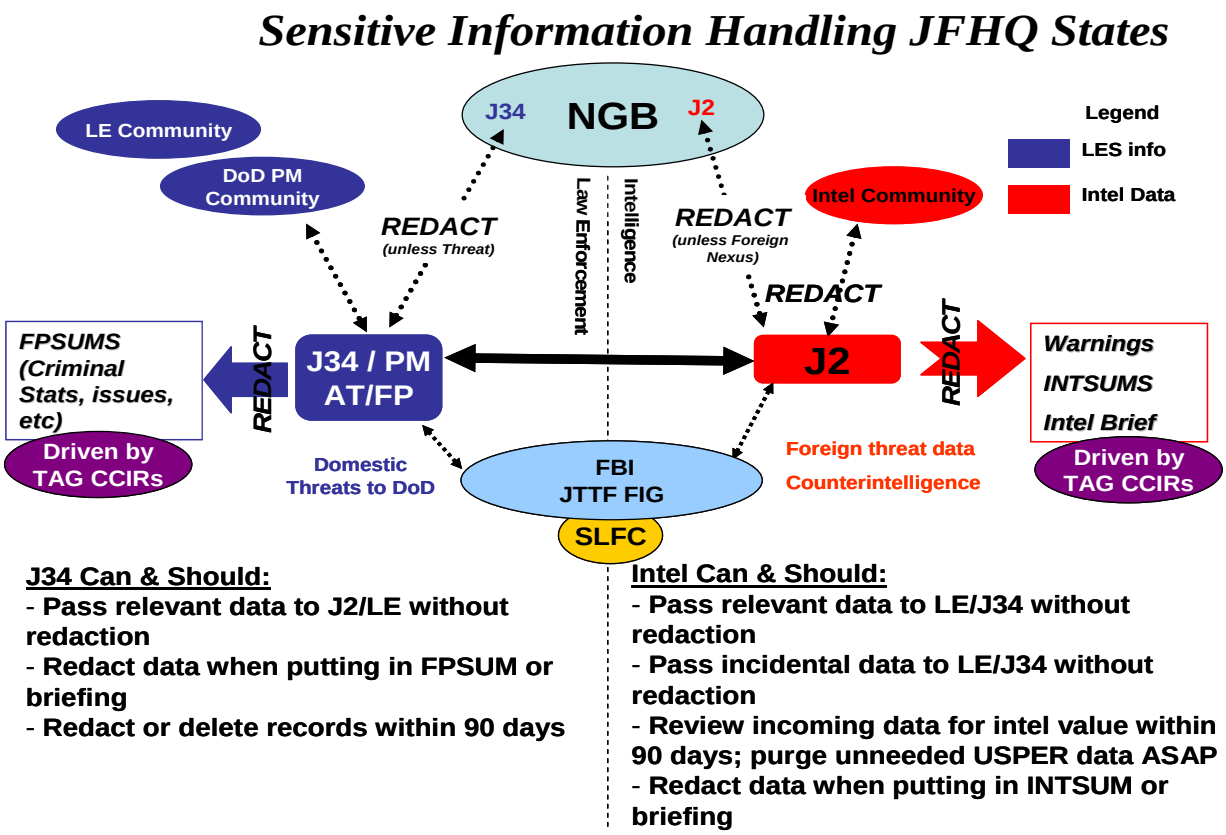
Domestic imagery collected by National Guard aerial imagery sensor platforms must be properly documented and approved via a Proper Use Memorandum (PUM). These PUMs must be in accordance with applicable Defense Intelligence Agency (DIA) policy, "Proper Use Statements for Domestic Imagery." The NGB-J2 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 compliance with federal and state law and National Guard policy.

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 answer 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; but it is necessary to carefully document the roads. Therefore, the recommendation can be to remind the collector not to focus on specific personal identifying information.

[16] Incident assessment and awareness (IAA) - The use of intelligence, surveillance and reconnaissance (ISR) DoD intelligence capabilities for domestic non-intelligence activities approved by the Secretary of Defense, such as search and rescue (SAR), damage assessment and situational awareness.

The chart below illustrates the proper flow of information to remain compliant with intelligence oversight regulations. It depicts how the J2 and Provost Marshall share and handle sensitive information (e.g., USPER) in accordance with both Intelligence Oversight regulations and DoDD



5200.27.

E. 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.[17] 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.

[17] DoD 5240.1-R, *supra* note 4, Procedure 15.

CHAPTER 10

RESERVE COMPONENTS, CIVIL AIR PATROL, U.S. COAST GUARD - STATUS AND RELATIONSHIPS

KEY REFERENCES:

- DoDD 1235.10 - Activation, Mobilization, and Demobilization of the Ready Reserve, November 26, 2008.
- DoDD 5125.01 - Assistant Secretary of Defense for Reserve Affairs, December 27, 2006 (with Chg. 1, June 4, 2008).
- DoDD 6025.13 - Medical Quality Assurance (MQA) in the Military Health System (MHS), May 4, 2004.
- DoDI 1215.13 - Reserve Component Member Participation Policy, May 11, 2009.
- DoDI 1215.06 - Uniform Reserve, Training and Retirement Category Administration, February 7, 2007 (with Chg. 2, December 25, 2008).
- DoDD 1200.17 - Managing the Reserve Components as an Operational Force, October 29, 2008.

A. Introduction

This chapter discusses the various reserve components and the importance of their designated status to the missions they may perform. First, the Reserve Component (RC) plays a significant role in domestic support operations. In numerous instances, particular military missions are located solely within them.[1] The RC provides trained and available units to its parent services in the event of war or national emergency.[2] The RC differs from the Active Component (AC) because it has unique personnel/duty categories that are important to understand because they not only determine what benefits and protections RC members have, but also the different types of duties that are authorized in particular personnel categories. The Assistant Secretary of Defense for Reserve Affairs (ASD(RA)) is responsible for overall supervision of all RC affairs in DoD and establishes the umbrella directives that provide guidance on activation, mobilization, and training.[3]

Judge advocates practicing domestic operational law must also be familiar with the 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. In addition to being an armed force, the Coast Guard is also a federal law enforcement agency. While in a non-federal status, the Air and Army National

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[1] For example, the Air Force Reserves maintains a weather reconnaissance mission and the Naval Reserves is tasked with a mine countermeasure mission.

[2] 10 U.S.C. § 10102. Various efforts are underway by the services to improve mobilization processes. See Rebalancing Forces, Easing the Stress on the Guard and Reserve, 15 January 2004, Office of the Deputy Assistant Secretary of Defense for Reserve Affairs (Readiness, Training, and Mobilization). This report was a result of a memorandum issued by the Secretary of Defense on 9 July 2003, entitled Rebalancing Forces, in which he directed the services to review the use of the Reserve components and implement force rebalancing initiatives as necessary.

[3] U.S. DEP'T OF DEFENSE, DIR 5125.01, ASSISTANT SECRETARY OF DEFENSE FOR RESERVE AFFAIRS (27 Dec. 2006) [hereinafter DoDD 5125.01].

Guard have different authorities and capabilities in domestic missions.[4] Finally, the Civil Air Patrol, a nonprofit corporation, also serves as an auxiliary to the United States Air Force.

B. Reserve Component

The RC consists of the Army Reserve, Air Force Reserve, Naval Reserve, Marine Corps Reserve, Coast Guard Reserve, Army National Guard of the United States, and the Air National Guard of the United States.[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 concept of these citizens who prepare for active service during peacetime and enter active duty in times of national emergency. These individuals have served the Nation since the Revolutionary War and continue to serve both in contingency operations overseas and in support of domestic operations. They form a vital link between the government, the Armed Forces, and the people.[6]

1. U.S. Army Reserve (USAR)[7]

The USAR's mission is to meet Department of the Army contingency operations and mobilization requirements.[8] There are over 200,000 Soldiers in the USAR, most with Combat Support and Combat Service Support missions. Troop Program Units, discussed in paragraph C.1.a.(1) below, train together to mobilize as units.

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). With just over ten percent of the Air Force's manpower, the USAFR performs more than thirty percent of all Air Force missions. Like all of the other RCs, the role of the USAFR is to provide trained and ready forces to the USAF. Yet the USAFR also has several unique missions like the 731st Airlift Squadron, assigned to the 302nd Airlift Wing, Peterson Air Force Base, Colorado, which is trained in the use of modular airborne firefighting systems that support local, state, and federal agencies by dropping retardant chemicals to prevent the spread of fires. 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.[10]

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[4] *See* DOPLAW Handbook, Supp., App 10-6, Role of the NG in Domestic Support Operations.

[5] 10 U.S.C. § 10101.

[6] *See generally* U.S. DEP'T OF DEFENSE, HANDBOOK 1215.15, para. C2.1. (Jun. 1996).

[7] U.S. DEPT' OF ARMY, REG. 140-1, MISSION, ORGANIZATION, AND TRAINING (1 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).

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

[9] U.S. DEP'T OF AIR FORCE, INSTR. 36-2132, FULL-TIME SUPPORT TO ACTIVE AND RESERVE PROGRAM (27 Mar. 2002); U.S. DEP'T OF AIR FORCE, INSTR. 36-2619, MILITARY PERSONNEL APPROPRIATION 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] 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

3. U.S. Naval Reserve (USNR)[11]

The Naval Reserve is composed of both commissioned units (self-contained, deployable assets with both personnel and mission equipment and hardware) and augmentation units (non-hardware units that provide trained manpower to active Navy units). The USNR is a significant force multiplier for the Navy and Marine Corps and represents twenty percent of the Navy's total assets. Unique missions to this reserve branch include a Mine Countermeasure Ship, Mobile Inshore Undersea Warfare Units, and Helicopter Warfare Support Squadrons.

4. U.S. Marine Corps Reserve (USMCR)[12]

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. Select Marine Corps Reserve (SMCR) units consist of more than 19,000 Reserves from 4th Marine Division (4th MARDIV); 7,000 from 4th Marine Aircraft Wing (4th MAW); 8,000 from 4th Force Service Support Group (4th FSSG); I Marine Expeditionary Force Augmentation Command Element (I MACE), Pacific; and II Marine Expeditionary Force Augmentation Command Element (II MACE), Atlantic. Unique missions to this reserve branch include Civil Affairs Groups and Air-Naval Gunfire Liaison Companies.

5. U.S. Coast Guard Reserve (USCGR)[13]

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 at paragraph f, below, is a unique member of the Joint Force because of a mix of military, civil law enforcement, and regulatory authorities that allows it to respond to a wide variety of national security missions at home and abroad.

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

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(annual training) for pay and points each fiscal year. The "Category B" program is the individual mobilization augmentee 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, or IDT, 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 are service with the Civil Air Patrol Assistance Program and the Chaplain reinforcement designees.

[11] 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).

[12] U.S. Marine Corps, Order 1001.52H, Active Reserve Support to the Reserve Component (RC) (17 Dec. 1996); U.S. Marine Corps, Order 1001.59, Active Duty for Special Work in Support of the Total Force (22 Oct. 2001).

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

duty without their consent in a domestic emergency.[14] 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 in times of serious natural or manmade disasters, accidents, or catastrophes. A unique mission to the USCGR is port security; the USCGR provides 95% of this capability. Under 10 U.S.C. § 12302, the USCGR also provides key support to Operation Iraqi Freedom and Operation Enduring Freedom.

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 guard as a reserve component of their respective service.[15] The term "federal service," is applied to National Guard members and units when ordered to active duty in their reserve component status or called into federal service in their militia status under various sections of Title 10 of the U.S. Code.

The terms "Army National Guard"(ARNG) and "Air National Guard" (ANG) refer to the federally recognized (and usually federally trained under Title 32, U.S. Code) organized militia of the various states, in other words, Guardsmen in a "state status" pursuant to Article I, Section 8, Clause 16 of the Constitution.[16]

Determining whether National Guard members are in the ARNGUS/ANGUS or the ARNG/ANG is 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, guard members only become subject to the Uniform Code of Military Justice (UCMJ) when federalized; 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 relieved from duty in the National Guard when on federal active duty as a member of the NGUS under 32 U.S.C. § 325. Per the National Defense Appropriations Act for Fiscal Year 2004, 32 U.S.C. § 325 was amended to allow National Guard officers to retain command authority over state forces with the approval of POTUS and the consent of the Governor.[17]

Guard personnel in Title 10 and Title 32 (discussed under National Guard of the Several States section below) status receive federal pay and are covered under the Federal Torts Claims Act. Title 10 personnel always receive federal military retirement credit for the performance of duty. Similarly, Title 32 personnel also receive such credit, unless in an inactive duty training (IDT) status. It is important to remember 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.

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[14] 14 U.S.C. § 712.

[15] 10 U.S.C. §§ 101(c), 10101.

[16] *See* 10 U.S.C. § 101; 32 U.S.C. §§ 301, 307.

[17] *See* DOPLAW Handbook, Supp., App. 10-7 for a comparison the National Guard in their different statuses.

b. History

In 1903, the organized militia (*i.e.*, the National Guard) was created.[18] The National Defense Act of 1916 further strengthened the organization and training of the National Guard.[19] 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.[20] Although Guardsmen 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.[21]

c. Federal Missions

Like the other RCs, ARNGUS/ANGUS[22] members and units augment the Armed Forces during wars or other conflicts. To become an ARNGUS or ANGUS member, the Guardsman or unit must

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

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

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

[21] 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.

[22] 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 also* U.S. DEP'T OF AIR FORCE, INSTR. 10-402, MOBILIZATION PLANNING, para 2.2 (9 Aug. 2007)) [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).

ANGRC exercises administrative control (ADCON) over all units and members in Title 10 status (except those brought on active duty through full mobilization) because they are assigned to ANGRC. ADCON includes: organization of forces; personnel management; control of resources and logistics; training, readiness, and mobilization; and discipline. ADCON flows from the National Command Authorities through the Secretary of the Air Force, Chief of Staff of the Air Force, Major Commands, and Numbered Air Forces to a unit. A commander exercises ADCON over all assigned forces, but not over attached forces. For attached forces, ADCON remains with the commander to whom they are assigned. For example, when forces are assigned to ANGRC but temporarily attached to another unit, ADCON remains with ANGRC. *See* U.S. DEP'T OF AIR FORCE, HANDBOOK 10-416, PERSONNEL, READINESS, AND MOBILIZATION, para 6.8.4 (22 Dec. 1994) [hereinafter AFH 10-416]. These ADCON/OPCON rules differ for full mobilization when guard personnel become part of the active component. *See* AFI 10-402 para 9.5; AFH 10-416, *supra* paras 5.4, 6.8.3.

ANGRC/CC makes forces available to a supported active duty commander by attaching them to the gaining organization that will exercise operational control (OPCON) over them. The Uniform Code of Military Justice (UCMJ) gives the COMAFFOR or any active duty commander within the chain of command the right to discipline any person serving in Title 10 status. UCMJ authority is a function of command under federal law and the Manual for Courts-Martial. Command authority for discipline includes UCMJ authority as an element of ADCON, which, for members of an ANGRC detachment, is within the command authority of ANGRC. Discipline is also an element of specified ADCON, which is within the command authority of the COMAFFOR. ADCON and specified ADCON do not confer UCMJ authority but identify those commanders who may exercise UCMJ authority as a matter of Air Force doctrine and policy in recognition that more than one commander may have UCMJ authority over a member in a given situation. Since disciplinary authority is shared between the commanders holding ADCON and specified ADCON, it is frequently a matter of coordination between the two concerning which one will take disciplinary action. U.S. DEP'T OF AIR FORCE,

also be "federally recognized."[23] To be federally recognized, the Guardsman or unit must meet prescribed federal standards.[24] NG units or members may be ordered to federal active duty in one of two ways. One way is to order NG members or units to active federal duty, with the consent of the governor, as members of the ARNGUS or ANGUS, the reserve components.[25] 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.[26] Congress has given the President the authority to call the NG to active duty for these purposes.[27]

Moreover, the National Guard has both a federal mission (when called up by Congress or activated by the President under applicable laws) and a state mission (inherent police power authority of the states) to ensure that the laws of the United States and the respective states are obeyed and to protect the people and property of the United States. This domestic portion of the NGUS federal mission is just as important as the National Guard's federal mission to augment the Armed Forces during wars or other conflicts outside of the United States.

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;[28] 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 2008 National Defense Authorization Act made major changes to the roles and responsibilities of the NGB. Significantly, NGB was designated in statute as a "joint activity" of DoD, serving as the NG channel of communications between the Army and Air Force and the fifty-four states and territories.[29] While the NGB serves as the coordination, administrative, policy, and logistical center

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INSTR. 51-202, NONJUDICIAL PUNISHMENT, para 3.7 (7 Nov. 2003) requires the USAF to coordinate with the parent reserve organization before imposing nonjudicial punishment.

ANGRC usually creates detachments and assigns ANGUS members to them for deployments that involve 10 or more persons for 15 days or longer. If a deployed group is less than 10 persons, or a deployment will not be for more than 15 days or does not include an officer, then ANGUS members are attached directly to the 201st Mission Support Squadron (201MSS), a Title 10 subordinate unit to ANGRC. ADCON and OPCON apply in the same manner to those directly attached to 201MSS as they apply to ANGRC detachments.

[23] 10 U.S.C. §§ 10105, 10111, 10503(7), 12201, 12211, 12212; 32 U.S.C. § 105(b).

[24] *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 (21 APR. 2004).

[25] U.S. CONST. art. 1, § 8, cl. 12; Perpich, 496 U.S. at 334; 10 U.S.C. §§ 12301–12304.

[26] U.S. CONST. art. I, § 8, cl. 15; 10 U.S.C. §§ 331–333 (these statutes also include the use of the Armed Forces of which the NGUS is part); 10 U.S.C. § 12406. Although these statutes are in Title 10 of the U.S. Code, members "called up" under these provisions retain their militia status.

[27] 10 U.S.C. §§ 331–333.

[28] 32 U.S.C. § 708.

[29] 10 U.S.C. § 10501.

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 and Air Force guidance, prescribing and monitoring training discipline and requirements, and supervising and administering the budgets of the ARNG and ANG.[30]

The Chief, NGB, a four-star general, is the principal advisor on NG matters to the Secretaries of the Army and Air Force and to the Army and Air Force Chiefs of Staff. The Chief, NGB, 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 Chief, NGB. The Chief Counsel's office at NGB provides legal advice and assistance to the Chief, NGB, 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.[31] The USPFO and his staff also perform functions relating to supply, transportation, internal review, data processing, contracting, and financial support for the state NG. [32] When required, the USPFO staff can support AC or other RC forces on a reimbursable basis.

e. Other NG Authorities for Duty

Guardsmen 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.[33] As noted above, some "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.[34]

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

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[30] DEP'T OF DEFENSE DIR. 5105.77, National Guard Bureau (NGB) (21 May 2008).

[31] 32 U.S.C. 708.

[32] National Guard Bureau Reg. 130-6/Air National Guard Instruction 36-2, United States Property and Fiscal Officer Appointment, Duties, and Responsibilities (1 July 2007).

[33] *See* 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).

[34] *See id.* ch. 2, sec.521 of the FY 2001 National Defense Authorization Act, which 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.

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.[35]

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.[36] 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.[37]

(2) Individual Mobilization Augmentees and Drilling Individual Mobilization Augmentees

IMAs and DIMAs are RC officers assigned to USAR Control Group—IMAs 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

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[35] U.S. DEP'T OF DEFENSE, INST. 1215.06, UNIFORM RESERVE TRAINING AND RETIREMENT CATEGORIES, para. E5.1 (4 May 2004) [hereinafter DoDI 1215.06].

[36] *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 and 14 U.S.C. § 712.

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

are authorized to perform 48 paid IDT period per year. The Selective Service System can perform 36 IDT periods per year. All IMAs must perform a minimum of 12 days of AT each year.[38]

(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 manpower 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.[39] 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 personnel in an inactive status in the Ready Reserve, not in the Selected Reserve, 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, however, train for points or pay and are not eligible for promotion.[40]

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 Standby Reserve is a pool of trained individuals who may be mobilized as needed to fill manpower needs in specific skills.[41]

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[38] DoDI 1215.06, *supra* note 35, para. E.25.1.1.1.3. The Army National Guard and the Air National Guard do not have IMA programs.

[39] *Id.* para. E.5.1.1.2. The IRR also may include personnel participating in officer training programs, including the Merchant Marine Academy, 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.*

[40] *Id.* para. E.5.1.1.3. The Air National Guard does not have an inactive status.

[41] *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 MSO, 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.

3. Retired Reserve

This category consists of all Reserve personnel transferred to the Retired Reserve. These individuals may voluntarily train with or without pay.[42] All members retired for having completed the requisite years of active duty service (Regular or Reserve), regardless of the retired list where assigned, may be ordered to active duty when required by the Secretary of the Military Department concerned.[43]

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.[44] Each military department has its own regulations and instructions that implement these training and support duties.[45]

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.

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),[46] 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

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[42] *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.

[43] 10 U.S.C. § 688.

[44] DoDI 1215.06, *supra* note 35, para. 5.2.2. Combatant commanders have oversight responsibility for the training and readiness of assigned guard and reserve forces.

[45] *Id.*

[46] DoDI 1215.06, *supra* note 35, para. 6.6.4.1.4.

National Guard, that training is not less than 14 days, and not less than 12 days for the Coast Guard Reserve. As previously noted, 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.[47]

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,[48] and equivalent training. It is funded by the Reserve Component.[49]

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.A. §§ 316, 502, 503, 504, 505. It is considered active service pursuant to 10 U.S.C.A. § 101(d)(3), but it is not considered "active duty." (For other reserve components, some of the categories above are active duty.)

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.[50]

a. Active Duty for Operational Support (ADOS)

The purpose of ADOS is to provide the necessary skilled manpower assets to support existing or emerging requirements. Because ADOS is intended to provide only temporary support, total cumulative FTNGD, including ADOS, is limited to 1,095 days in the previous 1,460 days.[51]

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[47] DoDI 1215.06, *supra* note 35, para. 6.1.4.1.

[48] 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. DoDI 1215.06, *supra* note 35, para. 6.1.2.

[49] DoDI 1215.06, *supra* note 35, 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.

[50] DoDI 1215.06, *supra* note 35, para. 6.1.5.3.

[51] DoDI 1215.06, *supra* note 35, para. 6.1.4.2.1.7.

Periods of service exceeding this limitation are accounted against active duty end strength.[52] ADOS may be funded by the Active Component to support AC functions. In the Army, these tours are called Temporary Tours of Active Duty (TTAD); in the Air Force, they are called MPA man-days. ADOS also may be funded by the RC to support RC functions.

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."[53]

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 limited to organizing, administering, recruiting, instructing, or training the reserve components.[54]

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 AC. IAD is funded by the AC.[55]

3. Military Technicians (Dual Status) (MT)[56]

Military Technicians are civilian employees who are required to maintain military membership in a RC and who perform administration and training of that RC or maintenance and repair of supplies or equipment issued to that RC. Military and civilian positions must be compatible. Though the NG also has technicians, they are administered differently as discussed below.

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

For major regional conflicts and national emergencies, access to RC units and individuals through an order to AD without their consent is assumed. For lesser regional conflicts, domestic emergencies, and other missions, where capabilities of the RC could be required, maximum consideration is given to accessing volunteer RC units and individuals before seeking authority to order member of the RC to active duty without their consent.[57]

It is important to distinguish the ARNGUS and ANGUS from the Air National Guard (ANG) and the Army National Guard (ARNG). Unlike the ARNGUS and ANGUS, which are RC

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[52] *Id*.

[53] 32 U.S.C. § 502(f)(2).

[54] 10 U.S.C. § 101(d)(6)(A). Other statutes include 10 U.S.C. §§ 10211, 10302, 12310, and 12402.

[55] DoDI 1215.06, *supra* note 35, para. E.3.1.1.2.3; *see also* 10 U.S.C. §§ 12301, 12302, 12304, and 14 U.S.C. § 712.

[56] 10 U.S.C. § 10216.

[57] U.S. DEP'T OF DEFENSE, DIR. 1235.10, ACTIVATION, MOBILIZATION, AND DEMOBILIZATION OF THE READY RESERVE, para. 4.1. (26 Nov. 2008) [hereinafter DoDD 1235.10].

organizations under the command and control of the President of the United States, the ANG and ARNG train for their federal military missions according to the congressionally established disciplines under Title 32, United Stated Code, under state control as members of their respective states' militia. ARNG/ANG members also take oaths to obey their respective governors and abide by state law.

Although the terms "activation" and "mobilization" are sometimes used interchangeably to describe the process that "federalizes" reservists, 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.[58] Reservists can be "activated" involuntarily or voluntarily with their consent (Guardsmen 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.[59] Levels of mobilization include selective mobilization, partial mobilization, full mobilization, and total mobilization. Therefore it is more helpful to use the term "activate" when referring to placing a reservist on active duty rather than using the more encompassing term "mobilize." The following statutes provide authority for activating reservists/calling up the militia."[60]

1. Full Mobilization (10 U.S.C. A. § 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. A. § 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 2 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. A. § 12304)

Involuntary activation of 200,000 members for up to 270 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 270 days. It authorizes ordering members of the RC to active duty without their consent, without declaration of war or national emergency, for operations other than domestic disasters except those involving a use or threatened use of a weapon of mass destruction.

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[58] *See generally id.*; JOINT CHIEFS OF STAFF, JOINT PUB. 4-05, JOINT MOBILIZATION PLANNING (11 Jan. 2006).

[59] DoDD 1235.10, *supra* note 57.

[60] 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 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.

4. Invasions and Rebellions (10 U.S.C. A. § 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. Any orders for these purposes are to be issued through the governors of the states or the DC commanding general.

5. Insurrection Act (10 U.S.C. A. § 331–335)

a. 10 U.S.C. A. § 331

If there is an insurrection in a state, the President, at request of state or legislature may call militia of other states into federal service as well as use the armed forces to suppress the insurrection.

b. 10 U.S.C. A. § 332

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 such of the militia of any state and use such of the armed forces to enforce the laws or suppress the rebellion. (Such authority was exercised in Arkansas in 1957; Mississippi in 1962; Alabama in 1963).

c. 10 U.S.C. A. § 333

The President can use the militia and/or the armed forces 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. A. § 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 governor or DC commanding general for guardsmen). Reservists are ordered to active duty as units but may be reassigned thereafter.

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 with the consent of the governor or DC commanding general for guardsmen) for an unlimited period of time.

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

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

F. United States Coast Guard[61]

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 the 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, our natural and economic resources, the global maritime transportation system, and the integrity of our maritime borders. The Coast Guard has eleven 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; drug interdiction; migrant interdiction; defense readiness; and other law enforcement.

The *non-homeland security* missions include: marine safety; search and rescue; aids to navigation; living marine resources; marine environmental protection; and ice operations.

Due to the multi-mission nature of the Coast Guard, Coast Guardsmen performing a non-homeland security mission one moment, such as a trained and qualified marine safety inspector, could end up performing a homeland security mission by interdicting illegal drugs the next moment.

The Coast Guard operates as part of the Department of Homeland Security. See 6 U.S.C. § 468. Presently, approximately 38,000 men and women serve on active duty in the Coast Guard. [62] However, 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. See 14 U.S.C. § 3. 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 during contingencies and special naval 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, perhaps believing it is like the National Guard which changes from a state to a federal status depending on the mission. The Coast Guard is at all times an "armed force" and "law enforcement agency" under Title 10 and Title 14. Put another way, the Coast Guard does not switch "hats" between a military service/armed force and a law enforcement agency—it performs both functions at all times.

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[61] Additional details about the history, unique missions, capabilities, and authorities of the Coast Guard are available in Coast Guard Publication 1 (1 May 2009) *available at* the Maritime Operations web portal at the CLAMO website: https://www.jagcnet.army.mil/8525751D00557EFF.

[62] *See* U.S. COAST GUARD, *Careers*, http://www.uscg.mil/top/careers.asp (last visited Jul. 6, 2011) [hereinafter CG Stats].

As discussed earlier in this chapter, the Coast Guard has a reserve component. Presently, approximately 8,000 Coast Guardsmen comprise the Coast Guard Reserve.[63]

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. See 14 U.S.C. § 822. 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 regatta and marine events.

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 assistance that the Coast Guard personnel or facilities are especially qualified to provide. 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 and other 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. Coast Guard units conducting maritime homeland security operations could find themselves in a maritime homeland defense situation in a matter of minutes. The ability to handle evolving scenarios as a federal law enforcement agency or an armed force is a unique characteristic of the Coast Guard.

MHS is a federal law enforcement mission carried out by domestic law enforcement authorities, including the Coast Guard.[64] The mission is to protect the U.S. Maritime Domain and the U.S. 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, as well as responding 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.

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.

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[63] *See* CG Stats, *supra* note 62.

[64] The Coast Guard is required to perform MHS 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. Part 6, Homeland Security 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.

G. National Guard of the Several States

1. Overview

Each state code and or constitution authorizes its state or territory to have a militia. 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.[65] In the Constitution, POTUS is the Commander in Chief of the militia only when it is "called into actual service of the United States."[66] This section discusses the National Guard when it is under the control of the governor, *i.e.*, Title 32 status and State Active Duty (SAD). In a state status, Guardsmen are subject to the military code of the respective state to which they belong.[67]

Each of the states and territories has an Adjutant General (TAG) or equivalent (*e.g.*, Commanding General for District of Columbia), a state officer whose rank may or may not be federally recognized.[68] The TAG/governor (depending on state law) is the Commander in Chief of the state military unless it is federalized; at which time that TAG loses command and control.[69] (POTUS is Commander in Chief of the District of Columbia.) In the fifty states, District of Columbia, Virgin Islands, and Puerto Rico, there are 88 Air Force wings in the ANG and 8 divisions, 15 enhanced brigades, and 6 other major units in the ARNG throughout the states.

Currently, each state has a joint headquarters, State JFHQs, to provide command and control to its ANG and ARNG; this concept was approved by Chief, NGB in October 2003. The State JFHQs currently operate as provisional organizations pursuant to NGB Memorandum 10-5/38-101 until the Joint Staff approval cycle has been completed approving the Joint Table of Distribution. The joint HQs will replace the STARCs and ANG Headquarters in each state and any other joint headquarters currently 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 ARNG Soldiers are traditional Guard personnel, sometimes referred to as "M-Day (Mobilization Day) Guardsmen" because of the weekend drills of inactive duty training (IDT) and annual training (AT). Each year, such NG Soldiers are required to perform 48 IDT drills and 15 days of AT. The operations of NG units in Title 32 status are controlled by the individual states, supplemented by funding from federal sources pursuant to federal regulations.[70] Federal recognition of NG units and associated funding is conditioned upon the unit continuing to meet applicable federal standards.[71] ARNG and ANG

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[65] 10 U.S.C. § 311.

[66] U.S. CONST. art. II, § 2, cl. 1.

[67] Pursuant to 32 U.S.C. § 327, the President or active duty commanders may convene state courts-martial. Moreover, in 2003, Congress ordered the preparation of a model state code of military justice.

[68] The U.S. President is the Commander in Chief of the National Guard of the District of Columbia. *See* Exec. Order No. 11485 (3 Oct. 2001) and Title 39, District of Columbia Code.

[69] 32 U.S.C. § 325.

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

[71] 32 U.S.C. §§ 107–109.

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.

Although there are many instances of the National Guard performing operations in a Title 32 status (*i.e.*, airport security duty, counter-drug program, WMD-CST teams), it is the current position of OSD that such operations are unauthorized unless there is specific congressional or presidential authority for such operations. Nevertheless, the performance of many 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 have more situational awareness in domestic areas than their active duty counterparts; and Title 10 activations result in National Guard loss of control over a state manpower pool depriving them of flexibility. Furthermore, HLS missions can enhance National Guard training by "training by doing." The concept of allowing Title 32 operations has continually been suggested by studies such as the Hart-Rudman Commission and the recent Defense Science Board just to name a few. Moreover, various legislative proposals have been advanced to modify Title 32.[72]

Thus, NG personnel in a Title 32 status should not provide military support to civil authorities (MSCA), such as disaster assistance, unless such missions receive funding and authority.[73] National Guard members should be in a State Active Duty (SAD) status (funded by the state) to perform those functions. If TAGs approve such services to governors when NG troops are in a Title 32 status, the state may be required to reimburse the federal government for the inappropriate use of NG pay and allowances for these personnel.

3. State Active Duty

Only the National Guard has a status entitled State Active Duty (SAD); such duty is performed pursuant to state constitutions and statutes.[74] It 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," they generally respond to local emergencies, such as civil disturbances, before active forces. For these types of operations, the governor will ordinarily proclaim an emergency and order a unit or units to SAD. Specific legislation governs the use of RC forces (NG and USAR) in domestic emergencies.[75] DoD funds are not obligated for any personnel or units performing SAD. However, if the President declares an emergency after a request by a

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[72] For example, H.R. 2073/S. 215, called "Guaranteeing a United and Resolute Defense Act of 2003," sets forth a mechanism that allows centralized federal funding and decentralized execution of National Guard homeland security missions, with state command and control by funding HLS missions by the guard that are performed pursuant to state plans similar to those submitted pursuant to 32 U.S.C. § 112 for the counter-drug program.

[73] Any "duty," other than that authorized by specific statutes, that is performed in a Title 32 status should constitute some sort of training because of fiscal considerations. 31 U.S.C. § 1301.

[74] 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).

[75] 10 U.S.C. § 12301.

governor under the Stafford Act, the state military department may be reimbursed through FEMA for the SAD pay and allowances it has expended.[76]

4. ANG/ARNG Personnel Categories

On any given day in a particular state, members of the National Guard are in different personnel categories: state employees, federal technicians, AGRs, ADSW, and part-time traditional guard members.

a. AGRs

Every guard unit has AGRs, full-time National Guard members under 32 U.S.C. 502. 10 U.S.C. A. § 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."[77] AGRs 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. They can also be "activated" and placed into a Title 10 status.[78]

b. Title 5 NG Federal Technicians

Every guard unit has Title 5 federal technicians; excepted NG military technicians are unique to the NG.[79] Technicians are federal civilian employees under the exclusive control of a state official, the Adjutant General who hires, fires, and supervises them. NG technicians must maintain three affiliations. In terms of their 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.[80] Second, these military technicians must also maintain membership in a state NG. Third, they must also maintain federal recognition in the grade for their position as members of ARNGUS/ANGUS.[81] Loss of NG membership terminates the full-time technician position.[82]

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 guard members. These members are also subject to "activation" into a Title 10 status and can also be called to perform "state active duty."

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[76] 42 U.S.C. § 5121.

[77] *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).

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

[79] 32 U.S.C § 709.

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

[81] 10 U.S.C. § 101(c)(3), (5).

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

In their civilian "excepted service" capacity, NG technicians are responsible for the maintenance of equipment and training and maintain employment in state headquarters, air defense, civil defense, and aircraft operations and are covered under the Federal Tort Claims Act. In their civilian capacity, their participation in domestic support operations is limited because any participation must fall within the position description for the particular job the NG technician performs. Otherwise, the NG technician will be placed in a leave status and placed on SAD orders.

However, 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 activated. 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 domestic support operations in their non-technician status.[83]

c. ADOS[84]

If funding is available, NG units can place National Guardsmen (whether traditional or federal technicians) on extended duty orders (as little as a day to as much as a year) to perform particular functions. These orders should not be confused with the requirements of Guardsmen to perform "training" (usually 15 days per year). Most Guardsmen that participate in the counter-drug program are on ADOS orders. These members are also subject to "activation" into a Title 10 status and can also be called to perform "state active duty."

d. State Civilian Employees

In addition to military technicians, the state NG units employ civilians pursuant to "Master Cooperative" agreements. 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 with Title 5 federal technicians discussed above. State employment should never be confused with SAD.

e. "Traditional" Guard Members

The majority of Guardsmen at a unit are "traditional" members. In other words, they hold civilian jobs in the community and are only in a military status when performing drills or other training (usually 15 days per year) or military duty. These members are subject to "activation" into a Title 10 status and can also be called to perform "state active duty."

As noted above, each member of the National Guard can be placed into several different personnel categories (without being in more than one at a time). These categories are important when determining, among other things, benefits, discipline, and immunities.

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[83] 32 U.S.C. § 709.

[84] Active duty for operational support – previously described in Section D.2.a., above.

5. Unique HLS/HLD missions

a. Weapons of Mass Destruction (WMD)/Civil Support Teams (CST)[85]

Pursuant to 10 U.S.C. § 12310(c), these National Guard teams 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. The teams are trained to *support* (they are not first responders) civil authorities at a CBRNE site by identifying the agents/substances, advising on responses, and otherwise assisting with requests for state support. Currently there are 32 teams, with 23 more pending identification and certification (in March 2004, pursuant to the National Defense Authorization Act for FY04, DoD identified 12 more states to receive these teams). By statute, the WMD/CST teams may not operate OCONUS although a study may be initiated to determine the benefits and drawbacks of OCONUS missions.

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

Currently twelve states are establishing regional task forces called NG-CERFP that will use existing guard units and traditional (M-day) Soldiers to provide governors or a combatant commander with the capabilities to locate and extract victims from a contaminated area, patient and casualty decontamination, and medical triage and treatment.[86] These response forces will provide support to civilian first responders or military authorities within the first 6 to 72 hours after a CBRNE event. These task forces are currently located in each FEMA region and will operate in SAD, Title 32 and Title 10 statuses. It is important for the judge advocate to know the deployed status of these forces in order to provide legal advice. For more detailed discussion areas, see below.

6. Miscellaneous Areas of Caution

a. Command and Control

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 exercise command and control over state status National Guard members nor can state status National Guard members exercise command and control over federal troops.[87] Two different statutes however, allow, under strictly prescribed circumstances, one officer to exercise command and control over both federal and state status troops although the authority is exercised in a mutually exclusive manner.[88]

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[85] Originally these teams were known as Rapid Assessment and Detection teams (RAID). NDAA FY99. The May 1997 Quadrennial Defense Review had recommended assigning chemical and biological counter-terrorism missions to the National Guard.

[86] The states establishing NG-CERFP's are Hawaii, Washington, California, Colorado, Texas, Missouri, Illinois, Florida, West Virginia, Pennsylvania, New York and Massachusetts.

[87] *See also* Perpich v. Department of Defense, 496 U.S. 334, 348 (1990).

[88] 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

The first statue, 10 U.S.C. § 315, allows regular members of the Army and Air Force to be detailed to duty with the National Guard and with the permission of the President and the consent of the governor, to accept a state commission.[89] Although it has also been argued that 32 U.S.C. § 104(d) allows the President to detail Title 10 Guardsmen or Regular Air Force officers to command Title 32 troops if the President details them, this detailing would not give the officer the ability to enforce his own orders unless he was also commissioned in that state's national guard.[90]

The second statutory basis is 32 U.S.C. § 325 as amended by the FY04 National Defense Authorization Act which allows a National Guard officer to serve in both a federal and state status while serving on active duty in command of a National Guard unit if the President authorizes such service in both duty statuses and 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. This command option provides unity of command and effort and facilitates the maintenance of a common operating picture for both the federal and state military chains of command.

A request to implement 32 U.S.C. § 325 could come from either DoD or the TAG of a particular state. Required implementing documents would be the Presidential authorization and the Gubernatorial consent to use 32 U.S.C. § 325, and a Memorandum of Agreement (MOA) between the two mutually exclusive federal and state military commands outlining the responsibilities and authority of the dual status commander.[91] 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. The dual status commander, acting pursuant to his/her federal authority may issue orders only to federal forces.

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 state active duty." 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 JP 1- 02, *supra* note 15. Many contend that a state status officer cannot use coordinating authority to supervise federal troops because of federal supremacy.

[89] 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 if a Title 10 officer who accepts such a commission may be placed in command of a non-federalized unit and notes that this would not be necessary for Title 10 Guardsmen in their own state. OpJAGAF 1998/20, 19 Feb 1998, 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."

[90] 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 state or territory." OpJAGAF 1998/20, 19 Feb. 1998, 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.

[91] For example, the Utah Governor and CDRUSJFCOM executed an MOA for the Utah Olympics in 2002 (although the command relationship was not pursuant to 32 U.S.C. § 325).

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 and other federal benefits.[92] However, once a state has passed the Emergency Management Assistance Compact (EMAC), discussed below, state law is modified in conformity with EMAC, so missions conducted pursuant to its guidance are "exempted" from any contradictory state law provisions. Moreover, because Congress consented to EMAC, this compact is now federal law.[93]

However, 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 Guardsmen are performing duty in another state.[94] Moreover, state law may dictate if and when non-federalized guard units may enter or leave a state for duty. For example, some states do not allow armed guard units to enter their state without permission from the governor or legislature.[95] Some states have specific authority that allows their militias to leave the state to perform duty.[96]

A 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, DC, or commonwealth, territory, or possession of the United States regardless of where actually licensed.[97] Arguably this directive also applies to Guardsmen who are in a Title 32 status. However, Guardsmen 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.[98] However, the Stafford Act does not provide that same authority to National Guardsmen in a state status.[99] Thus it is unclear if Title 32 Guardsmen would receive FTCA coverage when treating civilians not otherwise entitled to military medical care. Moreover, if, as discussed earlier, National Guard personnel cannot perform operations in a Title 32 status, it is possible that such "operational" activities will not be within the scope of employment.

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[92] 28 U.S.C. § 2671. Title 32 Guardsmen are also provided limited administrative remedies under the National Guard Claims Act, 32 U.S.C. § 715.

[93] A congressionally sanctioned interstate compact is a federal law subject to federal construction. New York v. Hill, 528 U.S. 110, 111 (2000).

[94] *See e.g.*, 44 OKL. ST. § 229.

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

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

[97] DoDD 6025.13 MEDICAL QUALITY ASSURANCE (MQA) IN THE MILITARY HEALTH SYSTEM (MHS) (4 May 2004).

[98] *E.g.*, 42 U.S.C. § 5121 *et seq.*

[99] Although it would be within the scope of employment to provide military medical care to those entitled to such care.

Furthermore, a medical professional's ability to practice medicine is based upon state authority. Because SAD military members are not "federal employees" under the FTCA, FTCA is not applicable to torts committed in this status.

c. Emergency Management Assistance Compact (EMAC)

This compact, which has become law in every state and territory, establishes immunities, authorities, and liabilities for missions executed under its authority. It allows the states to rely upon each other in responding to, among other things, emergencies such as man-made or natural disasters, insurgencies, or enemy attack. States can obtain reimbursement for support under this compact. Although Article VI of EMAC states that parties agree to recognize the licenses, certificates, or other permits issued by any other party to the compact for "professional, mechanical, or other skills," some opine that this section does not extend to the authority to practice medicine because the medical credentialing process is not a license or permit.

Article VIII of this compact states "Nothing in this compact shall authorize or permit the use of military force by the National Guard of a state at any place outside that state in any emergency for which the President is authorized by law to call into federal service the militia, or for any purpose for which the use of the Army or the Air Force would, in the absence of express statutory authorization, be prohibited under *18 U.S.C. sec. 1385*." Some read this provision as prohibiting the use of armed Guardsmen across state lines for EMAC missions. Others have opined that EMAC does not prohibit such activity, it merely does not "authorize" it within the scope of the compact and such authority would have to come through another agreement.

d. "Hip-Pocket" Activation

Pursuant to 10 U.S.C. § 12301, 1st Air Force (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 guard members into a Title 10 status upon the occurrence of a "triggering" event known in 1st AF as an "air sovereignty event." On 11 June 2003, Secretary Roche delegated the authority "to order into federal service . . . those members of the Air National Guard who have volunteered to perform federal active service in furtherance of the federal mission" 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.[100] This "hip pocket" process is now used for other Air Force missions. This process has been examined as a model for some Army missions, but at present is not applicable to any Army missions.

e. Rules for the Use of Force (RUF)

State law will govern the rules for the use of force for National Guardsmen 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

[100] 10 U.S.C. § 12301(d); Memorandum: Secretary of Air Force Delegation of Air National Guard Re-Call Authority, dated 11 June 2003; DoDD 1235.10, *supra* note 57.

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 11 and 12.

H. Civil Air Patrol (CAP)

The Civil Air Patrol, 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.[101] 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 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 USA provides oversight for disaster relief missions.

Civil Air Patrol-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.

I. Judge Advocates

1. National Guard Judge Advocates

The majority of the fifty-four National Guards have a single, full-time judge advocate, normally an AGR (Title 32) judge advocate, who may be either an ANG or ARNG judge advocate. The primary mission of the AGR judge advocate is to advise the TAG and, usually the USPFO. Both the Army and Air Headquarters in each state usually have a part-time headquarters judge advocate, although the creation of the new JFHQ-S in each state may change these assignments.

ARNG and ANG legal personnel support both state and federal missions. Approximately fifty per cent of the ARNG judge advocates are assigned to SJA sections in combat support and combat service support units (CS/CSS). The remaining ARNG judge advocates are usually assigned to the state or territory headquarters. Other than the ANG HQ judge advocate, ANG judge advocates are located at the wing level in the state (usually two judge advocates and two paralegals per wing). ARNG and ANG judge advocates typically possess a broad range of experience and expertise, both military and civilian, and they can serve as effective liaisons with local and state governments because of their extensive local community contacts. The senior judge advocate for the ARNG is usually the POC for purposes of coordinating training and preparation for natural disasters, civil

[101] *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).

disturbance, civilian assistance, and counterdrug missions within the respective state/territorial jurisdiction. The SJA of the ARNG combat or CS/CSS unit is the POC for legal training for the federal training/mobilization mission.

As noted previously, each of the fifty states, Guam, Puerto Rico, the Virgin Islands, and the District of Columbia, have their own distinct, independently commanded NG. Thus, the state judge advocate roles and missions will vary. Most states require their judge advocates to be a member of that state's bar.

2. U.S. Army Reserve Judge Advocates

Army Reserve judge advocates are either embedded in USAR Table of Organization and Equipment (TOE) units or assigned to Judge Advocate General Service Organizations (JAGSOs). Unit judge advocates train to mobilize with their units and provide legal advice to the commander. USAR judge advocates are also found in several USAR Table of Distribution and Allowance (TDA) organizations such as the ten Regional Readiness Commands (RRCs). The mission of these judge advocates is to perform the traditional function of providing legal support to their respective command.

JAGSOs are legal units that provide legal support to reserve personnel not otherwise provided the service or backfill for CONUS Army installations. One type of JAGSO, the Legal Support Organization, provides command and control over subordinate Legal Service Teams (LST) that provide legal support services. Legal Services Teams, organized on the basis of one Legal Service Team (LST) per 7,000 Soldiers, are functionally divided into three sections: the command opinions section, the client services section, and the litigation section. Several LSOs have primary missions to deploy outside the continental United States to provide legal support services in a particular geographical area. These LSOs are usually affiliated with a particular AC unit, and develop a repetitive training relationship. Other LSOs are designated as Mobilization Support Organizations (MSOs). MSOs become part of the CONUS support base and provide mobilization legal support at the Mobilization Stations.

The Army Reserve also has IMAs/DIMAs that are assigned to specific Army organizations that augment legal services of that organization's legal office. Army Reserve AGR judge advocates are on indefinite active duty status and assigned to various Joint, Active Army and USAR organizations.[102] In USAR organizations, these judge advocates are usually responsible for day-to-day legal affairs. However, in other organizations they augment the active duty judge advocate office and coordinate USAR support. Although the judge advocate's primary mission is to provide full-time legal support and USAR expertise, they also train, recruit, administer, and organize USAR forces assigned to their units.

3. U.S. Air Force Reserve Judge Advocates

USAFR judge advocates serve in either unit positions (Category A) or IMA positions (Category B). The Air Force JAG program is now a "Corps" rather than a department. As in the Army Reserves, there are USAFR AGR judge advocates assigned to Air Force and Air Force Reserve organizations to augment various missions.

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[102] NATIONAL GUARD BUREAU, REG. 600-10, ARNG TOUR PROGRAM (24 Feb. 1983).

The judge advocate reinforcement designee program is available for Guard and Reserve officers. These judge advocates are normally attached to the closest Air Force legal office to their homes and earn retirement points by performing non-pay IDT or completing ECI courses.

4. U.S. Naval Reserve Judge Advocates

Currently, there are over 440 Officer and 180 Enlisted billets in the United States Naval Reserve law program. Approximately two thirds of these billets are in 41 "Program 36" units directly supporting the Office of the Judge Advocate General Headquarters, Naval Legal Service Offices, Trial Service Offices, Trial Judiciary, Navy-Marine Corps Court of Criminal Appeals, and Naval Justice School. The remaining billets, primarily staff JA or legal advisor billets, are in units outside of Program 36 or are independent duty assignments. These billets support various active component commands, including the major combatant commanders, other major shore and fleet commands, and Naval Construction (Seabee) units. In addition, there are over 100 Officers and Enlisted personnel drilling in Voluntary Training Units for retirement points only.

5. U.S. Marine Reserve Legal Specialists

The Marine Corps does not have a JAG Corps although the Marines are in the process of creating an over-arching judge advocate administrative organization. All legal specialists are line officers and fill billets that require a legal specialty as well as non-specialty billets. Commands own the legally oriented billets.

6. U.S. Coast Guard Reserve Judge Advocates and Yeoman

Like the Marine Corps, the Coast Guard does not have a JAG Corps. Accordingly, each Coast Guard judge advocate is a line officer with a "legal specialty." The Coast Guard maintains Reserve judge advocates and Reserve yeomen. Each yeoman maintains qualifications as a legal technician and a paralegal. Coast Guard Reserve judge advocates and yeoman are typically assigned to support Coast Guard legal offices throughout the Coast Guard.

CHAPTER 11

RULES FOR THE USE OF FORCE 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. §§ 331–335 - The Insurrection Act.
- 10 U.S.C. § 12301.
- 18 U.S.C. § 242.
- 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, 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.
- AR 190-14, Carrying of Firearms and the Use of Force for Law Enforcement and Security Duties, March 12, 1993.
- U.S. Department of Justice, Office of Investigative Agency Policies, Resolution 14, Concerning the Use of Deadly Force, October 16, 1995.
- FORSCOM Augmentation Forces to Designated AMC and ATEC Sites,
- FORSCOM and USARC Force Protection OPORDs,
- QRF/RRF RUF,
- EXORD ISO Consequence Management Operations in New York City and Military District of Washington,
- CJCS CONPLAN 0500-98,

A. Introduction

The Standing Rules for the Use of Force (SRUF) provide the operational guidance and establish fundamental policies and procedures governing actions taken by DoD forces performing civil support missions (e.g., military assistance to civil authorities and military support for civilian law enforcement agencies) and routine Service functions (including AT/FP) within the United States and its territories. It also applies to land-based homeland defense missions occurring within the United States and its territories. The SRUF also 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 supersede CJCSI 3121.02, RUF for DoD Personnel Providing Support to Law Enforcement Agencies Conducting CD Operations in the United States, the rules for the use of force in the DoD Civil Disturbance Plan (Garden Plot) and the use of force guidance contained in DoD Directive 5210.56, Enclosure 2.

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 or Title 32 status. For information concerning National Guard rules for the use of force (RUF),

see Chapter 12, infra. Judge advocates should coordinate with their National Guard counterparts when operating in a joint environment to confirm the RUF the National Guard is using.

Before beginning any discussion on the use of force in an operational setting, service members need to understand the legal, policy, and practical limitations for the use of force. The use of force for domestic mission accomplishment is constrained or limited by federal law and the Standing Rules for the Use of Force.

While there are some very significant differences, the development, training, and application of the RUF and the ROE for overseas contingency operations can be similar.[1] The Standing Rules for the Use of Force provide the template for training RUF for domestic operations. 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. Often in training scenarios, the solution is not found in the applicable RUF but rather in the rules for when a service member can use force in self-defense and identifying either a hostile act or demonstration of hostile intent. 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.[2]

Use of force practice is one of the few areas in which the legal competence of the judge advocates can potentially have life or death consequences for service members and civilians. Therefore, it is imperative that judge advocates understand and apply legal and practical considerations when practicing in this area. This chapter will discuss the role of judge advocates in use of force, 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, the potential legal liability involved in use of force, as well as other issues. This chapter should provide the reader with an introduction to use of force and its key legal references.

B. The Judge Advocate's Role in the Use of Force

Judge advocates are called upon to practice domestic use of force law in routine legal duties as well as in domestic operations. The most common of these situations arises when judge advocates advise on force protection and installation law enforcement activities. Many judge advocates 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 or review investigations into incidents involving the use of force by a service members. Finally, judge advocates may be involved in civil or criminal proceedings for a use of force incident

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[1] For a comprehensive discussion on the development, training, and application of the ROE that can be applied to the RUF, see CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES (2000).

[2] *See* CJCSI 3121.01B at Enclosure L (U) – Standing Rules for the Use of Force for U.S. Forces (13 June 2005) [hereinafter SRUF], para. 4.a.

as a trial counsel, trial defense counsel, Special Assistant U.S. Attorney, or as an attorney assisting in defensive federal litigation in his or her respective service.

In drafting or reviewing RUF, judge advocates have to understand both the substantive law that governs Rules for 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 as soon as the need is identified.[3] In most cases, however, these RUF would already be staffed and implemented by judge advocates at higher echelons.

Judge advocates performing all of 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 control. In addition, the policies or RUF issued by higher headquarters further define the legal requirements for use of force. In order to properly apply those policies or RUF, judge advocates must understand the underlying legal standards.

RUF drafters involved in planning or executing a domestic operation should consider critical factors that are similar to those involved in Rules of Engagement. These factors include the following.

- What are your command's mission and your commander's concept of the operation?
- What type of unit is involved, what weapons and equipment, if any, will they deploy with, and what is the level of training for the domestic use of force with the assigned weapons?
- What threat could your command face?[4]
- 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 set the conditions for misapplication of the rules with the potential for significant legal consequences for soldiers and the command?
- Does the mission being planned nest well with the SRUF or should the local commander initiate a process to seek augmentation of the SRUF by submitting a request for a mission specific RUF?[5]

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[3] *See* SRUF, *supra* note 2, para. 3.a.–3.b. and CJCSI 3121.01B at 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.

[4] Judge advocates should base their draft SRUF and legal guidance on the worst feasible scenario. For example, a number of JAs have been assigned duties of advising on detention or migrant and refugee camp operations. In most cases, no one expected the detainees to violently riot. Unfortunately, rioting often occurs 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 the emergency situation they will face in a riot.

[5] 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.

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 allow for dispassionate, reflective, and judicious decision making on whether to use force. Thus, judge advocates should consider a number of critical factors: what capabilities and limitations do service members bring to a potential deadly force confrontation; what should judge advocates know about potential attackers; and, what physical reactions will affect service members during and after use of force incidents?

1. Capabilities and Limitations

What capabilities and limitations do most service members bring to a life or death confrontation during a domestic operation? Let's consider the service member's equipment, training, and use of force knowledge.

a. Soldier Equipment

Compared to civilian law enforcement personnel, most service members are not as well-equipped for potential confrontations with belligerent and innocent civilians. 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.[6] 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 for Confrontations

Most service members do not receive extensive training on the types of skills and situations that are involved in confrontations in domestic operations. Because service members receive little training on tactical marksmanship and close quarters confrontations, they may not understand how to shoot accurately under stress or how to employ lesser means of force competently. Moreover, units generally do not conduct training emphasizing firearms engagements at closer than 10 yards, or on how to defend oneself using bare hands. Finally, service members trained on unarmed combatives,[7] must know which are deadly and which are non-deadly techniques.

c. Training on RUF Law and Policy

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 and DA decisions.[8] Additional key concepts such as hostile act and hostile intent are often misapplied or used interchangeably. As such, it is critical that judge advocates understand the terminology and are capable of training these concepts in a straightforward manner. In addition, very few service

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[6] The Army's use of force policy advocates arming Soldiers with non-lethal equipment such as military police batons, OC pepper spray, and military working dogs.

[7] U.S. DEP'T OF ARMY, FIELD MANUAL FM 3-24.150, COMBATIVES (18 Dec. 2002).

[8] Military police and special operations Soldiers are probably the only general population in the Army that routinely learn and understand these rules.

members receive training on the RUF or the legal and policy aspects of the investigations and litigation that may follow a use of force incident. This increases the challenge for judge advocates preparing units for domestic operations.

The judge advocate must also consider the nature of the threat that our service members might face. Service members have to try to differentiate between aggressors employing various levels of force threats, those who do not present a direct threat but against whom force is authorized, and innocent civilians.

An attacker will generally have the service member at a disadvantage. They will almost always have the initiative and sometimes they will have the element of surprise. One of the accepted principles of violent confrontations is that the attacker's "action" will defeat a "reaction" of comparable speed by the service member.[9]

2. Physical and Psychological Effects

It is also imperative to keep in mind that the physical and psychological effects on the service member during 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 should research these reactions and consider their effects when drafting the RUF. They, and investigating officers, should also consider them when judging a service member's reactions and statements in the aftermath of a shooting incident.

D. 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 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 affecting use of force by armed forces of the nation-state. Finally, the use of force practitioner and SROE practitioner must 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.

All U.S. Army 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

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[9] This concept is central to law enforcement use of force training theory. If an officer is faced with a deadly threat, the officer should not waste time considering whether other options will work. The immediate choice is whether the officer needs to use deadly force to save life or limb. This is why the Federal Bureau of Investigation and the Department of Justice emphasize that the use of force policy that applies during a confrontation is essentially a question of whether it is objectively reasonable to use deadly force. If it is not, then the agent is free to consider other lesser alternatives.

[10] Since domestic operations have generated very few reported cases involving service members, we must look to law enforcement cases to help define the limits of military use of force.

protection and law enforcement could be justified under the President's executive powers.[11] The authority to order the military to defend the homeland against overt international aggression can be clearly justified under his 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 has been based on the President's duties 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] Similarly, whenever the military uses force to execute the orders of the President and 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 primary focus is on the Fourth Amendment.[16] The constitutional standard is whether the use of force violated 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 to advise on the RUF that support the operation. This makes the mission analysis portion of the planning critical. The phrasing of

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[11] U.S. CONST., art. II, § 1.

[12] *Id.* § 2.

[13] U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVILIAN DISTURBANCES (4 Feb. 1994).

[14] U.S. CONST., art. II, § 3.

[15] *See e.g.*, In Re Neagle, 135 U.S. 1 (1890).

[16] The Fifth Amendment Due Process Clause limits the ability of federal officers to use force after an arrest has occurred. The Eighth Amendment defines the rights of a prisoner when corrections personnel use force.

[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, 296 (1989).

[19] *Id.* (emphasis added).

[20] *Neagle*, 135 U.S. at 1.

Operations Orders or other directives that define the mission and operation are critical to defining the limits of this authority.

There are a number of restrictions and decision points that the SRUF imposes on our service members or that are, in practical effect, introduced into RUF training. 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 effectively restrict the SRUF or introduce tactically dangerous or unsound practices.

Such errors can occur because judge advocates are mistaken in their understanding of the law or uncomfortable 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]

1. Minimum Force Necessary or Deadly Force as a Last Resort

The SRUF provides that, "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 mission specific

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[21] As discussed above, the underlying substantive law applicable to domestic governmental use of force is the Constitution, not the Law of War. A common example is use of language of "proportionality of response" by a Soldier defending against an attack.

[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 level of a private citizen under state law. This is a significant concession of otherwise lawful defensive authority.

[23] SRUF, *supra* note 2, para. 5.b.1.

[24] *Id.* para. 5.c.

[25] SRUF, *supra* note 2, 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).

RUF that more closely resembles the standards of case law should be developed and staffed for approval by the Secretary of Defense.[28]

2. Mandatory Verbal Warnings

Federal courts require service members to issue 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] However, in defensive use of force there appears to be no such requirement in law. The SRUF does not 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]

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] This is a controversial authority provided to commanders in the SRUF and would likely be challenged by a soldier being prosecuted either for violation of a lawful order or manslaughter.[33] The SRUF also limits the use of deadly force to situations where lesser means have failed or cannot reasonably be employed.

4. Operational Orders/Execution Orders

For those operations that have not been thoroughly anticipated, judge advocates 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 of whether to draft new RUF or adopt an existing template is yet to be announced.

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[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] SRUF, *supra* note 2, para. 5.a.

[31] SRUF, *supra* note 2, 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.

[32] SRUF, *supra* note 2, para. 4.a.

[33] For an excellent discussion of the historical development of the inherent right of self-defense and its modern interpretation by American courts, *see* DAVID G. BOLGIANO, COMBAT SELF-DEFENSE 32–39 (2007).

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. It also provides a consistent training template to avoid the ad hoc approach previously used in domestic operations RUF practice.

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 against 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, and 2) when the use of force is directly related to the assigned mission.[34]

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.[35] 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.[36] 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.[37] Command guidance in this area is critical. Without clear and proper guidance, the commander's intent could easily be frustrated. For

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[34] SRUF, *supra* note 2, para. 5.c.2.

[35] SRUF, *supra* note 2, para. 4.f.

[36] SRUF, *supra* note 2, para. 4.f.

[37] SRUF, *supra* note 2, para. 4.f.

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 Soldiers on the ground.

e. National Critical Infrastructure

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 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 Crime against Persons

Service members may use deadly force when it appears reasonably necessary to prevent a serious crime involving the threat of imminent death or serious bodily harm (hereinafter referred to in this chapter as "serious crime"). 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. Serious crime is a critical term to the definition of a number of the following authorities to use deadly force.[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 probable cause to believe that the prisoner committed or attempted to commit a serious offense. Serious offense is defined as one that involves 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.

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[38] SRUF, *supra* note 2, paras. 5.c & 5.d.

[39] SRUF, *supra* note 2, para. 5.d.1.

[40] SRUF, *supra* note 2, para. 5.d.2.

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 in paragraph b 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, however, 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 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]

E. 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 and state civil and criminal proceedings after an incident. In addition, such incidents are often accompanied by a variety of investigations that can result in adverse administrative consequences. Therefore, it is important that judge advocates consider this liability as they draft RUF, disseminate the RUF, and participate in training for and the execution of domestic operations under RUF. Failing to do so could unnecessarily expose service members to the financial and emotional burdens of litigation, even if the case is ultimately dismissed.

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] In fact, one reported Supreme Court *Bivens* case involves an Army Soldier and use of force against a civilian.[45]

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[41] SRUF, *supra* note 2, para. 5.d.3.

[42] SRUF, *supra* note 2, para 3.a.

[43] SRUF, *supra* note 2, para. 3.b.

[44] Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[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

Litigation is also conceivable 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] However, 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. While discretionary function is a closely guarded "silver bullet" defense, plaintiff's counsel could use faulty or inadequate training as a basis to seek to establish negligence on the part of the U.S. Government.

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. Recent caselaw 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 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.)

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]

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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.

[46] United States v. Gaubert, 499 U.S. 315 (1990).

[47] Pearson v. Callahan, 555 U.S. 223 (2009).

[48] *Saucier*, 533 U.S. at 194.

[49] *Pearson*, 555 U.S. at 223.

Accordingly, *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 the analysis will be for those attempting to assert its procedure in establishing qualified immunity in the future.

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 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. 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.[52]

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[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. Ironically, it is conceivable that a third party that could have been covered under "defense of others" could attempt to bring a claim under the FTCA if the individual could establish that the Government was negligent in its training of RUF and it contributed to the injury suffered.

[51] SRUF, *supra* note 2, para. 1.b.

[52] For an excellent overview of the liability nightmare resulting from a Marine shooting that was authorized and proper under the Rules of Engagement for JTF-Six, 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.

3. State Civil and Criminal Liability

Federal Supremacy Clause Immunity 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.[53]

F. Other Trial or Litigation Issues

Judge advocates involved in post-shooting procedures and litigation should consider a number of issues. First, be prepared to advise commanders on the many investigations that could occur. Second, be aware of the Army's procedures on civilian litigation. Finally, know that service members have far less legal protection against use of force liability than a federal law enforcement agent.

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 the Army. Commanders will probably recognize the fact that the various commanders involved, their parent services, any joint command, and the National Guard Bureau or State National Guard authorities, could initiate an administrative investigation and Rules for Courts-Martial (RCM) 303 inquiries.[54] Commanders are often surprised to find that the following civilian investigations could occur.

- 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 in potential civil litigation. Army Regulation 27-40, Litigation,[55] Air Force Instruction 51-301, Civil Litigation,[56] Navy Instruction 5800.7D, and Manual of the Judge Advocate General (JAGMAN)[57] outlines 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,[58]

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[53] 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.

[54] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2008).

[55] U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION (19 Sep. 1994).

[56] U.S. DEP'T OF AIR FORCE, INSTR. 51-301, CIVIL LITIGATION (1 Jul. 2002).

[57] U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN), para. 6020 (14 Mar. 2004).

[58] U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES (21 Mar. 2008).

provides guidance on the management of potential claims against the U.S. Government under a variety of theories and statutory authorities.[59]

Finally, judge advocates need to recognize that service members and commanders involved in use of force incidents will probably have less legal and practical protection than their counterparts in federal law enforcement. Caselaw 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. These officers 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 do not have the benefit of this well-defined caselaw. Judges could potentially decide cases of first impression involving service members less deferentially than they have for law enforcement officials. Finally, Congress does not extend immunity that is routinely applied to federal law enforcement to Army domestic operations.[60]

G. Common Issues in Drafting and Training RUF

During domestic operations planning and execution, judge advocates may draft, interpret, or conduct training on the RUF on short notice. In this atmosphere of crisis planning, judge advocates must carefully balance the interests of protecting the rights of the public against the force protection concerns of service members in potentially dangerous situations. Accordingly, striking the appropriate balance requires that judge advocates: understand the law and policies that shape this area of practice, including key Supreme Court decisions; have a basic understanding of both tactical engagements applying RUF; and consider the psychological and physiological responses of citizens confronted with a use of force scenario.

1. Training of Judge Advocates

Although RUF is rarely at the forefront of training for judge advocates, leaders should seek opportunities for their judge advocates to obtain basic training in the deployment of weapons in tactical engagements.[61] If available, training with police or special forces elements can provide

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[59] 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 $1.3 million. *See U.S. Settles with Family in Fatal Border Shooting*, NY TIMES (August 12, 1998), http://www.nytimes.com/1998/08/12/us/national-news-briefs-us-settles-with-family-in-fatal-border-shooting.html (last visited Jul. 7, 2011).

[60] Congress, recognizing that the scope of duties for federal law enforcement officers does not 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 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.

[61] 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 on the tactical

judge advocates with great insight into the challenges confronted by a soldier in a lethal force encounter.

Ideally the 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. 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 a more nuanced appreciation for application of the RUF. Although scenario training that does not involve actual hands on experience cannot replicate the physiological and psychological responses associated with a tactical engagement, 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. Further, these scenarios can be developed to highlight the challenges that often face RUF planners and drafters and thus improve upon their ability to draft, provide advice concerning, and train RUF.

2. 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, respectively. RUF practitioners whether being asked to propose mission specific RUF, advise on existing RUF, or to train RUF need to be sensitive to several areas that often become the source of confusion or error.

The following are discussed in greater detail, supra, but care must be undertaken to understand the interface of the following concepts with the SRUF. These 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 that required by the SRUF that may have the inadvertent effect of depriving a Soldier of otherwise valid defenses available to federal officers acting in their official capacities. Such restrictions could come from the imposition of additional preconditions to the use of force beyond that of "reasonable belief," imposing a duty to retreat by inappropriately relying on state law as it relates to the use of force by private citizens, or by attempting to further restrict the right of self-defense.

Another potential source of confusion can flow from an effort to reconcile portions of AR 190-14, Carrying of Firearms and Use of Force for Law Enforcement and Security Duties[62] 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."[63]

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use of small arms and other lethal and non-lethal weapons will improve a judge advocate's ability to support the warfighter and the command significantly.

[62] 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).

[63] SRUF, *supra* note 2, para. 1.a.

However, AR 190-14, Chapter 3, was revised in 1993 to synchronize with the use of force guidance contained in DOD Directive 5210.56. Subsequently however, the use of force guidance contained in DoDD 5210.56 was specifically rescinded by the SRUF.[64] As such, judge advocates advising in a variety of areas related to law enforcement and security missions to include the development of contractual provisions for contract security forces need to be aware of this disconnect between AR 190-14 and the SRUF. When the provisions of the two cannot be reconciled, the SRUF would 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.

[64] SRUF, *supra* note 2, para. 1.b.

CHAPTER 12

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

KEY REFERENCES:

- 10 U.S.C. §§ 331–335 - 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.
- 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 in the rules for the use of force (RUF) for the National Guard.[5] The policies of DoD and service regulations governing RUF apply to elements of that Department, but not to the National Guard when commanded by state authorities.[6] As a result, the law that is the basis for National Guard RUF is the criminal law of the

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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 and governed by state law. For example, the District of Columbia National Guard is governed by D.C. Code Title 49.

[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. §§ 12,301–12,304.

[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 distinguish those rules of the 54 National Guard jurisdictions which are based upon the criminal laws of those individual jurisdictions. Compare this to either the Chairman of the Joint Chiefs Standing Rules of Engagement (SROE), CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 Jun. 2005) [hereinafter SRUF].

[6] *See, e.g.*, U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (29 Dec. 2011), U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (4 Feb. 1994);; U.S. DEP'T OF DEFENSE, DIR. 5210.56, USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES (1 Nov. 2001, C1 24 Jan. 2002); and U.S. DEPARTMENT OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (15 Jan. 1986, C1 20 Dec. 1989), which apply to "the Military Departments." U.S. DEP'T OF ARMY, REG. 190-14, CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITIES DUTIES (3 Dec. 1993) applies to the "Army National Guard only when called or ordered to active duty in a federal status under the provisions of Title 10, U.S.C."

state in which a National Guard unit is performing the mission.[7] It is the drafting and application of state National Guard RUF, derived from state law and National Guard Bureau policy,[8] that 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 relief from natural disasters, quelling of or 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 7,[11] the 2001–2002 National Guard airport security mission (hereinafter airport security mission), the G8 summit, and the Democratic and Republican National Conventions of 2008.[12] These operations were performed in Title 32 status.[13] As

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[7] A more precise explanation, discussed in the text *infra* subparagraph C.2, 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* subparagraph C.2.

[8] National Guard Bureau policy states that use of force is governed by state law. *See* NATIONAL GUARD REGULATION 500-1/ANGI 10-8101 - NATIONAL GUARD DOMESTIC OPERATIONS (13 JUN 08) [hereinafter NGR 500-1].

[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 6.

[10] *See generally* DEP'T OF DEFENSE, DIR. 2105.28, 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, National Guard Bureau and Active Army regulations do not usually apply unless the state has adopted those regulations as a matter of state law; for more information, see Chapter 10.

[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 request.

A mission conducted by New York National Guard personnel in a Title 32 status after the 9/11 terrorist attacks was 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).

Not discussed in this chapter are National Guard operations performed in support of civil authorities while in a federal active duty status.

[13] U.S. DEP'T OF ARMY, NATIONAL GUARD REG. 350-1, ARMY NATIONAL GUARD TRAINING, para. 2-1a(9) (3 June 1991) (providing that Title 32 status may be used by an Adjutant General for what would otherwise be a state (SAD)

explained in detail in Chapter 10, both SAD and Title 32 statuses are non-federal statuses, to which 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 governed the RUF; however, each state in which an airport was secured by National Guard personnel applied its own criminal law,[15] and airport security missions were executed in nearly all of the 54 National Guard jurisdictions.[16] Consequently, over 50 different RUF were used in the airport security mission. Although most RUF addressed similar subjects, the specific implementation of these subjects varied from state to state.[17] 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 [hereinafter OPLAN/OPORD].[18] 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.[19]

Appendix 12 includes a list of basic RUF subjects and subjects appropriate for National Guard law enforcement, law enforcement support, and security missions. Some of the basic and mission-dependent RUF for law enforcement, law enforcement support, or security missions are discussed below.

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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 supra* Chapter 10, subparagraph B.1.a(1). However, 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] Several of the 54 National Guard jurisdictions, such as the District of Columbia, did not have an airport within the jurisdiction of the Federal Aviation Administration, and therefore had no state mission (and no RUF) for that operation. In each of these Title 32 missions, the National Guard served under the command of National Guard officers in state status and was kept distinct from the command authority of any active Army federal support element.

[17] In 2003, the Counterdrug and Operational Law Team of the Chief Counsel's Office, National Guard Bureau, collected and reviewed virtually all of the state RUF used in the airport security mission. All these RUF are retained by that office in both paper and electronic format.

[18] For a list of those subjects to be included in an operation plan or operation order (OPLAN/OPORDER) for civil disturbance operations, *see* NGB Civil Disturbance Handbook, *supra* note 8, para. 5-3e.

[19] 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.

a. Subjects Appropriate for Inclusion in All 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 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.[20] Mission analysis[21] and state law[22] will determine whether, as part of the general right of self defense, National Guard personnel will be armed. One of the early concerns for NYARNG JAs 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.[23] 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.[24]

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[20] *See* SRUF, *supra* note 5. These documents provide 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 commander may place limits upon unit self-defense and, because individuals make up units, in that way limit the right of individual self-defense. Whether state National Guard RUF may, like paragraph 2 of 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, however, 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.

[21] 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.

[22] 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 on the part of Soldiers, leaders, and in post-incident litigation. Almost all of the topics listed in this section will allow for different conduct by a Soldier acting in self-defense under the two theories.

[23] N.Y. PENAL LAW § 265-20.

[24] NYARNG Transcript, *supra* note 12, at 51.

The RUF must also address such state law topics as the right to defend others,[25] the duty to retreat,[26] the use of deadly force to prevent escapes,[27] the requirement or limit on the use of warnings before the employment of deadly force in self defense,[28] the requirement for the use of proportionality,[29] and whether the place where the right of self defense is exercised has legal implications.[30]

(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 state Adjutant General 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 certainly variations between the states in the National Guard's authority to take actions requiring use of force in a law enforcement,[31] law enforcement support,[32]or security operation. For example, some states by statute give the National Guard the full authority of peace officers.[33] In other states, the National Guard has only those peace officer-type powers enjoyed by the population

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[25] The right to defend others is frequently the subject of the same state statutes that provides 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(2).

[26] 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).

[27] 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).

[28] 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.

[29] 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. *See* airport security mission RUF of the states of Colorado, Idaho, Michigan, Texas, Virginia, and Wyoming (on file with CLAMO). 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.

[30] 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.

[31] Because the Posse Comitatus Act, 18 U.S.C. § 1385 (2006) [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 text infra subparagraph C.2.

[32] 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.

[33] 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.

at large.[34] Still others provide that the National Guard has certain specific authorities in limited situations.[35] 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.[36] 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 state Adjutant General.[37] *See* DOPLAW Handbook, Supp., App. 12-3, for an information paper discussing the impact of state criminal law on RUF.

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) must or may be taken, and the level of force that may be used should also be covered. 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.

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[34] *See, e.g.*, Iowa RUF for the airport security mission "Task Force Freedom Flight - Airport Security Instructions," para. 4 (on file with CLAMO), 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") (on file with CLAMO); 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") (on file with CLAMO). 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 peace officers, the provision was not used because the Act also required a lengthy training period. *See* NYARNG Transcript, *supra* note 12, at 52.

[35] *See, e.g.*, GA. CODE ANN. § 38-2-6–38-2-6.1.

[36] 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."

[37] For the purposes of the airport security mission, some states adopted more restrictive RUF than state law allowed. *See, e.g.*, Annex E Rules of Engagement (ROE), para. 2, as approved by Wisconsin Attorney General Doyle (4 Oct. 2001) (in which Wisconsin National Guard authorities explained that the effect of Wis. Stat. Ann. § 939.22(22) was to grant National Guard personnel the authority of peace officers, but that the policy of the National Guard was to grant only those "specified tasks of the requesting civil authorities denoted by special operations orders") (on file with CLAMO).

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.[38] When this device is used, National Guard judge advocates must ensure that a statutory or other system exists for the designation of this property.

(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. Additional terms are included in *Appendix 12*.

(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. This control includes the employment of the firearms and ammunition or other weapons. One method is to specify how Soldiers will carry their weapons, ammunition, and other ancillary equipment. This control can be 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 Soldier 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.[39] Below is an example of arming orders used by the Indiana National Guard for the airport security mission.

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[38] 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.

[39] 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 Soldier or airman 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

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*

* Leave safety on until ready to fire

(4) THREATCON Levels Matched to RUF

Another method of control includes adjusting the readiness posture in relation to the threat condition,[40] or THREATCON.[41] One way to make RUF dependent upon THREATCON level is through use of arming orders in which the order number (condition of readiness of the firearm or other weapon) relates to the THREATCON in effect.[42]

(5) Special Orders

There are other subjects appropriate for inclusion in National Guard RUF for law enforcement, law enforcement support, or security missions that concern use of force. Subjects to consider include: the relationship of National Guard personnel to civilian law enforcement personnel,[43] acting at the

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expect that each service members 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.

[40] The THREATCON levels are ALPHA, BRAVO, CHARLEY, and DELTA. U.S. DEP'TS OF ARMY AND AIR FORCE, NATIONAL GUARD BUREAU PAM 190-1/AIR FORCE NATIONAL GUARD PAM 208-2, App. A (15 July 1986) [hereinafter NGBP 190-1/ANGP 208-2]. Note that this is different from the Force Protection Condition (FPCON) approach used by DoD and the Army. Army FPCONs are progressive levels of security measures implemented in response to threats facing DoD and Army personnel, information and critical resources. *See* U.S. DEP'T OF DEFENSE, DIR. 2000.12, DOD ANTITERRORRISM PROGRAM (18 Aug. 2003).

[41] Texas Rules for the Use of Force for the airport security mission specifically relied on THREATCON levels. Other states providing for "levels" of threat or RUF for the purposes of the airport security mission were Arkansas and North Carolina.

[42] The THREATCON levels provided in NGBP 190-1/ANGP 208-2, *supra* note 40, provide for increased security measures depending on the particular THREATCON level then in effect. *See id.* App. A, paras. A-7–A-10.

[43] 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 8; and, for the purposes of the airport security mission, 29 Sept. 2001 ARNG Airport Security Instructions, para. 2-1 [hereinafter ARNG Airport Security Instructions] (on file with CLAMO). *See id.* para. 3-6b, limiting the National Guard to a law enforcement support role during the airport security mission.

direction of civilian law enforcement,[44] defense of others, pursuit of suspects, retention of evidence,[45] use of restraints, reports of firearm discharge,[46] or other use of deadly force, accountability of weapons and ammunition, and a prohibition against use of non-issued weapons and ammunition should be considered.

C. Specific RUF Issues

1. RUF in Interstate (Cross Border) Operations

National Guard forces have for many years crossed 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, especially training missions, the units carry their organic weapons. In some states, however, state code or constitutions 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[47] may be a viable defense available to a National Guard force crossing a state border for federal training purposes in violation of a proscription like that in Texas statutes referred to above. If Federal Supremacy Clause immunity is successful in defense of a violation of state law, then State RUF would not appear to be an issue in cross-border operations (unless the RUF themselves are unconstitutional),[48] except for those operations undertaken in an SAD status.[49]

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.[50] The latest adopted or

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[44] 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. Another benefit of taking law enforcement-type action only at the express request or direction of law enforcement personnel may be that National Guard members are in those cases 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).

[45] DA Form 3316R (Detainee Turnover Record) may be used to inventory items taken from detainees.

[46] ARNG Airport Security Instruction, *supra* note 43, 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.

[47] *See* text infra subparagraph C.2.

[48] For an example of unconstitutional RUF, see Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997).

[49] It is even more likely that an armed National Guard force would be seen as a threat if entering the state in an SAD status to control civil unrest than in a purely training mission under 32 U.S.C. § 502(f). Some MSCA missions undertaken for state purposes may be counted as training; however, under NGR 350-1, *supra* note 13, para. 2-1a(9), and federal Supremacy Clause, immunity may be available to protect that mission or part of that mission.

[50] AMERICAN LAW SOURCE ON-LINE, *United States – Interstate Compacts*, http://www.lawsource.com/also/usa.cgi?usi (last visited Jul. 7, 2011) provides a significant listing of interstate compacts, including those of most direct concern to

enacted of these compacts available for use in 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).[51] 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 and the possibility of its use in situations where the use of force may be necessary is clearly great.[52]

EMAC, like all congressionally-approved interstate compacts, is federal law.[53] As such, it is applied in the same manner as other federal legislation.[54] 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.[55] Further, peace officer powers granted by the requesting state's statutes only to the National Guard forces of that state[56] may be granted to the National Guard forces of the sending state by the use of one or more EMAC supplemental agreements.[57]

Finally, National Guard judge advocates advising the State Adjutant General or Task Force commander for the sending and/or receiving state in cross-border law enforcement operations in a SAD or Title 32 status under EMAC should take note of Art. XIII ("Other Provisions") of that

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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.

[51] 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 was what state would have command and control over service members from other states. NYARNG Transcript, *supra* note 12, at 35-6.

[52] 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].

[53] *See, e.g.*, Texas v. New Mexico, 462 U.S. 554 (1983).

[54] *See, e.g.*, Skamania County v. Woodall, 16 P.3d 701 (Wash. 2001).

[55] 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 56, art. IV, para.1.

[56] *See* ARK. CODE ANN. § 12-61-112(a).

[57] 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 51, 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.

compact.[58] This provision is untested in the courts[59] but its apparent intent is to apply the PCA to National Guard operations, by denying the use of EMAC to the National Guard[60] in situations where the PCA would prevent the active components of the Army and Air Force from providing direct law enforcement services. Under most situations, this proscription will have little impact on National Guard cross border operations and the RUF because National Guard activities are usually limited to providing law enforcement support to civil authorities, rather than providing direct law enforcement service.[61] National Guard judge advocates should be mindful of this limitation, however, so that if EMAC is relied upon for any aspect of a cross-border operation to which Art. XIII might apply, National Guard authorities will be advised appropriately.

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.[62] The subject is 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[63] and both Title 32 status[64] 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.[65]

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[58] S*ee* EMAC, *supra* note 51, art. XIII (providing that "[n]othing in this compact shall authorize or permit the use of military force by the National Guard of a state at any place outside that state if any emergency for which the President is authorized by law to call into federal service the militia or for any purpose for which the use of the Army or Air Force would in the absence of express statutory authorization be prohibited under Section 1385 of title 18, United States Code").

[59] Telephone Interview with Ms. Amy Hughes, Policy Analyst for the National Emergency Management Association (NEMA), Lexington, KY (June 2003), which administers the NEMA website and provides support for the administration of EMAC.

[60] In other words, not prohibiting the National Guard from crossing a state border in a particular case but only prohibiting the use of EMAC as the authority to do so, so that if another interstate compact exists upon which to rely, or in the event that use of such a compact is considered unnecessary, the National Guard force may still cross the border in an SAD status for the purposes of an armed law enforcement mission.

[61] *See* NGR 500-1, *supra* note 8, 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 Mission Instruction, *supra* note 46, paras. 2-1e, 2-8.

[62] *See, e.g.*, Airport security mission RUF for the states of Nevada, New Jersey, and New York (on file with CLAMO).

[63] 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.

[64] This was the case in the airport security mission.

[65] 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.

a. Active Duty Federal Mission

Although the early history of the doctrine of Federal Supremacy Clause immunity[66] began somewhat before the case was decided,[67] 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 the Neagle 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,[68] defamation,[69] assault,[70] and murder in the course of guarding prisoners of the U.S. Army.[71] 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.[72]

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.[73] In this case, based largely on the court's understanding of the guard's federal duties, the guard was acquitted of manslaughter.

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[66] *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

[67] A U.S. Supreme Court case predating *Neagle* is Tennessee v. Davis, 100 U.S. 257 (1880).

[68] *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).

[69] Howard v. Sikula, 627 F. Supp. 497 (S.D. Ohio 1986).

[70] *See* Lima v. Lawler, 63 F. Supp. 446 (E.D. Va. 1945); Commonwealth v. Johnson, 297 F.Supp. 877 (W.D. Pa. 1969).

[71] *See* In re Fair, 100 F. 149 (C.C.D. Neb. 1900) and United States v. Lipsett, 156 F. 65 (W.D. Mich. 907).

[72] 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).

[73] United States v. Lipsett, 156 F. 65 (W.D. Mich. 907).

The only reported case found involving federal RUF is a non-military civil case involving the RUF used by the FBI in the shootings and 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 unlawfully deny the victim his constitutional rights, but the RUF may be subject to the same Fourth Amendment constitutional standard as the actions of the federal officer or agent.

b. Title 32 or SAD Status and Mission

The beginning of this chapter discussed the holding of *Perpich*[74] 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[75] resulting from good faith compliance with *state* RUF include:

- A state statute providing *criminal* immunity for National Guard personnel.[76]
- An agreement with the State Attorney General (possibly at the time the state Attorney General gives any approval of the RUF[77]) that National Guard personnel will not be prosecuted criminally for good faith compliance with the National Guard RUF.[78]
- Extension of the doctrine of Federal Supremacy Clause immunity to National Guard personnel if 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,[79] 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. Caselaw clearly

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[74] Perpich v. Department of Defense, 496 U.S. 334 (1990).

[75] 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.

[76] 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).

[77] The ARNG airport security instruction required the National Guard RUF used for that mission be reviewed by the state Attorney General. ARNG Airport Security Instruction, *supra* note 46, para. 3-6a

[78] 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).

[79] 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).

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.[80]

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 judge advocates must pay close attention to the RUF if active duty and National Guard Soldiers have 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.[81]

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. In addition, judge advocates should be directly involved in the production of RUF-related documents, such as information papers, memoranda of law, and memoranda of agreement with supported civil authorities.[82] Some MOAs may contain hold harmless provisions[83] 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 Soldiers' skills, training, capabilities, weapons, and mission. It may be necessary to add provisions specifically applicable to the National Guard.

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[80] 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).

[81] 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 500-1 applies, when federal equipment is used the RUF provides that deadly force may be used for the prevention of the destruction of "property vital to public health and safety" (undefined). *See* NGR 500-1, *supra* note 8, paras. 4-6 and 4-6b(3)(c). Some states followed this authorization for the purposes of the airport security operation, even though that operation was not a civil disturbance operation, but was an airline security operation. *See, e.g.*, Missouri RUF for airport security mission ("Commander's Guidance on Use of Force"), Force Continuum Deadly Force, para. 3c (on file with CLAMO). In contrast, the analogous provision of the draft SRUF, *supra* note 5, para. 5c(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."

[82] 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 Mission Instruction, *supra* note 46, para. 2-8a.

[83] *See, e.g.*, Memorandum of Understanding with the Kansas National Guard and supported airports, para. 11 (on file with CLAMO).

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.[84]

3. Providing Legal Advice on Liability

Counseling decision makers on the legal requirements necessary to protect Soldiers from civil and criminal liability can be a complicated task. The primary focus of the judge advocate's counseling will be the state Adjutant General; 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 Soldiers learn and apply the correct standards for force. In this role, judge advocates can write or assist in writing information papers, training vignettes, and legal memoranda. Also, the use of a training certification process may be useful.[85]

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[84] NYARNG Transcript, *supra* note 12, at 184.

[85] *See, e.g.*, State of Nevada Military Department Legal Annex to Rules of Engagement, para. VI 10 and Rhode Island Task Force Green Security Detail, App. A (Rules for the Use of Force) (copies on file with CLAMO).

CHAPTER 13

FUNDING DOMESTIC SUPPORT OPERATIONS

KEY REFERENCES:

- 18 U.S.C. § 1385 - Posse Comitatus Act.
- 10 U.S.C. §§ 371–382 - Military Support For Civilian Law Enforcement Agencies.
- 10 U.S.C. §§ 331–334 - Insurrection Act.
- 10 U.S.C. § 2012 - Innovative Readiness Training.
- 10 U.S.C. § 2551 - Equipment and other services: National Veterans' Organizations.
- 10 U.S.C. § 2552 - Equipment and other services: American Red Cross.
- 10 U.S.C. § 2554 - Equipment and other services: Boy Scout Jamborees.
- 10 U.S.C. § 2555 - Equipment and services: Girl Scouts of America.
- 10 U.S.C. § 2556 - Equipment and services: Homeless.
- 10 U.S.C. § 2558 - Equipment and services: National Military Associations.
- 10 U.S.C. § 2562 - Prohibition on Transfer of construction of firefighting equipment in FMS.
- 10 U.S.C. § 2564 - Provision of Support for Certain Sporting Events.
- 10 U.S.C. § 2576 - Sale or Donation of Military Equipment.
- 10 U.S.C. § 2667 - Lease of DoD Property.
- 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).
- National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-139, § 8131 (Emergency Response Fund, Defense).
- National Defense Authorization Act for Fiscal Year 1996, 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.
- 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, § 1022 (Extension and Restatement of Authority to Provide Department of Defense Support for Counter-Drug Activities of other Governmental Agencies).
- DoDD 1100.20 - Support and Services for Eligible Organizations and Activities Outside the Department of Defense, April 12, 2004.
- DoDD 2000.15 - Support to Special Events, December 8, 2003.

- DoDD 3025.18 - Defense Support of Civil Authorities, December 29, 2010.
- DoD 3025.1M - Manual for Civil Emergencies, June 94.
- DoDD 3025.12 - Military Assistance for Civil Disturbances, February 4, 1994.
- DoDD 5200.31E - Single Manager for DoD Military Working Dog Program, March 29, 2006.
- DoDD 5525.5 - DoD Cooperation With Civilian Law Enforcement Officials, January 15, 1986 (with Chg. 1, December 20, 1989).
- DoD Financial Management Regulation (FMR) 7000.14-R, vol. 12, ch. 6.
- NGR 500-1/ ANGI 10-8101 - Military Support to Civil Authorities, June 13, 2008.
- NGB 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, June 4, 2007.
- 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 3440.16C - Navy Civil Emergency Management Program, March 10, 2005.
- AFI 10-801 - Air Force Assistance to Civilian Law Enforcement Agencies, April 15, 1994.
- AFI 10-802 - Military Support to Civil Authorities, April 19, 2002.
- AFI 31-202 - Military Working Dog Program, May 16, 2009.
- Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAWYER, July 1997

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 administrative and/or criminal sanctions against those responsible for funding violations. There are several sources that define fund obligation and expenditure authority: (1) Title 10, U.S. Code; (2) Title 31, U.S. Code; (3) Department of Defense (DoD) appropriation acts; (4) DoD authorization acts; (5) agency regulations; (6) Department of Justice Office of Legal Counsel opinions; (7) Comptroller General decisions; and (8) other executive agencies' authorities.

Under the Constitution, Congress raises revenue and appropriates funds for federal agency operations and programs. *See* U.S. CONST., art. I, § 7. Courts interpret this constitutional authority to mean that Executive Branch officials, e.g., commanders and staff members, must find affirmative authority for the obligation and expenditure of appropriated funds.[1] *See, e.g.*, U.S. v. MacCollom,

[1] 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.

426 U.S. 317, at 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.") 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 for DoD to provide support. For other authorized activities, Congress has established special "no year" accounts (such as the Defense Emergency Response Fund (DERF) 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; (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); and (3) obligations must be within the amounts authorized by Congress.

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." *See* 31 U.S.C. § 1301(a). 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. *See* Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); *cf.* 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law). Appropriated funds designated for a general purpose may not be used for another purpose for which Congress has appropriated other funds. Secretary of the Navy, 20 Comp. Gen. 272 (1940). 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. *See* Funding for Army Repair Projects, Comp. Gen. B-272191, Nov. 4, 1997, 97-2 CPD P141. This concept is known legally as the "election doctrine," and the election is binding even after the chosen appropriation is exhausted.

Honorable Clarence Cannon, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).

If an agency obligates funds outside the normal appropriation process, then the agency is augmenting the funds that Congress has appropriated. In addition retaining those funds violates the Miscellaneous Receipts Statute. *See* 31 U.S.C. § 3302(b); s*ee also* Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992). In addition, when the retained funds are expended, this also violates the constitutional requirement for an appropriation. *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).

There are, however, statutory 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. *See, e.g.*, Economy Act, 31 U.S.C. § 1535. 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. *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). Judge advocates may wish to consult agency regulations for order approval requirements. *See, e.g.*, Federal Acquisition Regulation Subpart 17.5; Defense Federal Acquisition Regulation Subpart 217.5; and the 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. *See* 10 U.S.C. § 377. Another statutory provision authorizes operations or training to be conducted for the sole purpose of providing CLEAs with specific categories of support. *See* § 1004 of the 1991 Defense Authorization Act, codified at 10 U.S.C. § 374, note. 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.

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. *See* 31 U.S.C. § 1502(a). 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, as long as a current need is documented. Note that there are "lead-time" and "stock-level" exceptions to the general rule governing purchases of supplies. *See* Defense Finance and Accounting Service Reg. Indianapolis 37-1 [DFAS-IN 37-1], ch. 8. In any event, "stockpiling" items is prohibited. *See* Mr. H.V. Higley, B-134277, Dec. 18, 1957 (unpub.).

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, nonseverable services are bona fide needs of the year in which a contract (or other agreement) is executed. Nonseverable services are those that contemplate a single undertaking, e.g., studies, reports, overhaul of an engine, painting a building, etc. Fund the entire undertaking with appropriations current when the contract (or agreement) is executed. *See* DFAS-IN 37-1, ch. 8.

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 (31 U.S.C. § 1341); 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) (31 U.S.C. § 1517); or accepting voluntary services, unless authorized by law (31 U.S.C. § 1342).

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. *See* 31 U.S.C. § 1514(a) (requiring agencies to subdivide and control appropriations by establishing administrative subdivisions); 31 U.S.C. 1517; DFAS-IN 37-1, ch. 4.

Commanders must investigate suspected violations to establish responsibility and discipline violators. Regulations require "flash reporting" of possible ADA violations. DoD 7000.14-R, Financial Management Regulation, vol. 14; DFAS-IN 37-1, ch. 4. 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 if ASA (FM&C) concurs with a finding of violation.

By regulation, commanders must impose administrative sanctions on responsible individuals. Criminal action also may be taken if a violation was knowing and willful (31 U.S.C. § 1349, § 1350). 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 $750,000 with O&M; acquiring investment items 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 military's mission is to fight and win the nation's wars. DoD will cooperate with civil authorities, but the relationship is generally one of *support—the civilian authorities retain primary responsibility*. The starting point for all DoD support is DoD Directive (DoDD) 3025.18. The Posse Comitatus Act (18 U.S.C. § 1385) provides limitations on the types of support that the military may provide to civil authorities. The following consist of allowable military support to domestic operations.

- Civil disasters and emergencies. Stafford Act (42 U.S.C. §§ 5121, *et seq*.), DoDD 3025.18.
- Civil disturbances; Insurrection Act. 10 U.S.C. §§ 331-34, DoDD 3025.12.
- Support to civilian law enforcement:
    - Loan of equipment. 10 U.S.C. § 372, DoDD 5525.5;
    - Expert advice and training. 10 U.S.C. § 373, DoDD 5525.5;
    - Sharing information. 10 U.S.C. § 371, DoDD 5525.5; and
    - Maintenance and operation of equipment. 10 U.S.C. § 374, DoDD 5525.5.
- Counterdrug support:
    - Detection and monitoring. 10 U.S.C. § 124; and
    - Training and other support. Section 1004, Fiscal Year (FY) 91 NDAA, as amended by Section 1021, FY 02, NDAA; CJCSI 3710.01B.
- Individual 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), DoDD 2000.15.
- 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. § 1535 (to other federal agencies), 10 U.S.C. § 2667 (to anyone), and Army Regulation (AR) 700-131, Loan and Lease of Army Material.
- Military Assistance to Safety and Traffic (MAST). DoDD 3025.1M.
- Explosive Ordinance Disposal (EOD): AR 75-14, AR 75-15.
- Military Working Dogs. DoDD 5200.31, AR 190-21.
- Miscellaneous support:

    - Sensitive support. DoDD S-5210-36;
    - Law enforcement detachments. 10 U.S.C. § 379; and
    - Emergencies involving chemical or biological weapons. 10 U.S.C. § 382.

D. DoDD 3025.18

This Directive governs *all* DoD military assistance provided to civil authorities within the 50 States, District of Columbia, Puerto Rico, and U.S. possessions and territories. It provides six criteria against which all requests for support shall be evaluated. Commanders at all levels should use these criteria in providing a recommendation up the chain of command.

- Legality - compliance with the law.
- Lethality - potential use of lethal force by or against DoD forces.
- Risk - safety of DoD forces.
- Cost - who pays and the impact on DoD budget.
- Appropriateness - whether conducting the requested mission is in the interest of DoD.
- Readiness - impact on DoD's ability to perform its primary mission.

The Secretary of Defense (SECDEF) is the approval authority for civil disturbances, responses to acts of terrorism, and support that will result in a planned event with the potential for confrontation with specifically identified individuals or groups, or which will result in the use of lethal force.

When Combatant Command-assigned forces are to be used, there must be coordination with the Chairman of the Joint Chiefs of Staff (CJCS). CJCS will determine whether there is a significant issue requiring SECDEF approval, after coordination with the affected Combatant Command. Immediate response authority in the local commander is not affected. However, previously, local commanders could engage in support operations under an unwritten rule that such support should not normally extend beyond 72 hours. That rule is now memorialized formally in DoDD 3025.18 at para. 4(g)(2) (noting 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.")

E. Disaster and Emergency Relief[2]

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* (42 U.S.C. § 5170); the President may declare the area an *emergency* (42 U.S.C. § 5191) (same criteria as for a major disaster, except also requires that the governor define the *type* and *amount* of federal aid required, and total federal assistance may not exceed $5 million); the President may send in DoD assets on an *emergency* basis to "preserve life and property" (42 U.S.C. § 5170b(c)); 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 (42 U.S.C. § 5191(b)).

The Department of Homeland Security, through the Federal Emergency Management Agency (FEMA) directs and coordinates the federal response on behalf of the President. DHS has prepared the *National Response Framework*, which defines fifteen Emergency Support Functions (ESF's) 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.

The Federal Emergency Management Agency 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.

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 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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[2] Disaster Relief Statutes (Stafford Act), 42 U.S.C. § 5121; U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (29 Dec. 2010); U.S. DEP'T OF DEFENSE, MAN. DOD 3025.1-M, DOD MANUAL FOR CIVIL EMERGENCIES (Jun. 1994); NATIONAL GUARD BUREAU, REG. 500-1/ANGI 10-8101, MILITARY SUPPORT TO CIVIL AUTHORITIES (13 Jun. 2008) [hereinafter NGR 500-1]; CHIEF OF NAVAL OPERATIONS, INSTR. 3440.1C; NAVY CIVIL EMERGENCY MANAGEMENT; U.S. DEP'T OF AIR FORCE, INSTR. 10-802, MILITARY SUPPORT TO CIVIL AUTHORITIES (19 Apr. 2002).

- 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 (see discussion of DoDD 3025.18, above). 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, Puerto Rico, and the Virgin Islands) and USPACOM (Alaska, Hawaii, and Pacific possessions and territories) are responsible for developing disaster response plans and for the execution of those plans. They may form a Joint Task Force for this purpose.

1. Immediate Response Authority

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 <u>not</u> be denied because the requester is unable or unwilling to commit to reimbursement.

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 JDOMS has indicated that this assistance should not exceed 72 hours. 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. Often, the state and local governments do not have the available funding to reimburse. As a result, in the past DoD has looked to the Defense Emergency Response Fund for reimbursement.

2. Defense Emergency Response Fund (DERF)

The DERF 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 DERF 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 failed to reimburse, the command would forward reimbursement to the DERF. DoD Financial Management Regulation 7000.14-R, vol. 12, ch. 6. This fund is 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 DERF has been closed out (§ 1105 of the FY04 Emergency Supplemental Appropriations Act). This section provides that, effective 1 Nov. 2003, adjustments to obligations that before such date would have been properly chargeable to the DERF shall be charged to current appropriations available for the same purpose. If the DERF does not cover the costs, the request should be forwarded to FEMA. On rare occasions, FEMA has provided reimbursement to the DoD for Immediate Response assistance by "ratifying" the DoD action after the fact. Such ratification, however, is done on a case-by-case basis. Commanders cannot rely on FEMA doing so in every case. FEMA is under no obligation to reimburse the DoD for response actions taken prior to a Presidential Declaration and in some case may not have the legal authority to reimburse DoD if no Presidential declaration occurs. If no one reimburses the affected command, the costs of the Immediate Response assistance are funded through unit O&M, which is the most likely outcome. In some rare circumstances, such as man-made disasters, funding available under OPERATION NOBLE EAGLE may provide a solution.

3. Disaster Support Involving Law Enforcement Authorities

The Stafford Act is not an exception to the Posse Comitatus Act (PCA) (18 U.S.C. § 1385). Therefore, any support that includes direct involvement in the enforcement of the civil law must undergo the PCA analysis discussed below. Typical areas of concern include directing traffic, guarding supply depots, and patrolling. National Guard personnel, acting in their Title 32 (State) status, should be used whenever possible. Law enforcement duties that involve military functions may be permissible (e.g., guarding a military supply depot).

F. Civil Disturbances[3]

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

[3] 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. §§ 331–335; U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) (4 Feb. 1994).

these authorities to conduct law enforcement activities is a specific exception to the 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 state status; (3) federal civil law enforcement officials; and (4) Federal military troops, to include National Guard called to active federal service.

The insurrection statutes permit the President to use the 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. 10 U.S.C. § 334. At the end of that time period, the President may issue an Executive Order directing the use of 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 to himself the authority to approve support in response to civil disturbances (DoDD 3025.18). Although the civilian authorities have the primary responsibility for civil disturbances, military forces shall remain under military command and control at all times. Military forces shall not be used for civil disturbances unless specifically directed by the President (pursuant to 10 U.S.C. §§ 331-334), *except* for emergency employment of 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.
- 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 military forces (federal), then this is a DoD mission and O&M funds are used to cover the cost.

G. Support to Civilian Law Enforcement.[4]

Although certain activities could be considered law enforcement type activities, they do not violate the PCA because they do not involve use of military personnel to provide direct assistance. With proper approval, DoD activities may make equipment (including associated supplies and spare parts), base facilities, or research facilities available to federal, state, or local law enforcement officials for law enforcement purposes. (This authority is expanded for chemical or biological incidents.)

[4] 10 U.S.C. §§ 372–374, 377; U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, Encl. 3 (15 Jan. 1986) [hereinafter DoDD 5525.5]; NGR 500-1, *supra* note 2; 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 AIR FORCE, INSTR. 10-802, MILITARY SUPPORT TO CIVIL AUTHORITIES, Attachment 4 (18 Apr. 2002) [hereinafter AFI 10-802].

Under 10 U.S.C. § 374(a), SECDEF may make DoD personnel available for the maintenance of equipment provided, to include equipment provided pursuant to 10 U.S.C. § 372. Under 10 U.S.C. § 374(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. § 374(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; and
    - Transportation of suspected terrorists from foreign countries to the U.S. 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).

1. Economy Act

Pursuant to 10 U.S.C. § 377, 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. (Federal Acquisition Regulation (FAR) 2.101) 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 authority like the Economy Act that allows an agency to retain the money. Although the language in 10 U.S.C. § 372 *et seq.* authorizes support to state and local civilian law

enforcement agencies, the reimbursement provision in 10 U.S.C. § 377 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 into Miscellaneous Receipts. 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 SECDEF is the approval authority for any requests for potentially lethal support, including loans of arms, combat and tactical vehicles, vessels, aircraft, or ammunition. For the Army, HQDA (DALO-SMS) may approve requests for non-lethal equipment in excess of sixty days. The installation commander may approve all other equipment requests if loan/lease is for sixty days or less. The HQDA (DAMO-ODS) may approve requests for use of installation or research facilities. 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, Assistant Secretary of the Air Force (SECAF) for Manpower, Reserve Affairs, Installations, and Environment may approve requests for all non-drug related requests (AFI 10-801, Attachment 4). For the National Guard (NG), the loan of weapons, combat/tactical 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) (NGB 500-1/ANGI 10-8101).

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. 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. § 2576a authorizes the surplus sale or donation of military equipment to federal and state agencies for law enforcement. The primary focus is to support counter-drug or counter-terrorism activities. Recipient takes equipment on an as-is, where-is basis at no cost to DoD, and equipment must be drawn from current stocks.

10 U.S.C. § 2576b authorizes the surplus sale or donation of military property to any firefighting agency in a state. Additionally, the same conditions concerning as-is and where-is, as noted above, apply to this provision. Authority to furnish small arms and ammunition is included. As of October 1, 1995, the Defense Logistics Agency manages this program (Memorandum of the Secretary of Defense for the Under Secretary of Defense for Acquisition and Technology, 26 June 1995). The four Regional Logistics Support Offices (Buffalo, Miami, El Paso, and Los Angeles) actually provide this excess property.

4. Expert Advice and Training[5]

Military personnel may be used to *train* civilian law enforcement personnel in the use of equipment that the military provides. Large scale or elaborate training programs are prohibited, as is regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations. The Deputy Secretary of Defense has provided policy guidance in this area, which limits the types of training U.S. forces may provide. The policy is based on prudent concerns that advanced training could be misapplied or misused by CLEAs, resulting in death or injury to non-hostile persons.

The memorandum permits basic military training such as basic marksmanship, patrolling, medical/combat lifesaver, mission planning, and survival skills. It prohibits what it terms "advance military training," which is defined as "high intensity training which focuses on the tactics, techniques, and procedures (TTPs) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists." Examples of such training are sniper training, Military Operations in Urban Terrain (MOUT), Advanced MOUT, and Close Quarter Battle/Close Quarter Combat (CQB/CQC) training. A single general exception exists to provide this advanced training at the U.S. Army Military Police School. In addition, Commander, U.S. Special Operations Command may approve this training, on an exceptional basis, by special operations forces personnel.

Military personnel may also be called upon to provide *expert advice* to civilian law enforcement personnel. However, regular or direct involvement in activities that are fundamentally civilian law enforcement operations is prohibited. 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 (DoDD 5525.10, Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions, 17 Sept. 1990; Military Working Dog Program, AFI 31-202).

The SECDEF is the approval authority for training or expert advice to law enforcement in which there is a potential for confrontation between the trained law enforcement and specifically identified civilian individuals or groups, for assignments of fifty or more DoD personnel, or for a period of assignment of more than thirty days. The Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) is the approval authority for any other assignment. For the Army, Joint Director of Military Support (JDOMS) is the approval authority. For the Navy and Marine Corps, it is the Secretary of the Navy (SECNAVINST 5820.7C, para. 9.e).

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 results in a substantially equivalent training value. It is important to note that pursuant to 31 U.S.C. § 6505, the "Intergovernmental Cooperation Act," authorizes federal agencies 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."

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[5] 10 U.S.C. §§ 373, 375, 377; 50 U.S.C. §§ 2312, 2315; DoDD 5525.5, *supra* note 4, Encl. 4; SECNAVINST 5820.7C, *supra* note 4, paras. 9.a.(4)–(5); AFI 10-802, *supra* note 4.

This list is very specific and really does not include the type of operational assistance that state and local governments request from DoD. Two common requests 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.

What 31 U.S.C. § 6505 does provide for is a reimbursement mechanism between the federal and state/local level because 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[6]

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 (10 U.S.C. § 371(b)).

H. Counterdrug Support[7]

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. For FY04, Congress appropriated nearly $836 million for DoD counterdrug support. The Office of the Defense Coordinator for Drug Enforcement Policy and Support channels that money to the providers of counterdrug support.

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 (10 U.S.C. § 124). 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

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[6] 10 U.S.C. § 371; DoDD 5525.5, *supra* note 4, Encl. 2; SECNAVINST 5820.7C, *supra* note 4, para. 7; AFI 10-802, *supra* note 4, ch. 4.

[7] 10 U.S.C. § 124; 32 U.S.C. § 112; sec. 1004, FY91 NDAA as amended by sec. 1021, FY02 NDAA; sec. 1031, FY97 NDAA; sec. 1033, FY98 NDAA; DEP&S Policy of 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).

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, as amended by § 1021, 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 DoDD 5525.5 and implementing Service regulations, discussed above. For operational support, the 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. *See* CJCSI 3710.01B. Example: 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 was extended by § 1021 of the FY 2009 National Defense Authorization Act. This authority is subject to extension by the annual National Defense Authorization Act; the latest NDAA will determine what funds have been specifically authorized by Congress, who those funds were authorized for, and what the funding limitations are.

I. Innovative Readiness Training[8]

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 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

[8] 10 U.S.C. § 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); DoD Policy Memoranda dated July 1999, Aug. 2000, and Apr. 2002.

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 (19 July 1999, DoD policy memorandum). 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[9]

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.

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 this statutory provision does not apply to Special Olympics and The Paralympics because these events are 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 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.

[9] 10 U.S.C. § 2564; U.S. DEP'T OF DEFENSE, DIR. 2000.15, SUPPORT TO SPECIAL EVENTS (8 Dec. 2003) [hereinafter DoDD 2000.15].

The SISC account established in 1996 pursuant to Pub. L. No. 104-208, § 5802 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 FY2002, Pub. L. No. 107-107, § 302, Congress amended the law to include state active duty and full-time National Guard 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.

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[10]

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 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:

- 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; and
- The availability of commercial resources such as commercial lessors.

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.

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[10] 10 U.S.C. § 2667; U.S. DEP'T OF ARMY, REG. 700-131, LOAN, LEASE, AND DONATION OF ARMY MATERIEL (23 Aug. 2004); U.S. DEP'T OF ARMY, REG. 725-1, SPECIAL AUTHORIZATION AND PROCEDURES FOR ISSUES, SALES, AND LOANS (17 Oct. 2003).

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 POL and per diem costs; and
- Use of real property.

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.

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[11]

Under the MAST program, DoD provides aerial MEDEVAC 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 comes out of 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 will 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 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[12]

Explosive Ordnance Disposal (EOD) is the detection, identification, field evaluation, rendering–safe, recovery, and final disposition of unexploded explosive ordnance (UXO). AR 75-14, para. 3f. 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. AR 75-14, para. 7b(3). Each service is responsible for all self-caused Explosive Ordnance contamination on its own installations and operation basses. AR 75-14, para. 7d(3)(a). EOD assistance involving formerly used defense sites (FUDS) will be funded from the Environment Restoration Accounts. AR 75-14, para. 7d(3)(e). Services must request reimbursement for EOD services rendered for non-DoD incidents from the requesting agency. AR 75-15, para. 3-2d.

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[11] U.S. DEP'T OF DEFENSE, DIR. 3025.1-M, DOD MANUAL FOR CIVIL EMERGENCIES (Apr. 2001).

[12] U.S. DEP'T OF ARMY, REG. 75-14/U.S. DEP'T OF NAVY, INSTR. 8027.1G/MARINE CORPS ORDER 8027.1D/U.S. DEP'T OF AIR FORCE, REG. 136-8, INTERSERVICE RESPONSIBILITIES FOR EXPLOSIVE ORDNANCE DISPOSAL (14 Feb. 1992); U.S. DEP'T OF ARMY, REG. 75-15, RESPONSIBILITIES AND PROCEDURES FOR EXPLOSIVE ORDNANCE (1 Nov. 1978).

O. Military Working Dogs[13]

Military working dogs include patrol dogs, and patrol dogs with specialized training in either narcotic/contraband detection, or explosive detection. Explosive Detector Dogs 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 makes a determination that such assistance is required in the interest of public safety. AR 190-12, para. 4-11a(1). Requests for assistance may only be honored from civilian authorities, *not* private citizens. AR 190-12, para. 4-11b(1). Requesting agencies must agree to meet reimbursement requirements and utilize DD Form 1926 (Explosive Ordnance Disposal Civil Release and Reimbursement Agreement). AR 190-12, para. 4-11b(2).

P. Miscellaneous Support[14]

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. Regulations required by the statute, which would implement this authority, have not yet been promulgated. For weapons of mass destruction, federal funding is provided to DoD to develop and maintain domestic terrorism rapid response teams to aid federal, state, and local officials and responders. There are currently thirty-seven response teams, composed of full time Army and Air National Guard members. These teams are federally resourced, trained, evaluated, and operating under federal doctrine. They perform their missions, however, primarily under the command and control of state governors. If the teams are federalized, they fall under the command and control of Joint Task Force, Civil Support (JTF-CS).

Q. Miscellaneous Exceptions

DoDD 5525.5, Encl. 4, para. E,4.1.2., contains a list of situations containing express authorization for the use of military forces to enforce the civil law. Among them are protection of the President, Vice President, and other dignitaries, assistance in the case of crimes against members of Congress, foreign officials, or involving nuclear materials.

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[13] U.S. DEP'T OF DEFENSE, DIR. 5200.31E, SINGLE MANAGER FOR DOD WORKING DOGS PROGRAM (29 Mar. 2006); U.S. DEP'T OF ARMY, REG. 190-12, MILITARY WORKING DOGS (4 Jun. 2007).

[14] 10 U.S.C. §§ 379, 382; Defense Against Weapons of Mass Destruction Act (Nunn-Lugar-Domenici Act); Pub. L. 104–201; DoDDS-5210.36.

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