

DOMESTIC OPERATIONAL LAW

Handbook

for Judge Advocates



The Judge Advocate General's Legal Center and School, U.S. Army
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**DOMESTIC OPERATIONAL LAW
HANDBOOK**

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FOR JUDGE ADVOCATES

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Preface

“As our cause is new, so must we think anew and act anew.”
Abraham Lincoln

During the past eight years the Department of Defense has initiated a series of fundamental changes - in both culture and operational capability - in order to better protect the U.S. homeland from catastrophic events, natural and manmade. By necessity, these changes are closely linked to an evolving assessment of the 21st century threat environment. The legal implications associated with these changes are inevitably profound. Indeed, they go to the very definition of the military's proper role within domestic society - reigniting in the process a public policy debate that is as old as the Republic itself.

For lawyers within the Department of Defense the professional challenge is immediate and rewarding - the stakes involve core questions of national security, public safety and the preservation of essential liberty. In my judgment, this new edition of the Domestic Operational Law Handbook is the seminal compilation of

¹ In 2003, President George W. Bush appointed Mr. Paul McHale the first Assistant Secretary of Defense for Homeland Defense. Mr. McHale served in that capacity until January, 2009. The title of the position was later changed to Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs to reflect the increased responsibilities of the position. Previously, Mr. McHale served five terms in the Pennsylvania General Assembly - from 1982 to 1991. He resigned in 1991 and volunteered for active duty as a Marine Corps Infantry officer, seeing duty in Operations Desert Shield and Desert Storm. He was subsequently elected from the 15th Congressional District in Pennsylvania to the U.S. House of Representatives. Mr. McHale served in the U.S. House of Representatives for three consecutive terms. Prior to his appointment by President Bush, Mr. McHale served as the Vice President of Tallman, Hudders, and Sorrentino. He is currently employed with McKenna, Long, and Aldridge, LLP. Mr. McHale earned a J.D. from Georgetown University and a B.A. with highest honors from Lehigh University.

legal authorities (and related analysis) relevant to DOD's homeland defense and civil support missions.

For most of our nation's history the United States was effectively buffered by two great oceans and secured by the war fighting capabilities of forward deployed combat forces. Moreover, a significant threat to our country's security generally required the collective resources and manpower of an adversarial nation state - or frequently, a coalition of hostile nation states. The CBRNE technology of the 21st Century has shattered that paradigm.

The brutal attack of September 11, 2001, should not be seen as an isolated event, but rather, as a case study in modern conflict. While DOD must remain ever vigilant in guarding against the continuing threat from aggressive nation states, it's now clear that the asymmetric threat from terrorist organizations - or even isolated individuals - when strengthened by WMD destructive power, can pose a fundamental challenge to public safety and our vital institutions of government. The assumptions contained in the *Strategy for Homeland Defense and Civil Support* captured the current threat in stark terms:

** Terrorists will seek and potentially gain surreptitious entry into the United States to conduct mass casualty attacks against Americans on US soil.*

** Terrorists will exploit our vulnerabilities to create new methods of attack.*

** Terrorists and/or rogue states will attempt multiple, simultaneous mass casualty CBRNE attacks against the US homeland.*

** Terrorists will try to shape and degrade American political will in order to diminish American resistance to terrorist ideologies and agendas.*

On the morning of September 11, 2001 the United States was poorly prepared to detect, deter and defeat the asymmetric threat. For the most part, the Department of Defense was still organized as it had been during the Cold War. In many ways, outdated concepts of attrition warfare continued to shape military training, task organization and equipment. Indeed, at the time of Al Qaeda's barbaric attack, the very concept of a focused "homeland defense" did not yet exist - and "civil support" missions were seen as unwanted and expensive diversions from core national security requirements. By the end of that fateful day, however, it was manifestly clear that defenses developed to counter the 20th Century Soviet

threat were wholly inadequate to defeat transnational terrorist adversaries, employing asymmetric tactics, in a vastly different 21st Century threat environment. It was also clear that the terrorist threat would not likely change. Therefore, DOD had to.

As a result, between 2002 and 2008, the Department of Defense began an on-going series of fundamental force transformations. United States Northern Command was created in 2002. The Office of the Assistant Secretary of Defense for Homeland Defense was established by law in 2003. The Strategy for Homeland Defense and Civil Support was published in 2005.

During this period, the National Guard grew from just 9 Civil Support Teams (CSTs) to 53 certified. And as a direct result of far sighted National Guard leadership, 17 CBRNE Emergency Response Force Packages (CERFPs) were established and certified. Most significantly, the Deputy Secretary of Defense directed the creation of 3 CBRNE Consequence Management Response Forces (CCMRFs) - essentially joint task forces, each manned by 4,700 military personnel, highly trained for domestic catastrophic response. In a clear and compelling break with past practice, the first CCMRF was immediately assigned to NORTHCOM, with the further expectation that the remaining two CCMRFs would be similarly assigned in 2010 and 2011.

Upon full implementation of these changes, more than 20,000 active duty military personnel will soon have - as their primary mission - domestic catastrophic response. This military capability - though sensible and even admirable in its operational value - raises important questions of law and public policy.

In *Federalist 8*, Alexander Hamilton presciently noted the danger in relying excessively upon military forces to ensure domestic security. His cautionary words remain relevant today. The preservation of innocent life - and liberty - requires that domestic military missions be subject to very close scrutiny - by civilian DOD leadership, the Congress, the media, and the courts. To that end, it is essential that military lawyers provide clear and informed guidance with regard to domestic military missions, assessing the express language of applicable law, as well as the fundamental propriety of any proposed military mission when judged in the larger context of American history.

The recently published *Quadrennial Roles and Missions Review Report* listed six Core Mission Areas for DOD - the first listed is "Homeland Defense and

Civil Support.” The combined HD/CS annual budget will soon exceed \$25 billion. And when asked last year whether homeland defense could now be considered a military mission of peer importance when compared to power projection and overseas war fighting, Secretary Gates responded without hesitation that the domestic security of the American people is the pre-eminent mission of DOD.²

Although the brutality of the September 11th attack initially brought an anti-terrorism focus to Defense Support of Civil Authorities (DSCA) missions, the destruction wrought by Hurricane Katrina in 2005 - and the ineffectiveness of our nation’s response - served as a potent reminder that acts of nature can also have a catastrophic impact upon life and property. Indeed, when DOD subsequently planned for DSCA missions in anticipation of a potential pandemic influenza outbreak, we soon realized that many pandemic mission capabilities could build upon the lessons learned from Hurricane Katrina. And similarly, it quickly became apparent that the planning for contingent military missions during a pandemic outbreak had great relevance to foreseeable DSCA missions during a terrorist CBRNE event.

While each catastrophic event has unique characteristics, DOD’s DSCA missions have a remarkable degree of consistency in required training, equipment, force integration and command. In many ways the sheer magnitude of a catastrophic event - as much as its cause - will define the department’s DSCA roles and responsibilities. Lawyers should consider this issue of scale in reviewing the proper legal framework of relevant interagency and intergovernmental authorities. If a nuclear device were to be detonated on American soil, must the Secretary of Defense wait passively for the inevitable Stafford Act declaration? Can he immediately begin deploying tens of thousands of military forces - active, reserve and National Guard - in a massive consequence management mission? If he can and must act, by what legal authority does he do so?

It has now become clear that the domestic military missions assigned to DOD require an unprecedented level of interagency and intergovernmental cooperation, in both planning and execution. Whether in the realm of Article II war fighting or Stafford Act civil support, DOD’s roles and responsibilities can only be understood in a larger context of federal, state and local integration. As a result, the legal issues are inherently complex, frequently contentious, and often fundamental to the security and civil liberty of our citizens. The newly implemented Task Force

² Secretary of Defense, The Honorable Dr. Robert M. Gates.

for Emergency Readiness (TFER)³ pilot program, endorsed by the Secretary of Defense, offers great promise to achieve joint planning and operational integration in this area.

While many challenging legal questions have been answered in recent years, more than a few have not. Pursuant to the provisions of the amended Defense Against Weapons of Mass Destruction Act, what are NORTHCOM's foreseeable missions in preventing a WMD attack on our own soil? What are the lawful "homeland defense" missions now assigned to the National Guard in Title 32? What domestic counterterrorism missions - in support of civilian law enforcement - may now be executed by JTF-North? What is the scope of authority granted to the President under the Insurrection Act when dealing with the inevitable panic and domestic chaos in the immediate aftermath of a WMD attack? Under such circumstances, what authority does the President have to involuntarily activate and federalize the National Guard? Under current law, must the Department of Homeland Security always be the Lead Federal Agency in responding to the consequences of a domestic catastrophic event? Could the President lawfully designate that responsibility to another federal agency?

During the six years in which I served as Assistant Secretary of Defense for Homeland Defense & Americas' Security Affairs, I routinely quoted from the DOPLAW Handbook when advising the Secretary of Defense. I gave copies of the Handbook to two Secretaries of DHS and several in-coming NORTHCOM commanders. I passed out DOPLAW copies to dozens of senior officials throughout the federal interagency. It is a superb compilation of comprehensive legal authorities, effectively presented in a format that very knowledgeably describes the reality of DOD's war fighting and civil support missions. In short, it is the starting point for any competent lawyer's professional understanding of the 21st Century threat environment - an environment in which terrorists are fanatically committed to the belief that the US homeland is the ultimate battle space. In every sense, the DOPLAW Handbook is both past and prologue.

Paul McHale
24 May 2009

³ The Task Force for Emergency Readiness pilot was implemented by the Secretary of Defense September 1, 2008 with an expected duration of 18 months. The Task Force's mission is develop State specific emergency management plans that take into account the extant strengths and weaknesses of the individual states. The Task Force is composed of planners, under the leadership of the respective Governor, from the State emergency management office, the state National Guard, the Department of Homeland Security, and the Department of Defense.

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A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES
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The contents of this publication are not to be construed as official positions, policies, or decisions of the United States Government or any department or agency thereof.

EDITOR'S NOTE

The Domestic Operational Law (DOPLAW) Handbook for Judge Advocates is a product of the Center for Law and Military Operations (CLAMO). First published in April of 2001, before the events of September 11, 2001, it was the first of its kind. Designed as a resource for operational lawyers involved in domestic support operations, its publication was indeed timely. After the events of September 11, 2001, and more recently, Hurricanes Katrina in 2005 and Ike in 2008, the Handbook continued to meet a growing need for an understanding of the legal issues inherent in such operations. As with the original publication of the Handbook, this update would not have been possible without the tireless efforts of countless active, reserve, and National Guard judge advocates who participate in these unique operations on an ongoing basis.

The contents of this Handbook are based on statutes, national policy, DoD Directives, joint publications, service regulations and field manuals, and lessons learned by judge advocates. The Handbook is not a substitute for complete references. Indeed, as this update goes to publication, changes in these references are being discussed and in some cases, in the process of completion. The information contained herein is not doctrine (with the exception of footnoted doctrinal material). The Handbook is designed to serve as a working reference and training tool for judge advocates.

The information and samples provided in this Handbook are advisory only. Content and the opinions expressed do not represent the official position of the US Army or the other services, the National Guard Bureau, the Office of The Judge Advocate General, or The Judge Advocate General's Legal Center and School.

This Handbook is also available in electronic format from the CLAMO website at www.jagcnet.army.mil/clamo. CLAMO welcomes your suggestions, comments, and work products for incorporation into the next edition of this Handbook. You may contact CLAMO at (434) 971-3290/3210 (COMM), 521-3290/3210 (DSN), via email, at CLAMO@conus.army.mil or CLAMO@conus.s.army.mil, or at 600 Massie Road, Charlottesville, Virginia 22903-1781.

Table of Contents

CHAPTER 1. OVERVIEW OF DOMESTIC SUPPORT OPERATIONS	1
A. BACKGROUND.....	1
B. PURPOSE OF THIS HANDBOOK.....	2
C. DoD's ROLE IN CIVIL SUPPORT	3
D. DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA)	5
E. HANDBOOK ORGANIZATION.....	7
CHAPTER 2. NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT	9
A. THE FEDERAL RESPONSE STRUCTURE	10
1. HSPD-5.....	10
2. HSPD-8 and the National Preparedness Guidelines	12
3. Executive Order 12656: Emergency Preparedness and Response Responsibilities	12
4. The National Response Framework (NRF).....	14
5. National Incident Management System.....	22
6. HSPD-8, Annex I, National Planning	24
7. Interplay between the NRF and Other Plans Applicable to WMD Response and Recovery.....	25
8. Impact of the Homeland Security Act on the Federal Response Structure and Process.....	28
9. Defense Against Weapons of Mass Destruction Act.....	29
B. THE STAFFORD ACT	29
1. Requests for Emergency or Major Disaster Declarations	32
2. Liability under the Stafford Act.....	35
3. The President's Emergency Authority under the Stafford Act	35
C. SUMMARY	36
CHAPTER 3. DOD RESPONSE FOR CHEMICAL, BIOLOGICAL, RADIOLOGICAL, NUCLEAR, AND HIGH-YIELD EXPLOSIVES (CBRNE) CONSEQUENCE MANAGEMENT	37
A. INTRODUCTION	37
B. CBRNE CM OVERVIEW AND AUTHORITIES	40
C. DOD ENTITIES RESPONSIBLE FOR CBRNE CM OPERATIONS.....	44
D. SPECIALIZED DoD CBRNE RESPONDERS.....	45
1. Joint Task Force Civil Support	45
2. National Guard Weapons of Mass Destruction Civil Support Teams	48
E. SPECIAL LEGAL CONSIDERATIONS DURING CBRNE CM OPERATIONS	49
1. Quarantine / Isolation.....	50
2. Environmental Compliance.....	51
3. Health Care Licensure	52
4. Mortuary Affairs	54
CHAPTER 4. MILITARY SUPPORT TO CIVILIAN LAW ENFORCEMENT	57
A. INTRODUCTION	57
B. THE POSSE COMITATUS ACT.....	58
1. To Whom Does the PCA Apply?	59
2. Where Does the PCA Apply?	61
3. To What Does the PCA Apply?	62
CHAPTER 5. CIVIL DISTURBANCE OPERATIONS.....	79
A. INTRODUCTION	80
B. CIVIL DISTURBANCE STATUTES	80
1. Support a State Request	81
2. Enforce Federal Authority	83
3. Protect Constitutional Rights.....	84
4. Procedural Issues.....	85
C. OTHER AUTHORITY	86

Table of Contents

1. <i>Protection of Federal Property</i>	87
2. <i>Emergency</i>	87
D. RESPONSIBILITIES AND RELATIONSHIPS OF PARTIES INVOLVED IN CIVIL DISTURBANCE OPERATIONS.....	88
1. <i>Attorney General</i>	88
2. <i>Senior Civilian Representative of the Attorney General</i>	89
3. <i>Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs</i>	89
4. <i>Chairman, Joint Chiefs of Staff, Joint Director of Military Support (JDOMS)</i>	89
5. <i>Combatant Commanders, U.S. Northern Command and U.S. Pacific Command</i>	89
6. <i>Commander, U.S. Army North</i>	90
7. <i>Commander, Joint Civil Disturbance Task Force</i>	90
8. <i>National Guard Bureau</i>	90
9. <i>The National Guard</i>	91
E. THE DEPARTMENT OF DEFENSE CIVIL DISTURBANCE PLANS (COMBATANT COMMANDERS' CONPLANS).....	91
1. <i>Civil Disturbance Operations Mission</i>	92
2. <i>Combatant Commanders' CONPLANS</i>	92
3. <i>The Standing Rules for the Use of Force for US Forces</i>	95
4. <i>Other Legal Considerations</i>	99
CHAPTER 6. COUNTERDRUG OPERATIONS.....	103
A. INTRODUCTION.....	104
B. TITLE 10 SUPPORT TO COUNTERDRUG OPERATIONS.....	104
1. <i>National Defense Authorization Act of 1991</i>	105
2. <i>Detection and Monitoring</i>	107
3. <i>CJCS Implementation</i>	108
4. <i>Counterdrug Support Task Forces</i>	110
5. <i>Coast Guard Law Enforcement Detachments</i>	111
C. NATIONAL GUARD SUPPORT TO COUNTERDRUG OPERATIONS.....	115
CHAPTER 7. MILITARY SUPPORT TO SPECIAL EVENTS.....	123
A. INTRODUCTION.....	123
B. DESIGNATED SPECIAL EVENTS.....	124
1. <i>Types of Events</i>	126
2. <i>Requests for Support</i>	128
C. INNOVATIVE READINESS TRAINING.....	130
1. <i>Innovative Readiness Training Procedures</i>	131
2. <i>Legal Considerations for IRT Projects</i>	133
CHAPTER 8. MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS.....	137
A. INTRODUCTION.....	138
B. DISASTER AND DOMESTIC EMERGENCY ASSISTANCE.....	138
1. <i>Military Assistance to Safety and Traffic</i>	139
2. <i>Search and Rescue Operations</i>	141
3. <i>Employment of DoD Resources in Support of U.S. Postal Service</i>	141
4. <i>National Disaster Medical System</i>	142
5. <i>Animal and Plant Disease Eradication</i>	144
6. <i>Mass Immigration Emergency</i>	145
7. <i>Improvised Nuclear Device Incidents</i>	145
8. <i>DoD Response to Radiological Accidents</i>	146
9. <i>DoD Support to Wildfires</i>	147
C. ENVIRONMENTAL MISSIONS.....	152
D. MISSIONS IN SUPPORT OF LAW ENFORCEMENT.....	154
1. <i>Support of United States Secret Service</i>	154
2. <i>Imagery Intelligence and Geospatial Support</i>	154
3. <i>Critical Asset Assurance Program</i>	155
4. <i>Continuity of Operations Policies and Planning</i>	155
5. <i>Explosive Ordnance Disposal</i>	156

Table of Contents

E. COMMUNITY ASSISTANCE	157
1. <i>National Guard Assistance for Certain Youth and Charitable Organizations</i>	157
2. <i>Support and Services for Eligible Organizations and Activities Outside DoD</i>	159
3. <i>National Guard Civilian Youth Opportunities Program</i>	159
4. <i>Additional Assistance Programs</i>	160
CHAPTER 9. INTELLIGENCE OVERSIGHT AND INFORMATION HANDLING DURING DOMESTIC AND DOMESTIC SUPPORT OPERATIONS	161
A. INTRODUCTION	162
B. THE ROLE OF DoD INTELLIGENCE COMPONENTS IN DOMESTIC SUPPORT OPERATIONS.....	163
C. INFORMATION HANDLING AND THE ROLE OF DoD NON-INTEL COMPONENTS	167
D. THE NATIONAL GUARD.....	168
1. <i>Status: Title 32 or Title 10</i>	169
2. <i>Collection via an Intelligence Activity</i>	170
3. <i>Method of Collecting</i>	170
4. <i>Purpose of the Collection</i>	171
E. JUDGE ADVOCATE RESPONSIBILITIES.....	172
CHAPTER 10. RESERVE COMPONENTS, CIVIL AIR PATROL, U.S. COAST GUARD - STATUS AND RELATIONSHIPS	175
A. INTRODUCTION	175
B. RESERVE COMPONENT	176
1. <i>U.S. Army Reserve (USAR)</i>	176
2. <i>U. S. Air Force Reserve (USAFR)</i>	177
3. <i>U. S. Naval Reserve (USNR)</i>	177
4. <i>U. S. Marine Corps Reserve (USMCR)</i>	178
5. <i>U.S. Coast Guard Reserve (USCGR)</i>	178
6. <i>National Guard of the United States (NGUS)</i>	179
C. RESERVE COMPONENT CATEGORIES	184
1. <i>Ready Reserve</i>	184
2. <i>Standby Reserve</i>	186
3. <i>Retired Reserve</i>	186
D. RESERVE COMPONENT TRAINING AND SUPPORT	187
1. <i>Training</i>	187
2. <i>Support</i>	189
E. MOBILIZATION/ACTIVATION OF RESERVE COMPONENT AND CALLING UP THE MILITIA.....	190
1. <i>Full Mobilization (10 U.S.C. A. § 12301(a))</i>	191
2. <i>Partial Mobilization (10 U.S.C. A. § 12302(a))</i>	191
3. <i>Presidential Reserve Call-up (PRC) (10 U.S.C. A. § 12304)</i>	191
4. <i>Invasions and Rebellions (10 U.S.C. A. § 12406)</i>	192
5. <i>Insurrection Act (10 U.S.C. A. § 331-335)</i>	192
6. <i>15-Day Involuntary Federal Active Duty (10 U.S.C. A. § 12301(b))</i>	193
7. <i>Voluntary Federal Active Duty (10 U.S.C. A. § 12301(d))</i>	193
8. <i>Medical Care (10 U.S.C. A. § 12301(h))</i>	193
F. UNITED STATES COAST GUARD (USCG).....	193
G. NATIONAL GUARD OF THE SEVERAL STATES.....	195
1. <i>Overview</i>	195
2. <i>Title 32 Status</i>	196
3. <i>State Active Duty</i>	197
4. <i>ANG/ARNG Personnel Categories</i>	198
5. <i>Unique HLS/HLD missions</i>	201
6. <i>Miscellaneous Areas of Caution</i>	202
H. CIVIL AIR PATROL (CAP)	206
I. JUDGE ADVOCATES	207
1. <i>National Guard Judge Advocates</i>	207
2. <i>U.S. Army Reserve Judge Advocates</i>	208

Table of Contents

3. U.S. Air Force Reserve Judge Advocates.....	208
4. U.S. Naval Reserve Judge Advocates.....	209
5. U.S. Marine Reserve Legal Specialists	209
CHAPTER 11. RULES FOR USE OF FORCE FOR FEDERAL FORCES	211
A. INTRODUCTION	211
B. THE JUDGE ADVOCATE’S ROLE IN THE USE OF FORCE.....	213
C. PRACTICAL REALITIES OF USE OF FORCE SITUATIONS	215
1. Capabilities and Limitations	215
2. Physical and Psychological Effects.....	217
D. LEGAL AUTHORITY AND STANDARD FOR US MILITARY USE OF FORCE IN DOMESTIC OPERATIONS	217
1. Minimum Force Necessary or Deadly Force as a Last Resort	220
2. Mandatory Verbal Warnings.....	221
3. Denial of Deadly Force in Self-Defense.....	221
4. Operational Orders/Execution Orders.....	222
5. SRUF Authority to Use Deadly Force.....	222
6. Other mission related circumstances for use of deadly force	224
7. Augmentation of the RUF.....	225
E. LIABILITY FOR SERVICE MEMBERS, LEADERS, AND RUF DRAFTERS IN USE OF FORCE SITUATIONS	226
1. Federal Civil Liability.....	226
2. Federal Criminal Liability.....	229
3. State Civil and Criminal Liability	229
F. OTHER TRIAL OR LITIGATION ISSUES	229
G. COMMON ISSUES IN DRAFTING AND TRAINING RUF	231
1. Training of Judge Advocates.....	232
2. SRUF and Areas of Confusion and Concern.....	233
CHAPTER 12. RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD.....	235
A. INTRODUCTION	235
B. RUF AND STATE CRIMINAL LAWS.....	236
1. State Law Applicable to Both Title 32 and SAD Statutes	236
2. Subjects For Inclusion in State RUF for the National Guard	238
C. SPECIFIC RUF ISSUES.....	246
1. RUF in Inter-state (Cross Border) Operations	246
2. State Criminal Liability of National Guard Members for Use of Force	249
3. RUF in Mixed National Guard and Active Component Operations.....	253
D. ROLE OF THE NATIONAL GUARD JUDGE ADVOCATE.....	253
1. Drafting RUF	253
2. Negotiating RUF with State Agencies.....	254
3. Providing Legal Advice on Liability	254
4. Training.....	254
CHAPTER 13. FUNDING DOMESTIC SUPPORT OPERATIONS.....	257
A. INTRODUCTION: BASIC FISCAL LAW FRAMEWORK	259
B. BASIC FISCAL CONTROLS.....	260
1. Purpose	260
2. Time.....	262
3. Amount	263
C. MILITARY ASSISTANCE TO CIVIL AUTHORITIES	264
D. DoDD 3025.15	266
E. DISASTER AND EMERGENCY RELIEF	266
1. Immediate Response Authority.....	268
2. DERF	269
3. Disaster Support Involving Law Enforcement Authorities.....	270
F. CIVIL DISTURBANCES	270
G. SUPPORT TO CIVILIAN LAW ENFORCEMENT.	272

Table of Contents

1. <i>Economy Act</i>	273
2. <i>Miscellaneous Receipts</i>	273
3. <i>Excess Property</i>	274
4. <i>Expert Advice and Training</i>	275
5. <i>Sharing Information</i>	277
H. COUNTERDRUG SUPPORT	277
1. <i>Detection and Monitoring</i>	277
2. <i>Additional Support</i>	278
I. INNOVATIVE READINESS TRAINING.....	280
J. DoD SUPPORT TO SPECIAL EVENTS	281
K. SUPPORT TO PRIVATE ORGANIZATIONS AND INDIVIDUALS	282
1. <i>Boy Scouts of America</i>	282
2. <i>Girl Scouts of America</i>	282
3. <i>National Veterans' Organizations</i>	283
4. <i>American Red Cross</i>	283
5. <i>National Military Associations</i>	283
6. <i>Homeless Individuals</i>	283
L. LOAN OR LEASE OF NON-EXCESS PROPERTY OF A MILITARY DEPARTMENT	284
1. <i>Authorized loan or lease of non-excess property</i>	284
2. <i>Emergency Exceptions</i>	285
M. MILITARY ASSISTANCE TO SAFETY AND TRAFFIC	286
N. EXPLOSIVE ORDNANCE DISPOSAL	287
O. MILITARY WORKING DOGS	287
P. MISCELLANEOUS SUPPORT	288
Q. MISCELLANEOUS EXCEPTIONS	288

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 August and September 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 attack 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

¹ National Military Strategy, p. 3, 2004, *available at*, <http://www.defenselink.mil/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; and 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.

OVERVIEW OF DOMESTIC SUPPORT OPERATIONS

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 the Department's vision for transforming homeland defense and support to civil authorities.⁷

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 categories of this strategy, 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.

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

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

OVERVIEW OF DOMESTIC SUPPORT OPERATIONS

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 earthquake at Charleston, South Carolina. Similar support continued throughout the Twentieth Century to the present.

National Guard (NG) units, under the control of state Governors and 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 to a broad spectrum of emergencies on a short-notice basis. 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

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.

¹⁵ U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (18 Feb. 1997) [hereinafter DoDD 3025.15]. U.S. DEP'T OF DEFENSE, DIR. 3025.DD DEFENSE SUPPORT OF CIVIL AUTHORITIES is scheduled to be published in 2009.

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

OVERVIEW OF DOMESTIC SUPPORT OPERATIONS

U.S. domestic law, Presidential Decision Directives (PDDs),¹⁷ National Security Presidential Directives (NSPD) and Homeland Security Presidential Directives,¹⁸ 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 may limit the scope of support. Judge advocates must carefully consider whether the Posse Comitatus Act¹⁹ or fiscal law constraints,²⁰ 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 the Department of Defense 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. Its current mission statement:

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.²¹

This mission statement recognizes the unique dual roles for US NORTHCOM in HD and CS, in addition to standard Geographic Combatant Commander (GCC) assigned responsibilities.²² Because of its responsibility for operations in the homeland, USNORTHCOM is engaged in nearly constant liaison with our national leadership and with the federal agencies who would lead civil support operations.

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

²⁰ *See infra* Chapter 13.

²¹ 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.

²² Duties and assignments for Combatant Commanders are contained in the Unified Command Plan.

OVERVIEW OF DOMESTIC SUPPORT OPERATIONS

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 NG, while in state status, has primary responsibility for providing initial support to state and local civil authorities.²³

When federal forces respond in this 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)²⁴ 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, NG units and personnel, in non-federal status²⁵ 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)²⁶

The primary reference for all DoD support to domestic operations is DoD Directive (DoDD) 3025.15, *Military Assistance to Civil Authorities*.²⁷ This umbrella directive governs provision of all DoD military assistance to U.S. civil

²³ FM 3-07, *supra* note 12, 6-14.

²⁴ National Response Framework, *supra* note 6.

²⁵ See *infra* Chapter 10, Reserve Components - Special Issues, for further discussion of National Guard status.

²⁶ 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.

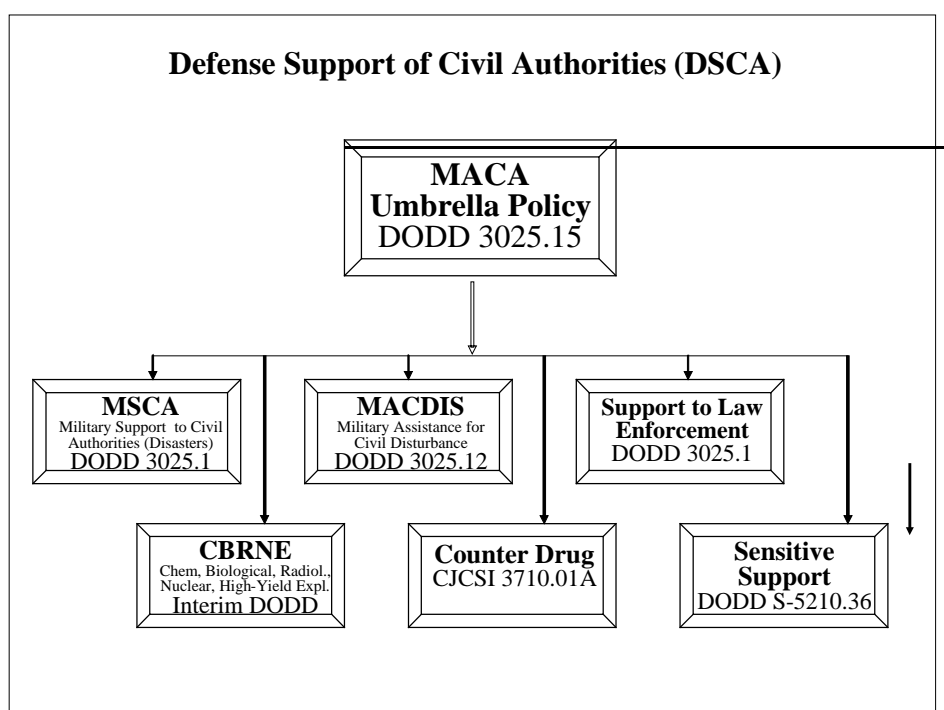
²⁷ DoDD 3025.15, *supra* note 15.

OVERVIEW OF DOMESTIC SUPPORT OPERATIONS

authorities (MACA), and encompasses a variety of specific types of support.²⁸ See Figure 1-2, below.

DoDD 3025.15 provides criteria against which all requests for support must be evaluated. The criteria are addressed to approval authorities, but commanders

Figure 1-2, Defense Support of Civil Authorities



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.

²⁸ The types of military support to domestic operations include military support to civil authorities (MSCA), military assistance for civil disturbances (MACDIS), military support to civil law enforcement (MSCLEA), continuity of operations plan (COOP), sensitive support (SS), counterdrug (CD), counter-terrorism (CT) and consequence management (CM).

OVERVIEW OF DOMESTIC SUPPORT OPERATIONS

- 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 3025.15 also outlines the roles and responsibilities of each DoD component and establishes request procedures and approval authorities for each type of domestic support operation. DoDD 3025.15 changes the approval authority, in certain cases, from that set forth in older directives, but the older directives have not been changed and are otherwise applicable. 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 their respective chapters.

E. HANDBOOK ORGANIZATION

The phrase “domestic support operations” covers a broad category of DoD operations within 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 lead Federal agency (LFA) to which DoD lends its support. From there, the handbook covers DoD's strategy for civil support, and then chapter by chapter, discusses its 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

OVERVIEW OF DOMESTIC SUPPORT OPERATIONS

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).
- PDD 39 - U.S. Policy on Counterterrorism, June 21, 1995.
- PDD 62 - Protection Against Unconventional Threats to the Homeland and Americans Overseas, May 22, 1998.
- PDD 63 - Critical Infrastructure Protection, May 22, 1998.
- HSPD 5 - Management of Domestic Incidents, February 28, 2003.
- HSPD 8 - National Preparedness, December 17, 2003.
- HSPD 8, Annex I - National Planning
- 42 U.S.C. § 9605 - National Contingency Plan
- 50 U.S.C. § 2061, *et. seq.* - *Defense Production Act of 1950*
- DoDD 3025.1, *Military Support to Civil Authorities*, 15 Jan 93
- DoD 3025.1-M, *Manual for Civil Emergencies*
- National Response Framework (NRF), January 2008

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

- National Incident Management System (NIMS)
- National Oil and Hazardous Substances Pollution Contingency Plan

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 accordingly.

1. HSPD-5

Homeland Security Presidential Directive 5 (HSPD-5), "Management of Domestic Incidents," established a new means to federal emergency management.¹ 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

¹ Homeland Security Presidential Directive 5, Management of Domestic Incidents, 28 Feb. 2003.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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 to assume responsibility for managing the domestic incident by the President.² Table 2-1 summarizes the roles and responsibilities established by HSPD-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.”³ Whereas under the old 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 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.⁴

Table 2-1: Roles and Responsibilities Established by HSPD - 5

Departments & Agencies	Roles and Responsibilities
Federal Government	Sec. 3 Declares that the 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 (NRF)
Attorney General	Sec. 8 Reaffirms the Attorney General’s role as having lead responsibility for criminal investigations of terrorist acts or terrorist threats.

² *Id.*

³ *Id.*

⁴ *Id.*

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

2. HSPD-8 and the National Preparedness Guidelines

HSPD-8 “National Preparedness” complements HSPD-5. The purpose of the directive is to establish the following:

policies to strengthen the preparedness of the United States to prevent and respond to threatened or actual domestic terrorist attacks, major disasters, and other emergencies by requiring a national domestic all-hazards preparedness goal, establishing mechanisms for improved delivery of Federal preparedness assistance to state and local governments, and outlining actions to strengthen preparedness capabilities of Federal, state, and local entities.⁵

The directive calls on the Secretary of Homeland Security to work with Federal departments and agencies in conducting preparedness activities and training, as well as develop and maintain a system to collect and analyze best practices. The heads of other Federal departments and agencies are also tasked with supporting the national preparedness goal.⁶

HSPD-8, Annex I, National Planning, is discussed at section F, below.

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.⁷ 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, the

⁵ Homeland Security Presidential Directive 8, National Preparedness, December 17, 2003.

⁶ *Id.*

⁷ Executive Order 12656, “Assignment of Emergency Preparedness Responsibilities,” November 18, 1988, as amended. See also Executive Order 12148, “Federal Emergency Management”, July 20, 1979, which transferred to FEMA responsibility for coordinating Federal response to civil emergencies at the regional and national level.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

Executive Order 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, the Executive Order provided the foundation for the former Federal Response Plan.

The Executive Order establishing the Office of Homeland Security⁸ amended EO12656 to account for the responsibilities of the new office within the functional and legal structure of emergency preparedness. Table 2-2 highlights the major areas of responsibility for several of the agencies identified in EO 12656, as amended by EO 13286.⁹

Table 2-2: EO 12656 Roles and Responsibilities during a National Security Emergency

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. Some of the roles and responsibilities of the affected departments/agencies are listed below.	
Departments & Agencies	Roles and Responsibilities
Department of Agriculture	Continuation of agricultural production, food processing, storage, and distribution; forest products; fires in rural areas; forestry and agricultural services, including control of diagnosis and control of diseases, pests, or biological, chemical, or radiological agents; livestock and poultry or their products; agricultural commodities and land exposed to or affected by hazardous agents. Support: Assist Secretary of Defense in formulating and carrying out plans for stockpiling strategic and critical agricultural materials.
Department of Defense	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; through the Secretary of the Army, manage and allocate all usable waters within U.S. jurisdiction; stockpile of storage and critical materials. Support: civil and military national mobilization.
Department of Energy	Identify, analyze, assess, and mitigate hazards from nuclear weapons, materials, and devices; all emergency response activities pertaining to DOE nuclear facilities. Support: advise, assist, and assess the radiological impact associated with national security emergencies.
Department of Health and Human Services	Mobilize health industry and resources to provide health, mental health, and medical services; allocate health, mental health, and medical services' resources among civilian and military claimants; reduce or eliminate adverse health and mental health effects produced by hazardous agents (biological, chemical, or radiological); minimize property and environmental damage; emergency human services, e.g., feeding, registration and inquiry, social services, family reunification, mortuary services and interment. Support: agricultural health services.

⁸ Executive Order 13228.

⁹ Executive Order 13286, "Executive Order Amendment of Executive Orders, and Other Actions, in Connection with the Transfer of Certain Functions to the Secretary of Homeland Security," February 28, 2003, transferred key functions of FEMA to the Department of Homeland Security.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

Departments & Agencies	Roles and Responsibilities
Department of Homeland Security	Primary: Advise National Security Council on issues of national security emergency preparedness, including mobilization preparedness, civil defense, continuity of government, technological disasters, and other issues, as appropriate. Coordinate with the other Federal departments and agencies and with state and local government to implement national security emergency preparedness policy. Support: preparing plans and programs, to include plans and capabilities for related to nuclear emergencies; promote programs for Federal buildings and installations.
Department of Justice	Interdict and respond to terrorism incidents in the United States; advise the President and departments/agencies regarding national security emergency powers, plans, and authorities; Coordinate Federal Government domestic law enforcement activities related to national security emergency preparedness, respond to civil disturbances that may result in a national security emergency. Support: the intelligence community in the planning of its counter-intelligence and counter-terrorism programs.
Department of Transportation	Meet essential transportation needs; provide direction to all modes of civil transportation; control civil transportation resources and systems; coordinate with state and local highway agencies in the management of all publicly owned or other highways, roads, streets, bridges, tunnels; maritime and port control, safety, law enforcement and security. Support: Energy to manage transportation resources involved in the bulk movement of energy materials; Federal departments/agencies, state and local governments, the private sector in developing plans to protect essential resources and facilities.

4. The National Response Framework (NRF)¹⁰

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 respective agencies. The NRF became effective 22 March 2008, superseding the National Response Plan.

The NRF builds upon and complements the National Incident Management System (NIMS).¹¹ The NIMS is a nationwide template enabling government and nongovernmental responders to respond to all domestic incidents. It provides the structure and mechanisms for national-level policy and operational coordination for domestic incident management. It does not alter or impede the ability of federal, state, local, or tribal departments and agencies to carry out their specific

¹⁰ A copy of the complete NRF is located at DOPLAW Handbook, Supp., App. 2-18 or online at: <http://www.fema.gov/emergency/nrf/>

¹¹ National Incident Management System; http://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

authorities. It 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, the Emergency Support Function (ESF), Support Annexes, Incident Annexes, and the 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 ESF 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,¹² catastrophic, cyber, food and agricultural, mass evacuation, and nuclear/radiological, and terrorism.¹³

¹² HSPD-10 recommended a biological response annex be included as part of the NRP. This was subsequently included in the NRF as well. Homeland Security Presidential Directive 10, "Biodefense for the 21st Century," April 28, 2004.

¹³ 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 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>.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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.

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

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

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

ESF #	ESF	Lead Federal Agency
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

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 Incident Command Posts, 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.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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, establish federal priorities, and implement 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)*: The 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)

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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 at hand, 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): The JOC, when established, 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 Branch 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

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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 Unified Command on-scene. 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 SCO, represents the governor of the state. 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

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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.

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 response efforts has been delegated from the President to the Secretary of DHS.¹⁴ Under the NRF, the President, upon the recommendation of the Secretary of DHS and the FEMA Administrator, can appoint a Federal Coordinating Officer (FCO)¹⁵ who is responsible for coordinating the delivery of federal assistance to

¹⁴ DEP'T OF HOMELAND SECURITY, NATIONAL RESPONSE FRAMEWORK, Jan. 2008[hereinafter NRF].

¹⁵ *Id.* at p. 67.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

the affected state(s), local government(s) and 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. National Incident Management System

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).¹⁶ 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."¹⁷

NIMS is comprised of five key components:

Preparedness. The NIMS focuses on the following elements of preparedness: planning, procedures and protocols, training and exercises, personnel qualifications and certification, and equipment certification.¹⁸ 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. The NIMS emphasizes that well-planned, established, and utilized communications are critical for enabling the dissemination of information during an incident.¹⁹ Common plans, standards and communication architecture help to facilitate interoperability and maintain a constant flow of information during an incident.²⁰ As with incident response in general, communication systems should be flexible and scalable to effectively manage any situation.

¹⁶ Available at http://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf

¹⁷ *Id.*

¹⁸ *Id.* at p. 9.

¹⁹ *Id.* at p. 23.

²⁰ *Id.* at p. 24.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

Resource Management. According to the NIMS, resource management is divided into five principles:²¹

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

Command and Management. The 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.²² The ICS works at the tactical level, organizing the on-scene operations.²³ In comparison, MACS coordinate activities above the field level and can be either informal or formal. Formal coordination address issues before an incident occurs and is the preferred process.²⁴

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 the NIMS and to provide for its refinement.²⁵ As part of this process, the NIMS notes the continued development of science and technology as playing a critical role in improving response capabilities.

As with the Stafford Act, the 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.²⁶ There are, however, incidents which require the involvement of higher levels of government and response.

²¹ *Id.* at p. 32-33.

²² *Id.* at p. 45.

²³ *Id.* at p. 46.

²⁴ *Id.* at p. 64.

²⁵ *Id.* at p. 75.

²⁶ *Id.* at p. 5.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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.²⁷

6. HSPD-8, Annex I, National Planning

Annex I to HSPD-8, published in 2007, is intended to “further enhance the preparedness of the United States by formally establishing a standard and comprehensive approach to national planning.”²⁸ The Annex comprises five components:

1. A standardized Federal planning process,
2. National planning doctrine,
3. Resourced operational and tactical planning capabilities at each Federal department and agency with a role in homeland security,
4. Strategic guidance, strategic plans, concepts of operations, and operations plans, and as appropriate, tactical plans; and
5. A system for integrating plans among all levels of government.

Annex I directs the Secretary of Homeland Security to develop an Integrated Planning System (IPS),²⁹ coordinated with the heads of Federal agencies involved in homeland security.³⁰ Among other things, the IPS “provides common processes for developing plans” and sets out the national planning doctrine, as well as guidance for all-hazard planning with principles applicable to all levels of government.³¹

²⁷ *Id.* at 17.

²⁸ HSPD-8, Annex I (2007) [hereinafter Annex I], Purpose.

²⁹ U.S. Department of Homeland Security, Integrated Planning System (Jan. 2009); *available at* <http://www.hlswatch.com/wp-content/uploads/2009/01/dhs-integrated-planning-system-january-2009.pdf>

³⁰ Annex I, *supra* note 28, para. 33.

³¹ *Id.*

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

Annex I also requires the development of National Planning Scenarios.³² Consequently, the Homeland Security Counsel developed fifteen scenarios³³ depicting “a diverse set of high-consequence threat scenarios of both potential terrorist attacks and natural disasters.”³⁴ USNORTHCOM subsequently developed CONPLANS that address each of the scenarios where DoD support is necessary. These CONPLANS can be accessed with permission of USNORTHCOM.

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

³² *Id.* at para. 34.

³³ In 2006, the Department of Homeland Security released National Planning Scenarios, an in-depth analysis of 15 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 12 scenarios focus on chemical, biological, radiological, nuclear or high-yield explosive (CBRNE) incidents.

³⁴ U.S. DEP’T OF HOMELAND SECURITY, NATIONAL PREPAREDNESS GUIDELINES (Sep. 2007).

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 National Emergency Communications Plan or NECP].

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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 development of the NECP was directed by the Homeland Security Act of 2002³⁷ 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 National Contingency Plan (NCP) was developed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 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. The U.S. Coast Guard, a DHS entity, is the lead agency for oil spills and hazardous materials releases in coastal areas. 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. 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 Order 12580 authorized the establishment of

³⁶ National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR 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.

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.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

National Response Team (NRT) for planning and preparing for response actions; designated the EPA and the Coast Guard as co-chairs; and designated 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 US.⁴²

Presidential Decision Directive 39 (PDD-39) details the policy of the United States in combating terrorism and reaffirms the lead agencies for the management of various aspects of the counterterrorism effort.⁴³ It recognizes that states have

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

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

⁴² *Id.* at Table 1.

⁴³ Presidential Decision Directive 39, “United States Policy on Counterterrorism,” June 21, 1995.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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 to terrorism; and minimizing the damage and assisting in the recovery from terrorist attacks that occur within the United States.⁴⁶ To execute these missions, DHS has four functional directorates: (1) Science and Technology; (2) Information Analysis and Infrastructure Protection; (3) Border and Transportation Security; and (4) Emergency Preparedness and Response.

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,

⁴⁴ Homeland Security Act of 2002, Pub. L. No. 107-296 (2002), as amended, [hereinafter The Homeland Security Act].

⁴⁵ *Id.* at § 101.

⁴⁶ *Id.* at § 101(b).

⁴⁷ FEMA mission as stated on the FEMA website located at: <http://www.fema.gov/about/index.shtm#0> (last visited on 22 May 2009).

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

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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 Chapter 40 of the U.S. Code deals with the Federal Government's response to the proliferation of and use or threat to use nuclear, chemical, or biological WMD or related materials and technologies. 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 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.⁴⁹

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.⁵⁰ The Stafford Act is the primary legal authority for federal emergency and disaster assistance to state and local governments. Congress' intent in passing the Stafford Act was to provide for an "orderly and continuing means of assistance by the federal government to state and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters."⁵¹ 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.

⁴⁹ 50 U.S.C. §§2301-2369 (2006).

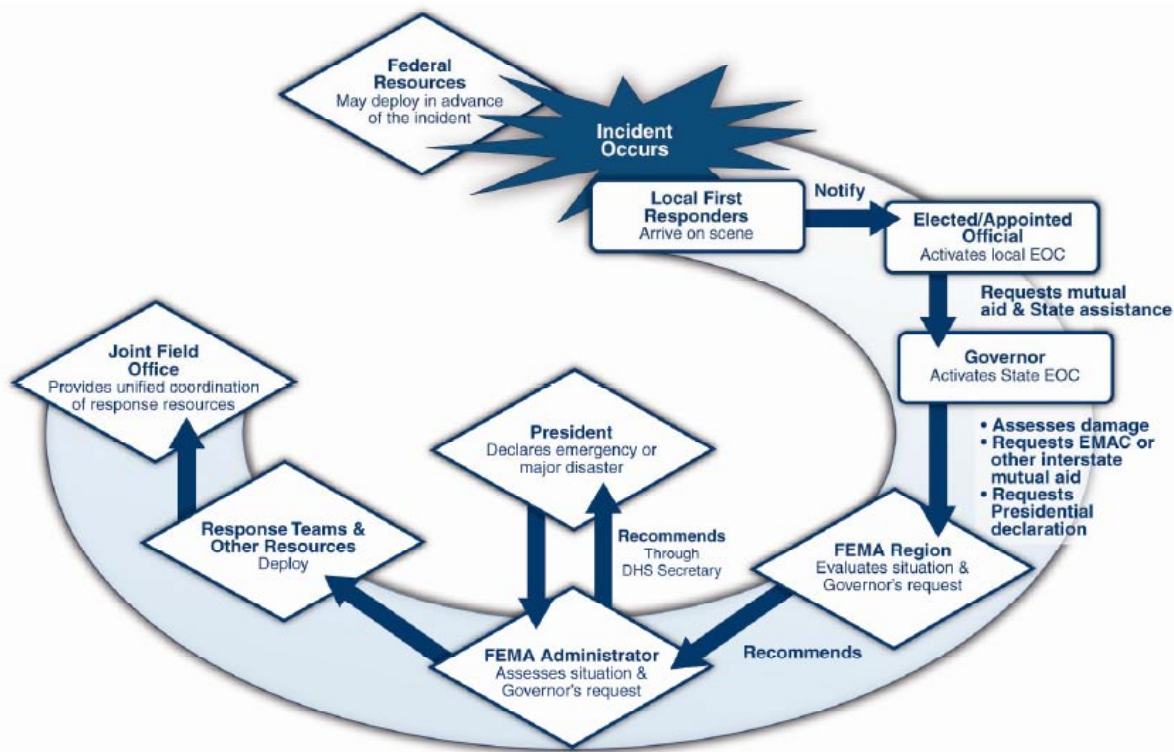
⁵⁰ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et. seq.*, as amended by Pub. L. No. 109-295 (2007) [hereinafter The Stafford Act].

⁵¹ *Id.* at § 5121.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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 governor⁵² 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. The Federal Emergency Management Agency (FEMA) of the Department of Homeland Security (DHS) 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



The Stafford Act lists the roles and responsibilities of federal agencies and departments in providing both major disaster and emergency assistance, and it

⁵² 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.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

delineates 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 Act authorizes the President to appoint a Federal Coordinating Officer (FCO) immediately after declaring a major disaster or emergency. The Act also requires the President to request that a Governor seeking federal assistance designates a State Coordinating Officer (SCO) to coordinate state and local disaster assistance efforts with those of the federal government.⁵³ 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.⁵⁴ 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.⁵⁵ 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.

Table 2-4. Stafford Act Roles and Responsibilities

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 <i>sua sponte</i> : 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.

⁵³ 42 U.S.C. § 5143.

⁵⁴ *Id.* at § 5144.

⁵⁵ 44 C.F.R. 206.24 (2003).

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

Emergency Support Teams	Assist the Federal Coordinating Officer in carrying out his responsibilities in a major disaster or emergency.
State Governor(s)	Request declaration by the President that a major disaster or emergency exists.
Federal Agencies	Assistance responsibilities as delegated by the President and outlined in response plans, within authority: Provide personnel for the Emergency Support Teams on request from the President; Provide assistance, on the direction of the President and as specified, to meet immediate threats to life and property resulting from a major disaster or emergency
FEMA ⁵⁶	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.

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. Major disaster is defined as follows:

any 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

⁵⁶ 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.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

*of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.*⁵⁷

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 weapons of mass destruction (WMD) event involving fire or explosion, including the detonation of a high-yield explosive, likely would 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. 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.⁵⁸

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 publicly or privately owned forest or grassland.⁵⁹ 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.⁶⁰

⁵⁷ 42 U.S.C. § 5122(2).

⁵⁸ *Id.* at § 5170.

⁵⁹ *See Id.* at §§ 5171-5186.

⁶⁰ *Id.* at §5170(b).

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

b. Emergencies. The Stafford Act defines “emergency” as follows:

*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 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.*⁶¹

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.⁶²

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 lesson or avert the threat of a catastrophe.⁶³ 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; public health and safety information; and management, control and reduction of immediate threats to public safety. He may also direct federal agencies to provide emergency assistance; remove debris pursuant to 42 U.S.C. § 5173; provide temporary housing assistance in accordance with 42 U.S.C. § 5174; and assist state and local governments in the distribution of food, medicine, and other consumable supplies.⁶⁴

⁶¹ *Id.* at § 5122(1).

⁶² *Id.* at § 5193.

⁶³ *Id.* at § 5192.

⁶⁴ *Id.* at § 5192(a).

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

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 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. The President's Emergency Authority under the Stafford Act

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.”⁶⁵ The 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 the Department of Defense for a maximum of ten days before the declaration of either an emergency or a major disaster.⁶⁶ In short, 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.

In summary, response to a disaster or emergency is primarily the responsibility of the state and local governments. However, 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 Act.⁶⁷ An incident of WMD terrorism is quite likely to be of sufficient severity to warrant an emergency

⁶⁵ *Id.* at § 5191(a).

⁶⁶ *Id.* at § 5170b(c).

⁶⁷ NRF, *supra* note 14, Overview of Stafford Act Support to States, p. 1.

NATIONAL FRAMEWORK FOR INCIDENT MANAGEMENT

declaration. 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.

C. SUMMARY

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.

CHAPTER 3.

DoD RESPONSE FOR CHEMICAL, BIOLOGICAL, RADIOLOGICAL, NUCLEAR, AND HIGH-YIELD EXPLOSIVES (CBRNE) CONSEQUENCE MANAGEMENT¹

KEY REFERENCES:

- Robert T. Stafford Disaster Relief and Emergency Assistance Act (as amended), Pub. L. No. 93-288, 42 U.S.C. §§ 5121-5207.
- National Response Framework, January 2008.
- DODD 3025.1, Military Support to Civil Authorities (MSCA), 15 Jan 93
- DODD 3025.12, Military Assistance for Civil Disturbances (MACDIS), 4 Feb 94
- DODD 3025.15, Military Assistance to Civil Authorities (MACA), 18 Feb 97
- DODD 5525.5, DOD Cooperation with Civilian Law Enforcement Officials, 15 Jan 86, incorporating change 1, 20 Dec 89
- CJCSI 3125.01A, “Military Assistance to Domestic Consequence Management Operations in Response to a Chemical, Biological, Radiological, Nuclear, or High-Yield Explosive Situation,” 16 Mar 07
- Joint Pub 3-28, Civil Support, 14 Sep 07
- Joint Pub 3-41, Chemical, Biological, Radiological, Nuclear, or High-Yield Explosive Consequence Management, 2 Oct 06

A. INTRODUCTION

In the wake of 9/11 and Hurricane Katrina, the Department of Homeland Security (DHS) developed the National Response Framework.² This

¹ Other agencies or organizations may occasionally refer to these operations as Chemical, Biological, Radiological and Nuclear (CBRN) consequence management. Consequence management (CM) comprises “those essential services and activities required to manage and mitigate problems resulting from disasters and catastrophes. Such services and activities may include transportation, communications, public works and engineering, fire fighting, information planning, mass care, resources support, health and medical services, urban search and rescue, hazardous materials, food, and energy.” *See*, DODD 3025.15, E2.1.5.

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

DOD CBRNE CONSEQUENCE MANAGEMENT

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 management³ built on the template of the National Incident Management System (NIMS).⁴ The NRF provides national-level policy and operational direction for all Federal agencies involved in the response to domestic disasters or emergencies. While responses to incidents should generally be handled at the lowest capable jurisdictional level, the NIMS and NRF contemplate the needs that must be met when the responding jurisdictions' capabilities are overwhelmed by the magnitude of a catastrophic incident.

This framework 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, the Department of Defense (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,⁵ and its activities are referred to as Defense Support to Civilian Authorities (DSCA).⁶

³ 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.

⁴ The National Incident Management System (NIMS) provides a doctrinal framework for incident management designed to provide consistency at all jurisdictional levels. The NIMS includes a core set of concepts, principles, terminology, and technologies covering the incident command system; multi-agency coordination systems; unified command; training; identification and management of resources (including systems for classifying types of resources); qualifications and certification; and the collection, tracking, and reporting of incident information and incident resources.

⁵ JOINT CHIEFS OF STAFF, JOINT PUB. 3-26, HOMELAND SECURITY IV-1 (2 Aug 2005) [hereinafter Joint Pub. 3-26].

⁶ See 32 CFR part 185. Defense Support to Civilian Authorities is defined as

Support provided by U.S. Federal military forces, National Guard forces performing duty under title 32, U.S.C., DoD civilians, DoD contract personnel, and DoD component assets, in response to requests for assistance from civil authorities for special events, domestic emergencies, designated law enforcement support, and other domestic activities. Support provided by National Guard forces performing duty under title 32,

DOD CBRNE CONSEQUENCE MANAGEMENT

The NRF and NIMS provide broad direction for any type of disaster, in what is characterized as an “all-hazards” approach.⁷ Consequently, the framework applies equally to natural disaster relief, the handling of an unintentional or negligent industrial accident, or the Federal government’s response following terrorists’ potential domestic employment of a Chemical, Biological, Radiological, Nuclear, and high-yield Explosives (CBRNE) weapon of mass destruction (WMD).⁸ 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 today⁹ and underscore the importance of maintaining a DOD force that is ready and able to respond to the specialized threats.

U.S.C., is considered DSCA but is conducted as a State-directed action. Also known as Civil Support (CS).

⁷ 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 2, at p. 2.

⁸ 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 or the pesticide release in Bhopal, India would most likely result in DOD-assisted CBRNE CM operations.

⁹ In 2006, the Department of Homeland Security released National Planning Scenarios, an in-depth analysis of 15 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, 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.

DOD CBRNE CONSEQUENCE MANAGEMENT

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 in exposed personnel. 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.¹⁰ As a general proposition, a catastrophic CBRNE event would quickly exceed the capabilities of local, state and tribal governments; consequently, CBRNE CM¹¹ is normally managed at the Federal level, with DOD in a supporting role.

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 SecDef 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 active duty in their state role and when performing active duty under Title 32, United States Code.

Requests for DOD capabilities from state governors or other Federal agencies are called requests for assistance (RFA). In most cases, these requests for emergency support are written and are processed through formal RFA process. The processing of an RFA varies depending upon the size and urgency of the incident, the level of Federal involvement, and the originator of the request. For 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

¹⁰ An exception to this general classification is the Government's response to incidents involving US nuclear weapons within DOD custody or fissionable materials within Department of Energy custody. *See*, generally, ESF 10; and DoD 3150.8-M, "NUCLEAR WEAPON ACCIDENT RESPONSE PROCEDURES (NARP)," February 22, 2005.

¹¹ 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.

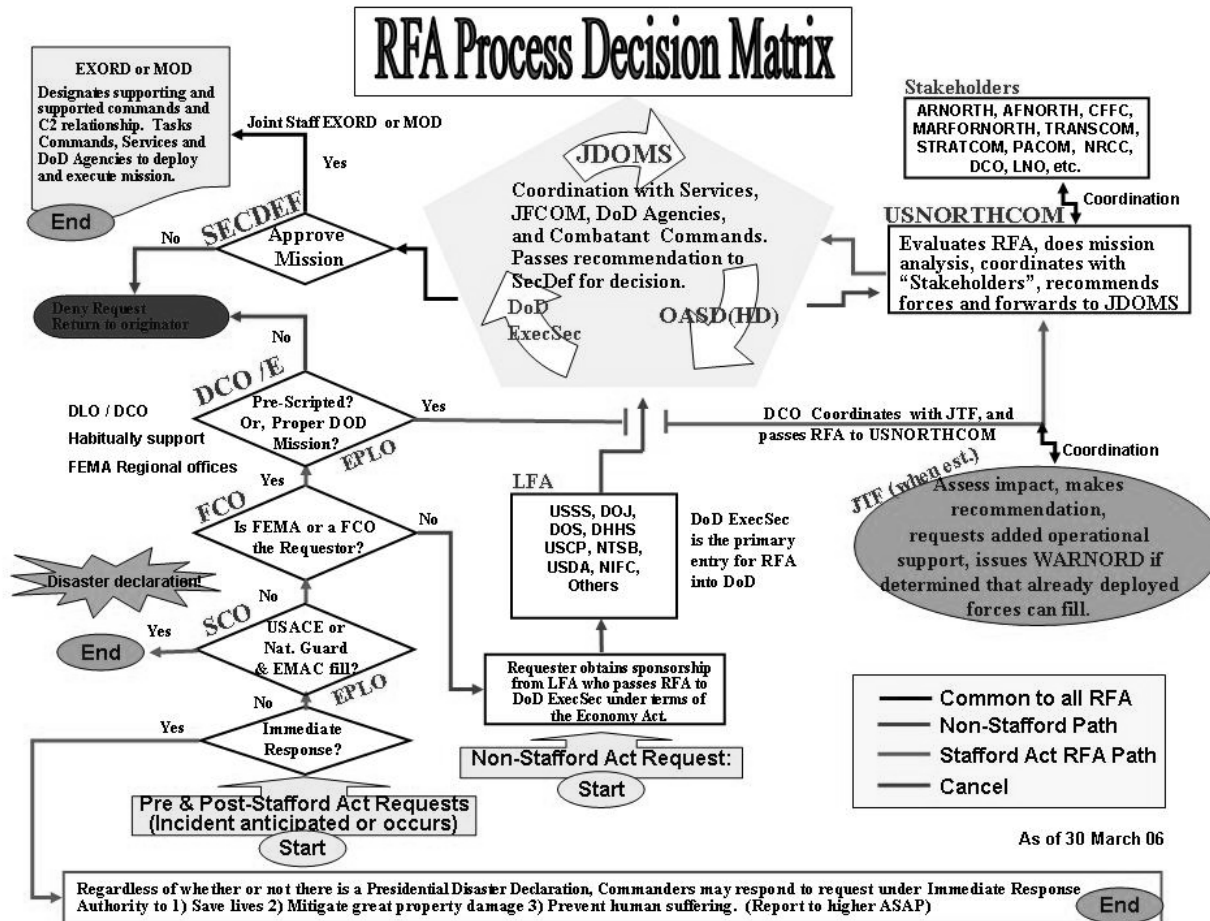
DOD CBRNE CONSEQUENCE MANAGEMENT

(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 US Northern Command (USNORTHCOM), the combatant command, to execute the mission.

Figure 3-1, below, 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, U.S. Pacific Command (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.

¹² The Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (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. 50 U.S.C. § 2313 (2006).

DOD CBRNE CONSEQUENCE MANAGEMENT



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

DOD CBRNE CONSEQUENCE MANAGEMENT

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 arises from other sources. For instance, the DOD policy on Immediate Response addresses the authority delegated to DOD component or military commanders 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 Joint Publication 3-28 sanctions immediate response authority for various CBRNE incident related operations, such as search and rescue missions and debris removal.¹⁶

¹³ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, (Public Law 93-288) (Title 42 US Code, Section 5121, *et seq.*) (as amended) [hereinafter Stafford Act].

¹⁴ The Stafford Act is outlined earlier in Chapter 5. 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. A non-Stafford Act incident is essentially all of the other emergencies occurring each year that do not necessarily overwhelm state and local authorities, but where the event would still benefit from federal assistance and coordination. A small-scale CBRNE response that is within the capabilities of a state's National Guard Weapons of Mass Destruction Civil Support Team may constitute a non-Stafford Act incident.

¹⁵ U.S. DEP'T OF DEFENSE, DIR 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES, 15 Jan 93 [hereinafter DODD 3025.1], at para 4.5.

¹⁶ 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.

DOD CBRNE CONSEQUENCE MANAGEMENT

It is “important for commanders to understand that the policy is limited, restrictive, and conditional.”¹⁷ There is both a temporal and proximity aspect to immediate response. Although no law or DOD policy limits the authority to a specific period of time, given the both the NRF’s policy that Federal assistance is applied only after lower level jurisdictions’ resources are exhausted and the premise that DOD should remain in a supporting role, immediate response should be limited to the time it takes local, State, and possibly Federal responders to reach the scene and assume control of the relief effort.¹⁸ Absent unusual circumstances, such as another incident, immediate response should not be initiated after a Presidential declaration under the Stafford Act, which would bring FEMA and the appropriate array of Federal agencies into the relief effort in support of the local community.¹⁹

C. DOD ENTITIES RESPONSIBLE FOR CBRNE CM OPERATIONS

The National Defense Authorization Act of Fiscal Year 2003²⁰ 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. The Joint Director of Military Support (JDOMS) produces military orders for DSCA, including consequence management operations.

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 CFR §185.3.

¹⁷ JOINT PUB 3-28, *supra* note 16, II-7.

¹⁸ *Id.* at II-28.

¹⁹ 32 CFR § 185.3.

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

DOD CBRNE CONSEQUENCE MANAGEMENT

In 2002, DOD also established the U.S. Northern Command (USNORTHCOM) to consolidate under a single unified command all existing missions previously executed by other military organizations.²¹ The command's specific mission is to “anticipate[] and conduct[] Homeland Defense and Civil Support operations within the assigned area of responsibility to defend, protect, and secure the United States and its interests.”²² USNORTHCOM is designated as the supported command to conduct CBRNE CM operations in support of a LFA in the 48 contiguous states, the District of Columbia, and 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. The JFLCC now has operational control of Joint Task Force Civil Support (JTF-CS), which had previously been directly subordinate to USNORTHCOM. The 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 U.S. 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

²¹ Unified Command Plan 2002.

²² USNORTHCOM, <http://www.northcom.mil/About/index.html> (last visited 30 Mar. 2009).

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).

DOD CBRNE CONSEQUENCE MANAGEMENT

Joint doctrine divides civil support (CS) operations into three broad categories:²⁴ domestic emergencies; designated law enforcement support;²⁵ and other activities,²⁶ based on the CS 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 located at Fort Monroe, Virginia. 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 National Guard Major General on Federal active duty status commands JTF-CS. The staff consists of active and reserve component military from all five services, government service personnel, and civilian contractors. Collectively, the command possesses expertise in a wide range of functional areas to include operations, logistics, intelligence, planning, communications, and medical services. Created by the Unified Command Plan for 1999,²⁷ JTF-CS provides both an operational capability and an

²⁴ JOINT PUB. 3-28, *supra* note 16, III-1.

²⁵ When situations are beyond the capability of the state, the governor requests federal assistance through the President. DOD support and/or assistance in restoring public services and civil order may include augmentation of local first responders and equipment. It may include law enforcement support, continuity of operations/continuity of government measures to restore essential government services, protect public health and safety, and provide emergency relief to affected governments, businesses, and individuals. Responses occur under the primary jurisdiction of the affected state and local government, and the Federal government provides assistance when required. *See*, JOINT PUB. 3-28, Executive Summary, at x.

²⁶ 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* DOPLAW Handbook, chapter 7.

²⁷ 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

DOD CBRNE CONSEQUENCE MANAGEMENT

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. These units possess the military occupational specialties required to staff DOD's initial CBRNE CM entry force. The CCMRF is comprised of approximately 4,500 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.

JTF-CS employs a three-fold process that enables the command to gain and maintain situational awareness prior to an execution order. First, at Fort Monroe, 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 at Fort Monroe to perform predictive analysis regarding the types of missions that the LFA

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.

DOD CBRNE CONSEQUENCE MANAGEMENT

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 5 to 15 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.²⁸ Recognizing that the National Guard is “forward deployed for civil support,”²⁹ 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 22 full-time National Guard Soldiers and Airmen and contains five elements: command, operations, administrative/ logistics, medical, and survey. The teams are designed to deploy rapidly to assist local first responders in the event of an intentional or unintentional CBRNE incident.³⁰

The mission of the 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;

²⁸ The number of authorized CSTs is the culmination of legislative actions during the last decade. For a current account of CSTs, see <http://www.ngb.army.mil/features/homelanddefense/cst/index.html>.

²⁹ U.S. Secretary of Defense Report to Congress pursuant to FY00 National Defense Authorization Act § 1036, 2 (24 Feb. 2000).

³⁰ *Id.*

DOD CBRNE CONSEQUENCE MANAGEMENT

- 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 to be specially equipped and trained. Special equipment includes the Mobile Analytical Laboratory System (MALS)³¹ for nuclear, biological and chemical (NBC) detection and the Unified Command Suite (UCS) for communications.³² WMD-CST capabilities are specifically designed to complement civilian responders.³³ 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.³⁴ If the teams are called to Federal active duty, they will normally be attached with operational control to JTF-CS.³⁵

WMD-CSTs assigned to one state are authorized to operate in another state under one of the following:

- State-to-State Compacts
- State-to-State Memoranda of Agreement
- Activation under Title 10.³⁶

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

³¹ *Id.* at 3. MALS is based on system used by the Marine Corps' Chemical Biological Incident Response Forces with enhanced biological detection capability.

³² *Id.* The UCS, built by the Navy, provides communication interface across the ICS frequencies, military command and control elements, and technical support assets.

³³ *Id.* at 4.

³⁴ *Id.* at 5.

³⁵ *Id.*

³⁶ *Id.* at 6. *See infra* Chapter 10, Reserve Components, for a discussion of interstate compacts.

DOD CBRNE CONSEQUENCE MANAGEMENT

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. Following are four legal issues that 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

Quarantine³⁷ and isolation³⁸ 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.³⁹ 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."⁴⁰

Regardless of whether the quarantine and isolation measures are imposed from the Federal, state, or local level, DoD enforcement actions will likely be subject to the Posse Comitatus Act,⁴¹ 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.⁴² Typically, however,

³⁷ "Quarantine" is defined as the "[s]eparation of individuals who have been exposed to an infection but are not yet ill from others who have not been exposed to the transmissible infection." Homeland Security Council, *National Strategy for Pandemic Influenza: Implementation Plan* 209 (GPO May 2006).

³⁸ *Id.*

³⁹ 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.

⁴⁰ 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.

⁴¹ 18 U.S.C. § 1385.

⁴² 10 U.S.C. §§ 331-335.

DOD CBRNE CONSEQUENCE MANAGEMENT

any DoD support provided to quarantine and isolation support will be limited to logistical, communications, medical, and other support commonly envisioned by the Stafford Act.

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 (an exception is that restoring a facility substantially to its condition prior to the disaster or emergency is not deemed a major Federal action significantly affecting the quality of the human environment).⁴³ Although the Stafford Act does contain a blanket waiver authority of “administrative conditions for assistance” for Federal agencies,⁴⁴ 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.⁴⁵ 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 3-11.5⁴⁶ are sufficient for CBRNE CM operations, or whether those procedures should be modified pursuant to guidance from appropriate state and federal regulatory agencies.

⁴³ 42 U.S.C. § 5159.

⁴⁴ 42 U.S.C. § 5141.

⁴⁵ DEP’T OF HOMELAND SECURITY, NATIONAL RESPONSE FRAMEWORK, EMERGENCY SUPPORT FUNCTION #10 (OIL AND HAZARDOUS MATERIALS RESPONSE ANNEX), Jan. 2008.

⁴⁶ 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].

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).⁴⁷ 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 the appropriate state laws, however, 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 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.⁴⁸ DoD has promulgated qualification and coordination requirements to this statutory portability provision as it pertains to off-base duties.⁴⁹ 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. C4.2.

⁴⁷ DEP'T OF HOMELAND SECURITY, NATIONAL PLANNING SCENARIOS (6 Apr. 2006).

⁴⁸ 10 U.S.C. § 1094.

⁴⁹ "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).

DOD CBRNE CONSEQUENCE MANAGEMENT

On the state level, many jurisdictions have passed emergency management provisions containing portability of licensure provisions. For example, in Florida, the 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.⁵⁰ 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.⁵¹ 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 mesh the Title 10 provisions.

Also on the state level, Judge Advocates can look to the state Emergency Management Assistance Compact (EMAC). Article V of the Model EMAC legislation states that

[w]henver any person holds a license, certificate, or other permit issued by any state party to the compact evidencing the meeting of qualifications for professional, mechanical, or other skills, and when such assistance is requested by the receiving party state, such person shall be deemed licensed, certified, or permitted by the state requesting assistance to render aid involving such skill to meet a declared emergency or disaster, subject to such limitations and conditions as the governor of the Requesting State may prescribe by executive order or otherwise.⁵²

⁵⁰ FLA. STAT. § 252.36(3)(c)1.

⁵¹ CAL. BUS. & PROF. CODE § 900.

⁵² NAT'L EMERGENCY MGMT ASS'N, MODEL EMAC LEGISLATION, Article V, <http://www.emacweb.org/?13> (last visited 29 Mar. 2009).

DOD CBRNE CONSEQUENCE MANAGEMENT

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.

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 – improvised explosives), through fatality numbers that are catastrophic (over a quarter of a million for a improvised nuclear device, and nearly two million for pandemic influenza).⁵³ As in other aspects of emergency management, primary responsibility for mortuary affairs 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,⁵⁴ 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 / storage of remains, among others.⁵⁵ 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.⁵⁶

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 FRAGO to an EXORD. For example, during Hurricane Katrina, DoD forces assisting in the recovery effort were prohibited from touching human remains, and were permitted only to mark the locations of remains.⁵⁷ Nevertheless, during operations, judge advocates should become familiar with the relevant state laws, regulations, and licensure requirements

⁵³ DEP'T. OF HOMELAND SECURITY, NATIONAL PLANNING SCENARIOS (6 Apr. 2006).

⁵⁴ DEP'T. OF HOMELAND SECURITY, NATIONAL RESPONSE FRAMEWORK, EMERGENCY SUPPORT FUNCTION #8 (PUBLIC HEALTH AND MEDICAL SERVICES), 8-2, January, 2008.

⁵⁵ JOINT CHIEFS OF STAFF, JOINT PUB 4-06, MORTUARY AFFAIRS IN JOINT OPERATIONS (5 Jun. 06), para. II-4h.

⁵⁶ *Id.*

⁵⁷ FORSCOM FRAGO 7 TO JTF KATRINA EXORD, 06XXXXZSEP05, para. 3.b.2.

DOD CBRNE CONSEQUENCE MANAGEMENT

regarding the handling, transportation, and disposition of human remains, and ensure that these requirements have either been met or waived by appropriate authorities. Judge advocates should also be cognizant of the various points of contact involved in mortuary affairs operations, including the local medical examiner/coroner, local law enforcement, and the FBI.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

CHAPTER 4.

MILITARY SUPPORT TO CIVILIAN LAW ENFORCEMENT

KEY REFERENCES:

- 10 U.S.C. § 371-381 - 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, 4 Feb 94
- DoDD 5200.27 - Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense, 7 Jan 80
- DoDD 5240.01 - DoD Intelligence Activities, 27 Aug 07
- DoD 5240.1-R - Procedures Governing the Activities of DoD Intelligence Components that Affect U.S. Persons, 1 Dec 82
- SECNAVINST 5820.7C - Cooperation with Civilian Law Enforcement Officials (26 Jan. 2006)
- AFI 10-801 - Assistance to Civilian Law Enforcement Agencies (15 Apr. 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 August and September 2005, and the US-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 Department of Defense's (DoD) 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

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 generally* 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).

SUPPORT TO CIVILIAN LAW ENFORCEMENT

contested states.³ The use of the military in this manner by a President led Congress to enact the PCA in 1878.⁴

The intent of the PCA was to limit direct military involvement with civilian law enforcement, absent Congressional or Constitutional authorization, 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, 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

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* (15 Jan. 1986) [hereinafter DoDD 5525.5].

⁸ Service regulations that implement DoDD 5525.5, *Id.* 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].

language of the Act 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 and, as a result, the restrictions placed on Army and Air Force activities through the PCA now 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 Reserve¹⁴ 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 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

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 USC §502(f).

SUPPORT TO CIVILIAN LAW ENFORCEMENT

Active Duty (SAD) status and are not subject to PCA in that capacity.¹⁶ Civilian employees of the Department of Defense 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 read any extraterritorial application into the PCA.²⁰ 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.²³ 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

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. E4.2.

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.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

must be considered even when contemplating military assistance to law enforcement overseas. In case 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

3. To What 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.

In addition to the above categories, 10 U.S.C. §§ 376 and 377 provide further limitations on the provision of military support to civilian law enforcement. 10 U.S.C. § 376 provides an overarching 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 disposition²⁷ 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

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 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.

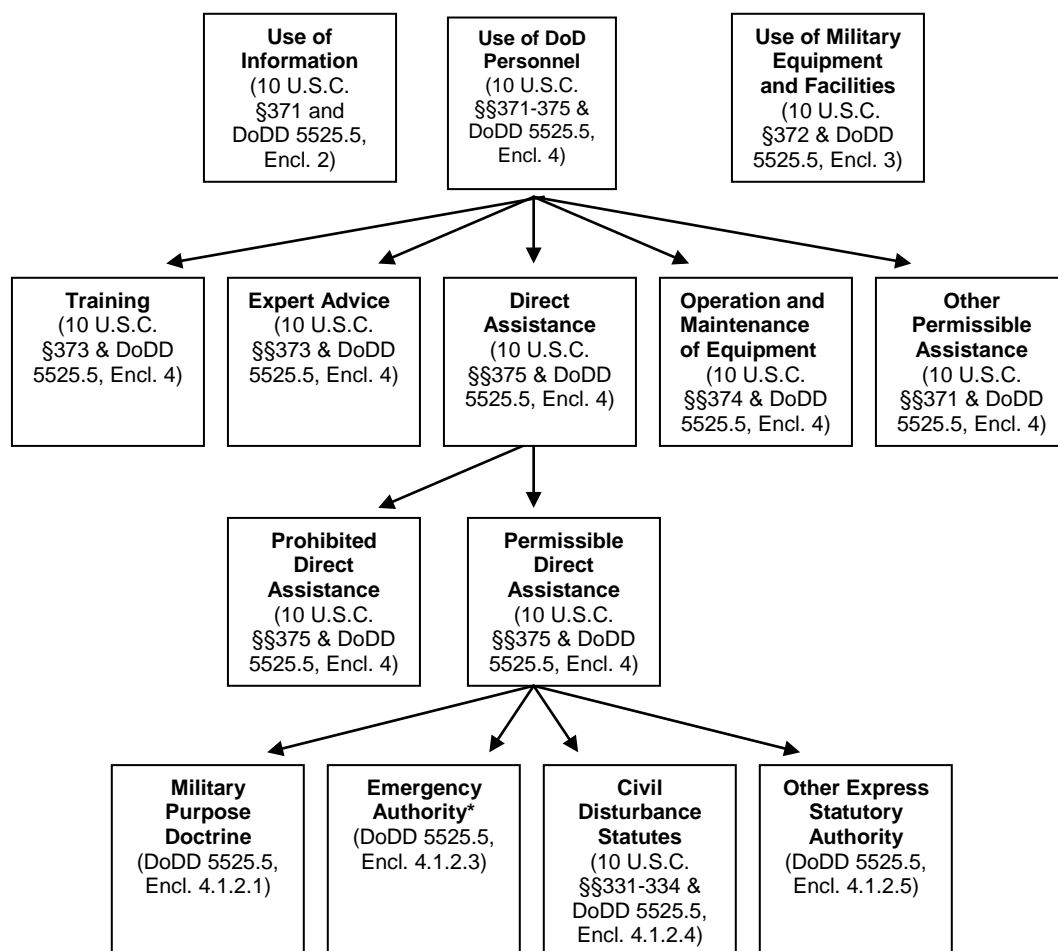
²⁵ DoDD 5525.5, *supra* note 7, para. E4.1; SECNAVINST 5820.7C, *supra* note 8, para. 8; AFI 10-801, *supra* note 8, ch. 2.1.

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. E3.1 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. E4.4; SECNAVINST 5820.7C, *supra* note 8, para. 6(b); AFI 10-801, *supra* note 8, ch. 3.

Figure 4-1. PCA Restrictions contained in 10 U.S.C. §§371-375 and DODD 5525.5



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

10 U.S.C. § 377 requires civilian law enforcement agencies to *reimburse* DoD for support provided as required by the Economy Act²⁹ 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

²⁹ 31 U.S.C. § 1535.

³⁰ 10 U.S.C. § 377.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

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

a. Use of Information Collected During Military Operations

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. 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 with local, State and Federal entities.³² The President is to ensure that the procedures apply to “all agencies of the Federal Government.”³³

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., are included at *Appendix 2-2, Statutes Governing Support to Law Enforcement*.

Enclosure 2 of DoDD 5525.5 implements the above guidance 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 when planning and executing military training

³¹ DoDD 5525.5, *supra* note 7, para. E5.2; SECNAVINST 5820.7C, *supra* note 8, para. 9; AFI 10-801, *supra* note 8, ch. 5.

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)

SUPPORT TO CIVILIAN LAW ENFORCEMENT

and operations in accordance with 10 U.S.C. § 371 above, the planning or creation of missions or training *for the primary purpose of aiding civilian law enforcement officials 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 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 See ch. 9, *Intelligence Law and Policy Considerations During Domestic Support Operations*, for additional information.

b. Use of 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 the DoDD 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.

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].

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

SUPPORT TO CIVILIAN LAW ENFORCEMENT

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 loaned³⁹ 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 DoD 5240.1-R;⁴⁴
- DoDD 5525.5 places approval authority for arms, ammunition, combat vehicles, vessels, and aircraft with the Secretaries of the Military Departments and the Directors of the Defense Agencies; however, DoDD 3025.15 subsequently reserved approval authority to the Secretary of Defense;
- 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

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. 3025.15, *MILITARY ASSISTANCE TO CIVIL AUTHORITIES* (18 Feb. 1997), which withholds approval authorities for some types of support.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

Service regulations supply additional 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 2-2, Loan and Lease of DoD Equipment*.

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

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.⁴⁷ If any one of these three tests is met, the assistance may be considered a violation of the PCA.⁴⁸ The *first* test is whether the actions of military personnel are “active” or “passive.” Only the direct, active use of military personnel to enforce the laws is a violation of the PCA.⁴⁹ 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.⁵⁰ The *third* test is whether the military

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

⁴⁷ Yunis, *supra* note 9.

⁴⁸ Kahn, *supra* note 22, at 431.

⁴⁹ *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); *Red Feather*, note 5, at 925 (W.D.S.D. 1975) (Activities which constitute active role in law enforcement by military are: arrest, seizure of evidence, search of a person, search of a building, investigation of crime, interviewing witnesses, pursuit of an escaped prisoner, search of an area for a suspect, and other like activities. Activities which constitute a passive role are: mere presence of military personnel under orders to report on necessity for military intervention, preparation of contingency plans to be used if military intervention is ordered, advice or recommendations given to civilian law enforcement officials regarding tactics or logistics, presence of military personnel to deliver military equipment and supplies, training civilian law enforcement officials on the use and maintenance of equipment, aerial reconnaissance flights, and similar activities).

⁵⁰ Kahn, *supra* note 22, 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

SUPPORT TO CIVILIAN LAW ENFORCEMENT

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.⁵¹

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, such as occurred following the 3d US Army’s and the 82d Airborne Division’s support in the aftermath of Hurricane Katrina, and prior to that, the standoff between the Branch Davidians and the federal government in Waco, Texas. In advising commanders on the permissible use of military personnel in support of civilian law enforcement activities, JAs must also consider possible legal ramifications of PCA violations. Evidence may be excluded from use at trial and the military may be sued.⁵²

(1) Direct Assistance

(a) Prohibited Direct Assistance

Direct assistance and participation by military personnel in the

operation at all times, and Navy merely provided necessary support services); Hayes, *supra*, note 6, at 103-04 (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)).

⁵¹ See, Yunis, *supra*, note 9, 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).

⁵² 18 U.S.C. § 1385.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

execution and enforcement of the law is the heart of the prohibition of the PCA.⁵³ 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 5525.5.⁵⁴ 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.⁵⁵ 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;

⁵³ Red Feather, *supra* note 5, at 923 (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).

⁵⁴ DoDD 5525.5, *supra* note 7, para. E4.1.3; SECNAVINST 5820.7C, *supra* note 8, para. 8(b); AFI 10-801, *supra* note 8, ch. 2.

⁵⁵ DoDD 5525.5, *supra* note 7, para. E4.1.2; SECNAVINST 5820.7C, *supra* note 8, para. 8(c)(1); AFI 10-801, *supra* note 8, ch. 2.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

- 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 Department of Defense; and
- Such other actions that are undertaken primarily for a military or foreign affairs purpose.⁵⁶

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

(ii) Emergency Authority

A second type of direct assistance that may be permitted is action that falls under the "emergency authority" of the United States.⁵⁷ 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).⁵⁸ DoDD 3025.12 states: "Military Forces shall not be used in MACDIS unless specifically authorized by the President, except in the following emergency circumstances:"⁵⁹

- 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

⁵⁶ *Id.*

⁵⁷ See 32 CFR § 215.4.

⁵⁸ DoDD 3025.12, *supra* note 42.

⁵⁹ *Id.* at para. 4.2.2.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

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,⁶⁰ 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.⁶¹

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.⁶²

(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. *See* ch. 4, *Military Assistance for Civil Disturbances (MACDIS)* for a more detailed discussion. These statutes contain express exceptions to the Posse Comitatus Act⁶³ and they relate to the use of military forces with respect to insurgency, domestic violence, or conspiracy that hinders the execution of state or federal law in specified circumstances. Actions under this authority are governed by DoDD 3025.12. 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;⁶⁴
- A rebellion makes it impracticable to enforce the federal law through ordinary judicial proceedings;⁶⁵ 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

⁶⁰ *Id.* at para. 4.2.2.1.

⁶¹ *Id.* at para. 4.2.2.2.

⁶² *Id.* at para. 4.2.2.

⁶³ Insurrection Act, 10 U.S.C. §§ 331-334 (1998).

⁶⁴ *Id.* at § 331.

⁶⁵ *Id.* at § 332.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

deprived of their Constitutional rights and the state is unable or unwilling to protect these rights.⁶⁶

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. *See* ch. 4, *Military Assistance for Civil Disturbances*, for more information.

(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.⁶⁷ These statutes permit direct military participation in civilian law enforcement, subject to the limitations within the respective statutes. This section does not contain detailed guidance. Specific statutes and other references must be consulted before determining whether military participation is permissible. These statutes include the following:

- 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);
- 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 Fishery Conservation and Management Act of 1976 (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);

⁶⁶ *Id.* at § 333.

⁶⁷ DoDD 5525.5, *supra* note 7, para. E4.1.2.5; SECNAVINST 5820.7C, *supra* note 8, para. 9(c)(5).

SUPPORT TO CIVILIAN LAW ENFORCEMENT

- 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.⁶⁸ 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.⁶⁹

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.⁷⁰

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

⁶⁸ Memorandum, Deputy Secretary of Defense, subject: DoD Training Support to Civilian Law Enforcement Agencies (29 June 1996) [hereinafter Training Memorandum].

⁶⁹ DoD may allow local police organizations and other civic organizations to use military ranges. See 10 U.S.C. § 4309 (1998).

⁷⁰ Training Memorandum, *supra* note 68.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

provided to civilian law enforcement by DoD under 10 U.S.C. § 372. The Secretary of Defense has implemented this guidance in DoDD 5525.5.⁷¹

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.⁷²

(3) Expert Advice

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.⁷³

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

10 U.S.C. § 374 and DODD 5525.5 encl. 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;⁷⁴

⁷¹ DoDD 5525.5, *supra* note 7, para. E4.1.4; SECNAVINST 5820.7C, *supra* note 8, para. 8(c)(7).

⁷² *Id.*

⁷³ DoDD 5525.5, *supra* note 7, para. E4.1.5; SECNAVINST 5820.7C, *supra* note 8, para. 8(c)(6).

⁷⁴ Controlled Substances Act, 21 U.S.C. §§ 801-904 (1999); Controlled Substances Import and Export Act, 21 U.S.C. §§ 951-971 (1999); Immigration and Nationality Act, 8 U.S.C. §§ 1324-1328 (1999); a law relating to the

SUPPORT TO CIVILIAN LAW ENFORCEMENT

- 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):
 - 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).

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 (2000); or any foreign or domestic law prohibiting terrorist activities.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

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.⁷⁵ 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.⁷⁶

Not all of the provisions of 10 U.S.C. § 374 have been implemented by the Secretary of Defense through DoDD 5525.5.⁷⁷ 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.⁷⁸ 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. Under the DoD Directive, 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:

⁷⁵ 10 U.S.C. § 374(b)(3) (1998).

⁷⁶ See DOPLAW Handbook, Supp., App. 4-8, *Support to DOJ*.

⁷⁷ DoDD 5525.5, *supra* note 7, para. E4.1.6. DoDD 5525.5 was last updated in 1989 while 10 U.S.C. §§ 371-382 have been updated several times since 1989. 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.

⁷⁸ 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.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

- 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 respect to any criminal violation of a law enumerated in paragraph E4.1.2.5,⁷⁹ 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 circumstance 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 circumstance 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 inconsistent. Under 10 U.S.C. § 374, requests for DoD personnel to *maintain* equipment may come from federal, state, or local authorities, while 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 requests for personnel to *operate* or to *maintain* equipment. The Directive, only requires that

⁷⁹ The laws enumerated in DoDD 5525.5, *supra* note 7, para. E4.1.2.5 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.

SUPPORT TO CIVILIAN LAW ENFORCEMENT

the requests 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 the DoD Directive. Operations such as aerial reconnaissance and intercepting vessels outside the land area of the U.S. in order to direct them to a certain area are permitted under § 374, but not under the DoD Directive. A legal advisor 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.”⁸⁰ Under 10 U.S.C. § 371, the transfer of information acquired in the normal course of military operations to civilian law enforcement agencies is not a violation of the PCA.⁸¹ Additionally, the DoD Directive 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. *See app. 2-5, Support to Capitol Police Order.*

⁸⁰ DoDD 5525.5, *supra* note 7, para. E4.1.7; SECNAVINST 5820.7C, *supra* note 8, para. 9(d); AFI 10-801, *supra* note 8, ch. 4.

⁸¹ Transfer of information is discussed in greater detail above in this chapter at B.3.a. *Use of Information Collected During Military Operations.*

CHAPTER 5.

CIVIL DISTURBANCE OPERATIONS¹

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
- DoDD 3025.12 - Military Assistance for Civil Disturbances, 4 Feb 94
- DoDD 3025.15 - Military Assistance to Civil Authorities, 18 Jan 97
- DoDD 5111.13 – Assistant Secretary of Defense for Homeland Defense and Americas’ Security Affairs
- DoDD 5525.5 - DoD Cooperation with Civilian Law Enforcement Officials, 15 Jan 86
- CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules For the Use of Force for US Forces (S), 13 JUN 2005
- CJCSI 3110.07C, Guidance Concerning Chemical, Biological, Radiological, and Nuclear Defense and Employment of RIOT Control Agents and Herbicides (S), 22 NOV 2006
- Joint Pub 3-28 - Civil Support (14 Sep. 2007)
- Army Regulation 700-131 - Loan and Lease of Army Materiel (23 Aug. 2004)
- National Guard Regulation 500-1/ANGI 10-8101 - National Guard Domestic Operations (13 Jun. 2008)
- FM 3-07 - Stability Operations and Support Operations (6 Oct. 2008)
- FM 3-19.15 - Civil Disturbances (18 Apr. 2005)
- USNORTHCOM CONPLAN 3502 (S)
- USNORTHCOM CONPLAN 3600 (S)

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.

- 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 render the military subordinate to civilian authority.² The basic policy is rooted in the Constitution³ 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

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, *supra*, Chapter 2, 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.

CIVIL DISTURBANCE OPERATIONS

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. The Department of Defense and the courts use one phrase, “civil disturbance,” to encompass the various situations allowing the use of military assistance under the Insurrection Act.

The Department of Defense defines civil disturbances as “group acts of violence and disorders prejudicial to public law and order in the 50 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 have used similar language when defining “insurrection.”⁹

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. Support a State Request

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]. Note that DoDD 3025.dd, Defense Support to Civil Authorities, is pending final approval and should soon be released. DoDD 3025.dd will replace both DoDD 3025.12 and DoDD 3025.15. DoDD 3025.dd, will refer to all support to civilian authorities, formerly MACDIS, MSCLEA, or CS as DSCA.

⁸ *Id.* at para. E2.1.4 (4 Feb. 1994) [hereinafter DoDD 3025.12]. 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 *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.).

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 *supra* Chapter 4, Military Support to Civilian Law Enforcement.

¹¹ 10 U.S.C. §§ 331-335.

CIVIL DISTURBANCE OPERATIONS

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. Title 10, United States Code, section 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

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

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 .

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).

On 1 May 1992, pursuant to this statute, 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. Enforce Federal Authority

The President of the United States 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 Title 10, United States Code, Section 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

The provisions of this statute were used to enforce public school desegregation in Arkansas²³ and Alabama.²⁴ The same provisions were used to

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.

²² *Id.*

²³ See Exec. Order No. 10,730, 22 Fed. Reg. 7,628 (Sept. 24, 1957).

²⁴ See Exec. Order No. 11,118, 28 Fed. Reg. 9,863 (Sept. 10, 1963).

control civil rights protests in Mississippi²⁵ and Alabama.²⁶ See *Appendices 4-9, EO 10730; 4-10, EO 11053; 4-11, EO 11111; and 4-12, EO 11118.*

3. Protect 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 Title 10, United States Code, section 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 USC § 333, President Kennedy sent military troops to Alabama in April 1963 during the civil rights protests in Birmingham, Alabama.³⁰

²⁵ See Exec. Order No. 11,053, 27 Fed. Reg. 9,681 (Sept. 30, 1962).

²⁶ See Exec. Order No. 11,111, 28 Fed. Reg. 5,709 (June 11, 1963).

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.

²⁹ *Id.*

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

4. 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 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 proclamations and Executive Orders in this area are final³³ and cannot be compelled by the courts.³⁴ Copies of the Presidential Proclamation and Executive Order for the deployment of military forces to Los Angeles along with the Executive Orders for enforcing school desegregation and controlling civil rights protests in the 1960s are included at *Appendices 4-1 and 4-9 through 4-12*.

Department of Defense Directive (DoDD) 3025.15, *Military Assistance to 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.

³¹ 10 U.S.C. § 334 which states in full, "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."

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).

CIVIL DISTURBANCE OPERATIONS

- 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. The criteria are helpful to local commanders and legal advisors when forwarding formal assistance requests to higher headquarters for consideration.

The Secretary of Defense has reserved the authority to approve all military support in response to civil disturbances.³⁶ Pre-commitment approvals and requirements do not prevent federal military forces from alerting troops, conducting planning, preparing orders, or pre-positioning forces under the command and control of the appropriate geographic combatant commander in coordination with ASD(HD&ASA) and the Chairman of the Joint Chiefs of Staff, Joint Director of Military Support (JDOMS).³⁷ If more than a battalion-sized unit is to be pre-positioned, the President must approve the pre-positioning.³⁸ The Secretary of Defense, through the office of the ASD(HD&ASA), will issue employment orders prior to the Presidential executive order directing the use of troops.³⁹

C. 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.⁴⁰

³⁵ U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES, para. 4.2 (18 FEB. 1997) [hereinafter DoDD 3025.15]. *See also supra* note 7.

³⁶ DoDD 5111.13, *supra* note 15. The Secretary of Defense delegated all previous executive agent assignments for support to civil authorities to the DoD Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD(HD&ASA)). DoDD 3025.15, *supra* note 35, withheld approval authority for civil disturbance operations at the Secretariat level. (Note: DoDD 3025.15 (MACA) and DoDD 3025.12(MACDIS), *supra* note 7, have not been updated to reflect the duties of ASD(HD&ASA). *But*, DoDD 3025.dd (DSCA) is pending release and it should capture these changes.)

³⁷ JP 3-28, *supra* note 8, provides valuable guidance until DoDD 3025.12 and DoDD 3025.15 are updated.

³⁸ DoDD 3025.12, *supra* note 7, para. 4.2.6. *See also* United States v. Alabama, 373 U.S. 545 (1963) (no justiciable issue when President alerts and stations troops in the vicinity of an area of civil disturbance foreseeing need to exercise powers under the Insurrection Act).

³⁹ JP 3-28, *supra* note 8, chapter III. *See* USNORTHCOM CONPLAN 3502 (S) (limdis) and USPACOM CONPLAN 7502 (S) (limdis). To review these CONPLANS, contact the respective Staff Judge Advocates.

⁴⁰ 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 supra*, Chapter 4, Military Support to Civilian Law Enforcement, which discusses the Posse Comitatus Act and its exceptions.

1. *Protection of Federal Property*

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.⁴¹ A military installation commander, exercising “inherent authority,”⁴² 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.⁴³

2. *Emergency*

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.⁴⁴ This emergency provision should be used with great caution. The authority granting the use of federal forces in this manner clearly states that it would be

⁴¹ DoDD 3025.12, *supra* note 7, para. 4.2.2.2.

⁴² 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.”).

⁴³ 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).

⁴⁴ DoDD 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. E4.1.2.3.1 (15 JAN. 1986), [hereinafter DoDD 5525.5].

difficult to justify such action, without prior approval, while communications facilities are operating.⁴⁵

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.⁴⁶ 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.⁴⁷

D. 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.⁴⁸ 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.⁴⁹ 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

⁴⁵ DoDD 3025.12, *supra* note 7, para. 4.2.2., JP 3-28, *supra* note 8, chapter II, para. 3, *but see* note 36.

⁴⁶ 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].

⁴⁷ DoDD 5525.5, *supra* note 44, para. 4.7.1.

⁴⁸ EO 12,656, *supra* note 14, at § 1101(3) and (8).

⁴⁹ For a detailed discussion of the Attorney General’s role under the Insurrection Act, including a historical description of the Act’s uses, see “The Use of Military Force Under Federal Law to Deal with Civil Disorders and Domestic Violence,” United States Department of Justice (1980).

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 the Department of Defense and the Department of Justice for CDO.⁵⁰ 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.⁵¹

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

The Chairman, Joint Chiefs of Staff (JDOMS) is the action agent within the Department of Defense 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 the Department of Defense for civil disturbance matters.⁵²

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

⁵⁰ DoDD 5111.13, *supra* note 15.

⁵¹ *Id.*

⁵² *Id.* and DoDD 3025.12, *supra* note 7, para. 5.6.4; *see also* FM 3-19.15, *supra* note 46, Appendix B.

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.⁵³ 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.⁵⁴

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 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 is a joint activity of the Department of Defense, and is the channel of communication for all National Guard matters

⁵³ DoDD 3025.12, *supra* note 7, para. 4.3.3.

⁵⁴ *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.

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.⁵⁵ 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.⁵⁶

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 32.⁵⁷ In either capacity, they are not subject to the prohibitions of the PCA,⁵⁸ and can freely support state or federal law enforcement missions. 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.⁵⁹ Once federalized, the NG conducts its mission in accordance with Federal law and CONPLANS, as discussed in the next section.

The NGs' use of force while in SAD or Title 32 status is governed by the law of the state where the operation occurs. Multi-state operations therefore will involve a separate RUF for each receiving state. The only instance to date of a regional RUF for T32 forces occurred during Operation Jump Start, a border security mission conducted during 2006-2007⁶⁰

E. THE DEPARTMENT OF DEFENSE CIVIL DISTURBANCE PLANS (COMBATANT COMMANDERS' CONPLANS)

⁵⁵ U.S. DEP'T OF DEFENSE, DIR. 5105.77, NATIONAL GUARD BUREAU (NGB) (21 May 2008) [hereinafter DODD 5105.77].

⁵⁶ *Id.* at para. 5.1.11.2.

⁵⁷ With SecDef approval, the National Guard may conduct operational missions under 32 U.S.C. 502(f)(2) "operational support" authority.

⁵⁸ *See supra*, Chapter 2, Military Support to Civilian Law Enforcement, for a complete discussion on the Posse Comitatus Act.

⁵⁹ *See infra* Chapter 10, Reserve Components, for a complete discussion of National Guard status.

⁶⁰ See Memorandum of Agreement Between the States of Arizona, California, New Mexico, Texas, and the Department of Defense, subj: OPERATION JUMP START (June 2006).

The Department of Defense has delegated to geographic combatant commanders responsibility for developing Civil Disturbance CONPLANS. Formerly, DoD's CDO plan was known as "GARDEN PLOT."⁶¹ 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.⁶² 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.⁶³ CDO mission statements do not allow the joint civil disturbance task force commander to undertake preservation missions.⁶⁴ 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.⁶⁵ 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,

⁶¹ GARDEN PLOT was published in 1991. The creation of the Department of Homeland Security and US 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 NORTHCOM and PACOM having sole responsibility for CDO planning. GARDEN PLOT has been replaced by COCOM CONPLANS for the respective theaters.

⁶² JP 3-28, *supra* note 8, at para. 3(1)(b).

⁶³ 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 52, I-8, para. 5(a)(2).

⁶⁴ 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."

⁶⁵ FM 3-19.15, *supra* note 52.

CIVIL DISTURBANCE OPERATIONS

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.⁶⁶ 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 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.⁶⁷

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 12 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.

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.

⁶⁶ In most of the US, USNORTHCOM CONPLAN directs how the Joint Civil Disturbance Task Force would plan, train, and conduct operations. See NORTHCOM CONPLAN 3502 *supra* note 39.

⁶⁷ 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.

CIVIL DISTURBANCE OPERATIONS

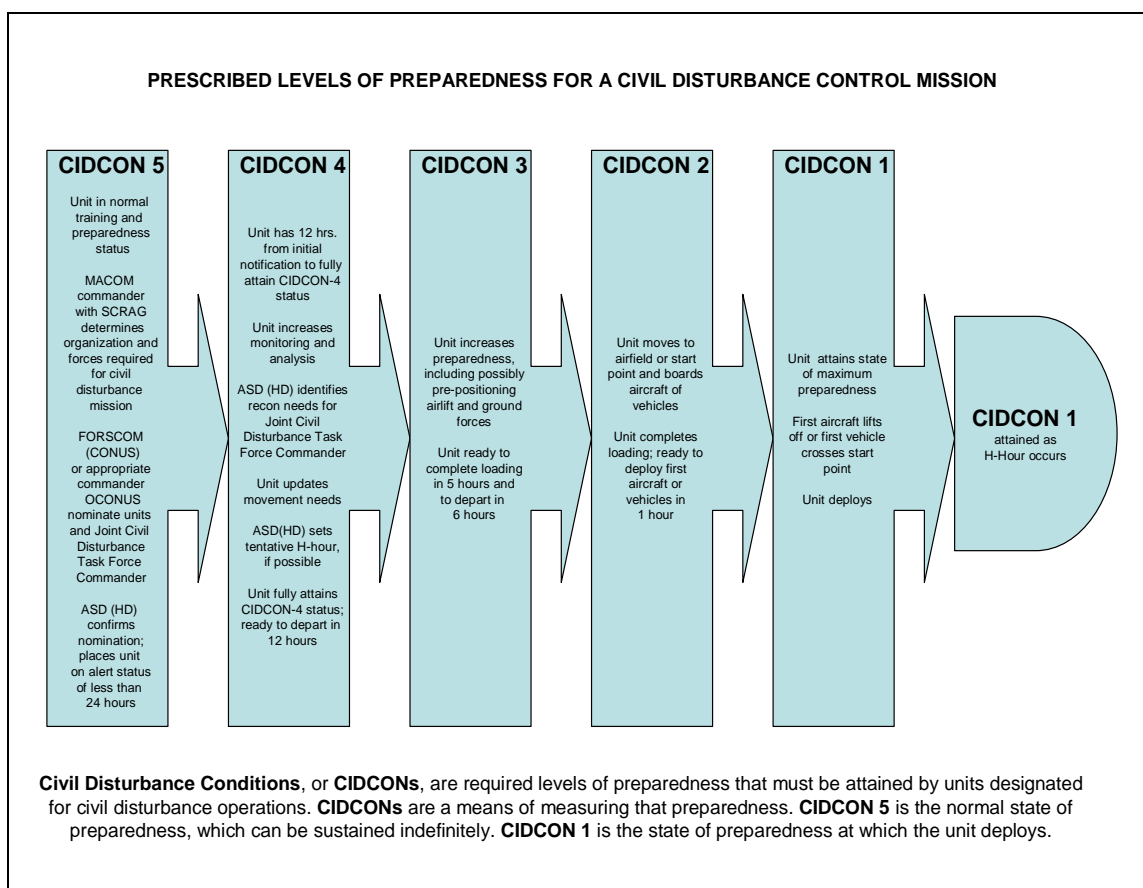


Figure 4-2, CIDCON levels of preparedness

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.⁶⁸

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

⁶⁸ It is important to remember that civilian authorities retain primary authority over the employment of military forces. See notes 1-4, *supra*, and accompanying text. See 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.”).

will accept missions from the SCRAG, and, if reasonably possible, within the framework of his orders, comply with requests from civil authorities.⁶⁹

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.⁷⁰

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 US Forces

CDO are conducted in accordance with Appendix L of the Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces (SRUF). Guidance on how and 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.⁷¹ Civilians taken

⁶⁹ JP 3-28, *supra* note 8, Chapter III.

⁷⁰ *Id.*

⁷¹ JP 3-28, *supra* note 8, Chapter III.

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 personal information such as name and address. If formal questioning of an offender is necessary, civilian police should conduct the interrogation. If civilian police are not available, CID agents or military police may conduct interrogations only if the interrogation 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.⁷²

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.⁷³ Generally these are limited to the following types of searches.

(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

⁷² See FM 3-19.15, *supra* note 52, Chapter 3.

⁷³ *Id.*

removed from the individual and seized.⁷⁴

(2) Incident to 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.⁷⁵

(3) Exigent circumstances

Federal 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. 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 violence⁷⁶

(4) Emergency

Armed 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.⁷⁷

(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.⁷⁸

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

(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.⁷⁹ When conducting warrantless searches that require a probable cause determination, military forces can obtain advice from a JA; 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, JAs 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.

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.⁸⁰ A hand receipt or some similar document should be prepared when items of personal property are seized from an individual.⁸¹

c. Confinement Facilities

The Joint Civil Disturbance Task Force should not operate a detention facility.⁸² 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,⁸³ the Joint Civil Disturbance Task Force

⁷⁹ *Id.*

⁸⁰ *Id.* at 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.

⁸¹ 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.

⁸² FM 3-19.15, *supra* note 52, para. 3-38 to 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.").

⁸³ 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 39. CONPLAN 3502 (or Commander US PACIFIC COMMAND CONPLAN 7502) specifies that detention facilities be under the control of US Army MP Corps personnel. Due to base closure and increased joint nature of operations it is possible that US Navy and US Air Force confinement facilities could be used.

commander must seek the approval of the SCRAG and Combatant Commander to set up a temporary detention facility.⁸⁴

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.⁸⁵ 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.⁸⁶

d. Riot Control Agents

Normally, for CDO the deployment and use of riot control agents is allowed as a matter of U.S. policy.⁸⁷ 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.⁸⁸

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

⁸⁴ USNORTHCOM CONPLAN 3502, *supra* note 39; JP 3-28, *supra* note 8; FM 3-19.15, *supra* note 52.

⁸⁵ *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 81.

⁸⁶ USNORTHCOM CONPLAN 3502, *supra* note 39.

⁸⁷ USNORTHCOM CONPLAN 3502, *supra* note 39; 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 52.

⁸⁸ *See* USNORTHCOM CONPLAN 3502, *supra* note 39, Appendix 4 to Annex E (Legal).

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).⁸⁹ 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 United States 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.⁹⁰

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.⁹¹ The ACO in whose geographical area a claims incident occurs is primarily responsible for investigating and processing the claim.⁹² 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.⁹³ A complete list of ACOs and their geographical responsibilities is reprinted in *Appendix 4-19*.

Even though primary claims investigating responsibilities fall to the ACO, JAs 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.⁹⁴

⁸⁹ 28 U.S.C. §§ 1346, 2671-2680.

⁹⁰ USNORTHCOM CONPLAN 3502, *supra* note 39.

⁹¹ U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 1-11k (8 Feb. 2008).

⁹² *Id.* at para. 2-2.

⁹³ *Id.* at para. 1-17(c).

⁹⁴ Extensive information on claims arising during civil disturbances can be found in U.S. Army Claims Service, OTJAG, Disaster Claims Handbook (1998) *available at* <http://www.jagcnet.army.mil/Claims>.

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.⁹⁵ 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.⁹⁶

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

⁹⁵ 18 U.S.C. §§ 231-233.

⁹⁶ *Id.* at § 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.

concerning the appropriateness of various restrictions and then assist local authorities in carrying them out.⁹⁷

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 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.⁹⁸ All loans or leases of U.S. Army material will be for a period of 15 days with the possibility of an additional 15-day extension.⁹⁹ Commanders are authorized to approve the loan or lease of equipment as required to save human life, prevent human suffering, or reduce great 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.¹⁰⁰ Equipment for non-federal law enforcement agencies must be leased under the leasing statute, which requires both a lease agreement and a surety bond.¹⁰¹ The leasing statute also includes the requirement for the payment of a lease fee, which may be waived by the ASA(I, L&E). When Commanders approve emergency loans or leases, follow-up action will be taken within 5 days to formalize the action by completing a loan or lease agreement.¹⁰² See DOPLAW Handbook, Supp., App. 5-7, *Loan, Lease and Donation of Army Material*.

⁹⁷ FM 3-19.15, *supra* note 52.

⁹⁸ 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.

⁹⁹ AR 700-131, *supra* note 98, at Table 2-1.

¹⁰⁰ 31 U.S.C. § 1535.

¹⁰¹ 10 U.S.C. § 2667; see also AR 700-131, *supra* note 98, paras. 2-7, 2-8 (discussing loan/lease agreements and surety bonds).

¹⁰² AR 700-131, *supra* note 98, 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 - Law Enforcement (Coast Guard)
- 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)
- DepSecDef Memo, Department of Defense Counternarcotics Policy, 31 Jul 02
- DepSecDef Memo, Department of Defense International Counternarcotics Policy, 24 Dec 08
- DepSecDef Memo, Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities, 2 Oct 03
- DASD/CN Memo, Policy Definition of “Counterdrug Activities”, 23 Oct 02
- DASD/CN Memo, Policy Definition of “Narcoterrorism”, 12 Apr 04
- DASD/CN Memo, Counter Drug Support to Counter-Narcoterrorist Activities, 26 Aug 2005 (memo to Chief, NGB)
- DASD/CN Memo, Procedures for Handling Requests for Counterdrug Narcoterrorist Support, 2006
- DoDD 5525.5, DoD Cooperation with Civilian Law Enforcement Officials, 15 Jan 86
- CNGB Memo, Counter Drug Support to Counter-Narcoterrorist Activities, 22 Dec 2005
- CNGB Memo, Implementation of Procedures for Handling Requests for Counterdrug Narcoterrorist Support, 2 Jun 06
- NGR 500-2 - National Guard Counterdrug Support (28 Aug. 2008)
- CJCSI 3121.01B - Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, 13 JUN 2005
- CJCSI 3710.01B, DoD Counterdrug Support, 26 JAN 2007
- Joint Pub 3-07.4, Joint Counterdrug Operations (13 Jun. 2007)

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. It now includes both active component and National Guard forces engaged fulltime in the mission. Department of Defense 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 U.S.⁴ Section 1206 of the same Act stated that the “Secretary of Defense shall direct that the armed forces, to the maximum extent practicable, shall conduct military training exercises in drug interdiction areas.”⁵ Finally, Congress provided specific counterdrug authority to DoD by passing Section 1004 of the NDAA for FY 1991.⁶

¹ 10 U.S.C.A. §§ 371-382 (2001). See *supra* 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.

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.

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.

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

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.* These authorities first appeared in the National Defense Authorization Act of 1991 and this section has been continuously amended to apply through the year 2009. Many of these authorities are also reproduced in the notes following 10 U.S.C.A. §374 in the annotated codes.

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

COUNTERDRUG OPERATIONS

- 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
 - 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.

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 21 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.* at § 1004(h).

COUNTERDRUG OPERATIONS

- 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

¹¹ *Id.* at §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.* at §1004(g).

¹⁴ *Id.* at §1004(e).

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
- 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

3. CJCS Implementation

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 The 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. Specifically withheld is the 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. 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

¹⁵ 10 U.S.C. § 124(a)(2).

¹⁶ *Id.* at §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)(1998).

¹⁸ *Id.* 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.

COUNTERDRUG OPERATIONS

On 31 July 2002, The Deputy Secretary of Defense (DepSecDef) published the Department of Defense Counternarcotics Policy. Also, on 2 October 2003, the DepSecDef published the policy on domestic counternarcotics activities.

The July 2002 policy states that the DoD will focus its counternarcotics activities on programs that: enhance the readiness of the DoD; satisfy the Department's statutory detection and monitoring responsibilities; contribute to the war on terrorism; advance the Department's security cooperation goals; or enhance national security.

The October 2003 policy established a goal of reducing the operational stress on Title 10 forces that conduct domestic counternarcotics activities through utilization of Title 32 forces; concentrating the Department's support on those military unique 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 (policy) shall be responsible for reviewing and approving Title 10 counternarcotics support, except where that authority was delegated pursuant to CJCSI 3710.01B.

This policy also dictates that all requests for department support must satisfy the following criteria:

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

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 the Department to provide the requested support. Second, the support will assist the requesting agency in accomplishing its counternarcotics activities within the U.S. Third, the support is consistent with the Department'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 are essential to national security goals. Memorandum, Deputy Secretary of Defense, Subject: Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities (2 Oct 2003).

COUNTERDRUG OPERATIONS

For all domestic counternarcotics support requests sent to NORTHCOM, the Cdr, NORTHCOM, will first ensure a National Guard unit cannot provide the support. If not, NORTHCOM will determine whether the requested support is feasible, supportable, and consistent with DOD policy. If approval is authorized under CJCSI 3710.01B, the Cdr, NORTHCOM, or his 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 (USD (P)), for consideration.

Requests sent directly to DoD will first be referred to the National Guard Bureau. If the NGB cannot provide the support the request will be referred through the Joint Staff to Cdr, USNORTHCOM, for review. If feasible and supportable the Cdr, USNORTHCOM will request 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 U.S. are provided in CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for US 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 (SOUTHCOM)), JIATF West, located in Alameda, California, (under the command and control of Pacific Command (PACOM)), and Joint Task Force North (JTF-N), located in El Paso, Texas (under the command and control of NORTHCOM.) 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. To deconflict and identify interim and long-term solutions for command and control arrangements between NORTHCOM, SOUTHCOM and PACOM, the ASD (SOLIC) established specific areas of responsibility for JIATF-S, JIATF-W and for JTF-N.²² While the JIATFs

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

²² Memorandum, Assistant Secretary of Defense, Special Operations/Low Intensity Conflict, Subject Joint Interagency task Force (JIATF) Area Responsibilities (1 Aug 2003).

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, 1989,²³ 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.²⁴ 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.

There are approximately 175 personnel assigned to JTF-N, including civilians, contractors and service members from all four 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. It 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.

5. Coast Guard Law Enforcement Detachments

As the primary enforcer of U.S. maritime law, the United States Coast Guard (USCG) plays a critical role in the war on drugs. The USCG has the lead role in

²³ Message, 152330Z Oct 89, Commander in Chief, Forces Command (CINCFOR), subject: Operations Order—Counternarcotics Operations (15 Oct 1989).

²⁴ 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.

maritime drug interdiction, and shares the lead role in air interdiction with the U.S. Customs Service. The USCG conducts extensive maritime counterdrug operations. These range from enforcing drug possession and use laws during routine recreational vessel boardings, to conducting sustained multi-unit operations targeting major drug traffickers far from U.S. shores. Since the PCA does not apply to the USCG,²⁵ the PCA restrictions on arrest, search, seizure, and the interdiction of vessels and aircraft, are inapplicable to USCG operations and personnel. To capitalize on this expertise and capability, 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.²⁶ 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 Title 14, United States Code.²⁷ Coast Guard personnel assigned under §379 will have functions which are agreed to by the Secretary of Defense and Secretary of Homeland Security and which are otherwise within the Coast Guard's jurisdiction.²⁸ No fewer than 500 active duty Coast Guard personnel will be assigned duties under §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

²⁵ *United States v. Chaparro-Almeida*, 679 F.2d 423 (5th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1982).

²⁶ 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.

²⁷ 14 U.S.C. § 89(a):

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.

²⁸ 10 U.S.C. § 379(b).

Coast Guard personnel may be assigned duties to enforce the laws listed under 10 U.S.C. §374(b)(4)(A).²⁹

Specific rules governing the use of USCG LEDETs are provided in Commandant, United States Coast Guard Instruction (COMDTINST) M16247.1D, *Maritime Law Enforcement Manual*.³⁰ Chapter Five of the Maritime Law Enforcement Manual addresses the roles and responsibilities of the USCG in counterdrug operations. The primary federal statute used by the USCG in counterdrug operations is the Maritime Drug Law Enforcement Act (MDLEA).³¹ 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.³² The term “U.S. vessel” includes:

- Federally documented or state numbered vessels;
- Vessels owned in whole or in part by:
 - the U.S. or a territory, commonwealth, or possession of the U.S.;
 - a state or political subdivision thereof;
 - a citizen or national of the U.S.; or
 - a corporation created under the laws of the U.S. or any state, the District of Columbia, or any territory, commonwealth, or possession of the U.S.;and
- U.S. documented vessels sold or registered in a foreign country in violation of U.S. law.³³

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

- In U.S. Customs waters;
- On the high seas and the flag State has consented or waived objection to the enforcement of U.S. law; or

²⁹ *Id.* at § 379(c).

³⁰ U.S. DEP'T OF COAST GUARD, COMMANDANT OF THE COAST GUARD INSTR. M16247.1D, MARITIME LAW ENFORCEMENT MANUAL (15 Apr. 2005)(FOUO)[hereinafter COMDTINST M16247.1D]. *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).

³¹ 46 U.S.C.A. App. §§1901-1904 (2000).

³² *Id.* at § 1903.

³³ *Id.* at § 1903(b).

- In the territorial waters of another nation and that coastal State consents to the enforcement of U.S. law.³⁴

U.S. Navy ships with USCG 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.”³⁵ When an U.S. Navy ship enters the boarding phase of a law enforcement operation, it shifts tactical control (TACON) to the USCG 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.”³⁶ U.S. Navy ships transporting USCG LEDETs under TACON of the USCG will follow the Use-of-Force Policy issued by the Commandant, USCG regarding use of warning shots and disabling fire.³⁷

In addition to placing LEDETs on U.S. Navy ships, the USCG also relies on extensive bilateral and multilateral agreements between the U.S. 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. Standing agreements typically address various aspects of enforcement including: shipriders, overflight, access to territorial waters, combined operations, and flag State authorization to board, search, seize, and arrest. As with all international agreements, these bilateral and multilateral agreements can only be negotiated with authorization from the U.S. Department of State.³⁸ See DOPLAW Handbook, Supp., App. 6-13, *Sample LEDET MOA*, for a sample bilateral agreement.

³⁴ *Id.* at § 1903(c).

³⁵ COMDTINST M16247.1D, *supra* note 30 ch 2, § E(1)(e).

³⁶ *Id.*

³⁷ CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT, Encl. H, Counterdrug Support Operations Outside the US 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 (1998), Stopping vessels; immunity from firing at or into vessels.

³⁸ COMDTINST M16247.1D, *supra* note 30, at ch. 5, sec. B and encl. 4.

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.³⁹

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 Bureau of Alcohol, Tobacco, and Firearms (BATF) and Federal Bureau of Investigation (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.⁴⁰

CD funds may be used for the purpose of drug interdiction and counterdrug activities in which (1) drug traffickers use terrorism to further their aims of drug

³⁹ Procurement of equipment cannot exceed \$5000 per purchase order unless approval is granted by the Secretary of Defense. 32 U.S.C.A. §112(a)(3)(1959). 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].

⁴⁰ DA (FM&C) Report of Antideficiency Act Violation Case #95-09, 11 March 1997.

trafficking or (2) terrorists benefit from or use drug trafficking to further their aims of drug trafficking.⁴¹

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.⁴² A state drug interdiction and counterdrug activities plan shall:

- Specify how personnel of the National Guard of that state are to be used in drug interdiction and counterdrug activities;
- Certify that those operations are to be conducted at a time when the personnel involved are not in federal service;
- Certify that participation by National Guard personnel in those operations is service in addition to training required under 32 U.S.C. §502;⁴³
- Certify that any engineer-type activities (as defined by the Secretary of Defense) under the plan will be performed only by units and members of the National Guard;
- Include a certification by the Attorney General of the state that the use of the National Guard of the state 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.⁴⁴

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,

⁴¹ CNGB Memo, Implementation of Procedures for Handling Requests for Counterdrug Narcoterrorist Support, 2 June 2006.

⁴² State drug interdiction and counterdrug support plans must be submitted through the Counterdrug Office of the National Guard Bureau. NGR 500-2, *supra* note 39, para. 2-5.

⁴³ See 32 U.S.C. §502 (1959) (addressing annual drill and field exercise requirements of National Guard personnel).

⁴⁴ *Id.* at §112(c).

COUNTERDRUG OPERATIONS

and other appropriate offices within the department, recommends approval or rejection to the Secretary of Defense.⁴⁵

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;
- 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.⁴⁶

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

National Guard units performing counterdrug missions under 32 U.S.C. §112 are in State service (not Federal service in Title 10 status) and under State command and control. In fact, §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, the CD personnel must be in FTNGD (full time national guard duty) status, not AGR. As with all National Guard personnel in a Title 32 status under State control, National Guard personnel conducting counterdrug missions under 32

⁴⁵ Memorandum, Deputy Secretary of Defense, Subject: Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities (2 Oct 2003).

⁴⁶ 32 U.S.C. §112(b)(2)(C).

U.S.C. §112 are covered under the Federal Tort Claims Act⁴⁷ even though they are not in a federal status.⁴⁸ For NG members sued or prosecuted in state court for state or federal constitutional violations resulting from counterdrug operations, they may request representation from the Department of Justice pursuant to AR 27-40, chapter 4 or AFI 51-301, chapter 1. For this purpose, NG personnel in a Title 32 status are considered state employees. The process of determining representation is separate and distinct from the determination of FTCA coverage. If representation is granted, NG 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 NG personnel for any adverse monetary judgments or sanctions, but may, in its sole discretion, do so upon request.

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.⁴⁹ This allows NG personnel more flexibility than active component forces in conducting counterdrug missions. However, the National Guard Bureau has imposed several policy restrictions on National Guard counterdrug operations in NGR 500-2.⁵⁰ As a matter of policy, National Guard personnel will not directly participate in the arrest of suspects, conduct searches which include direct contact of National Guard members with suspects or the general public, or become involved in the chain of custody of any evidence, except in exigent circumstances, or when otherwise authorized.⁵¹ 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.⁵²

⁴⁷ 28 U.S.C. §§2671-2680.

⁴⁸ NGR 500-2, *supra* note 39, para. 2-4.

⁴⁹ *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. Guardsmen were found to be exempt from the Posse Comitatus Act, which generally prohibits use of federal army to aid civil authorities in the enforcement of civil laws); *United States v. Benish*, 5 F.3d 20, 25-26 (3rd Cir. 1993) (The use of National Guard unit that was not in federal service for civilian law enforcement involving surveillance of possible drug operation was held not to be in violation of federal law, where under Pennsylvania law governor could place members of National Guard on special state duty to support drug interdiction programs).

⁵⁰ This regulation does not address National Guard counterdrug activities performed under the authority of Title 10, United States Code.

⁵¹ NGR 500-2, *supra* note 39, para. 2-1e.

⁵² *Id.*

COUNTERDRUG OPERATIONS

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;

COUNTERDRUG OPERATIONS

- Surface Reconnaissance – Reconnoitering or performing area observation by land or water to detect and report illegal drug activities that include, but are not limited to, cultivated marijuana, suspected isolated drug trafficking airstrips, drug drop zones, drug trafficking corridors, illegal drug laboratories, suspicious aircraft, watercraft, or motor vehicles;
- Aerial Reconnaissance – Conducting reconnaissance/observation of airspace, maritime or surface areas (land and internal waterways of the U.S. and territories) for illegal drug activities which include, but are not limited to, cultivation of marijuana or delivery of illegal drugs;⁵³
- 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.⁵⁴

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.⁵⁵

⁵³ 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.

⁵⁴ See NGR 500-2, para. 2-7 for a detailed description of what each mission entails.

⁵⁵ *Id.* para. 3-6. This authority may be delegated in accordance with para. 3-6(b).

COUNTERDRUG OPERATIONS

Since National Guard personnel providing counterdrug support under 32 U.S.C. §112 are acting as State officials, each State 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 US Territory, is not applicable to the NG unless they are in federal service (Title 10 status). A sample NG RUF card is DOPLAW Handbook, Supp., App. 6-11, *California National Guard Counterdrug Task Force Standing Rules of Engagement*. Judge advocates must be aware of the application of the law of the state in which operations are being conducted.⁵⁶

If National Guard personnel are armed, NGR 500-2 requires the AG to consider the following:

- All personnel authorized to carry firearms must have received qualification training and testing on the type of firearm to be carried, in accordance with current regulations. Training will include instruction on safety functions, security, capabilities, limitations, and maintenance of the firearms. Testing will include qualification firing in accordance with current qualification standards;
- Arms and ammunition will be secured at all times in accordance with appropriate regulations and policies. Rounds will be chambered only on order of the commander/senior officer/senior noncommissioned officer present, in coordination and in conjunction with the supported LEA, except in cases of exigent circumstances;
- Firearms will not be discharged from moving vehicles (except in self defense or to defend other persons);
- Pilots in command of aircraft have the authority to override an order to chamber rounds while on board an aircraft;
- Possession or use of non-issued or personally owned firearms and/or ammunition during counterdrug support operations is prohibited. National Guard personnel will not accept offers of weapons or ammunition from LEAs except for use on LEA operated ranges for training purposes only. The only weapons used for counterdrug support operations will be federally owned military weapons listed on the unit's property books;
- Federally owned military weapons will not be secured in private dwellings at any time;

⁵⁶ 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[hereinafter Stafford].

COUNTERDRUG OPERATIONS

- 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.⁵⁷

⁵⁷ NGR 500-2, *supra* note 39, para. 3-6.

MILITARY SUPPORT TO SPECIAL EVENTS

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 (22 May 1998)
- HSPD 7 - Critical Infrastructure Identification, Prioritization, and Protection (17 December 2003)
- HSPD 15 - U.S. Strategy and Policy in the War on Terror (6 March 2006) (Classified)
- NSPD 46 - U.S. Strategy and Policy in the War on Terror (6 March 2006) (Classified)
- DoDD 1100.20 - Support and Services for Eligible Organizations and Activities Outside the Department of Defense, 12 Apr 04
- DoDD 2000.15 - Support to Special Events, 8 Dec 03
- Reese, Shawn, *National Special Security Events*, CRS REP. FOR CONG. (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 National Special Security Events such as major sporting events, Presidential inaugurations, and international meetings.¹ The IRT program allows commanders to conduct training in the civilian community, but benefit to the community must be incidental

¹ Reese, Shawn, *National Security Special Events*, CRS REP. FOR CONG. (March 19, 2008), at 3-4 (hereinafter CRS Report, *National Security Special Events*).

MILITARY SUPPORT TO SPECIAL EVENTS

to the training.² IRT support must provide a training benefit to the participating unit or individual.

B. DESIGNATED SPECIAL EVENTS

Title 10 of the United States Code § 2554 permits support for Boy Scout Jamborees.³ 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.⁴ Further, if the Jamboree is conducted on a military installation, the Secretary may authorize logistical and personnel support on the military installation.⁵ 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.⁶

Congress has also authorized military support to certain sporting events, such as the Olympics or World Cup soccer.⁷ In addition to sporting events, other special events may be designated by the Secretary of Defense for support.⁸ Such support may be provided on a reimbursable basis or may be funded by specific appropriations.⁹

² Memorandum, Assistant Secretary of the Army (Manpower and Reserve Affairs), subject: Innovative Readiness Training (IRT), Encl. 1 (28 Mar. 2000) [hereinafter IRT Policy].

³ 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*.

⁴ 10 U.S.C. § 2554(a.).

⁵ 10 U.S.C. § 2554(g).

⁶ 10 U.S.C. § 2554(b-f).

⁷ 10 U.S.C. § 2564. Note that this section was previously numbered as 2554 until 2000.

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.

Id. at 2564(a).

⁸ U.S. DEP'T OF DEFENSE, DIR. 2000.15, SUPPORT TO SPECIAL EVENTS, para. 3.1 (21 Nov. 1994) [hereinafter DoDD 2000.15].

⁹ *Id.* at para. 4.4.

MILITARY SUPPORT TO SPECIAL EVENTS

Event	Location	Date
World Energy Council Meeting	Houston, TX	Sep. 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
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

Event	Location	Date
Republican National Convention	Minneapolis-St. Paul, MN	Sep. 1-4, 2008
Presidential Inauguration	Washington, DC	Jan. 20, 2009
Super Bowl XLIII	Tampa Bay, FL	Feb 1, 2009

Figure 7-1, DoD Support to Special Events¹⁰

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.¹² Other sporting events previously supported include the World Alpine Ski Championships and the Special Olympics. Military forces provided extensive support during the 1996 and 2002 Olympic Games held in Atlanta, Georgia and Salt Lake City, Utah, respectively.¹³

Commander, U.S. Joint Forces Command (JFCOM) formed Joint Task Force-Olympics (JTF-O) on January 16, 2001.¹⁴ Routine support approved by the Secretary of the Army for this event included aviation, communications, explosive ordnance disposal, physical security, and temporary facilities.¹⁵ JTF-O received requests for assistance from the U.S. Olympic Planning Committee and the Salt Lake Olympic Planning Committee.¹⁶ With the establishment of U.S. Northern Command (USNORTHCOM) on September 11, 2003, similar future support missions would be assigned to USNORTHCOM.

¹⁰ Table produced by Reese, Shawn, *see* CRS Report, *National Security Special Events*, *supra* note 1.

¹¹ DoDD 2000.15, *supra* note 8, 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: USCINCFJCOM JTF-Olympics Stand Up Announcement (18 Jan. 2001).

¹⁵ Message 141555Z Mar 00, Commander in Chief, Joint Forces Command, subject: USCINCFJCOM 2000 XIX Olympics PLANORD Feedback (14 Mar. 2000).

¹⁶ FORSCOM Presentation, *supra* note 13.

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 DoD may also support designated "national special security events" when tasked to do so.

(1) Events Not Declared National 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 security event.¹⁹ The G-8 meeting of 2004 was also designated to receive such support.

(2) National Security Events

Presidential Decision Directive (PDD) 62 provides that events may be designated as *national special security events* (NSSEs).²⁰ 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 NSSE.²¹ This determination is made after consultation with the Homeland Security Council.²² 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 responsible for security design, planning and implementation at NSSEs.²³ Military assets provided in support of NSSEs may include explosive

¹⁷ DoDD 2000.15, *supra* note 8, 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 Presidential Decision Directive 62, Protection Against Unconventional Threats to the Homeland and Americans Overseas (22 May 1998) (classified Secret) [hereinafter PDD-62]. An unclassified abstract of PDD-62 is included at DOPLAW Handbook, Supp., App 2-9.

²¹ HSPD-7, Critical Infrastructure Identification, Prioritization, and Protection at para. 26 (December 17, 2003).

²² *Id.*

²³ 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 United States Secret Service, National Special Security Events, available at, <http://www.ustreas.gov/uss/ussse.shtml>.

ordnance disposal (EOD) teams, technical escort units (TEU),²⁴ geospatial intelligence support²⁵, and Chemical/Biological Immediate Response Forces (C/BIRF).²⁶

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.²⁷ Examples of such events receiving DoD support include the NATO 50th Anniversary Summit, the 1999 visit to the U.S. by Pope John Paul II, and the World Trade Organization (WTO) meeting held in Seattle in 1999.²⁸

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.

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

²⁴ TEU teams are capable of detecting, rendering safe, and transporting chemical and biological devices.

²⁵ 10 U.S.C. 442, National Geospatial-Intelligence Agency, Missions.

²⁶ For an excellent overview of the process from an interagency perspective, *see* Briefing, "National Special Security Events," prepared by USNORTHCOM and the FBI, Miami (4 March 2008) on file with CLAMO.

²⁷ CRS Report, *National Security Special Events*, *supra* note 1, at 2.

²⁸ Message, 180715Z Oct 99, Department of the Army, subject: World Trade Organization (WTO) Ministerial Conference (18 Oct. 1999).

²⁹ 10 U.S.C. § 2554(a).

certify that the specific categories of support are "necessary to meet essential 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 Secretary, DHS, 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

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 1, at 3.

³³ *Id.*

³⁴ DODD 2000.14, 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 8, at para. 3.2.

³⁷ 10 U.S.C. § 2564 (b)(1) & (2).

³⁸ DoDD 2000.15, *supra* note 8, para. 4.3.

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 addition to general funding for NSSEs that began in FY2006, Congress has also designated funds for specified NSSEs since 2004. These NSSEs receiving specific appropriations include the Presidential Nominating Conventions for both parties in 2004 and 2008.

C. INNOVATIVE READINESS TRAINING

Under certain circumstances, the “units and military personnel” can be used to assist eligible organizations and activities in “addressing community and civic needs of the United States” to include territories and possessions.⁴² These activities when authorized are to be performed as “innovative readiness training” (IRT).⁴³ Innovative Readiness Training (IRT) provides the military the opportunity to satisfy valid unit training requirements or relate to the military skills of requested individual military members.⁴⁴ Further, IRT projects provide a direct and lasting benefit to our communities. 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 only avenue for commanders to conduct military training in the civilian community while simultaneously providing support and

³⁹ Pub. L. 104-208, div. A, title V, §5802, 110 Stat. 3009-522 (1996).

⁴⁰ 10 U.S.C. § 2564 (b)(3).

⁴¹ *Id.* at § 377; U.S. DEP’T OF DEFENSE, REG. 7000.14-R, VOL. 2, DEPT. OF DEFENSE FINANCIAL MANAGEMENT REGULATION (June 2000).

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], at para. 4.1.

⁴³ *Id.*

⁴⁴ *Id.* at paragraphs 4.4.2.1.1 to 4.4.2.1.2.

services to civil authorities and other eligible civilian organizations and activities.⁴⁵ IRT is conducted by combat support units and individuals off base and within communities throughout the U.S., its territories and possessions. 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 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.”⁴⁶

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 US, its territories and possessions, and the Commonwealth of Puerto Rico.⁴⁷ Such assistance must be provided incidental to training or be otherwise authorized by law.⁴⁸ Assistance is primarily provided by combat service support units, combat support units, and personnel serving in the areas of health-care services, general engineering and infrastructure support and assistance services.⁴⁹

a. Requests for Assistance

Requests for assistance must come from a "responsible official" of an "eligible organization."⁵⁰ A responsible official is "an individual authorized to

⁴⁵ 10 U.S.C. § 2012; *implemented by* DODD 1100.20, *supra* note 42; an excellent overview of this program and its procedures is by Lieutenant Commander W. Kent Davis, *Innovative Readiness Training Under 10 USC § 2012: Understanding the Congressional Model for Civil-Military Projects*, ARMY LAW., Jul. 2001, at 21.

⁴⁶ DODD 1100.20, *supra* note 42, paragraph 4.4.1.2.

⁴⁷ 10 U.S.C. § 2012 (1998); DoDD 1100.20, *supra* note 42.

⁴⁸ 10 U.S.C. § 2012(a).

⁴⁹ DoDD 1100.20, *supra* note 42, para. 4.2.

⁵⁰ 10 U.S.C. § 2012(c)(1).

represent the organization or activity regarding the matter of assistance to be provided."⁵¹ There are three categories of eligible organizations. Any federal, regional, state or local government entity is an eligible organization.⁵² 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.⁵³

The request for IRT assistance must specify that the requested assistance is not reasonably available from a commercial entity.⁵⁴ 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."⁵⁵ If commercial assistance is reasonably available, the requesting individual must certify the commercial entity agrees to the provision of such services by the military.⁵⁶

b. IRT Program Assistance-Nature and Requirements

An organization may request Innovative Readiness Training assistance of 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).⁵⁷ 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).⁵⁸ Second, providing the assistance cannot adversely affect the quality of training or otherwise interfere with a unit or its members'

⁵¹ DoDD 1100.20, *supra* note 42, para. 4.4.1.1.

⁵² 10 U.S.C. § 2012(e)(1).

⁵³ *Id.* at § 2012(e)(3).

⁵⁴ *Id.* at § 2012(c)(2).

⁵⁵ DoDD 1100.20, *supra* note 42, para. 4.4.1.2.

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

⁵⁷ *Id.* at § 2012(d)(1)(A)(i).

⁵⁸ *Id.* at § 2012(d)(1)(A)(ii).

ability to perform military functions.⁵⁹ Third, providing the assistance cannot result in a significant increase in training costs.⁶⁰

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.⁶¹ In such cases, volunteers will meet manpower requests, and assistance other than manpower will be extremely limited.⁶² Military vehicles may only be used, for instance, to provide transportation of personnel to and from the work site.⁶³ 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 Projects⁶⁴

OASD/RA approval is required of all 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.⁶⁵ All IRT project requests received directly from requestors that lack military unit sponsors must also be forwarded to OASD/RA.⁶⁶ 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

⁵⁹ *Id.* at § 2012 (d)(1)(B).

⁶⁰ *Id.* at § 2012 (d)(1)(C).

⁶¹ *Id.* at § 2012 (d)(2).

⁶² DoDD 1100.20, *supra* note 42, para. 4.4.2.1.3.

⁶³ *Id.*

⁶⁴ IRT Policy, *supra* note 2, Encl. 1, 2.

⁶⁵ 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.

⁶⁶ IRT Policy, *supra* note 2, Encl. 1, 2.

IRT requests.⁶⁷ Additional requirements may exist if the proposed IRT project crosses multiple fiscal years.⁶⁸

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 meant. 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.

(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.⁶⁹

(3) IRT Project Requests-The Review Process

All IRT project requests must be reviewed for full compliance with

⁶⁷ *Id.* at Encl. 1, 3.

⁶⁸ *Id.*

⁶⁹ *Id.* at Tab A, 3.

applicable guidelines and law. All IRT project requests must be reviewed and endorsed by the Staff Judge Advocate, U.S. Property and Fiscal Officer or Federal Budget Officer, and Plans, Operations and Training officials.⁷⁰ 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.⁷¹

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.⁷² 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.

⁷⁰ *Id.* at Encl. 1, 2.

⁷¹ *Id.* at Tab A, 4.

⁷² *Id.* at Tab A, 2.

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

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
- PDD-63 - Critical Infrastructure Protection
- 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, 21 March 2001.
- DoDD 3020.26 - Department of Defense Continuity Programs, 9 Jan 09
- DoDD 3020.36 - Assignment of National Security Emergency Preparedness (NSEP) Responsibilities to DoD Components, 2 Nov 88 (incorporating Change 1, 12 Mar 93)
- DoDD 3025.13 - Employment of Department of Defense Resources in Support of the United States Secret Service, 13 Sep 85
- DoDD 3025.15 - Military Assistance to Civil Authorities, 18 Feb 97
- DoDD 3150.8 - DoD Response to Radiological Accidents, 13 Jun 96
- DoD 3150.8-M - Nuclear Weapon Accident Response Procedures (NARP), 22 Feb 05
- DoDD 4500.9E - Transportation and Traffic Management, 11 Sep 07
- DoDD 5030.50 - Employment of Department of Defense Resources in Support of the United States Postal Service, 13 Apr 72
- DoDD 5105.60 - National Imagery and Mapping Agency (now NGA)

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

- DoDD 5230.16 - Nuclear Accident and Incident Public Affairs (PA) Guidance, 20 Dec 93
- DoDD 6000.12 - Health Services Operations and Readiness, 29 Apr 96
- National Military Strategy to Combat Weapons of Mass Destruction (C, JCS) (13 Feb. 2006)
- AR 95-1 - Flight Regulations (12 Nov. 2008)
- AR 500-3 - U.S. Army Continuity of Operations Program Policy and Planning (18 Apr. 2008)
- NGR 500-1/ANGI 10-8101, National Guard Domestic Operations (13 Jun. 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

¹ U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS (Jul. 2003) [hereinafter FM 3-07].

² *Id.*

³ Exec. Order No. 12656, Assignment of Emergency Preparedness Responsibilities, § 101 (Nov. 18, 1988) [hereinafter EO 12656].

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

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

- 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 USC 1535-36;

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 SEP 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.* at para. 1.4.

⁶ *Id.*

⁷ *Id.* at para. E4.2.1.

⁸ *Id.* at para. E4.3.1.

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

- Medical evacuations pursuant to the provisions of DoD Instruction 6000.11, “Patient Movement,” September 9, 1998;⁹ and,
- As authorized and funded pursuant to DoD 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

⁹ *Id.* at para. E4.3.3.1.

¹⁰ *Id.* at para. E4.3.2.

¹¹ *Id.* at para. E4.2.3.1 through E4.2.3.6.

¹² *Id.* at para. E4.2.1.

¹³ *Id.* at E4.2.2.

¹⁴ *Id.* at E4.2.3.6.

¹⁵ *Id.* at E4.2.3.5.

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 have traditionally provided aviation assistance to civilians only during times of disaster or distress. During a Stafford Act incident, DOD may provide search and rescue (SAR) support following a request by FEMA, directed by JDOMS, and approved 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 USAF and represents the primary SAR resource available to the civil sector. Under the National Response Framework (NRF), the Federal Emergency Management Agency (FEMA) is the primary agency for Emergency Support Function (ESF) 9, Urban Search & Rescue.¹⁹

3. Employment of DoD Resources in Support of 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

¹⁶ *Id.* at E4.2.3.3.

¹⁷ DOD 4515.13-R AIR TRANSPORTATION ELIGIBILITY, (Nov. 1994), through change 3, April 9, 1998. para. C5.7; *See also* ESF #9.

¹⁸ *Id.* at C10.11.

¹⁹ U.S. DEP’T OF HOMELAND SECURITY, NATIONAL RESPONSE FRAMEWORK (Jan. 2008).

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.* at 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.”).

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

Authority to support the USPS rests in the President's authority to use the armed forces to prevent interference with transporting the mail²² and the authority for interdepartmental transfer of services and equipment prescribed by the Economy Act²³ and implemented by DoD Instruction (DoDI) 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 USC § 12301.²⁵ Army and Air National Guard units may be called under authority granted in 10 USC § 12406.

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 response system to supplement and assist state and local medical resources during disasters, is outlined in DoDD 6000.12, *Health Services Operations and Readiness*.²⁶ The NDMS is a joint partnership sponsored by DoD, the Department of Veterans Affairs (DVA), HHS, and FEMA and it is activated by the ASD(HA).²⁷ 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.²⁸

Under the National Response Framework, Emergency Support Function (ESF) Number 8, Public Health and Medical Services Annex,²⁹

²² *In re Debs*, 158 U.S. 564 (1895).

²³ The Economy Act of 1932, 31 U.S.C.A. § 1535 (1983), 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 U.S. DEP'T OF DEFENSE, DIR. 6000.12, HEALTH SERVICES OPERATIONS AND READINESS, para. 4.9 (April 29, 1996)[hereinafter DoDD 600.12].

²⁷ *Id.*

²⁸ *Id.*

²⁹ NRF, EMERGENCY SUPPORT FUNCTION #8, PUBLIC HEALTH AND MEDICAL SERVICES ANNEX (January 2008) [hereinafter ESF #8].

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

HHS is the primary agency.³⁰ The Public Health Service (PHS), an agency of the DHHS, leads this effort by directing the activation of the NDMS.³¹ 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).³² 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.³³

The NDMS may be activated by the Director, FEMA, or the Assistant Secretary of Health, HHS, in response to a U.S. domestic disaster.³⁴ The federal government will respond to the crisis by using the NDMS to

³⁰ *Id.* at 8-1.

³¹ *Id.* at 8-3.

³² *Id.*

³³ *Id.* at 8-1 to 8-2.

³⁴ DoDD 6000.12, *supra* note 26, para. 4.9.

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

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).³⁵ 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.³⁶ Further assets from the strategic national stockpile, medical equipment and supplies, radiation detection equipment, ambulance support under the national ambulance contract, transportation support, patient care, and mortuary services and support.³⁷

5. Animal and Plant Disease Eradication

Under ESF #8, USDA is responsible for providing the resources to control and eradicate and outbreak of highly contagious or economically devastating animal disease and food security.³⁸ 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.³⁹ The National Guard maintains National Guard Expeditionary Medical Support (EMEDS) packages that can

³⁵ ESF #8, *supra* note 29, 8-2.

³⁶ *Id.* at 8-5.

³⁷ *Id.* at 8-5 to 8-8. See also Chart at ESF #8-11 to 8-12.

³⁸ *Id.* at 8-10 to 8-11.

³⁹ *Id.* at 8-11.

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

support these missions with proper authority.⁴⁰ The National Guard also maintains the Fatality & Services Recovery Response Team (FSRT).⁴¹

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.⁴² The majority of this responsibility is fulfilled by the routine daily operations of the U.S. Immigration and Customs Enforcement (ICE)⁴³ of the DHS. When individuals enter the United States illegally, they are subject to apprehension by law enforcement authorities. ICE then takes action to deport or resettle these immigrants. If the number of illegal immigrants exceeds the capacity of the ICE, the President may declare a Mass Immigration Emergency and DoD may be called on to provide support to 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 U.S. (CONUS). Further, the National Guard supports domestic emergencies such as mass immigration emergencies in a Civil Support role while in a Title 10 status.⁴⁴ “National Guard Civil Support,” however, is conducted in a Title 32 status.⁴⁵

7. Improvised Nuclear Device Incidents

⁴⁰ NATIONAL GUARD BUREAU REGULATION 500-1, NATIONAL GUARD DOMESTIC OPERATIONS, para. 5-11a (13 June 2008)[hereinafter NGR 500-1].

⁴¹ *Id.* at para. 5-11b.

⁴² HOMELAND SECURITY ACT OF 2002 §101(B).

⁴³ 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 & removal, and intelligence functions of the former INS with the investigative, intelligence, and air & marine functions of the former Customs Service. All the functions of the former FPS are also part of ICE.

⁴⁴ NGR 500-1, *supra* note 40, para. 4-2d.

⁴⁵ *Id.* at para. 4-2d(1-2).

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

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.⁴⁶ 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.⁴⁷ In the event of a deliberate attack, DHS is the coordinating agency and DOJ is the lead law enforcement authority.⁴⁸

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."⁴⁹ These accidents are not included in DoDD 3025.1, *Military Support to Civil Authorities*. DoDD 3150.8, *DoD Response to Radiological Accidents*, outlines DoD support for the FEMA Federal Radiological Emergency Response Plan (FRERP).⁵⁰ The FRERP establishes an organized and integrated capability for timely, coordinated response by Federal agencies to peacetime radiological emergencies.⁵¹ The Defense Nuclear Agency is assigned the lead role in coordinating plans with other federal agencies.⁵² COCOMJFCOM 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

⁴⁶ U.S. DEP'T OF HOMELAND SECURITY, NUCLEAR/RADIOLOGICAL INCIDENT ANNEX, p.1 (current as of June 2008)[hereinafter NRIA].

⁴⁷ *Id.* at p. 8.

⁴⁸ *Id.* at p. 9.

⁴⁹ 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].

⁵⁰ *Id.* at para. 1.2.

⁵¹ 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).

⁵² DoDD 3150.8, *supra* note 49, para. 5.1.1.

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

Contingency Plan.⁵³ 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.⁵⁴ EO 12657 is 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.⁵⁵ 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.⁵⁶ DoD provides support pursuant to a memorandum of understanding (MOU) between DoD, the USDA, and the Department of the Interior (DOI).⁵⁷ 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), which is located in Boise, Idaho.⁵⁸ The NIFC is the nation's support center for

⁵³ Exec. Order No. 12241, National Contingency Plan (Sept. 29, 1980).

⁵⁴ Exec. Order No. 12657, Nuclear Facility Accidents, Contingency Planning (Nov. 18, 1988).

⁵⁵ 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* FRP, *supra* note 24, 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.fs.fed.us/land/wdfirex.html>.

⁵⁶ DoD 3025.1-M, *supra* note 55, ch. 3 (Disasters), para. B3a.

⁵⁷ MOU-USDA/DOI, *supra* note 55; COMFORSCOM Func Plan 2501-00, *supra* note 55, App. 27, para. 1e(1).

⁵⁸ 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 55, App. 27, para. 1c(1).

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

wild land firefighting⁵⁹ and is a joint operation of the DOI and USDA.⁶⁰ Seven federal agencies operate from the NIFC and work together to coordinate and support wild land 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)
- Office of Aircraft Services (OAS)⁶¹

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.⁶² In early 1993 the name was changed to the National Interagency Fire Center to reflect a national mission.

If the national fire situation becomes severe, the National Multi-agency Coordinating (MAC) Group is activated.⁶³ This group consists of representatives of each of the federal wild land 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 wild land 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.

⁵⁹ DoD 3025.1-M, *supra* note 55, para. B.3.a, b; MOU-USDA/DOI, *supra* note 55, 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>.

⁶⁰ DoD 3025.1-M, *supra* note 55, para. B.3.b.

⁶¹ *See* NIFC - The Agencies At NIFC at <http://www.nifc.gov/nifcagcy.html>; *see also* COMFORSCOM Functional Plan 2501-00, *supra* note 55, App. 27, para., 1c(1).

⁶² *See* NIFC History at <http://www.nifc.gov/nifcmiss.html> ("Boise' Interagency Fire Center" is the phrase referred to MOU-USDA/DOI, *supra* note 55, rather than NIFC).

⁶³ *See* NIFC Multi-Agency Coordinating Group at <http://www.nifc.gov/nifcmiss.html>.

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

The National Interagency Coordination Center (NICC) is located within the NIFC. The NICC was established in 1975 to provide logistical support and intelligence for wild land 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 U.S., and provides support to incidents in foreign countries. The NICC is staffed jointly by BLM and USFS.⁶⁴ When activity warrants, NICC operates 24 hours a day, seven days a week.⁶⁵

The NICC uses a three-tiered coordination system to respond to wild land fires.⁶⁶ First, a wild land fire is initially managed by the local agency that has fire protection responsibility for that area.⁶⁷ 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 wild land fire grows to the point where local personnel and equipment cannot contain the fire, the responsible agency contacts one of the eleven Geographic Area Coordination Centers (GACC), 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.⁶⁸ First, for wild 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 NIFC requires military assistance under its own authorities, it contacts the Director of Military Support (DOMS). Second, if

⁶⁴ See COMFORSCOM Func Plan 2501-00, *supra* note 55, App. 27, para. 1c (1).

⁶⁵ See NICC Organization at <http://www.nifc.gov/nifctour/nicc.html>.

⁶⁶ See NICC Coordination System at <http://www.nifc.gov/nifctour/nicc.html>.

⁶⁷ See NICC Geographic Area Coordination Centers at <http://www.nifc.gov/fireinfo/geomap.html>.

⁶⁸ DoD 3025.1-M, *supra* note 55, para. B.3.a; MOU-USDA/DOI, *supra* note 55, III. POLICY, paras. A-B.

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

the response is to an emergency under the Stafford Act⁶⁹, NIFC requests military assistance from FEMA, which coordinates with DOMS. 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.⁷⁰ 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.⁷¹ For example, during the summer of 2000, ten states provided more than 1,500 NG Soldiers and airmen who served in SAD status.⁷² 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 wild land firefighting during extreme conditions.⁷³ Congress established the MAFFS

⁶⁹ 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].

⁷⁰ DoD 3025.1-M, *supra* note 55, para. B.3.d.

⁷¹ This is distinguished from Title 32 and Title 10 status for NG personnel. *See infra* Chapter 10, Reserve Components.

⁷² *See* DoD News Release, *More Troops Tabbed to Battle Montana Wildfires*, Aug. 23, 2000 at <http://www.defenselink.mil/briefings/>.

⁷³ DoD 3025.1-M, *supra* note 55, ch. 3 (Disasters), para. B.3.f.; *see also* Modular Airborne Fire Fighting System (MAFFS) Fact Sheet at <http://www.fire.blm.gov/FactSheets/maffs.htm#MAFFS>. A MAFFS unit is a self-contained and pressurized, reusable 3,000-gallon aerial fluid dispersal system that allows Lockheed

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

Program in the early 1970s as a wild land 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.

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)
- 302nd AW, Peterson AFB, Colorado Springs, CO (AFR)

The mobilization of MAFFS 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.⁷⁴

C-130 cargo/utility aircraft to be converted to wild land 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 60 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. Its bright red or fuchsia color helps air tanker pilots observe the accuracy of their retardant drops on the edge of the fire.

⁷⁴ See M.A.F.F.S. at <http://www.fs.fed.us/r2/fio/moreinfo/haines.htm>.

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

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. 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).⁷⁵

The NCP is the federal government's plan for emergency response to discharge of oil into the navigable waters of the U.S., 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.

If a discharge is so severe that the President declares a disaster, the FRP is activated. Under the FRP, the Environmental Protection Agency (EPA) has primary responsibility for ESF 10, Hazardous Materials.⁷⁶ DOMS coordinates the DoD response in support of FEMA and the NCP.⁷⁷ 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 representatives

⁷⁵ Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601-9675 (1995); The National Oil and Hazardous Substances Contingency Plan, 40 C.F.R. § 112 (1997) [hereinafter NCP].

⁷⁶ NRF, *supra* note 19, EMERGENCY SUPPORT FUNCTION #10, HAZARDOUS MATERIALS ANNEX.

⁷⁷ 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].

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

of appropriate federal departments and agencies, including DoD.⁷⁸ 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.⁷⁹ 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.⁸⁰

The RRTs provide regional planning and preparation before a pollution incident as well as coordination and advice after an incident occurs.⁸¹ 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 USCG. 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 USCG chairs the incident specific RRT, depending on the location of the spill.⁸²

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

⁷⁸ Exec. Order No. 12,580, Superfund Implementation (Jan. 23, 1987); *see also* DoDD 5030.41, *supra* note 81, para. 5.4.

⁷⁹ NRF, *supra* note 19, ESF# 10, *Relation to Existing Response under the NCP, the National Response System, and the National and Regional Response Teams*.

⁸⁰ NCP, *supra* note 75, § 30.5, Definition.

⁸¹ NRF, *supra* note 19, ESF# 10.

⁸² *Id.*

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

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.⁸³

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.⁸⁴ Requests for assistance go through the White House Military Office or DoD Executive Secretary.⁸⁵

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 Federal departments and agencies.”⁸⁶ Although the use of intelligence assets are subject to extensive regulation (see chapter 9), this capability provides appropriate Federal consumers access to real time and near real time imagery and geospatial support.

Intelligence activities in the United States are governed broadly by Executive Order 12333. This Order prohibits directed collection on US Persons through the use of overhead reconnaissance by intelligence agencies.⁸⁷ This Order, however, grants broad authority to US 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

⁸³ National Response Center, "National Response System," at <http://www.nrc.uscg.mil/nrsinfo.htm>.

⁸⁴ 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).

⁸⁵ *Id.* at para. 3.4.2

⁸⁶ DIRECTOR OF CENTRAL INTELLIGENCE DIRECTIVE (DCID)1/8 – MANAGEMENT OF NATIONAL IMAGERY, IMAGERY INTELLIGENCE, GEOSPATIAL (21 March 2001), D.2b.ii.

⁸⁷ Exec. Order No. 12333, United States Intelligence Activities, para. 2.3(h).

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

risk.⁸⁸ 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 ____) 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

Executive Order 12656 provides 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.⁸⁹

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.⁹⁰ 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.⁹¹ See DOPLAW Handbook, Supp., App.2-4, *EO 12656, Emergency Preparedness*. See also *Appendix 8-16, PDD-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

⁸⁸ *Id.* at para. 2.6(c).

⁸⁹ EO 12656, *supra* note 3, § 204.

⁹⁰ EO 12656, *supra* note 3, § 202.

⁹¹ U.S. DEP'T OF DEFENSE, DIR. 3020.26, CONTINUITY OF OPERATIONS POLICY AND PLANNING, para. 4.1 (Oct. 1988).

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

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.⁹² DoDD 3020.36 also requires the identification of alternate headquarters, emergency relocation sites, and other permanent facilities to be used during emergencies.⁹³

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.⁹⁴ 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.⁹⁵

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."⁹⁶ 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

⁹² 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).

⁹³ *Id.*

⁹⁴ 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.

⁹⁵ *Id.* at 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.

⁹⁶ *Id.* at para. 1-4.

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

directives."⁹⁷ 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 perform render safe and disposal procedures if requested.

Thus, EOD forces should only provide physical assistance when the explosive is a DoD munition or when necessary under immediate response authority to save lives.

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 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,⁹⁸ may provide services to certain eligible youth and charitable organizations.⁹⁹ The eligible organizations are:

⁹⁷ *Id.*

⁹⁸ 32 U.S.C. § 502.

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

- 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.¹⁰⁰

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.¹⁰¹

In providing authorized services, NG facilities and equipment, including U.S. military property issued to the NG and General Services Administration (GSA), vehicles leased to the NG, and General Services Administration vehicles leased to DoD may be used.¹⁰² 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's or unit's ability to perform military functions. Among other factors circumscribing the provision of such services, training costs should not significantly increase, and NG personnel should enhance their military skills as a result of providing such services. The requested services must not be commercially available, unless a commercial entity that would otherwise provide such services has approved, in writing.¹⁰³

⁹⁹ *Id.* at § 508.

¹⁰⁰ *Id.* at § 508(d).

¹⁰¹ *Id.* at § 508(b).

¹⁰² *Id.* at § 508(c).

¹⁰³ *Id.* at § 508(a).

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.¹⁰⁴ See *Chapter 7, Military Support to Special Events* for a discussion of the relevant authorities.

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".¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ Usually, the governor will delegate the establishment, organization and administration of the Program to the state Adjutant General (TAG).

¹⁰⁴ 10 U.S.C. § 2012(a).

¹⁰⁵ 32 U.S.C. § 509.

¹⁰⁶ *Id.* at § 509(a).

¹⁰⁷ *Id.* at § 509(g).

¹⁰⁸ *Id.* at § 509(c).

MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

The Challenge Program is not cost-free.¹⁰⁹ For fiscal year 2001 and thereafter, a state must 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.¹¹⁰ 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.¹¹¹

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 USC § 5332).¹¹² 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.¹¹³

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.¹¹⁴ These include 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.¹¹⁵

¹⁰⁹ *Id.* at § 509(d).

¹¹⁰ *Id.* at § 509(h).

¹¹¹ *Id.* at § 509(j).

¹¹² *Id.* at § 509(g).

¹¹³ *Id.* at § 509(h).

¹¹⁴ *See* FM 3-07, *supra* note 1, ch. 8.

¹¹⁵ *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] Dec. 17, 2004
- The Immigration and Nationality Act (as amended), 8 U.S.C. §§ 1101 *et. seq.*
- EO 12333 - U.S. Intelligence Activities, 4 Dec 81, as amended
- DoDI 5210.52 - Security Classification of Airborne Sensor Imagery and Imaging Systems, 18 May 89
- DoDD 5143.01, Undersecretary of Defense for Intelligence (USD(I)), 23 Nov 05
- DoDD 5240.1 - DoD Intelligence Activities, 27 Aug 07
- DoD 5240.1-R - Procedures Governing the Activities of DoD Intelligence Components That Affect U.S. Persons, 1 Dec 82
- Defense Intelligence Agency Regulation (DIAR) 50-30 - Security Classification of Airborne Sensor Imagery, 25 Jun 97
- Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation, 5 April 1979 (FOUO)
- Supplement to 1979 FBI/DoD Memorandum of Understanding: Coordination of Counterintelligence Matters Between the FBI and DoD, 20 June 1996 (S)
- Joint Publications Intelligence series 2-0
- AFRP 14-1 - ISR Planning, Resources, and Operations (2 Apr. 04)
- AFI 14-104 - Oversight of Intelligence Activities (14 Apr. 05)
- AFI 14 series on Intelligence
- AR 381-10 - Army Intelligence Activities (22 Nov. 05)
- AR 381-20 - The Army Counterintelligence Program (15 Nov. 93)
- AR 381-xx series on Intelligence
- SECNAVINST 3820.3E - Oversight of Intelligence Activities Within the Dep't of the Navy, 21 Sep 05
- SECNAVINST 3850.2C – Dep't of the Navy Counterintelligence, 21 Jul 05

INTELLIGENCE AND INFORMATION HANDLING

- Marine Corps Warfighting Pub 2-1 - Intelligence Operations, 10 Sep 03
- Marine Corps Warfighting Pub 2-14 - Counterintelligence, 13 Jul 04
- Marine Corps Warfighting Pub 2-x series on Intelligence
- National Guard Joint Force Headquarters State J2 Incident Awareness and Assessment Handbook, 27 Feb 09

KEY REFERENCES FOR INFORMATION HANDLING:

- 5 U.S.C. §552a - The Privacy Act (as amended)
- DoDD 5400.11-R - DoD Privacy Program, 17 May 07
- DoDD 5200.27 - Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense, 7 Jan 80

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 US laws and policies? The judge advocate’s role is especially important during domestic operations utilizing intelligence assets and components. JAGs must recognize that collecting domestic intelligence by necessity entails collecting information on United States citizens. Therefore the rules regarding intelligence collection in the US 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 US citizens.

At the same time, 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 will provide a broad overview of collecting information on US 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 US persons (USPER), it is important to understand first that there are two distinct groups of people that collect information in the homeland. The first are DoD intelligence components, as defined in EO 12333. In simple terms these are the 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. 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-intel 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 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 US persons by DoD non-intelligence components. Section D briefly addresses the policies and restrictions applicable to the National Guard when collecting information on US persons during domestic operations.

B. THE ROLE OF DoD INTELLIGENCE COMPONENTS IN DOMESTIC SUPPORT OPERATIONS

DoD intelligence components¹ are governed by four primary references. The National Security Act of 1947 establishes a comprehensive program for national

¹ 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.

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 US intelligence community.² DoD Directive (DoDD) 5240.1, *DoD Intelligence Activities*,³ and DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that affect United States Persons*⁴ implement the guidance contained in EO 12333 as it pertains to DoD. In addition, each Service has its own regulation and policy guidance.

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).⁵ 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

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- 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.

² *Id.*

³ U.S. DEP’T OF DEFENSE, DIR. 5240.1, DOD INTELLIGENCE ACTIVITIES (25 Apr. 1988) [hereinafter DoDD 5240.1].

⁴ U.S. DEP’T OF DEFENSE, REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DO D INTELLIGENCE COMPONENTS THAT AFFECT U.S. PERSONS (Dec. 1982) [hereinafter DoD 5240.1-R]. .

⁵ “*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.* at para. 3.4(a).

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.⁶

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.⁷ A U.S. person includes many unincorporated associations and U.S. corporations (e.g., “Joe’s Diner”).⁸ 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 activities⁹ of any U.S. person.

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.¹⁰ 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 with respect to 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

⁶ *Id.* at 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).

⁷ Judge advocates must read these authorities before advising a commander on the collection of information in a domestic support operation.

⁸ “*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 6, at para. 3.4(i).

⁹ “*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 4, Procedure 2, at para. B3.

¹⁰ *Id.* at 4.2.1.

INTELLIGENCE AND INFORMATION HANDLING

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 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 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 asset, 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 a 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 collection of US person information 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.¹¹

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.

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 responsibility of state / local law enforcement and the FBI. It is, however, the relationships between the National Guard and the state and the local law enforcement entities will keep the judge advocate heavily employed.

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

¹¹ 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.

for the JFHQ-State. 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 US 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.

To alleviate some of the confusion, the Chief of the National Guard Bureau established policy that applies to all members of the National Guard serving in a Title 10 or Title 32 status. It requires that NG intelligence personnel operating in either a Title 10 or Title 32 status must comply with all federal IO rules without exception. Furthermore, the policy recognizes that while NG intelligence personnel operating in a State Active Duty status are not members of the DoD intelligence community, they are limited by 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.

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 (32 USC 112). While serving in a non-intel 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).

The National Guard has a variety of Incident Awareness and Assessment¹² tools within its arsenal. Some of the tools are considered to be both an Intel asset and a non-intel 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 rules.. 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. Its mission is to assist law enforcement in the capture of personnel involved in drug activities. However when disaster strikes it is often called upon to assist in life saving measures. The RC 26 Provides an aerial surveillance capability that enables the commander to understand their area of operations, provide damage assessments, obstacle and hazard assessments and other such non-intelligence purposes. USPER collection incidental to the mission 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, such as the C26, 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.

4. Purpose of the Collection

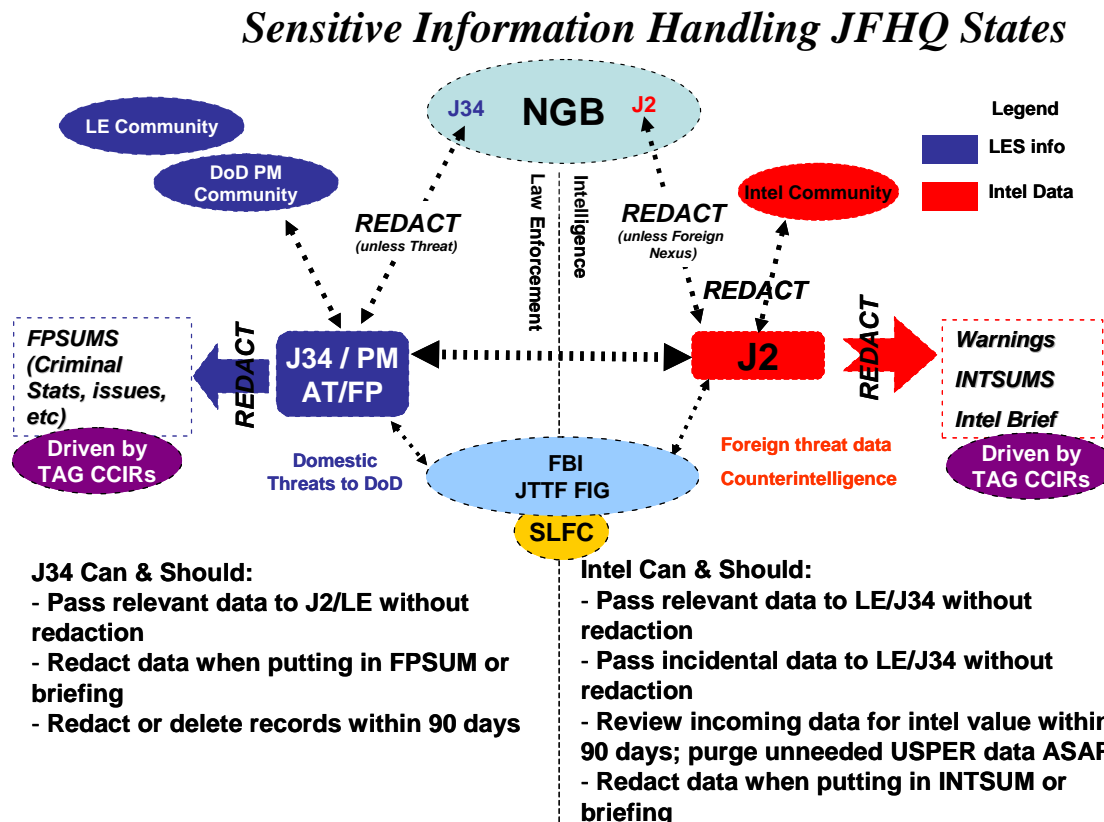
A judge advocate must also determine whether information is being collected for an intelligence purpose or whether it is being collected to help the commander gain situational awareness. As mentioned earlier, information is often acquired in response to the Guard commander's need to establish a common operating picture. If the answer is for situational awareness, then the JA 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's unnecessary for cameras to collect information regarding the license plates numbers of those individuals traveling on the roads; but it is necessary to carefully document the roads.

¹² 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.

INTELLIGENCE AND INFORMATION HANDLING

Therefore, the recommendation can be to remind the collector not to focus on specific personal identifying information.

The chart below illustrates the proper flow of information to remain compliant with intelligence oversight regulations. It depicts how the J2 and MP share and handle sensitive information (e.g. USPER) IAW 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

INTELLIGENCE AND INFORMATION HANDLING

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, JAs 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, JAs 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.¹³ JAs 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, JAs should establish close working relationships with the legal advisors of supporting intelligence agencies and organizations, all of whom can provide expert assistance.

¹³ 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, 26 Nov 08
- DoDD 5125.01 - Assistant Secretary of Defense for Reserve Affairs, 27 Dec 06 (with Chg. 1, 4 Jun 08)
- DoDD 6025.13 - Medical Quality Assurance (MQA) in the Military Health System (MHS), 4 May 04
- DoDI 1215.13 - Reserve Component Member Participation Policy, 11 May 09
- DoDI 1215.06 - Uniform Reserve, Training and Retirement Category Administration, 7 Feb 07 (with Chg. 2, 25 Dec 08)

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)),

¹ See, for example, the weather reconnaissance mission in the Air Force Reserves and the mine countermeasure mission in the Naval Reserves.

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.

responsible for overall supervision of all RC affairs in DoD, establishes the umbrella directives that provide all RC guidance concerning activation, mobilization, and training.³

Judge advocates practicing domestic operational law must also be familiar with the United States Coast Guard (USCG), the National Guard in a non-federal status, and the Civil Air Patrol because these entities have unique roles in domestic operations. The USCG, although a military service, also has domestic law enforcement authority. Moreover, in a non-federal status, the Air and Army National Guard have different authority and capabilities in domestic missions.⁴ 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 citizen Soldiers who prepared for active service during peacetime and become Soldiers 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

³ U.S. DEP'T OF DEFENSE, DIR 5125.01, ASSISTANT SECRETARY OF DEFENSE FOR RESERVE AFFAIRS (27 Dec. 2006) [hereinafter DoDD 5125.01].

⁴ See DOPLAW Handbook, Supp., App 10-6, Role of the NG in Domestic Support Operations.

⁵ 10 U.S.C. § 101(c).

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).

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 36 wings that report to one of three Numbered Air Forces (NAFs). With just over 10 percent of the Air Force's manpower, the USAFR performs more than 30 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

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

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 (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).

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 20 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 is the military RC of the USCG, 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. The U.S. 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 allow 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 duty without their consent in a domestic emergency.¹⁴ They may be used for not more

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. DEP'T OF HOMELAND SECURITY, COAST GUARD COMDT, INSTR. MANUAL 1001.28A, RESERVE POLICY MANUAL (18 May 2003).

¹⁴ 14 U.S.C. § 712.

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 forces in time of serious natural or manmade disaster, accident, or catastrophe. A mission unique to the USCGR is port security capability; the USCGR provides 95% of this capability. The USCGR also provides key support to Operation Iraqi Freedom and Operation Enduring Freedom under 10 U.S.C. § 12302.

6. National Guard of the United States (NGUS)

a. Overview

The terms “Air National Guard of the United States” (ANGUS) and “Army National Guard of the United States”(ARNGUS) 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 called to active duty to serve the federal government under Article I, Section 8 and Article II, Section 2 of the Constitution and the US Code, Title 10, §§ 12401 to 12408. The terms “Air National Guard” (ANG) and “Army National Guard”(ARNG) 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 temporarily relieved of their state commissions (and membership in the state National Guard) when on federal active duty as a member of the NGUS under 32 U.S.C. § 325. The National Defense Appropriations Act for Fiscal Year 2004 amended 32 U.S.C. § 325 to allow federally activated commanders of National Guard units to retain their state commissions with the authority of POTUS and the consent of the Governor.¹⁷

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.

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.

b. History

In 1903, the organized militia (*i.e.*, the National Guard) was created.¹⁸ In 1916, because the then Attorney General had opined that the militia could not be used outside of the US, Congress enacted a statute requiring guardsmen to take a dual oath; moreover, the statute mandated that guardsmen drafted into federal service by the President be "discharged" from the militia.¹⁹ Because the statute provided no method for guardsmen to "rejoin" the militia, it virtually destroyed the militias, requiring Congress, in 1933, to create 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/ANGUS²² members and units augment the Armed Forces during wars or other conflicts. To become a NGUS member, the

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, § § 69-73, 111. *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

guardsman or unit must 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 NGUS, the reserve component.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"

ANG Directorate and is on Title 10 orders. *See also* U.S. DEP'T OF AIR FORCE, INSTR. 10-402, MOBILIZATION PLANNING, para 4.1.7 (1 Jan. 1997) [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, note 22, para 4.1.6; 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, 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.

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 or any other National Guard members serving a tour of duty under Title 10 in support of NGB, Major Commands, or other "seats of government" (commonly called "stat tours")(still common language?).

(1) National Guard Bureau (NGB)

The 2008 National Defense Authorization Act made major changes to the roles and responsibilities of the NGB. Significantly, NGB became a "joint activity" of DOD, a statutory, joint activity within DoD, serves as the NG channel of communications between the Army and Air Force and the 54 states and territories.²⁹ While the NGB serves as the coordination, administrative, policy, and logistical center for the ARNG and the ANG, NGB does not command and control either the Army or Air National Guard. Pursuant to its charter dated 1 September 1995, NGB is responsible for, among other things, implementing Army and Air

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.

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, Army National Guard, 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 JAs 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 resources (equipment, dollars, and real estate) provided to the NG of each state.³¹ Their duties are limited to administering property in the possession of the NG of a state or territory; all transactions with the state NG involving federal property must involve the USPFO.³² The USPFO's staff provides supply, transportation, internal review, data processing, contracting, and financial support for the state NG. When required, the USPFO staff can support AC or USAR forces on a reimbursable basis.

e. Other NG authorities for duty

Guardsmen perform Inactive Duty Training (IDT) and Active Duty for Training (ADT) in a Title 10 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

³⁰ U.S. DEP'T OF ARMY, REG. 130-5/AFMD 10, ORGANIZATIONS FUNCTIONS OF THE NATIONAL GUARD BUREAU (31 Dec. 2001).

³¹ NATIONAL GUARD BUREAU, REG. 130-6/AIR FORCE NATIONAL GUARD INSTRUCTION 36-2, UNITED STATES PROPERTY AND FISCAL OFFICER APPOINTMENT, DUTIES AND RESPONSIBILITIES (1 Jul. 2007).

³² 32 U.S.C. § 708(c).

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).

Title 10 status. They also perform Extended Active Duty (EAD) in a Title 10 status, which requires them to be accessed into the end strength of the active Army and Air Force; this duty is paid by Army and Air Force appropriations.³⁴ A Temporary Tour of Active Duty (TTAD), a Title 10 status to support the active Army, and Military Personnel Appropriation (MPA) man-days are used to support the active Air Force.

C. RESERVE COMPONENT CATEGORIES

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

³⁴ See *id.* ch. 2. sect. 521 of the FY 2001 National Defense Authorization Act exempts reserve officers on the reserve active-status list (RASL) serving on active duty for 3 years or less from placement on the active-duty list (ADL). Previously, these Soldiers were added to the ADL for promotion.

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.* at para. E5.1.1. 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.

Sometimes called Troop Program Units (TPU), these units consists 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 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

³⁷ U.S. DEP'T OF DEFENSE, INST. 1215.13, RESERVE COMPONENT MEMBER PARTICIPATION POLICY, Encl. 2, para. 1.a.(2) (11 May 2009).

³⁸ DoDI 1215.06, *supra* note 35, para. E25.1.1.1.3. The Army National Guard and the Air National Guard do not have IMA programs.

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 liable for 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

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

³⁹ *Id.* at para. E5.1.1.2. 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.* at para. E5.1.1.3. The Air National Guard does not have an inactive status.

⁴¹ *Id.* at para. E5.1.2. 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.

⁴² *Id.* at para. E5.1.3. 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

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), 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

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.*

Reserve units, except for those in the National Guard, that training is not less than 14 days, and not less than 12 days for the Coast Guard Reserve. 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.⁴⁶

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,⁴⁷ and equivalent training. It is funded by the Reserve Component.⁴⁸ ADT includes Initial Active Duty for Training (IADT), which provides basic military and technical skills training required for all enlisted accessions.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. 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.)

⁴⁶ DoDI 1215.06, *supra* note 35, at para. 6.1.4.1.

⁴⁷ 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. .

⁴⁸ DoDI 1215.06, *supra* note 35, para. 4.3.1. 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.

⁴⁹ DoDI 1215.06, *supra* note 35, para. 6.6.4.1.4.

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 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, or Marine Corps, the 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

⁵⁰ DoDD 1215.06, *supra* note 35, para. 6.1.5.3.

⁵¹ DoDI 1215.06, *supra* note 35, at para. 6.1.4.2.1.7.

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.

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 the 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 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 in Title 32, United States 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

⁵⁵ DoDI 1215.06, *supra* note 35, para. E3.1.1.2.3. 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].

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 probably 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))

Involuntary full mobilization of units or members not assigned to units organized to serve as units for the duration of a war or emergency (plus six months) by an authority designated by the Secretary concerned. This section requires 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

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 10 U.S.C., § 672(a) is now codified as § 12301(a); § 672(b) is now codified as § 12301(b); § 672(d) is now codified as § 12301(d); § 673 is now codified as § 12302; § 673(b) is now codified as § 12304; and § 3500 and § 8500 are now codified as § 12406.

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.

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

If the U.S. or any state or territory is invaded or invasion is threatened by a foreign nation or there is 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 US in any state or territory by judicial proceedings, he 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 (used in 1957 in Arkansas; in 1962 in Mississippi; in 1963 in Alabama).

c. 10 U.S.C. A. § 333

The President can use the militia and/or 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 U.S. it deprives citizens of Constitutional rights (e.g. due process); or (b) it opposes or obstructs the execution of laws or impedes course of justice. In the event of the deprivation of rights, the state is deemed to have denied 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 (USCG)

The United States Coast Guard is one of the nation’s five armed forces, as well as a Federal law enforcement agency. 14 U.S.C. § 1, 14 U.S.C. § 2 and 10 U.S.C. § 101 (a)(4). 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 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, P.L. 107-296 (6 U.S.C. § 468).

The *homeland security* missions are: 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, a Coast Guardsman performing a non-homeland security mission, such as a Marine Safety inspection one moment, could end up performing a homeland security missions 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. However, upon a declaration of war if Congress so directs in the declaration or when directed by the President, the USCG will operate as a service in the Navy, transferring them from the Department of Homeland Security to the Department of Defense. See 14 U.S.C. § 3. The last time the Coast Guard became part of the Navy was during 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. There is no such switch. The Coast Guard is at all times an "armed force" and "law enforcement agency" under Title 14 and Title 10.

As discussed earlier in this chapter, the Coast Guard has a reserve component. It also has an Auxiliary with many responsibilities such as assisting both the active duty and the reserve Coast Guard in search and rescue/assistance missions, environmental protection, marine safety, and patrolling regatta and marine events.

The Coast Guard is authorized by 14 U.S.C. § 141 to use its personnel and equipment to assist any federal agency, including DoD. Thus the 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.

Because the Coast Guard is at all times a Federal law enforcement agency and an armed forces 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.

MHLS is a federal law enforcement mission carried out by domestic law enforcement authorities, including the Coast Guard.⁶¹ 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 MHLS, 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.

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.⁶² In the Constitution, POTUS is the Command in Chief of the militia only when it is “called into actual service of the United States.”⁶³ This section will discuss 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

⁶¹ The Coast Guard is required to perform MHLS 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, Presidential Decision Directive 39 (PDD-39), 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.

⁶² 10 U.S.C. § 311.

⁶³ U.S. CONST. art. II, §2, cl. 1.

status, guard members are subject to the military code of the respective state to which they belong.⁶⁴

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.⁶⁵ The TAG/governor (depending on state law) is the Commander in Chief of the state military unless it is federalized; at which time that governor loses command and control.⁶⁶ (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 STARC's 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.⁶⁷ Federal recognition of NG units and associated funding is conditioned upon the unit

⁶⁴ Pursuant to 32 U.S.C. § 327, the President or active duty commanders may convene state courts-martial. Moreover, in 2002, Congress ordered the preparation of a model state code of military justice.

⁶⁵ 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.

⁶⁶ 32 U.S.C. § 325.

⁶⁷ *Illinois National Guard v. Federal Labor Relations Authority*, 854 F.2d 1396, 1398 (D.C. Cir. 1988).

continuing to meet applicable federal standards.⁶⁸ ARNG and ANG Soldiers performing duty in Title 32 status have Federal Tort Claims Act (FTCA) coverage as long as they are acting within the scope of their federal employment.

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 32.⁶⁹

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.⁷⁰ 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

⁶⁸ 32 U.S.C. §§ 107-109.

⁶⁹ 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.

⁷⁰ 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.

Only the National Guard has a status entitled State Active Duty (SAD); such duty is performed pursuant to state constitutions and statutes.⁷¹ 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.⁷² The DoD funds are not obligated for any personnel or units performing SAD. However, if the President declares an emergency after a request by a governor under the Stafford Act, the state military department may be reimbursed through FEMA for the SAD pay and allowances it has expended.⁷³

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."⁷⁴ They receive essentially the same benefits

⁷¹ 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).

⁷² 10 U.S.C. § 12301.

⁷³ 42 U.S.C. § 5121.

⁷⁴ 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).

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.⁷⁵

b. Title 5 NG Federal Technicians

Every guard unit has Title 5 federal technicians; excepted NG military technician are unique to the NG.⁷⁶ 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.⁷⁷ 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.⁷⁸ Loss of NG membership terminates the full-time technician position.⁷⁹

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.”

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.

⁷⁵ For a good discussion of FTNGD status, see *United States ex rel. Karr v. Castle*, 746 F. Supp. 1231, 1237 (Del. 1990).

⁷⁶ 32 U.S.C. § 709.

⁷⁷ See *Lopez v. Louisiana National Guard*, 733 F. Supp. 1059, 1065 (E.D. La. 1990).

⁷⁸ 10 U.S.C. § 101(c)(3), (5).

⁷⁹ NATIONAL GUARD BUREAU, REG. 635-100, TERMINATION OF APPOINTMENT AND WITHDRAWAL OF FEDERAL RECOGNITION, ch. 6 (8 Sep. 1978).

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.⁸⁰

c. ADOS⁸¹

If funding is available, guard 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 guard members to perform “training” (usually 15 days per year). Most National 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 NGs 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 below. Do not confuse state employees 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.”

⁸⁰ 32 U.S.C. § 709.

⁸¹ Active duty for operational support – previously described in Section D.2.a., above.

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.

5. *Unique HLS/HLD missions*

a. Weapons of Mass Destruction (WMD)/Civil Support Teams (CST)⁸²

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.⁸³ 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. It is important for the JA to know the deployed status of these forces in order to provide legal advice. For more detailed discussion areas, see below.

⁸² 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.

⁸³ The states establishing NG-CERFP's are Hawaii, Washington, California, Colorado, Texas, Missouri, Illinois, Florida, West Virginia, Pennsylvania, New York and Massachusetts.

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.⁸⁴ 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.⁸⁵

The first statute, 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.⁸⁶ 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 said officer the ability to enforce his own orders unless he was also commissioned in that state’s national guard.⁸⁷

⁸⁴ See also *Persich v. Department of Defense*, 496 U.S. 334, 348 (1990).

⁸⁵ Though not true military “command and control,” *coordinating authority* has been used by the USAF to allow a federal status officer to control federal and state forces. The concept works because one commander tells his forces to obey the orders of the other commander or risk discipline. The concept has been used while fighting wildfires and it has recently been accepted as Air Force doctrine as a method of promoting “unity of effort between Active, federalized Air National Guard, Reserve, civilian, contract and Auxiliary Air Force personnel operating under Title 10 U.S. Code, and non-federalized Air National Guard forces operating under Title 32 U.S. Code or 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.

⁸⁶ 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.”

⁸⁷ 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.

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.⁸⁸ 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.

b. State law

State law provides the legal basis for the National Guard of each state and territory 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.⁸⁹ However, once a state has passed the Emergency Management

⁸⁸ *E.g.*, the Utah Governor and CDRUSJFCOM executed the MOA for the Utah Olympics in 2002 (although the command relationship was not pursuant to 32 U.S.C. § 325).

⁸⁹ 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.

Assistance Compact (EMAC), discussed below, its 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.⁹⁰

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.⁹¹ 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.⁹² Some states have specific authority that allows their militias to leave the state to perform duty.⁹³

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.S.C. § 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.⁹⁴ 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.⁹⁵ However, the Stafford Act does not provide that same authority to National Guardsmen in a state status.⁹⁶ Thus it is unclear if Title 32 guardsmen would receive FTCA coverage when treating civilians not

⁹⁰ A congressionally sanctioned interstate compact is a federal law subject to federal construction. *New York v. Hill*, 528 U.S. 110, 111 (2000).

⁹¹ *E.g.*, 44 OKL. ST. at § 229.

⁹² *E.g.*, KY CONST. § 225; MON. CONST., art. II, § 33; IDAHO CODE § 46-110; KAN. STAT.ANN. § 48-203.

⁹³ *E.g.*, CONN. GEN. STAT. § 27-16; MISS. CODE ANN. § 33-7-7; NY CLS MIL § 22.

⁹⁴ DoDD 6025.13 MEDICAL QUALITY ASSURANCE (MQA) IN THE MILITARY HEALTH SYSTEM (MHS) (4 May 2004).

⁹⁵ *E.g.*, 42 U.S.C. § 5121 *et seq.*

⁹⁶ Although it would be within the scope of employment to provide military medical care to those entitled to such care.

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.

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 except Hawaii and California, 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 V 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.⁹⁷ 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 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. § 9442.⁹⁸ 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.

⁹⁷ 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.

⁹⁸ 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).

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 JA, normally an AGR (Title 32) JA, who may be either an ANG or ARNG JA. The primary mission of the AGR JA is to advise the TAG and, usually the USPFO. Both the Army and Air Headquarters in each state usually have a part-time headquarters JA, 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 JAs are assigned to SJA sections in combat support and combat service support units (CS/CSS). The remaining ARNG JAs are usually assigned to the state or territory headquarters. Other than the ANG HQ JA, ANG JAs are located at the wing level in the state (usually two JAs and two paralegals per wing). ARNG and ANG JAs 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 JA for the ARNG is usually the POC for purposes of coordinating training and preparation for natural disasters, civil 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 JA roles and missions will vary. Most states require their JAs to be a member of that state's bar.

2. U.S. Army Reserve Judge Advocates

Army Reserve JAs are either embedded in USAR Table of Organization and Equipment (TOE) units or assigned to Judge Advocate General Service Organizations (JAGSOs). Unit JAs train to mobilize with their units and provide legal advice to the commander. USAR JAs 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 JAs 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 JAs are on indefinite active duty status and assigned to various Joint, Active Army and USAR organizations.⁹⁹ In USAR organizations, these JAs are usually responsible for day-to-day legal affairs. However, in other organizations they augment the active duty JA office and coordinate USAR support. Although the JA 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 JAs serve in either unit positions (Category A) or IMA positions (Category B). The Air Force JAG program is now a "Corps" rather than a

⁹⁹ NATIONAL GUARD BUREAU, REG. 600-10, ARNG TOUR PROGRAM (24 Feb. 1983).

department. As in the Army Reserves, there are USAFR AGR JAs assigned to Air Force and Air Force Reserve organizations to augment various missions.

The JA reinforcement designee program is available for Guard and Reserve officers. These JAs 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 JA 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 Legal Specialists

The Coast Guard has Reserve Law Specialists (attorneys), and Reserve Yeomen with qualifications as legal technicians and paralegals. They are assigned to support Coast Guard legal offices throughout the Coast Guard.

RULES FOR THE USE OF FORCE
FOR FEDERAL FORCES

CHAPTER 11.

RULES FOR 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, *et seq* - 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 US Forces, 13 JUN05
- AR 190-14, Carrying of Firearms and the Use of Force for Law Enforcement and Security Duties (12 Apr. 1993)
- U.S. Department of Justice, Office of Investigative Agency Policies, Resolution 14, Concerning the Use of Deadly Force, 16 October 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

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 US and its territories. It also applies to land-based homeland defense missions occurring within the US 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 these rules, see Chapter 12, *infra*. JAs 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 or not the service member may use force, up to and/or including deadly force, against someone or something. 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

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).

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 JAs can potentially have life or death consequences for service members and civilians. Therefore, it is imperative that JAs understand and apply legal and practical considerations when practicing in this area. This chapter will discuss the role of JAs 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 JAs advise on force protection and installation law enforcement activities. Many JAs train service members on domestic operational RUF or use of force policies for law enforcement and security operations. JAs advise units executing domestic operations, and will also advise or review investigations into incidents involving the use of force by a service members. Finally, JAs may be involved in civil or criminal proceedings for a use of force incident as a trial counsel, trial defense counsel, Special Assistant US Attorney, or as an Army attorney assisting in defensive federal litigation.

² See CJCSI 3121.01B at Enclosure L (U) – Standing Rules for the Use of Force for US Forces (13 June 2005)(hereinafter SRUF), at Paragraph 4.a.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 JAs 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 United States 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, JAs 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?

³ See SRUF, *supra* note 2, para. 3.a to 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 RUF 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 RUF 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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

- 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

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, JAs should consider a number of critical factors: What capabilities and limitations do service members bring to a potential deadly force confrontation; what should JAs 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

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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 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 JAs preparing units for domestic operations.

The JA must also consider the nature of the threat that our service members might face. Service members have to try to differentiate between

⁶ Army 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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 US 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 of government, 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.

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 the 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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 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 and authority has been based on his duties to execute the laws.¹⁴ As officers of the Executive, we conduct our operations and derive our 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 use of force is 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

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.

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 *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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 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.

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 *E.g.*, *In Re Neagle*, 135 U.S. 1 (1890).

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

Further, JAs 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 JAs are mistaken in their understanding of the law or uncomfortable with the application of the RUF. Judge advocates sometimes fail to recognize that Law of War restrictions are inapplicable to the domestic law on the use of force.²¹ Judge advocates also confuse the law of individual self-defense of a private individual, from 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

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.* at para. 5.c.

²⁵ SRUF, *supra* note 2, para. 5.b.1.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

requirement to use minimum force.²⁶ Nor do they 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 RUF that more closely resembles the standards of case law should be developed and staffed for approval to the Secretary of Defense.²⁸

2. Mandatory Verbal Warnings

The 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

The 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 JAs 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-

²⁶ *E.g.*, *O’Neal v. DeKalb County, Ga.*, 850 F.2d 653, 666 (11th Cir. 1988).

²⁷ *E.g.*, *Deering v. Reich*, 183 F.3d 645, 652-53 (7th Cir. 1999).

²⁸ Staffing of the request should be initiated using Enclosure P to CJCSI 3121.01B as a template. As this must be staffed to the Combatant Commander for staffing through the CJCS to the Secretary of Defense for Approval, it is imperative that this action 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 are: 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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

defense, however, JAs 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, JAs may find that the RUF are disseminated through message traffic with an OPOD or EXORD. Often JAs 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.

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

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).

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 defined 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 to include nuclear assets and nuclear command and control facilities of 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

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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

dangerous.³⁷ Command guidance in this area is critical. Without clear and proper guidance, the commander's intent could easily be frustrated. For example, a commander may not want to have lethal force deployed against looters who steal small arms ammunition. Failure to provide guidance on this could lead to an engagement that was proper under a strict reading of the SRUF but is inconsistent with the on-ground commander's intent. Likewise, a commander may consider all crew served weapons as "inherently dangerous," but a failure to make such designations may lead to confusion over what is "inherently dangerous property" by 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

³⁷ SRUF, *supra* note 2, para. 4.f.

³⁸ SRUF, *supra* note 2, para. 5.c and 5.d.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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. Escape⁴⁰

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.

c. Arrest or apprehension of a person believed to have committed a serious offense⁴¹

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 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

³⁹ SRUF, *supra* note 2, para. 5.d.1

⁴⁰ SRUF, *supra* note 2, para. 5.d.2.

⁴¹ SRUF, *supra* note 2, para. 5.d.3.

⁴² SRUF, *supra* note 2, para 3.a.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 JAs 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. The 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

⁴³ SRUF, *supra* note 2, para. 3.b.

⁴⁴ 403 U.S. 388 (1971).

⁴⁵ *Saucier v. Katz*, 533 U.S. 1984 (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. He brought a *Bivens* action against the military police that apprehended him. Katz alleged that the military police violated his Fourth Amendment rights by use of excessive force in forcibly removing him from the immediate vicinity of the podium and in placing him into a van.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 US 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. A critical element in defensive Federal litigation in use of force cases is 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 can serve as a bar to trial. Recent case law provides guidance on how courts are to apply a qualified immunity analysis.

Saucier v. Katz, a case involving a Military Police officer assigned to protect the Vice President, is a noteworthy case in the context of military support to domestic operations as Saucier was a Military Police officer. Although a recent decision by the Supreme Court in *Callahan*, discussed below, overturned the requirement for the use of the *Saucier* two-part analysis, *Saucier* remains an important case for RUF practitioners.

Pearson v. Callahan is the key case from which to analyze issues of qualified immunity.⁴⁷ Notwithstanding, it is necessary to understand the analysis initially handed down in *Saucier* as it may still be used by lower courts, but its strict two prong analysis is no longer required. In *Saucier*, the Court mandated a two step analysis in determining whether an official was entitled to qualified immunity. First, the 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'

⁴⁶ United States v. Gaubert, 499 U.S. 315 (1990).

⁴⁷ 128 S. Ct. 1702(2009).

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

at the time of the defendant's alleged misconduct.”⁴⁸ This analysis under *Saucier* 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.

The Court in *Callahan* effectively reversed its position in *Saucier* by holding that lower courts were no longer bound to the rigid two step process. 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 Accordingly, *Saucier* remains an important qualified immunity case. However, in light of *Callahan* 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. Section 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

⁴⁸ *Saucier*, 553 U.S. at 194.

⁴⁹ 128 S. Ct. 1702(2009).

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 JA advising a commander on RUF for a domestic operation should compare the different 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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

specifically directs that commanders at all levels must train their subordinates on the use of both deadly and non-deadly force⁵¹, failure to do so may expose commanders, their soldiers, their advisors and the United States 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. The Department of Justice 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

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

The JA 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

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.

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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 the Department of Justice or the US Attorney for potential Federal civil or criminal disposition.
- An investigation by state, county, or municipal law enforcement authorities for state criminal disposition.
- 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

⁵⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2005).

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).

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

Procedures,⁵⁸ provides guidance on the management of potential claims against the U.S. Government under a variety of theories and statutory authorities.⁵⁹

Finally, JAs 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. The case law defining the role of service members using force during Homeland Security operations is extremely limited. Many of the cases interpreting governmental use of force have expressly or impliedly based their interpretations of the “reasonableness” of the force on the law enforcement status of the Federal officers. 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 case law. 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

⁵⁸ U.S. DEP’T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES (21 Mar. 2008).

⁵⁹ Claims have been paid in recent history for shootings by US Military personnel engaged in the performance of their duties. For example, US Marines were seconded in 1997 to support the US 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 US person of Hispanic ancestry was under observation by US 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), *avail at* <http://www.nytimes.com/1998/08/12/us/national-news-briefs-us-settles-with-family-in-fatal-border-shooting.html> (last visited on 12 April 2009).

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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

During domestic operations planning and execution , JAs may draft, interpret, or conduct training on the RUF on short notice. In this atmosphere of crisis planning, JAs 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 JAs: 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 a JA 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

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 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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 Duties⁶² 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

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.

RULES FOR THE USE OF FORCE FOR FEDERAL FORCES

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 has been 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.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

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 (13 Jun. 2008)
- Emergency Management Assistance Compact (EMAC), Pub. L. No. 104-321, 110 Stat. 3877 (1996)

A. INTRODUCTION

The National Guard is a state¹ government entity, except when called or ordered² to federal active duty.³ The effect of this Constitutionally-derived⁴ status is perhaps greatest in the rules for the use of force (RUF) for the National Guard.⁵ The policies of the Department of Defense and service

¹ “State” as used here includes the 50 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. The Washington D.C. 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 *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, art. I, § 8, cl. 15 and art. II, § 2, cl. 1.

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].

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

regulations governing RUF apply to elements of that Department, but not to the states.⁶ As a result, the law that is the basis for National Guard RUF is the criminal law of the state in which a National Guard unit performing the mission.⁷ It is the drafting and application of state National Guard RUF, derived from state law and National Guard policy⁸ 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

⁶ See, e.g., U.S. DEP’T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (15 Jan. 1993), U.S. DEP’T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (4 Feb. 1994); U.S. DEP’T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (18 Feb. 1997); 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.”

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 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 *supra* Chapter 6.

¹⁰ 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]. 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; see *supra* Chapter 10.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

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, such as support for the Olympic Games,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 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 law¹⁵, and airport security mission were executed in nearly all of the 54 National Guard jurisdictions.¹⁶ Consequently, over 50 different RUF were used in the airport

¹¹ 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 11 September 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 pp. 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) 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.

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.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

security mission. Although most RUF addressed similar subjects, the specific implementation of these subjects 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 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 mission-dependent decisions.¹⁹

Appendix 12-7 includes a list of both 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.

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

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, at 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.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

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 retain 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 21} Mission analysis²² and state law²³ 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.²⁴ Unfortunately, such regulations were not previously

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.

²¹ *Id.* *supra* note 5, 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.

²² 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.

²³ 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.

²⁴ N.Y. PENAL LAW § 265-20

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

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 2001.²⁵

The RUF must also address such state law topics as the right to defend others,²⁶ the duty to retreat,²⁷ the use of deadly force to prevent escapes,²⁸ the requirement or limit on the use of warnings before the employment of deadly force in self defense,²⁹ the requirement for the use of proportionality,³⁰ and whether the place where the right of self defense is exercised has legal implications.³¹

(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

²⁵ NYARNG Transcript, *supra* note 12, at 51.

²⁶ 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) and COLO. REV. STAT. § 18-1-704(2).

²⁷ The law 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).

²⁸ 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).

²⁹ 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.

³⁰ 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.

³¹ 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) and N. D. CENT. CODE § 12.1-05-07.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

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,³² law enforcement support,³³ or security operation. For example, some states by statute give the National Guard the full authority of peace officers.³⁴ In other states, the National Guard has only those peace officer-type powers enjoyed by the population at large.³⁵ Still others provide that the National Guard has certain specific authorities in limited situations.³⁶ Depending upon the state statutes, the National Guard's authority to act as peace officers may apply to operations in a Title 32 status,

³² Because the Posse Comitatus Act, 18 U.S.C. § 1385 (2000) [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.

³³ 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.

³⁴ For example, Arkansas law 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.

ARK. CODE ANN. § 12-61-112(a).

³⁵ *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 terrorists 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.

³⁶ *See, e.g.*, GA. CODE ANN. § 38-2-6 to 38-2-6.1.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

SAD status, or both.³⁷ Regardless, the National Guard JA must participate in the effort to tailor the RUF to the particular mission, state law, and the policies of the state Adjutant General.³⁸ *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.

³⁷ 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.”

³⁸ 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).

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

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.³⁹ When this device is used, National Guard JAs 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 defined terms are included in Appendix 12-7.

(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

³⁹ 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.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

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.⁴⁰ Below is an example of arming orders used by the Indiana National Guard for the airport security mission.

Arming Order	Rifle or Shotgun	Pistol	Baton	Chamber	Ammo	Bayonet	Weapon/Safety
AO-1	Sling	Holster	Belt	Empty	In Pouch	Not issued	ON
AO-2	Port	Holster	Belt	Empty	In Pouch	Not issued	ON
AO-3	Sling	Holster	Hand	Empty	In Pouch	Not issued	ON
AO-4	Port	Holster	Hand	Empty	In Pouch	Not issued	ON
AO-5	Port	Holster	Hand	Empty	In Weapon	Not issued	ON
AO-6	Port	In Hand	Belt	Locked & Loaded	In Weapon	Not issued	ON*

* Leave safety on until ready to fire

⁴⁰ 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 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.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

(4) THREATCON Levels Matched to RUF

Another method of control includes adjusting the readiness posture in relation to the threat condition,⁴¹ or THREATCON.⁴² 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.⁴³

(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,⁴⁴ acting at the direction of civilian law enforcement,⁴⁵ defense of others, pursuit of

⁴¹ 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 ANTITERRORISM PROGRAM (18 Aug. 2003).

⁴² 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.

⁴³ The THREATCON levels provided in NGBP 190-1/ANGP 208-2, *supra* note 41, provide for increased security measures depending on the particular THREATCON level then in effect. See *id.* App. A, paras. A-7 to A-10.

⁴⁴ 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.

⁴⁵ 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

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

suspects, retention of evidence,⁴⁶ use of restraints, reports of firearm discharge,⁴⁷ 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 Inter-state (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 section 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 immunity⁴⁸ 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

Guard members are in those cases provided with state immunity from civil or criminal prosecution. *See, e.g.,* UTAH CODE ANN. § 76-2-404 and CONN. GEN. STAT. § 53a-22(d)-(e).

⁴⁶ DA Form 3316R (Detainee Turnover Record) may be used to inventory items taken from detainees.

⁴⁷ ARNG Airport Security Instruction, *supra* note 44, 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.

⁴⁸ *See text infra* subparagraph C.2.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

unconstitutional),⁴⁹ except for those operations undertaken in an SAD status.⁵⁰

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.⁵¹ The latest adopted or 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).⁵² 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.⁵³

EMAC, like all Congressionally-approved interstate compacts, now has the status of Federal law⁵⁴ and is applied in the same manner as Federal

⁴⁹ For an example of unconstitutional RUF, *see* *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997).

⁵⁰ 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.

⁵¹ American Law Source On-line at <http://www.lawsources.com/also/usa.cgi?usi> provides a fairly comprehensive listing of all interstate compacts, including those of most direct concern to the National Guard, the Emergency Management Assistance Compact (EMAC); the Interstate Civil Defense and Disaster Compact; the Interstate Emergency Management Compact; the Interstate Mutual Aid Compact; and the National Guard Mutual Assistance Compact. This on-line list does not include the Massachusetts Compact with New York for Military Aid in an Emergency nor the New England States Emergency Military Aid Compact.

⁵² 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 11 September 2001 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.

⁵³ 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 the 11 September 2001, 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].

⁵⁴ *See, e.g., Texas v. New Mexico*, 462 U.S. 554 (1983).

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

statute.⁵⁵ That means not only that objections by persons of one state, based upon law like Montana's Constitution section 33, to the entry of another state's National Guard unit into that first state can be overcome,⁵⁶ but also that any peace officer powers (and the attendant use of force to enforce those powers) granted by the requesting state's statutes only to the National Guard forces of that state⁵⁷ may be granted to the National Guard forces of the sending state by the use of one or more EMAC supplemental agreements.⁵⁸

Finally, National Guard JAs advising the State Adjutant General or Task Force commander for the sending and/or receiving state in cross border operations for law enforcement-type operations in an SAD or Title 32 status under EMAC should take note of Art. XIII ("Other Provisions") of that compact.⁵⁹ This provision is untested in the courts⁶⁰ but its apparent intent is to apply the PCA to National Guard operations, by denying the use of EMAC to the National Guard⁶¹ in situations where the PCA would prevent

⁵⁵ See, e.g., *Skamania County v. Woodall*, 16 P.3d 701 (Wash. 2001).

⁵⁶ 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.

⁵⁷ See ARK. CODE ANN. §12-61-112(a).

⁵⁸ 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 52, 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.

⁵⁹ See EMAC, *supra* note 52, 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").

⁶⁰ 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.

⁶¹ 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.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

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.⁶² National Guard JAs 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.⁶³ 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 mission⁶⁴ and both Title 32 status⁶⁵ 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.⁶⁶

a. Active Duty Federal Mission

⁶² 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.

⁶³ See, e.g., Airport security mission RUF for the states of Nevada, New Jersey, and New York (on file with CLAMO).

⁶⁴ Such as during the 2002-2003 Air Force security mission, in which approximately 8100 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.

⁶⁵ This was the case in the airport security mission.

⁶⁶ 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.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

Although the early history of the doctrine of Federal Supremacy Clause immunity⁶⁷ began somewhat before the case was decided,⁶⁸ 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 body guard to Mr. Justice Stephen Field, then a sitting member of the United States Supreme Court, was charged with murder by the state of California after killing a 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 body guard 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,⁶⁹ defamation,⁷⁰ assault,⁷¹ and murder in the course of guarding prisoners of the U.S. Army.⁷² 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.⁷³

⁶⁷ See U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

⁶⁸ A U.S. Supreme Court case predating *Neagle* is *Tennessee v. Davis*, 100 U.S. 257 (1880).

⁶⁹ *Montana v. Christopher*, 345 F. Supp. 60 (D. Mont. 1972) (operating a vehicle without lights) and *Commonwealth v. Thomas*, 612 F. Supp. 14 (W.D. Pa. 1984) (violation of state weight limits).

⁷⁰ *Howard v. Sikula*, 627 F. Supp. 497 (S.D. Ohio 1986).

⁷¹ *Lima v. Lawler*, 63 F. Supp. 446 (E.D. Va. 1945) and *Commonwealth v. Johnson*, 297 F.Supp. 877 (W.D. Pa. 1969).

⁷² *In re Fair*, 100 F. 149 (C.C.D. Neb. 1900) and *United States v. Lipsett*, 156 F. 65 (W.D. Mich. 1907).

⁷³ 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).

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

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 by-stander 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.⁷⁴ In this case, based largely on the court's understanding of the guard's federal duties, the guard was acquitted of manslaughter.

The only reported case found involving federal RUF is a non-military civil case involving the RUF used by the FBI 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 to the U.S. 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*⁷⁵ 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 defense to the possibility of a *state* criminal charge⁷⁶ resulting from good faith compliance with *state* RUF include:

⁷⁴ *Lipsett*, *supra* note 76, 68.

⁷⁵ *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

⁷⁶ 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 the state tort claims laws.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

- A state statute providing *criminal* immunity for National Guard personnel.⁷⁷
- An agreement with the State Attorney General (possibly at the time the state Attorney General gives any approval of the RUF⁷⁸) that National Guard personnel will not be prosecuted criminally for good faith compliance with the National Guard RUF.⁷⁹
- 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,⁸⁰ 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 activation to Title 32 duty at the request of federal government officials. Case law clearly indicates that Federal Supremacy Clause immunity should be applied to cases involving a federal mission whether or not the subject of that protection is a federal employee.⁸¹

⁷⁷ 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).

⁷⁸ 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 47, para. 3-6a

⁷⁹ 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).

⁸⁰ 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).

⁸¹ 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. Marshall's posse made of ordinary citizens charged with murder); Connecticut v. Marra, 528 F. Supp. 381 (D. Conn. 1981) (informal cooperating with FBI charged with attempting to bribe a city policeman).

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

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 personnel JAs 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.⁸²

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, JAs 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.⁸³ Some MOA may contain hold harmless provisions⁸⁴ which the JA should review, negotiate and advise upon. If the RUF used by the National Guard in a law enforcement, law enforcement support, or

⁸² 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.”

⁸³ 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 30 days. *See* ARNG Airport Security Mission Instruction, *supra* note 47, para. 2-8a.

⁸⁴ *See, e.g.*, Memorandum of Understanding with the Kansas National Guard and supported airports, para. 11 (on file with CLAMO).

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

security mission refers the reader to, or adopts the RUF currently used by a state law enforcement agency, JAs 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.

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, JAs may find it necessary to educate and negotiate issues that meld legal requirements with operational imperatives. For example, in New York September 11th, New York Army National Guard JAs 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 2001.⁸⁵

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 JA'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, JAs can write or assist in writing

⁸⁵ NYARNG Transcript, *supra* note 12, 184.

RULES FOR THE USE OF FORCE FOR THE NATIONAL GUARD

information papers, training vignettes, and legal memoranda. Also, the use of a training certification process may be useful.⁸⁶

⁸⁶ 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).

FUNDING DOMESTIC SUPPORT OPERATIONS

CHAPTER 13.

FUNDING DOMESTIC SUPPORT OPERATIONS

KEY REFERENCES:

- 18 U.S.C. § 1385 - Posse Comitatus Act
- 10 U.S.C. §§ 371-382, ch. 18 - Military Support For Civilian Law Enforcement Agencies
- 10 U.S.C. §§ 331-334, ch. 15 - 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)

FUNDING DOMESTIC SUPPORT OPERATIONS

- 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, 12 Apr 04
- DoDD 2000.15 - Support to Special Events, 8 Dec 03
- DoDD 3025.15 - Military Assistance to Civil Authorities, 18 Feb 97
- DoDD 3025.1 - Military Support to Civil Authorities
- DoD 3025.1M - Manual for Civil Emergencies
- DoDD 3025.12 - Military Assistance for Civil Disturbances, 4 Feb 94
- DoDD 5200.31E - Single Manager for DoD Military Working Dog Program
- DoDD 5525.5 - DoD Cooperation With Civilian Law Enforcement Officials, 15 Jan 86 (with Chg. 1, 20 Dec 89)
- DoD Financial Management Regulation (FMR) 7000.14-R, vol. 12, ch. 6
- NGR 500-1/ ANGI 10-8101 - Military Support to Civil Authorities (13 Jun. 2008)
- NGB 500-2/ ANGI 10-801 - National Guard Counterdrug Support
- CJCSI 3710.01B, DoD Counterdrug Support, 26 JAN 07

FUNDING DOMESTIC SUPPORT OPERATIONS

- AR 75-14/OPNAVINST 8027.1G/MCO 8027.1D/AFR 136-8 - Interservice Responsibilities for Explosive Ordinance Disposal (14 Feb. 1992)
- AR 75-15 - Responsibilities and Procedures for Explosive Ordinance Disposal (22 Feb. 2005)
- AR 190-12, Military Working Dogs (4 Jun. 2007)
- AR 700-131, Loan and Lease of Army Material (23 Aug. 2004)
- AR 725-1, Special Authorization and Procedures for Issues, Sales, and Loans (17 Oct. 2003)
- SECNAVINST 5820.7C - Cooperation With Civilian Law Enforcement Officials (26 January 2006)
- OPNAVINST 3440.16C - Navy Civil Emergency Management Program
- AFI 10-801 - Air Force Assistance to Civilian Law Enforcement Agencies
- AFI 10-802 - Military Support to Civil Authorities
- AFI 31-202 - Military Working Dog Program
- 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; and (6) Department of Justice Office of Legal Counsel opinions (7) Comptroller General decisions (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

FUNDING DOMESTIC SUPPORT OPERATIONS

and expenditure of appropriated funds.¹ *See, e.g., U.S. v. MacCollom*, 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 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 they shall be 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

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.

FUNDING DOMESTIC SUPPORT OPERATIONS

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. 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); *see 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

FUNDING DOMESTIC SUPPORT OPERATIONS

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); *see also* DoD 7000.14-R, vol. 11A, ch. 1, para. 010201.J. (waiving overhead for transactions within DoD). JAs 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

FUNDING DOMESTIC SUPPORT OPERATIONS

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

FUNDING DOMESTIC SUPPORT OPERATIONS

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 and 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). 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

FUNDING DOMESTIC SUPPORT OPERATIONS

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) 3025.15. 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 3025.1.
- 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 3025.15

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 directive changes the approval authority, in certain cases, from that set forth in older directives, but the older directives have not been changed and are otherwise applicable. 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.

E. DISASTER AND EMERGENCY RELIEF²

² Disaster Relief Statutes (Stafford Act), 42 U.S.C. § 5121; U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) (15 Jan. 1993); 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).

FUNDING DOMESTIC SUPPORT OPERATIONS

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.

FUNDING DOMESTIC SUPPORT OPERATIONS

- 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.
- 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 3025.15, 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

FUNDING DOMESTIC SUPPORT OPERATIONS

assistance should not 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 (DERF) for reimbursement.

2. DERF

The DERF was created in the FY90 National Defense Appropriation Act, P.L. 101-165, in response to Hurricane Hugo. Under this provision, “the Fund is available for providing reimbursement to currently applicable appropriations of the Department of Defense 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.

FUNDING DOMESTIC SUPPORT OPERATIONS

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 DISTURBANCES³

The maintenance of law and order is primarily vested in state and local officials. Involvement of military forces will only be appropriate in extraordinary circumstances. Use of the military under these authorities to conduct law enforcement activities is a specific exception to the 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

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).

FUNDING DOMESTIC SUPPORT OPERATIONS

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 3025.15). 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.

FUNDING DOMESTIC SUPPORT OPERATIONS

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.)

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.

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 NAV 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].

FUNDING DOMESTIC SUPPORT OPERATIONS

- 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

FUNDING DOMESTIC SUPPORT OPERATIONS

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 1 Oct. 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

FUNDING DOMESTIC SUPPORT OPERATIONS

June 1995). The four Regional Logistics Support Offices (Buffalo, Miami, El Paso, and Los Angeles) actually provide this excess property.

4. Expert Advice and Training⁵

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 US 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).

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.

FUNDING DOMESTIC SUPPORT OPERATIONS

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.”

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 Information⁶

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

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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 supported civilian authorities. Detection and monitoring

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) .

FUNDING DOMESTIC SUPPORT OPERATIONS

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. Additional, 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 (U.S. 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—

FUNDING DOMESTIC SUPPORT OPERATIONS

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 SIX (JTF-6). 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 has

FUNDING DOMESTIC SUPPORT OPERATIONS

been is subject to extension by the annual National Defense Authorization Act, and you must refer to the latest NDAA to determine

I. INNOVATIVE READINESS TRAINING⁸

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 defined as 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 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.

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.

FUNDING DOMESTIC SUPPORT OPERATIONS

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 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 EVENTS⁹

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

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).

FUNDING DOMESTIC SUPPORT OPERATIONS

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.

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 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.

FUNDING DOMESTIC SUPPORT OPERATIONS

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 DEPARTMENT¹⁰

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 material 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 material: 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

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).

FUNDING DOMESTIC SUPPORT OPERATIONS

all records of loans of DoD material. Loans are made at no additional cost to the government. Borrowers are responsible for all incremental costs (costs above the normal Army operating expenses) and these will be identified and added into the loan agreement.

Agencies loaning or leasing materiel from an Army activity are responsible for all costs associated with the loan or lease to include shipping, return, and repair of the materiel. Reimbursable incremental costs include the following:

- Any overtime pay and pay of additional civilian personnel required to accompany, operate, maintain, or safeguard borrowed equipment;
- Travel and per diem expenses of Army personnel (military and civilian);
- Packing, crating, handling, and shipping from supply source to destination and return, to include port loading and off loading;
- All transportation, including return for repair and renovation;
- Hourly rate for the use of Army aircraft;
- Petroleum, oils, and lubricants (including aviation fuel);
- The cost of material lost, destroyed, or damaged beyond economical repair;
- Utilities (gas, water, heat, and electricity);
- Any modification or rehabilitation or real property that affects its future use by the Army;
- Overhaul of returned material;
- Repair parts used in maintenance and renovation;
- Price decline of borrowed stock fund material at which returned property can be sold;
- Issue and turn-in inspection labor costs;
- Charges for the use of vehicles, except 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 prevent the use of normal procedures.” Emergency loans and leases will not be withheld because a formal reimbursement agreement has not

FUNDING DOMESTIC SUPPORT OPERATIONS

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 TRAFFIC¹¹

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.,

¹¹ U.S. DEP'T OF DEFENSE, DIR. 3025.1-M, DoD MANUAL FOR CIVIL EMERGENCIES (Apr. 2001).

FUNDING DOMESTIC SUPPORT OPERATIONS

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 DISPOSAL¹²

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. The Department of Defense 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 bassets. 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.

O. MILITARY WORKING DOGS¹³

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

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).

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 Sep. 2007).

FUNDING DOMESTIC SUPPORT OPERATIONS

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 SUPPORT¹⁴

U.S. Coast Guard personnel shall be assigned to naval vessels operating in drug interdiction areas. Such personnel have law enforcement powers, and are known as Law Enforcement Detachments (LEDETs). When approaching a contact of interest, tactical control (TACON) of the vessel shifts to the Coast Guard. As a “constructive” Coast Guard vessel, the ship and its crew are permitted to participate in direct law enforcement. However, to the maximum extent possible, the law enforcement duties should be left to the Coast Guard personnel. Military members should offer necessary support.

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

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.

FUNDING DOMESTIC SUPPORT OPERATIONS

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.

