

**DOMESTIC OPERATIONAL LAW
(DOPLAW)
HANDBOOK
FOR
JUDGE ADVOCATES**

VOLUME I

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PREFACE

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, prior to the events of September 11, 2001, it was the first of its kind. Its publication was indeed timely, as it was designed as a resource for operational lawyers involved in domestic support operations. After the events of September 11, 2001 and more recently, Hurricane Katrina, it continued to meet a greatly increased need for an understanding of the legal issues inherent in such operations. As with the original publication of this 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, DoD Directives, 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, the US Marine Corps, National Guard Bureau, the Office of the Judge Advocate General, the Staff Judge Advocate to the Commandant of the Marine Corps, or The Judge Advocate General's Legal Center and School, Army.

This Handbook is also available in electronic format from the CLAMO databases at www.jagcnet.army.mil/clamo. The Center welcomes your suggestions, comments, and work products for incorporation into the next edition of this Handbook. You may contact the Center at (434) 971-3290/3210 (COMM), 521-3290/3210 (DSN), via email, at CLAMO@hqda.army.mil or CLAMO@hqda-

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CHAPTER 1. INTRODUCTION

A. GENERAL OVERVIEW OF DOMESTIC SUPPORT OPERATIONS

Domestic support operations are "[t]hose activities and measures taken by the Department of Defense to foster mutual assistance and support between the Department of Defense and any civil government agency in planning or preparedness for, or in the application of resources to, the consequences of civil emergencies or attacks, including national security emergencies.¹

Historically, the foremost task of the U.S. military has been to fight and win the nation's wars.² While this is the Department of Defense's (DoD) primary mission, DoD will also be called upon to assist civil authorities.³ In these instances, DoD's role is one of support—*civilian authorities retain primary responsibility for domestic operations*. U.S. domestic law, Presidential Decision Directives (PDDs),⁴ National Security

¹ THE JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 166 (12 Apr. 2001 as amended through 23 Mar. 2004) [hereinafter DoD Dictionary], The most recent amended version of DoD Dictionary dated 14 Apr. 2006 no longer includes the term "domestic support operations." U.S. DEP'T OF ARMY, FIELD MANUAL 100-19/U.S. MARINE CORPS, FLEET MARINE FORCE MANUAL 7-10, DOMESTIC SUPPORT OPERATIONS, 1-2 (1 July 1993)[hereinafter FM 100-19] has been superseded by U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS (July 2003)[hereinafter FM 3-07]. While FM 3-07 might suggest that "stability operations and support operations (SOSO)" is doctrinally a more correct term, this publication will retain the more generic "domestic support operations" term as the description of the type of law/operations with which the book deals. It's known by its community of users and is a reference with which all are familiar. The DoD Dictionary now uses the term "civil support." Civil support which is defined as:

Department of Defense support to US civil authorities for domestic emergencies, and for designated law enforcement and other activities. Also called CS.

² National Military Strategy, 2004, 3, *available at*, <http://www.defenselink.mil/news/Mar2005/d20050318nms.pdf> [hereinafter National Military Strategy].

³ 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 June of 2006.

⁴ The Presidential Decision Directive (PDD) series is the mechanism used by the Clinton Administration to promulgate Presidential decisions on national security matters.

Presidential Directives (NSPD),⁵ Homeland Security Presidential Directives,⁶ Executive Orders (EOs), and DoD regulations provide the framework for, and set limits on, the use of military forces to assist civil authorities.

Judge advocates (JAs) advise commanders on all military operations, including military support to civil authorities. The scope of advice JAs are called upon to provide is broad. Domestic support operations encompass a wide range of missions, from counterdrug operations to community assistance activities, such as a static display at a local fair. All domestic support operations share the common characteristic of using DoD human and physical resources to support the local community.

Domestic support operations are conducted in the continental United States (CONUS), Alaska, Hawaii, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.⁷

While the types of domestic support operations vary widely, two forms of statutory restrictions may limit the scope of support. JAs must carefully consider whether the Posse Comitatus Act⁸ or fiscal law constraints⁹ apply when reviewing a proposed domestic support operation.

B. THE DEVELOPMENT OF MILITARY SUPPORT TO DOMESTIC OPERATIONS

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,

⁵ In the George W. Bush Administration, the directives that are used to promulgate Presidential decisions on national security matters are designated National Security Presidential Directives (NSPDs). This new category of directives replaces both the PDD and the Presidential Review Directives of the previous Administration. Unless otherwise indicated, however, past directives remain in effect until they are superseded.

⁶ In the George W. Bush Administration, the directives that are used to promulgate Presidential decisions on homeland security matters are designated Homeland Security Presidential Directives (HSPDs). This new category of directives replaces both the PDD and the Presidential Review Directives of the previous Administration. Unless otherwise indicated, however, past directives remain in effect until they are superseded.

⁷ Locations where military support to domestic operations is permitted may change based on the type of support to be provided.

⁸ 18 U.S.C. § 1385. *See infra* Chapter 2.

⁹ *See infra* Chapter 13.

occasionally administering governmental affairs until local governance was established.¹⁰ During the final year of the Civil War, Army officers provided disaster relief through the Freedman's Bureau.¹¹ 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.

National Guard (NG) units, under the control of state Governors and The Adjutants General (TAGs),¹² have traditionally been the primary military responders in domestic operations and emergencies. Using federal forces to support state and local governments has been the exception rather than the norm. Federal forces have been generally used only after state resources were exhausted and their use has been requested by state officials.

However, 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.

To fully understand the civil support environment, it is necessary to briefly look at the larger concepts of National Security and Homeland Security (HLS), and then examine the DoD role in supporting HLS.

National Security¹³ represents the broadest security interests of the United States and reflects our interests throughout the globe and all relevant topical areas. It represents our perception of the world at present, as well as our perception of how the world should change in order to best protect our sovereign interests in the future. These interests are outlined in the National

¹⁰ 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 supercedes 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.

¹¹ U.S. Bureau of Refugees, Freedmen, and Abandoned Lands.

¹² 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.

¹³ A collective term encompassing both national defense and foreign relations of the United States. Specifically, the condition provided by: a. a military or defense advantage over any foreign nation or group of nations; b. a favorable foreign relations position; or c. a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert. *See*, <http://www.dtic.mil/doctrine/jel/doddict/data/n/03587.html>.

Security Strategy as promulgated by the President.¹⁴ For the Department of Defense, the tenets of the National Security Strategy are further refined in guidance contained in the National Military Strategy.¹⁵

Homeland Security is a more focused and limited segment of National Security. Homeland Security in its broadest definition is “a concerted national effort to prevent terrorist attacks within the United States, reduce America’s vulnerability to terrorism, and minimize the damage and recover from attacks that do occur.”¹⁶ The national perspective on Homeland Security is contained in the National Strategy for Homeland Security, which discusses the panoply of topics related to Homeland Security, some of which are at the very periphery of areas where DoD may anticipate providing support to civilian authorities. Anticipated DoD support for Homeland Security is discussed in *The DoD Role in Homeland Security*, which outlines how the Department of Defense intends to support the National Strategy for Homeland Security.

DoD intends to provide support to Homeland Security in three key areas:

Homeland Defense (HD). The HD mission is defined as “the protection of US sovereignty, territory, domestic population and critical defense infrastructure against external threats and aggression.”¹⁷

¹⁴National Security Strategy, March 2006, may be found on the internet at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>.

¹⁵ See National Military Strategy, *supra* note 2.

¹⁶ National Strategy for Homeland Security, Office of Homeland Security, 2, July 2002. This document may be found on the internet at http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf.

¹⁷ THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-26, JOINT DOCTRINE FOR HOMELAND SECURITY, GL-8, 2 August 2005 [hereinafter JP 3-26]. This definition is included in the DoD Dictionary, *supra* note 1, and located at <http://www.dtic.mil/doctrine/jel/doddict/data/h/02466.html>:

The protection of United States sovereignty, territory, domestic population, and critical infrastructure against external threats and aggression or other threats as directed by the President. The Department of Defense is responsible for homeland defense. Homeland defense includes missions such as domestic air defense. The Department recognizes that threats planned or inspired by "external" actors may materialize internally. The reference to "external threats" does not limit where or how attacks could be planned and executed. The Department is prepared to conduct homeland defense missions whenever the President, exercising his constitutional authority as Commander in Chief, authorizes military actions.

Civil Support (CS). The CS mission is defined as “Department of Defense support to US civil authorities for domestic emergencies and for designated law enforcement and other activities.”¹⁸

Emergency Preparedness. Emergency Preparedness has been defined as “those planning activities undertaken to ensure DoD processes, procedures and resources are in place to support the President and the Secretary of Defense in a designated National Security Emergency.”¹⁹

The first two concepts are by far the most important. Emergency Preparedness can be seen, in military planner’s terminology, as an implied task to successful accomplishment of the HD and CS missions. In Congressional testimony, Secretary of Defense Rumsfeld described circumstances where DoD involvement in HD and CS missions might occur:²⁰

In **extraordinary circumstances**, DoD would conduct military missions such as combat air patrols or maritime defense operations. DoD would take the lead in defending the people and the territory of our country, supported by other agencies. Included in this category are cases in which the President, exercising his constitutional authority as Commander in Chief and Chief Executive, authorizes military action to counter threats within the United States.²¹

In **emergency circumstances**, such as managing the consequences of a terrorist attack, natural disaster, or other catastrophe in support of civil authorities, DoD could be asked to act quickly to provide capabilities they do not possess or that have been exhausted or overwhelmed.²²

¹⁸ *Id* at GL-5.

¹⁹ This definition is contained in the 2004 Defense Planning Guide. However, this definition varies slightly from the definition included in the current draft Joint Pub. 3-26, *supra* note 17. The variance in the definitions should not effect accomplishment of the assigned HLD and CS missions.

²⁰ Testimony of Secretary of Defense Donald H. Rumsfeld before the Senate Committee on Appropriations, May 7, 2002 excerpted from a pre-decisional draft of the Defense Study and Report to Congress January 2003, The DoD Role in Homeland Security.

²¹ This circumstance discusses Homeland Defense (HD) operations.

²² This circumstance discusses both Civil Support (CS) operations and Immediate Response Actions, a subset of CS operations, designed to give local commanders flexibility and authority to respond immediately to time-sensitive situations to save lives, prevent human suffering, or mitigate great property damage. This authority is discussed in depth at U.S. DEP’T OF DEFENSE, DIR 3025.15, MILITARY ASSISTANCE TO CIVIL

In **non-emergency circumstances of limited scope or planned duration**, DoD would support civil authorities where other agencies have the lead—for example, providing security at a special event such as the 2002 Winter Olympics, or assisting other federal agencies to develop capabilities to detect chemical, biological, nuclear, and radiological threats.²³

While circumstances involving exercise of HD authority are clearly beyond the scope of this publication, it is important to recognize the structure of the overall security environment and how the Department of Defense contributes to this larger strategic construct.

In response to the attacks on the United States on September 11, 2001, a Combatant Command for the geographic area containing the United States was established. On September 11, 2003, U.S. Northern Command

AUTHORITIES (18 Feb. 1997) and U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (15 Jan. 1993) [hereinafter DoDD 3025.1]. It is anticipated that these directives will be replaced by U.S. DEP'T OF DEFENSE, DIR. 3025.DD, DEFENSE SUPPORT OF CIVIL AUTHORITIES (expected to be published in June 2006) and U.S. DEP'T OF DEFENSE, MAN. 3025.DD, DEFENSE SUPPORT OF CIVIL AUTHORITIES (expected to be published in June 2006).

²³ This circumstance discusses CS operations.

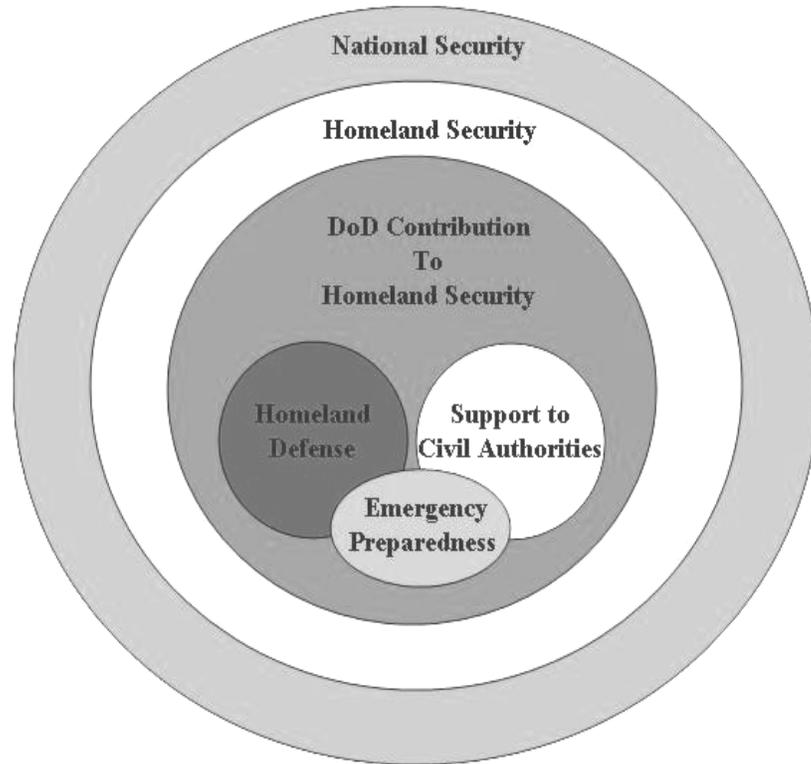


Figure 1-1. DoD relationship to National Security and Homeland Security

(USNORTHCOM) reached full operational capability with the following mission statement:

Conducts operations to deter, prevent, and defeat threats and aggression aimed at the United States, its territories, and interests within the assigned area of responsibility; as directed by the President or Secretary of Defense, provides military assistance to civil authorities including consequence management operations.²⁴

This bifurcated mission statement recognizes unique roles for US NORTHCOM in both HD and CS, in addition to standard Geographic Combatant Commander (GCC) assigned responsibilities.²⁵ Because of its

²⁴ 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.

²⁵ Duties and assignments for Combatant Commanders are contained in the Unified Command Plan.

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.

Acknowledging the value of civil support that the 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, have primary responsibility for providing initial support to state and local civil authorities.²⁶

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 Plan* (NRP)²⁷ 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 status²⁸ 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 deemed inadequate, and such support is requested, will the federal government provide support. Additionally, such support is typically provided on a

²⁶ FM 3-07, *supra* note 10, at 6-14.

²⁷ The Federal Response Plan (FRP), 9230.1-PL, Interim, January 2003 has been replaced, effective 15 December 2004, by the National Response Plan (NRP) which includes a Federal Incident Management Plan designed to merge all hazard response plans and promulgated by the Department of Homeland Security (DHS). A copy of the NRP is located at DOPLAW Handbook, Vol. II, Appendix 5-24 or online at: http://www.dhs.gov/dhspublic/interweb/assetlibrary/NRP_FullText.pdf.

²⁸ See *infra* Chapter 10, Reserve Components - Special Issues, for further discussion of National Guard status.

reimbursable basis.²⁹ The U.S. military’s primary mission remains the responsibility to fight and win the nations wars.³⁰

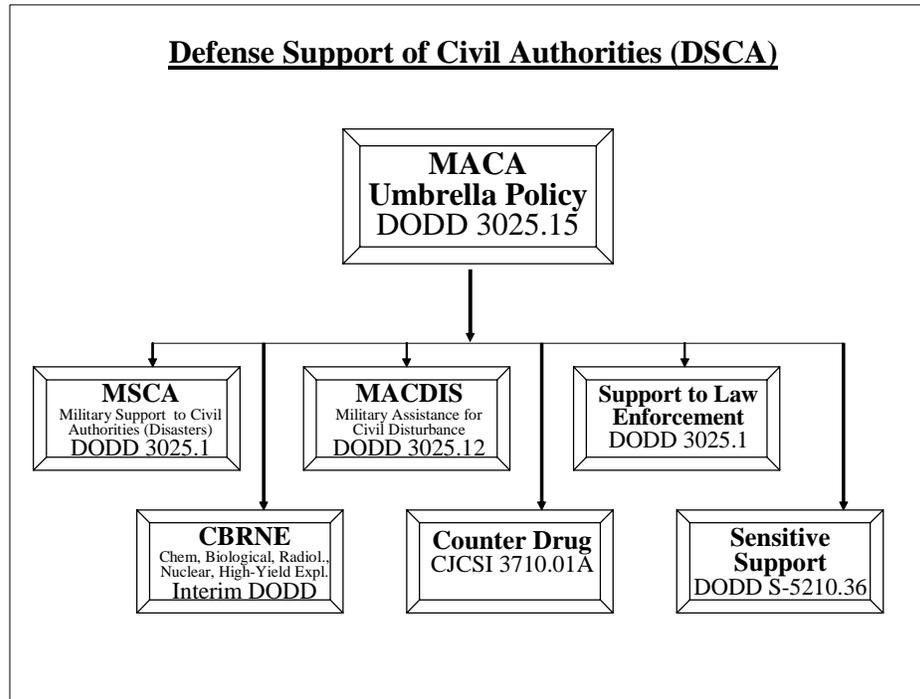


Figure 1-2, Defense Support of Civil Authorities

C. DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA)³¹

The primary reference for all DoD support to domestic operations is DoD Directive (DoDD) 3025.15, *Military Assistance to Civil Authorities*.³² This umbrella directive governs provision of all DoD military assistance to

²⁹ 10 U.S.C. § 1535, Economy Act. While there are many exceptions to the reimbursement requirement, such exceptions must specifically and explicitly recognize a waiver of reimbursement. The general rule is that without an exception, reimbursement is the standard practice. See *infra* Chapter 13 for further discussion.

³⁰ National Military Strategy, *supra* note 2.

³¹ MACA and MSCA now come under the term Defense Support of Civil Authorities (DSCA) in the National Response Plan (NRP). See National Response Plan, December 2004 at 41. A copy of the complete NRP is located at DOPLAW Handbook, Vol. II, App. 5-24 or online at: http://www.dhs.gov/dhspublic/interweb/assetlibrary/NRP_FullText.pdf.

³² DoDD 3025.15, *supra* note 3.

U.S. civil authorities (MACA), and encompasses a variety of specific types of support.³³ See figure 1-2, above.

DoDD 3025.15 provides criteria against which all requests for support must be evaluated. The criteria are addressed to approval authorities, but commanders at all levels should be cognizant of these requirements when forwarding a recommendation for military support through the chain of command. The criteria are:

- Legality - compliance with the law.
- Lethality - potential use of lethal force by or against DoD forces.
- Risk - safety of DoD forces.
- Cost - who pays impact on DoD budget.
- Appropriateness - whether it is in the interest of DoD to provide the requested support.
- Readiness - impact on DoD's ability to perform its primary mission.

DoDD 3025.15 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 are covered in more detail in specific Directives and Instructions. Because the authorities, roles, and responsibilities of military forces change depending upon the type of domestic support operation, this Handbook addresses domestic support operations by category in the chapters that follow.

³³ 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).

CHAPTER 2.
MILITARY SUPPORT TO CIVILIAN LAW ENFORCEMENT

KEY REFERENCES:

- 18 U.S.C. § 1385 - The Posse Comitatus Act (PCA)
- 10 U.S.C. § 371-381 - Statutory Implementation of the PCA
- DoDD 5525.5 - DoD Cooperation with Civilian Law Enforcement Officials
- DoDD 3025.12 - Military Assistance for Civil Disturbances
- DoDD 5240.1 - Activities of DoD Intelligence Components that Affect U.S. Persons
- DoDD 5200.27 - Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense
- DoD 5240.1-R - Procedures Governing the Activities of DoD Intelligence Components that Affect U.S. Persons
- AR 500-51 - Support to Civilian Law Enforcement
- SECNAVINST 5820.7B - Cooperation with Civilian Law Enforcement Officials
- AFI 10-801 - Assistance to Civilian Law Enforcement Agencies

A. INTRODUCTION

Military support to civilian law enforcement agencies has undergone significant growth in recent years, initially due to the U.S. war on drugs. However, this support is undergoing a transition in the wake of the events of September 11, 2001. The need for support and coordination to state and local law enforcement agencies and the new Department of Homeland Security has increased. The necessity of defending the homeland has created a renewed domestic emphasis for Department of Defense (DoD) forces. As a consequence, DoD established U.S. Northern Command and charged it with DoD's mission to protect the country directly.

The U.S. military has specialized personnel, equipment, facilities, and training that may be useful to civilian law enforcement agencies.

Consequently, the demand for this DoD support may increase. However, this demand must be consistent with the limits Congress has placed on military support to civilian law enforcement through the Posse Comitatus Act and other laws. Judge advocates should also weigh the political sensitivity of employing U.S. military forces in law enforcement roles against U.S. civilians.

This chapter will begin with a discussion of the Posse Comitatus Act. The chapter will then discuss the applicable provisions of the U.S. Code addressing military support to civilian law enforcement and the DoD regulations that implement this guidance. The following chapter discusses 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 to be used by U.S. Marshals as a posse comitatus at polling places in the states of South Carolina, Louisiana, and Florida. Hayes won the electoral votes of these three hotly contested states, possibly as a result

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).

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of President Grant's use of the military in these states.³ This use of the military in this manner by a sitting President during a presidential election led Congress to enact the PCA in 1878.⁴

Congress enacted the PCA to limit direct military involvement with civilian law enforcement activities to enforce the laws of the United States absent Congressional or Constitutional authorization.⁵ The PCA is a criminal statute and violators are subject to fine and/or imprisonment. The PCA, especially its current viability after the terrorist attacks of September 11, 2001, has been the subject of recent debate.⁶ It must be remembered that the PCA does not prohibit all military involvement with civilian law enforcement. A considerable amount of military participation with civilian law enforcement authorities 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*⁷ and Department of Defense Directive (DoDD) 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, also provide guidance in this area.⁸ Both authorities, discussed below, provide

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, e.g., Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J. L. & POL'Y 99 (2003); Com. Gary Felicetti & Lt. John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding before Any More Damage is Done*, 175 MIL. L. REV. 86 (2003); Tom A. Gizzo, Esq. & Tama S. Monoson, *A Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle Against International Terrorism*, 15 PACE INT'L L. REV. 149 (2003); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383 (2003); Richard K. Kohn, *POSSE COMITATUS: Using the Military at Home: Yesterday, Today, and Tomorrow*, 4 CHI. J. INT'L L. 165 (2003); Michael Noone, *Posse Comitatus: Preparing for the Hearings*, *id.* at 193.

⁷ 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).

⁸ U.S. DEP'T OF DEFENSE, DIR. 5525.5, *DoD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS* (15 Jan. 1986) [hereinafter DoDD 5525.5].

additional guidance regarding restrictions the PCA placed on the military when supporting civilian law enforcement agencies.⁹

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. In fact, federal courts have consistently read the plain language of the Act to limit its application to these two services.¹⁰ 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.”¹¹ The Secretary of Defense subsequently prohibited these activities in DoDD 5525.5,¹² and, as a result, the restrictions placed on Army and Air Force activities in the PCA now apply to the Navy and Marine Corps.¹³ The PCA does *not* apply to the Coast Guard unless it is operating under the command and control of the Department of Defense.¹⁴

⁹ Service regulations that implement DoDD 5525.5, *id.* note 8, are U.S. DEP’T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT (1 Aug. 1983) [hereinafter AR 500-51]; U.S. DEP’T OF NAVY, SECRETARY OF THE NAVY INSTR. 5820.7B, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (28 Mar. 1988) [hereinafter SECNAVINST 5820.7B]; 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].

¹⁰ *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).

¹¹ Hayes, *supra*, note 7, at 102-103 (10 U.S.C. § 375 makes the proscriptions of 18 U.S.C. § 1385 applicable to the Navy). *See also* Yunis, note 10, at 1094 (“Regulations issued under 10 U.S.C. § 375 require Navy compliance with the restrictions of the Posse Comitatus Act....”).

¹² *See* DoDD 5525.5, *supra* note 8, para. E4.3; AR 500-51, *supra* note 9, para. 2-1(d); SECNAVINST 5820.7B, *supra* note 9, para. 9(a)(3); AFI 10-801, *supra* note 9, 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).

¹³ SECNAVINST 5820.7B, *supra* note 9, para. 9(a)(3).

¹⁴ 14 U.S.C. § 2.

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The PCA also applies to Reserve¹⁵ 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 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)* will they be subject to the PCA. Members of the National Guard also perform additional duties in a State Active Duty (SAD) status and are not subject to PCA in that capacity.¹⁶ Civilian employees of 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

¹⁵ 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.

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 8, 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).

the PCA.²⁰ However, in *United States v. Kahn*²¹ the 9th U.S. Circuit Court of Appeals indicated that the extraterritorial application of the PCA is an open question.²² While recognizing that several courts have 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, because through 10 U.S.C. §§ 371-381, the PCA imposes restrictions on the use of the armed forces abroad.²²

Nevertheless, 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.²³ DoD implementing policy in DoDD 5525.5, however, applies to all members of the armed forces wherever they may be located. Therefore, PCA restrictions must be considered 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,

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

²² *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.

²³ Memorandum from Office of the Assistant Attorney General to General Brent Scowcroft, subject: Extraterritorial Effect of the Posse Comitatus Act (3 Nov. 1989). A copy of the memorandum is located at DOPLAW Handbook, Vol. II, at App. 2-12.

²⁴ DoDD 5525.5, *supra* note 8, 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.

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(2) use of military equipment and facilities, and (3) the 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

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 that prohibits the provision of military support to civilian law enforcement if “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

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 Personnel). This authority may be delegated to the Secretaries of the Military Departments

²⁵ DoDD 5525.5, *supra* note 8, para. E4.1; AR 500-51, *supra* note 9, at paras. 3-1 to 3-10; SECNAVINST 5820.7B, *supra* note 9, para. 9; AFI 10-801, *supra* note 9, 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 8, 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.”

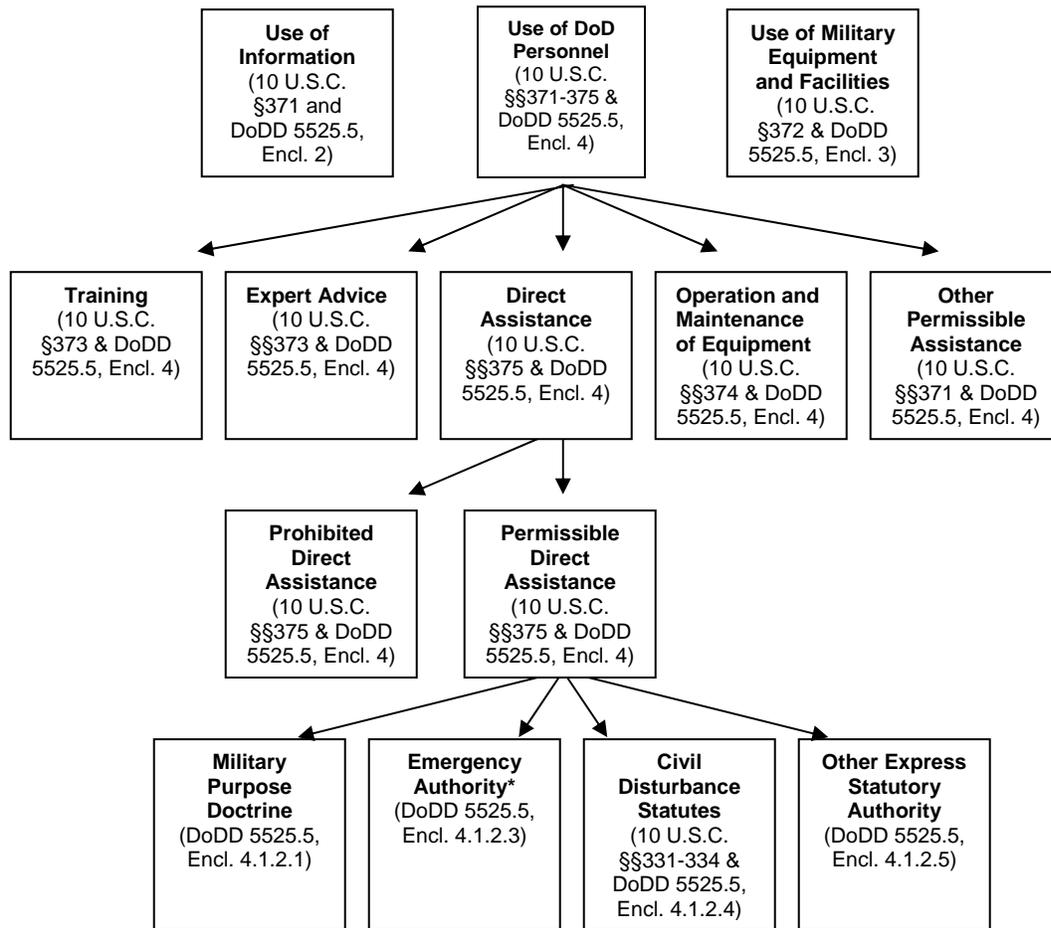
²⁸ *Id.*, para. E4.4; AR 500-51, *supra* note 9, at para. 2-5; SECNAVINST 5820.7B, *supra* note 9, para. 9(e); AFI 10-801, *supra* note 9, ch. 3.

²⁹ 31 U.S.C. § 1535.

³⁰ 10 U.S.C. § 377.

and the Directors of the Defense Agencies (or designees) on matters within their approval authority.³¹

**PCA RESTRICTIONS 10 U.S.C. §§371-375
AND DoDD 5525.5**



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

Figure 2-1. PCA Restrictions

³¹ DoDD 5525.5, *supra* note 8, para. E5.2; AR 500-51, *supra* note 9, at para. 4-1; SECNAVINST 5820.7B, *supra* note 9, para. 10; AFI 10-801, *supra* note 9, ch. 5.

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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. This sharing of intelligence information has taken on crucial importance after the terrorist attacks of September 11, 2001. In the Homeland Security Act of 2002, the Congress stated: “It is the sense of the Congress that Federal, State, and local entities should share homeland security information to the maximum extent practicable. . . .”³² In addition, the Act tasked the Secretary of the Department of Homeland Security with establishing procedures to share that information. 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 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*

³² HLSA of 2002, § 891(c).

³³ *Id.*, § 892(a)

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 Regulations dealing with these subjects are AR 500-51 and 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.³⁹ The provision of equipment and facilities must be made in accordance with all other applicable law. Enclosure 3 of the DoDD

³⁴ See U.S. DEP'T OF DEFENSE, REG. 4515.13-R, AIR TRANSPORTATION ELIGIBILITY (Jan. 1980) for guidance on this type of assistance. This rule does not apply to counter-drug operations. See *infra* ch. 3, Counterdrug Operations.

³⁵ U.S. DEP'T OF DEFENSE, DIR. 5240.1, ACTIVITIES OF DoD INTELLIGENCE COMPONENTS THAT AFFECT U.S. PERSONS (5 Apr. 1998) [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 (Dec. 1982) [hereinafter DoDD 5240.1-R].

³⁸ Army Judge Advocates should carefully compare provisions of AR 500-51, *supra* note 9, with DoD Directive 5525.5, *supra* note 8, and with subsequent statutory provisions as the service regulation does not always accurately reflect current DoD policy and statutory authorities.

³⁹ See also U.S. DEP'T OF ARMY, REG. 700-131, LOAN AND LEASE OF ARMY MATERIEL (1 Sept. 1996); AR 500-51, *supra* note 9; and SECNAVINST 5820.7B, *supra* note 9, for Army, Navy, and Marine Corps service requirements.

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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 this assistance does not adversely affect national security or military preparedness.

Approval authority under DoDD 5525.5 varies based on the type of equipment requested, the reason for the request, and whether the equipment will be loaned⁴⁰ or leased.⁴¹ The following is a listing of the approval authorities for various types of equipment and facilities:⁴²

- Approval authority for military assistance in civil disturbances is governed by DoDD 3025.12, *Military Assistance for Civil Disturbances (MACDIS)*;⁴³
- 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*;⁴⁴
- 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;⁴⁵
- 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;

⁴⁰ 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.

⁴¹ Leases under 10 U.S.C. § 2667 may be made to entities outside the federal Government.

⁴² 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.

⁴³ U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) (4 Feb. 1994)[hereinafter DoDD 3025.12]; *see also* U.S. DEP'T OF ARMY, REG. 500-50, CIVIL DISTURBANCES (21 Apr. 1972).

⁴⁴ U.S. DEP'T OF DEFENSE, DIR. 5030.46, ASSISTANCE TO THE DISTRICT OF COLUMBIA GOVERNMENT IN COMBATING CRIME (26 Mar. 1971).

⁴⁵ *See also* U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (1 July 1984). Army Regulation 381-10, "U.S. Army Intelligence Activities," was reissued on November 22, 2005, but up to now it has not been publicly disclosed.

- 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.⁴⁶

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. However, before making these materials available, the Secretary of Defense must make a determination that the items are not reasonably available from another source.⁴⁷

c. Participation of DoD Personnel in Civilian Law Enforcement Activities

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

⁴⁶ DoDD 5525.5, *supra* note 8, para. E3.4; AR 500-51, *supra* note 9, at para. 2-5; SECNAVINST 5820.7B, *supra* note 9, para. 8(c); AFI 10-801, *supra* note 9, 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.

⁴⁷ *See also* 10 U.S.C. § 382 for further guidance on emergency situations involving chemical or biological weapons of mass destruction.

⁴⁸ Yunis, *supra*, note 10.

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

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laws is a violation of the PCA.⁵⁰ The *second* test is whether the use of military personnel pervades the activities of civilian law enforcement officials. To be a violation of the PCA under this test, military personnel must fully subsume the role of civilian law enforcement officials.⁵¹ The *third* test is whether the military personnel subjected citizens to the exercise of military power that was regulatory, proscriptive, or compulsory in nature. A power “regulatory in nature” is one which controls or directs. A power “proscriptive in nature” is one that prohibits or condemns. A power “compulsory in nature” is one that exerts some coercive force.⁵²

As mentioned above, 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.

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

⁵¹ Kahn, *supra*, note 50, at 431-432 (holding that Navy’s involvement in apprehension, arrest, and detention of defendant in international waters was passive and thus did not violate PCA because the FBI was in charge of operation at all times, and Navy merely provided necessary support services); Hayes, *supra*, note 7, 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)).

⁵² See, Yunis, *supra*, note 10, 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).

DoD personnel involvement in support to civilian law enforcement will often be subject to intense scrutiny, such as occurred following 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.⁵³

(1) Direct Assistance

(a) Prohibited Direct Assistance

Direct assistance and participation by military personnel in the execution and enforcement of the law is the heart of the prohibition of the PCA.⁵⁴ Impermissible direct assistance by military personnel in civilian law enforcement activities is codified in 10 U.S.C. § 375 and is implemented as DoD policy by DoDD 5525.5.⁵⁵ Prohibited direct assistance by military personnel includes:

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

(b) Permissible Direct Assistance

(i) Military Purpose Doctrine

Conversely, there are several forms of direct assistance by military personnel that are permitted under the PCA. The first type of permitted direct assistance is action taken for the primary purpose of furthering a

⁵³ 18 U.S.C. § 1385.

⁵⁴ Red Feather, 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).

⁵⁵ DoDD 5525.5, *supra* note 8, para. E4.1.3; AR 500-51, *supra* note 9, para. 3-5; SECNAVINST 5820.7B, *supra* note 9, para. 9(a)(3); AFI 10-801, *supra* note 9, ch. 2.

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military or foreign affairs function of the United States.⁵⁶ This category is often referred to as the “Military Purpose Doctrine” and covers actions the primary purpose of which is to further a military interest. While civilian agencies can receive an incidental benefit, this section should be construed narrowly and cannot be used as a subterfuge for getting around the PCA. For example, the scheduling of a military exercise for the sole purpose of benefiting a civilian law enforcement agency is contrary to the intent of the military purpose doctrine. Military actions under the military purpose doctrine include:

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

It is important to emphasize that in the wake of the terrorist attacks of September 11, 2001, use of military forces in the national defense of the United States is more likely. This is not support to civilian law enforcement agencies engaged in homeland security; rather, this is homeland defense under the President’s authority as Commander in Chief under Article II of the Constitution. This 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

⁵⁶ DoDD 5525.5, *supra* note 8, para. E4.1.2; AR 500-51, *supra* note 9, at para. 3-4(a), SECNAVINST 5820.7B, *supra* note 9, para. 9(a)(2); AFI 10-801, *supra* note 9, ch. 2.

⁵⁷ *Id.*

A second type of direct assistance that may be permitted is action that falls under the “emergency authority” of the United States.⁵⁸ These actions

⁵⁸ See 32 CFR § 215.4 Legal considerations.

(a) Under the Constitution and laws of the United States, the protection of life and property and the maintenance of public order are primarily the responsibilities of State and local governments, which have the necessary authority to enforce the laws. The Federal Government may assume this responsibility and this authority only in certain limited instances.

(b) Aside from the constitutional limitations of the power of the Federal Government at the local level, there are additional legal limits upon the use of military forces within the United States. The most important of these from a civil disturbance standpoint is the Posse Comitatus Act (18 U.S.C. 1385), which prohibits the use of any part of the Army or the Air Force to execute or enforce the laws, except as authorized by the Constitution or Act of Congress.

(c) The Constitution and Acts of Congress establish six exceptions, generally applicable within the entire territory of the United States, to which the Posse Comitatus Act prohibition does not apply.

(1) The constitutional exceptions are two in number and are based upon the inherent legal right of the U.S. Government—a sovereign national entity under the Federal Constitution—to insure the preservation of public order and the carrying out of governmental operations within its territorial limits, by force if necessary.

(i) *The emergency authority.* Authorities prompt and vigorous Federal action, including use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situations.

(ii) *Protection of Federal property and functions.* Authorizes Federal action, including the use of military forces, to protect Federal property and Federal governmental functions when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protection.

(2) There are four exceptions to the Posse Comitatus Act based on Acts of Congress.

(i) In the cases of each of the first three of those described, paragraphs (c)(2)(i) (a), (b), and (c) of this section, personal Presidential action, including the issuance of a proclamation calling upon insurgents to disperse and retire peaceably within a limited time, is a prerequisite.

(a) *10 U.S.C. 331.* Authorizes use of the militia and Armed Forces when a State is unable to control domestic violence, and a request for Federal assistance has been made by the State legislature or governor to the President. Implements Article IV, section 4, of the Constitution.

(b) *10 U.S.C. 332.* Authorizes use of the militia and Armed Forces to enforce Federal law when unlawful obstructions or rebellion against the authority of the United States renders ordinary enforcement means unworkable. Implements Article II, section 3, of the Constitution.

(c) *10 U.S.C. 333.* Authorizes use of the militia and Armed Forces when domestic violence or conspiracy hinders execution of State or Federal law, and a State cannot or will not protect the constitutional rights of the citizens. Implements Article II, section 3, and the 14th Amendment of the Constitution.

(d) *House Joint Resolution 1292, June 6, 1968.* ¹ Directs all departments of the Government, upon the request of the Secret Service, to assist that Service in carrying out its statutory duties to protect Government officials and major political candidates from physical harm. Assistance to the Secret Service is governed by DoD Directive 3025.13, “Employment of Department of Defense Resources in Support of the United States Secret Service,” July 15, 1968. ²

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are taken under the inherent right of the U.S. Government as a sovereign national entity under the U.S. Constitution. Actions taken under this authority are intended to preserve public order and to carry out governmental operations within U.S. territorial limits, or otherwise in accordance with applicable law. Force may be used if necessary.

This “emergency authority” is reserved for *extremely unusual* circumstances. While AR 500-50 gives commanders emergency authority without prior approval, it states in para. 2-4 that “*in view of the availability of rapid communications capabilities, it is unlikely that action under this authority would be justified without prior Department of the Army approval while communications facilities are operating.*”

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

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

(ii) It should be noted that none of the above authorities, in and of itself, provides sufficient legal basis to order members of the Reserve components to active Federal service.

¹ Although this resolution has been placed in the Statutes at Large as Public Law 90–331, 82 Stat. 170, it has not been codified; it is set out in the notes to 18 U.S.C. 3056.

² Filed as part of original copies available from U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120, Code: 300.

⁵⁹ DoDD 3025.12, *supra* note 43.

⁶⁰ *Id.* para. 4.2.2.

⁶¹ *Id.* para. 4.2.2.1.

functions, federal action (including the use of military forces) is authorized, as necessary, to protect the federal property or functions.⁶²

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

(iii) Civil Disturbance Statutes

The third type of permitted direct assistance by military forces to civilian law enforcement is action taken pursuant to DoD responsibilities under 10 U.S.C. §§ 331-334. *See* ch. 4, *Military Assistance for Civil Disturbances (MACDIS)* for a more detailed discussion. These statutes contain exceptions to the Posse Comitatus Act.⁶⁴ These statutes are sometimes referred to as the “Insurrection Statutes,” 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 Statutes permit 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;⁶⁵
- A rebellion makes it impracticable to enforce the federal law through ordinary judicial proceedings;⁶⁶ or
- An insurrection or domestic violence opposes or obstructs federal law, or so hinders the enforcement of federal or state laws that residents of that state are deprived of their Constitutional rights and the state is unable or unwilling to protect these rights.⁶⁷

⁶² *Id.* para. 4.2.2.2.

⁶³ *Id.* para. 4.2.2.

⁶⁴ Insurrection Act, 10 U.S.C. §§ 331-334 (1998).

⁶⁵ *Id.* § 331.

⁶⁶ *Id.* § 332.

⁶⁷ *Id.* § 333.

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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 laws that provide statutory authority for the military to provide assistance to civilian law enforcement agencies in executing the laws.⁶⁸ These statutes permit direct military participation in civilian law enforcement, subject to applicable limitations within the respective statutes. This section does not contain detailed guidance. Specific statutes and other references must be consulted before determining 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);

⁶⁸ DoDD 5525.5, *supra* note 8, para. E4.1.2.5; AR 500-51, *supra* note 9, at para. 3-4(d); SECNAVINST 5820.7B, *supra* note 9, para. 9(a)(2)(f).

- Removal of persons unlawfully present on Indian lands (25 U.S.C. § 180);
- Execution of certain warrants relating to enforcement of specified civil rights laws (42 U.S.C. § 1989);
- Removal of unlawful enclosures from public lands (43 U.S.C. § 1065);
- Protection of the rights of a discoverer of a guano island (48 U.S.C. § 1418);
- Support of territorial governors if a civil disorder occurs (48 U.S.C. §§ 1422, 1591); 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.⁶⁹ 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.⁷⁰

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-in-Chief, U.S. Special Operations Command (USCINCSOC) may approve similar training by special operations forces on an exceptional basis.⁷¹

⁶⁹ Memorandum, Deputy Secretary of Defense, subject: DoD Training Support to Civilian Law Enforcement Agencies (29 June 1996) [hereinafter Training Memorandum]. A copy of the memorandum is located at DOPLAW Handbook, Vol. II, at App. 2-13.

⁷⁰ DoD may allow local police organizations and other civic organizations to use military ranges. See 10 U.S.C. § 4309 (1998) and U.S. DEP'T OF DEFENSE, DIR. 1025.1, DoD CIVILIAN RIFLE AND PISTOL MARKSMANSHIP TRAINING PROGRAM (31 Jan. 1984).

⁷¹ Training Memorandum, *supra* note 68.

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10 U.S.C. § 373 permits the Secretary of Defense to make DoD personnel available for the training of federal, state, and local civilian law enforcement personnel in the operation and maintenance of equipment, including equipment provided to civilian law enforcement by DoD under 10 U.S.C. § 372. The Secretary of Defense has implemented this guidance in DoDD 5525.5.⁷²

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.⁷³

(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.⁷⁴

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

10 U.S.C. § 374 addresses providing DoD personnel to operate

⁷² DoDD 5525.5, *supra* note 8, para. E4.1.4; AR 500-51, *supra* note 9, at para. 3-6; SECNAVINST 5820.7B, *supra* note 9, para. 9(a)(4).

⁷³ *Id.*

⁷⁴ DoDD 5525.5, *supra* note 8, para. E4.1.5; AR 500-51, *supra* note 9, at para. 3-7; SECNAVINST 5820.7B, *supra* note 9, para. 9(a)(5).

or maintain equipment 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 for federal, state, and local law enforcement agencies. 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;⁷⁵
- 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 to a civilian law enforcement agency under 10 U.S.C. § 374(b) may operate equipment for the following purposes:

- Detection, monitoring, and communication of the movement of air and sea traffic;
- Detection, monitoring, and communication of the movement of surface traffic outside of the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary;
- Aerial reconnaissance;
- Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with such vessels and aircraft to direct such vessels and aircraft to go to a location designated by appropriate civilian officials;
- Operation of equipment to facilitate communications in connection with law enforcement programs specified in 10 U.S.C. §374(4)(b)(1);
- Subject to joint approval by the Secretary of Defense and the Attorney General (and the Secretary of State in the case of a law enforcement operation outside of the land area of the United States):

⁷⁵ 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 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.

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

Additionally, DoD personnel made available to operate equipment for the purpose stated above may continue to operate such equipment into the land area of the United States in cases involving the pursuit of vessels or aircraft where the detection began outside such land area.⁷⁶ 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.⁷⁷

Not all of the provisions of 10 U.S.C. § 374 have been implemented by the Secretary of Defense through DoDD 5525.5.⁷⁸ Generally, under DoDD 5525.5, use of DoD personnel to operate or maintain, or to assist in operating or maintaining equipment will be limited to situations where it would be impractical because of time or cost to use non-DoD personnel. This type of assistance cannot involve DoD personnel in a direct law enforcement role unless otherwise authorized by law, and the subject 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 law enforcement agency making the request. This appears to be a broader

⁷⁶ 10 U.S.C. § 374(b)(3) (1998).

⁷⁷ See DOPLAW Handbook, Vol. II, App. 2-11, *Support to DOJ*.

⁷⁸ DoDD 5525.5, *supra* note 8, 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.

authorization than found in 10 U.S.C. § 374, which requires requests for the use of DoD personnel to operate equipment to specifically come from the head of a *federal* law enforcement agency.⁷⁹ 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:

- 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 E4.1.2.5,⁸⁰ 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

⁷⁹ 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.

⁸⁰ The laws enumerated in DoDD 5525.5, *supra* note 8, 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.

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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. 10 U.S.C. § 374 allows DoD personnel to operate and maintain equipment. Under this authority, 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 DoD personnel to *operate* or *maintain* equipment. Under the Directive, requests for both must come from the head of a civilian law enforcement agency charged with enforcing specified federal laws.

In addition, the purposes listed in 10 U.S.C. § 374(b) (2) for which DoD personnel may operate equipment are far 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. It is unclear whether the Secretary of Defense chose to withhold some of the authority he was granted under § 374, or whether the DoD Directive has not been updated to reflect the authority granted under § 374. Presently, the DoD Directive makes no distinction between maintenance and operation, whereas § 374 specifically limits conduct under § 374(b) to operation of equipment only.

(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.”⁸¹ 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.⁸² 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.*

⁸¹ DoDD 5525.5, *supra* note 8, para. E4.1.7; AR 500-51, *supra* note 9, at para. 3-10; SECNAVINST 5820.7B, *supra* note 9, para. 9(a)(7); AFI 10-801, *supra* note 9, ch. 4.

⁸² Transfer of information is discussed in greater detail above in this chapter at B.3.a. *Use of Information Collected During Military Operations.*

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**CHAPTER 3.
COUNTERDRUG OPERATIONS**

KEY REFERENCES:

- 18 U.S.C. § 1385 - The Posse Comitatus Act (PCA)
- 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)
- 32 U.S.C. § 112 - National Guard Funding
- National Defense Authorization Act of 1991, Pub. L. No. 101-510, §1004 (1991) (as amended)
- CJCSI 3121.01A - Standing Rules of Engagement for US Forces
- CJCSI 3121.02 - Rules on the Use of Force by DoD Personnel Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States
- CJCSI 3710.01A - DoD Counterdrug Support
- NGR 500-2 - National Guard Counterdrug Support

A. INTRODUCTION

Both Active Component and National Guard personnel support counterdrug operations. Department of Defense (DoD) support for counterdrug activities is coordinated through 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)).

Congress makes specific appropriation for counterdrug support operations.¹ This money is disbursed to the providers of counterdrug

¹ 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 2004, Congress appropriated \$817.4 million for counterdrug operations. National Defense Appropriations Act, 2004, Pub. L. No. 108-134, 117 Stat. 1391 (2003).

support through DASD-CN. Counterdrug support differs from most other areas of military support to civilian law enforcement because reimbursement is not required.

B. NATIONAL GUARD SUPPORT TO COUNTERDRUG OPERATIONS

National Guard Forces, in both their State and Federal statuses, have become a critical part of military support to civilian law enforcement agencies in the counterdrug arena. 32 U.S.C. § 112(a) allows the Secretary of Defense to provide federal funding for National Guard counterdrug activities. Funds provided by the Secretary of Defense shall be used for:

- 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.²

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. 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.³ 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;

² 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. 6-12, 6-14 (31 Mar. 2000)[hereinafter NGR 500-2].

³ State drug interdiction and counterdrug support plans must be submitted through the Counterdrug Office of the National Guard Bureau. NGR 500-2, *supra* note 2, para. 2-5.

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- 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;⁴
- 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.⁵

The National Guard Counterdrug Coordinators who are State officials, through their respective states and territories shall submit State Plans to the National Guard Bureau for review. The National Guard Bureau shall submit the State Plans, complete with original certifying signatures from the respective Adjutants General, Attorneys General, and Governors, to DASD (CN). DASD (CN) shall review the State Plans and, in coordination with the Comptroller, ASD (HLD), the Joint Staff, the Commander, NORTHCOM, and other appropriate offices within the department, recommend approval or rejection of the State Plans to the Secretary of Defense.⁶

Before funds are provided to the Governor of a state by the Secretary of Defense, the state drug interdiction and counterdrug activities plan must be analyzed for adequacy and sufficiency by the Secretary of Defense. 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:

⁴ See 32 U.S.C. §502 (1959) (addressing annual drill and field exercise requirements of National Guard personnel).

⁵ *Id.* §112(c).

⁶ Memorandum, Deputy Secretary of Defense, Subject: Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities (2 Oct 2003).

- The performance of the activities may not adversely affect the quality of that training or otherwise interfere with the ability of a member or unit of the National Guard to perform the military functions of the member or unit;
- National Guard personnel will not degrade their military skills as a result of performing the activities;
- The performance of the activities will not result in a significant increase in the cost of training;
- 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.⁷

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 and command and control (not Federal service in Title 10 status). 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." Because of this, 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.⁸ Additionally, as with all National

⁷32 U.S.C. §112(b)(2)(C).

⁸ *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).

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Guard personnel in a Title 32 status under State control, National Guard personnel conducting counterdrug missions under 32 U.S.C. §112 are covered under the Federal Tort Claims Act⁹ even though they are not in a federal status.¹⁰

National Guard units under State command and control and in a Title 32 status have greater flexibility than active component forces in conducting counterdrug missions since the PCA does not apply to them. However, the National Guard Bureau has imposed several policy restrictions on National Guard counterdrug operations in National Guard Bureau Regulation (NGR) 500-2, *National Guard Counterdrug Support*.¹¹ 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.¹² 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.¹³

Only certain counterdrug missions will be funded by the Secretary of Defense under 32 U.S.C. §112. Some states may not approve all of the missions authorized by the Secretary of Defense. All missions included in a Governor's State Plan must be consistent with, and not prohibited by, state law. State Attorneys General must ensure all missions in the Governor's State Plan are consistent with state law.¹⁴

The following missions have been approved for federal funding by the Secretary of Defense under 32 U.S.C. §112:

⁹ 28 U.S.C. §§2671-2680.

¹⁰ NGR 500-2, *supra* note 2, para. 2-4.

¹¹ This regulation does not address National Guard counterdrug activities performed under the authority of Title 10, United States Code.

¹² NGR 500-2, *supra* note 2, para. 2-1e.

¹³ *Id.*

¹⁴ *Id.* para. 2-7.

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- 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;
- Engineer Support – Providing engineer support to LEAs and community organizations where the project has a counterdrug nexus;
- Subsurface/Diver Support – Conducting subsurface inspections of commercial vessel hulls within U.S. territorial waters or maritime ports of entry through the use of sidescan sonobuoys or divers to detect alien devices or containers attached to vessel hulls, or other underwater activities;
- Domestic Cannabis Suppression/Eradication Operations Support – Supporting LEA domestic cannabis suppression and eradication operations;
- Transportation Support – Providing transportation (aerial, ground, or maritime) of LEA personnel/equipment, persons in LEA custody, seized property or contraband as part of on-going time-sensitive counterdrug operations, when security or other special circumstances reasonably necessitate National Guard support and there is a counterdrug nexus;
- Maintenance/Logistical Support – Providing maintenance/logistical support of LEA vehicles and equipment to enhance the counterdrug effectiveness of the supported agency;
- Cargo/Mail Inspection – Assisting LEAs by inspecting cargo and mail;
- Training LEA/Military Personnel – Training LEA/military personnel in military subjects and skills useful in the conduct of counterdrug operations or in the operation of equipment used in counterdrug operations;
- Surface Reconnaissance – Reconnoitering or performing area observation by land or water to detect and report illegal drug activities that include, but are not limited to, cultivated marijuana, suspected isolated drug

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- 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;¹⁵
 - Community Based Demand Reduction Support – Providing support to community based activities primarily designed to educate, train, or otherwise prevent drug abuse among youth;
 - Educational Institution Demand Reduction Support – 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;
 - Informational Demand Reduction Support – Providing information about drug abuse or drug abuse programs;
 - 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.¹⁶

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.¹⁷

Since National Guard personnel providing counterdrug support under 32 U.S.C. §112 are acting as State officials, each state promulgates its own Rules of Engagement (ROE), or Rules for the Use of Force (RUF) as they

¹⁵ 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.

¹⁶ *See id.* note 2, para. 2-7 for a detailed description of what each mission entails.

¹⁷ *Id.* para. 3-6. This authority may be delegated in accordance with para. 3-6(b).

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are now generally called in domestic operations. CJCSI 3121.02, *Rules on the Use of Force by DoD Personnel Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States*, is not applicable to the NG unless they are in federal service (Title 10 status). A sample NG RUF card is DOPLAW Handbook, Vol. II, App. 3-12, *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.¹⁸

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 anytime;

¹⁸ 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].

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- 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.¹⁹

C. TITLE 10 SUPPORT TO COUNTERDRUG OPERATIONS

As a result of a series of congressional mandates dating back to 1981, DoD has assumed an increasingly active role in supporting domestic civilian law enforcement agencies with drug enforcement investigative jurisdiction (hereinafter referred to as DLEA) to fight the flow of illegal narcotics into and through the United States. In addition to passing specific statutory authorities for providing counterdrug support, Congress has annually appropriated specific funds to DoD to provide counterdrug support.

In 1981, Congress passed Chapter 18 of Title 10 entitled *Military Cooperation with Civilian Law Enforcement Officials*.²⁰ 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.²¹ 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 1991,²² Congress designated DoD as the single “lead” agency for the detection and monitoring of aerial and maritime transit of

¹⁹ NGR 500-2, *supra* note 2, para. 3-6.

²⁰ 10 U.S.C.A. §§ 371-382 (2001). *See supra* Chapter 2, Military Support to Civilian Law Enforcement.

²¹ 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.

²² National Defense Authorization Act of 1990, Pub. L. No. 101-189, 103 Stat. 1563 [hereinafter FY90 NDAA].

illegal drugs into the U.S.²³ 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.”²⁴ Finally, Congress provided specific counterdrug authority to DoD by passing Section 1004 of the NDAA for FY 1991.²⁵

1. 1991 National Defense Authorization Act Provisions

Congress annually gives DoD authority to support federal, state, local, and foreign agencies that have counterdrug responsibilities. This authority has not been codified in the U.S. Code, but can be found in Section 1004 of the National Defense Authorization Act for FY 1991.²⁶ 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.²⁷

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

²³ 10 U.S.C. § 124.

²⁴ FY90 NDAA, *supra* note 22, § 1206.

²⁵ National Defense Authorization Act of 1991, Pub. L. No. 101-510, § 1004, as amended, 104 Stat. 1629 [hereinafter FY91 NDAA]. *See also* DOPLAW Handbook, Vol. II, App. 3-2, Statutes Governing DoD Support to Counterdrug Operations.

²⁶ *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 2006. Many of these authorities are also reproduced in the notes following 10 U.S.C.A. §374 in the annotated codes.

²⁷ FY91 NDAA, *supra* note 25, § 1004(a).

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- 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.²⁸
- 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.
- 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.

²⁸ 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.* § 1004(h).

- Aerial and ground reconnaissance.²⁹

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.³⁰

Section 1004 also provides exceptions to the PCA. 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 376.³¹ 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.³² For example, §1004(f) allows the Secretary of Defense to plan and execute otherwise valid military training and operations for the primary purpose of aiding civilian law enforcement agencies, which contradicts the guidance contained in Enclosure 2 of DoDD 5525.5.

2. Detection and Monitoring

10 U.S.C. §124 makes DoD the lead federal agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States. This statute does not extend to the detection and monitoring of *land* transit. Although detection and monitoring is now a DoD mission per §124, it must still be carried out in support of federal, state local, or foreign law enforcement authorities.³³

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

²⁹ *Id.* §1004(b). CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 3710.01A, DOD COUNTERDRUG SUPPORT (30 March 2004) [hereinafter CJCSI 3710.01A], provides a detailed listing and discussion of approval authorities for certain types of DoD support to counterdrug operations.

³⁰ FY91 NDAA, *supra* note 25, para. (d).

³¹ *Id.* §1004(g).

³² *Id.* §1004(e).

³³ 10 U.S.C. § 124(a)(2).

- Directing that vessel or aircraft to go to a location designated by appropriate civilian officials.³⁴

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.³⁵

3. CJCS Implementation

Authority to approve counterdrug operational support³⁶ to DLEAs 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).³⁷ The CJCSI 3710.01A 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,³⁸ detection and monitoring operations, and deployments for longer than 179 days or involving more than 400 personnel. These missions require specific SECDEF approval. CJCSI 3710.01A, contains significant guidance and

³⁴ *Id.* §124(b).

³⁵ 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).

³⁶ Operational support is defined in CJCSI 3710.01A, *supra* note 29, as “Support to (host nations) and law enforcement agencies involving military personnel and their associated equipment and provided by the geographic combatant commanders from forces assigned to them or made available to them by the Services for this purposes. Operational support does not include support in the form of equipment alone, nor the conduct of joint law enforcement investigations with cooperating civilian law enforcement agencies.” Non-operational support, such as pure equipment loans or transfers, are handled and approved through Regional Logistical Support Offices (RLSO) or through the Service Secretaries.

³⁷ *Id.* U.S. Northern Command (USNORTHCOM) further delegated its authority to Commander, Joint Forces Headquarters, Homeland Security (JFHQ-HLS). Memorandum for Commander, JFHQ-HLS from Commander, USNORTHCOM, Subject: Delegation of Authority for Approving Counterdrug (CD) Operational Support to Drug Law Enforcement Agencies (DLEAs) (31 Oct. 2002). JFHQ-HLS delegated its authority to Commander, Joint Task Force Six. (now called Joint Task Force North), Memorandum from Commander, JFHQ-HLS to Commander, Joint Task Force Six, Subject: Delegation of Authority for Approving Counterdrug (CD) Operational Support to Drug Law Enforcement Agencies (DLEAs) – Action Memorandum (1 Nov. 2002).

³⁸ Memorandum, Secretary of Defense, Subject: Military Support to Counternarcotics Activities (6 Oct. 1998).

guidelines on permissible counterdrug support to DLEAs and should be consulted whenever reviewing a proposed operation.³⁹

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 3710.01A.

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;⁴⁰
- the support must improve unit readiness or mission capability;

³⁹ A copy of CJCSI 3710.01A is located at DOPLAW Handbook, Vol. II, App. 3-9.

⁴⁰ 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).

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- the support must provide a training opportunity that contributes to combat readiness; and
- Title 10 forces will not be used for continuing, on-going, long term operational support commitments at the same location.

For all Domestic Counternarcotics support requests sent to USNORTHCOM, the Cdr, NORTHCOM, will first ensure the State National Guard cannot provide the support. If not, USNORTHCOM will determine whether the requested support is feasible, supportable, and consistent with Department Policy. If approval is authorized under CJCSI 3710.01A, 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 Under Secretary of Defense for Policy (USD (P)), for consideration.

Request 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, NORTHCOM, for review. If feasible and supportable the Cdr, NORTHCOM 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 3121.02, *Rules on the Use of Force by DoD Personnel Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States*.⁴¹ Judge Advocates should also look for the publication of CJCSI 3121.03, which is currently being staffed. This instruction will provide a unified Standing Rules for Use of Force that is meant to provide RUF for the majority of Domestic Support Operations.

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 Six (JTF-6), located in El Paso, Texas

⁴¹ An internet address to see a copy of CJCSI 3121.02 is located at DOPLAW Handbook, Vol. II, App. 3-8

(under the command and control of NORTHCOM. While the two JIATFs do provide some support to DLEAs in their Areas of Responsibility (AORs),⁴² 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 area of responsibility for JIATF-S, JIATF-W and for JTF-6.⁴³ While the JIATFs focus their attention on international AORs the bulk of domestic counterdrug support is provided by JTF-6.

Joint Task Force Six, activated on November 13, 1989,⁴⁴ has been 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.⁴⁵ Joint Task Force Six's mission is to synchronize and integrate 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 164 personnel assigned to JTF-6, including civilians, contractors and servicemembers from all four services. Unlike the JIATFs, JTF-6 has no DLEA representatives assigned to or working in the command. Joint Task Force Six has no assigned units and no tasking authority. The command relies entirely on volunteer units to perform its operational support missions. In the year 2003, JTF-6 conducted 320 counterdrug support missions throughout CONUS. These included aerial

⁴² For example, Hawaii falls within PACOM's AOR, and Puerto Rico and the Virgin Islands fall within NORTHCOM's AOR.

⁴³ Memorandum, Assistant Secretary of Defense, Special Operations/Low Intensity Conflict, Subject Joint Interagency task Force (JIATF) Area Responsibilities (1 Aug 2003)

⁴⁴ Message, 152330Z Oct 89, Commander in Chief, Forces Command (CINCFOR), subject: Operations Order—Counternarcotics Operations (15 Oct. 1989).

⁴⁵ 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.

and ground reconnaissance missions, detection and monitoring, mobile training teams, and engineer support missions.

Co-located with JTF-6 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 DLEA support requests, and then forwards their requests to JTF-6 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 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,⁴⁶ 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 Transportation to assign Coast Guard law enforcement detachments (LEDETs) to every appropriate naval surface vessel operating at sea in a drug interdiction area.⁴⁷ With the assignment of the USCG to the Department of Homeland Security, the Secretarial function described in this statute will now transfer to the Secretary of Homeland Security. See DOPLAW Handbook, Vol. II, App. 3-13, *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.⁴⁸ Coast Guard personnel assigned under

⁴⁶ United States v. Chaparro-Almeida, 679 F.2d 423 (5th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1982).

⁴⁷ 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.

⁴⁸ 14 U.S.C. § 89(a):

§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.⁴⁹ 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 Coast Guard personnel may be assigned duties to enforce the laws listed under 10 U.S.C. §374(b)(4)(A).⁵⁰

Specific rules governing the use of USCG LEDETs are provided in Commandant, United States Coast Guard Instruction (COMDTINST) M16247.1A, *Maritime Law Enforcement Manual*.⁵¹ 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).⁵² 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

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.

⁴⁹ 10 U.S.C. § 379(b).

⁵⁰ *Id.* § 379(c).

⁵¹ U.S. DEP'T OF COAST GUARD, COMMANDANT OF THE COAST GUARD INSTR. M16247.1A, MARITIME LAW ENFORCEMENT MANUAL (1 Feb. 1994) [hereinafter COMDTINST M16247.1A]. *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).

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

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manufacture or distribute, a controlled substance.⁵³ 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.⁵⁴

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

- In U.S. Customs waters;
- On the high seas and the flag State has consented or waived objection to the enforcement of U.S. law; or
- In the territorial waters of another nation and that coastal State consents to the enforcement of U.S. law.⁵⁵

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.”⁵⁶ 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

⁵³ *Id.* § 1903.

⁵⁴ *Id.* § 1903(b).

⁵⁵ *Id.* § 1903(c).

⁵⁶ COMDTINST M16247.1A, *supra* note 50 ch 2, § E(1)(e).

unit is the tactical commander of that unit.”⁵⁷ 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.⁵⁸

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.⁵⁹ See DOPLAW Handbook, Vol. II, App. 3-14, *Sample LEDET MOA*, for a sample bilateral agreement.

⁵⁷ *Id.*

⁵⁸ CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT, Encl. H, Counterdrug Support Operations, para. 1(c) (15 Jan. 2000). CJCSI 3121.01A 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.

⁵⁹ COMDTINST M16247.1A, *supra* note 50, at ch. 5, sec. B and encl. 4.

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**CHAPTER 4.
MILITARY ASSISTANCE FOR CIVIL DISTURBANCES¹**

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 - Federal Tort Claims Act
- 31 U.S.C. § 1535 - Agency Agreements
- DoDD 3025.12 - Military Assistance for Civil Disturbances
- DoDD 3025.15 - Military Assistance to Civil Authorities
- DoDD 5525.5 - DoD Cooperation with Civilian Law Enforcement Officials
- Executive Order 12656 - Assignment of Emergency Preparedness Responsibilities
- ASD Memo - Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense, 25 Mar. 2003
- AR 500-50 - Civil Disturbances
- AR 700-131 - Loan and Lease of Army Materiel
- NGR 500-1/ANGI 10-8101 - Military Support to Civil Authorities
- FM 19-15 - Civil Disturbances
- FM 3-07 – Stability Operations and Support Operations
- Department of Defense Civil Disturbance Plan (GARDEN PLOT)

A. INTRODUCTION

Within civilian communities in the United States, the primary responsibility for protecting life and property and maintaining law and order is vested in state and local governments. Generally, federal armed 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’

¹ The National Response Plan (Dec. 2004) uses Defense Support of Civil Authorities (DSCA). A copy of the National Response Plan is located at DOPLAW Handbook, Vol. II at Appendix 5-24.

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.

Exceptions to the restrictions on employment of federal armed forces to assist state and local civil authorities are also grounded in the Constitution,⁵ which provides the basis for federal legislation allowing military assistance for civil disturbances (MACDIS). Other emergency conditions, which are outside the constitutionally and congressionally prescribed conditions, may also allow for MACDIS.

B. CIVIL DISTURBANCE STATUTES

Title 10, Chapter 15 of the United States Code,⁶ entitled “Insurrection,” allows the use of federal forces to restore order during times of civil disturbance. 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.” The phrase

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.house.gov/house/Declaration.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, and art. III, § 4.

⁶ 10 U.S.C. §§ 331-335.

“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 for the domestic conditions requiring the use of Federal Forces under DoDD 3025.12.”⁷ Courts have used similar language when defining “insurrection.”⁸

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.⁹ The Insurrection Act permits the commitment of U.S. forces by the President under three circumstances: to support a request from an U.S. state or territory; to enforce federal authority; or to protect Constitutional rights.¹⁰

1. Support a State Request

The Federal Government has a Constitutional obligation to protect every state in the union, upon request, from domestic violence.¹¹ 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

⁷ U.S. DEP’T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS), para. E2.1.4 (4 Feb. 1994) [hereinafter DoDD 3025.12]. *See also* U.S. DEP’T OF ARMY, REG. 500-50, CIVIL DISTURBANCES, para. 1-2b (12 Apr. 1972) [hereinafter AR 500-50].

⁸ *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.).

⁹ 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 2, Military Support to Civilian Law Enforcement.

¹⁰ 10 U.S.C. §§ 331-335.

¹¹ U.S. CONST. art. IV, § 4.

other states, in the number requested by that state, and use such of the armed forces, as he considers necessary to suppress the insurrection.¹²

A formal request by 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.¹³ See DOPLAW Handbook, Vol. II, App. 4-11, *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.¹⁴

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,¹⁵ should have been brought to bear on the civil disturbance.¹⁶

On 1 May 1992, pursuant to this statute, California Governor Pete Wilson requested federal military support from President George 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.¹⁷ In accordance with the order of President Bush, The Secretary of Defense ordered the federalization of the California

¹² 10 U.S.C. § 331.

¹³ 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 6, para. 4.6.1; AR 500-50, *supra* note 6, para. 2-3a. A copy of the Executive Order is located at DOPLAW Handbook, Vol. II at Appendix 4-11.

¹⁴ An Assistant Secretary of Defense Memorandum, dated 25 Mar 2003, appointed Assistant Secretary of Defense for Homeland Defense as DoD Executive Agent and transferred the Director of Military Support function from the Army to the Chairman of the Joint Chiefs of Staff [hereinafter ASD Memo].

¹⁵ See *infra*, Chapter 10, Reserve Components - Special Issues, which discusses the mobilization and activation of National Guard forces.

¹⁶ See NATIONAL GUARD BUREAU, REG. 500-1/ANGI 10-8101, MILITARY SUPPORT TO CIVIL AUTHORITIES, para. 4-1 (1 Feb. 1996) (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).

¹⁷ Proclamation No. 6427, 57 Fed. Reg. 19,359 (May 5, 1992).

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.¹⁸ See DOPLAW Handbook, Vol. II, App. 4-1, *Presidential Declaration and Presidential Decision Document Activating the ARNG for the LA Riots*; App. 4-2, *Army Orders to Execute and Terminate Military Operations During the LA Riots*; and App. 4-3, *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.¹⁹ Within the Insurrection Act, Congress gave the President the authority to commit the U.S. military to enforce federal law.²⁰ 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.²¹

The provisions of this statute were used to enforce public school desegregation in Arkansas²² and Alabama.²³ The same provisions were used to control civil rights protests in Mississippi²⁴ and Alabama.²⁵ See *Appendices 4-9, EO 10730; 4-10, EO 11053; 4-11, EO 11111; and 4-12, EO 11118*.

¹⁸ Exec. Order No. 12,804, 57 Fed. Reg. 19,361 (May 5, 1992).

¹⁹ U.S. CONST. art. II, § 3.

²⁰ 10 U.S.C. § 332.

²¹ *Id.* See AR 500-50, *supra* note 6, para. 2-1b.

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

²³ See Exec. Order No. 11,118, 28 Fed. Reg. 9,863 (Sept. 10, 1963).

²⁴ See Exec. Order No. 11,053, 27 Fed. Reg. 9,681 (Sept. 30, 1962).

²⁵ See Exec. Order No. 11,111, 28 Fed. Reg. 5,709 (June 11, 1963).

3. Protect Constitutional Rights

Citizens of the United States are guaranteed equal protection under the law.²⁶ 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.²⁷ 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.²⁸

Under 10 USC § 333, President Kennedy sent military troops to Alabama in April 1963 during the civil rights protests in Birmingham, Alabama.²⁹

²⁶ 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.”

²⁷ 10 U.S.C. § 333.

²⁸ *Id.* See AR 500-50, *supra* note 6, para. 2-1c.

²⁹ 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.³⁰ 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.³¹ Decisions of the President to issue proclamations and Executive Orders in this area are final³² and cannot be compelled by the courts.³³ 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 the requested mission is in the interest of DoD to conduct.

³⁰ 10 U.S.C.A. § 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.” See AR 500-50, *supra* note 6, para. 2-3b.

³¹ 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).

³² 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).

³³ 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).

- Readiness—impact on DoD’s ability to perform its primary mission.³⁴

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.³⁵ Pre-commitment approvals and requirements do not prevent federal military forces from alerting troops, conducting planning, preparing orders, or pre-positioning forces at the direction of the ASD(HD) with the advice and assistance of the Chairman of the Joint Chiefs of Staff, Joint Director of Military Support (JDOMS).³⁶ If more than a battalion-sized unit is to be pre-positioned, the President must approve the pre-positioning.³⁷ The ASD(HD) will not direct the issuance of employment orders prior to the Presidential executive order directing the use of troops by the Secretary of Defense.³⁸

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.³⁹

³⁴ U.S. DEP’T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES, para. 4.2 (18 FEB. 1997) [hereinafter DODD 3025.15].

³⁵ ASD Memo, *supra* note 13. 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 (ASD(HD)). DoDD 3025.15, *supra* note 33, withheld approval authority for civil disturbance operations at the Secretariat level. (Note: DoDD 3025.15 (MACA) and DoDD 3025.12(MACDIS), *supra* note 6, have not been updated to reflect the duties of ASD(HD)).

³⁶ AR 500-50, *supra* note 6, para. 2-3b., Although not controlling, AR 500-50 provides valuable precedent and guidance until DoDD 3025.12 and DoDD 3025.15 are updated to reflect change in Executive Agent.

³⁷ DoDD 3025.12, *supra* note 6, 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).

³⁸ AR 500-50, *supra* note 6, para. 2-3b. *See also* U.S. DEP’T OF DEFENSE CIVIL DISTURBANCE PLAN (GARDEN PLOT) (15 Feb. 1991), Annex C (Concept of Operations) paras. 2d-2e [hereinafter GARDEN PLOT].

³⁹ 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 2, 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.⁴⁰ A military installation commander, exercising “inherent authority,”⁴¹ 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.⁴²

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.⁴³ This emergency provision should be used

⁴⁰ DoDD 3025.12, *supra* note 6, para. 4.2.2.2.

⁴¹ 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.”).

⁴² 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).

⁴³ DoDD 3025.12, *supra* note 6, para. 4.2.2.1; DoDD 5525.5, *supra* note 9, para. E4.1.2.3.1.

with great caution. The authority granting the use of federal forces in this manner clearly states that it would be difficult to justify such action, without prior approval, while communications facilities are operating.⁴⁴

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.⁴⁵ 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.⁴⁶

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.⁴⁷ 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.⁴⁸ 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

⁴⁴ DoDD 3025.12, *supra* note 6, para. 4.2.2., AR 500-50, *supra* note 6, para. 2-4a, *but see* note 35.

⁴⁵ AR 500-50, *supra* note 6, para. 2-4a, limitation to “active Army in command of troops” is predicated on Executive Agent responsibilities lying with Secretary of the Army.

⁴⁶ DoDD 5525.5, *supra* note 9, para. 4.7.1.

⁴⁷ EO 12656, *supra* note 12, at § 1101(3) and (8).

⁴⁸ 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).

Attorney General, who also advises the President on the use of federal military forces to restore law and order. The Attorney General coordinates the activities of federal law enforcement agencies with those of the local and state agencies in an area faced with a civil disturbance. Finally, the Attorney General appoints the Senior Civilian Representatives of the Attorney General (SCRAG), who will be located in each city where federal forces are committed.

2. Senior Civilian Representative of the Attorney General

Appointed by the Attorney General, the SCRAG is the Attorney General’s on-scene agent. The SCRAG is responsible for the coordination of effort of all federal agencies involved in the civil disturbance operation with the efforts of state and local agencies engaged in restoring law and order. The SCRAG has the authority to assign missions to federal military forces and the authority to resolve disputes arising between local law enforcement agencies and the joint task force commander concerning the types of missions military forces may undertake.

3. Assistant Secretary of Defense for Homeland Defense

The Assistant Secretary of Defense for Homeland Defense (ASD(HD)) acts as the principal point of contact between the Department of Defense and the Department of Justice for MACDIS.⁴⁹ ASD(HD) is responsible for all training, planning, and operations relating to the employment of any military resources in the event of a civil disturbance.⁵⁰

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 is responsible for designating the supported Combatant Commander (CC) for a civil

⁴⁹ ASD Memo, *supra* note 14.

⁵⁰ *Id.*

disturbance operation. JDOMS is the point of contact within the Department of Defense for civil disturbance matters.⁵¹

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

The Combatant Commanders of U.S. Northern Command (CDRUSNORTHCOM) and U.S. Pacific Command (CDRUSPACOM) have responsibility for planning and executing civil disturbance plans within their areas of operation. In total, these areas cover the 48 contiguous states, Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, Guam, American Samoa and all United States territories, possessions, and territorial waters.⁵² 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 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.⁵³

6. Commander, U.S. Army Forces Command

U.S. Army Forces Command (FORSCOM) is currently the lead operational authority for civil disturbance response within the 48 contiguous states. The Commander, FORSCOM, nominates a Commander, Joint Civil Disturbance Task Force, designates civil disturbance units, ensures preparedness, and deploys forces to the objective area. CDRUSNORTHCOM designates the Joint Civil Disturbance Task Force Commander.

⁵¹ *Id.* and DoDD 3025.12, *supra* note 6, para. 5.6.4; *see also* AR 500-50, *supra* note 6, para. 3-1b which provides an illustrative list of the responsibilities of DOMS, the Army predecessor to JDOMS.

⁵² DoDD 3025.12, *supra* note 6, para. 4.3.3.

⁵³ *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.

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.*

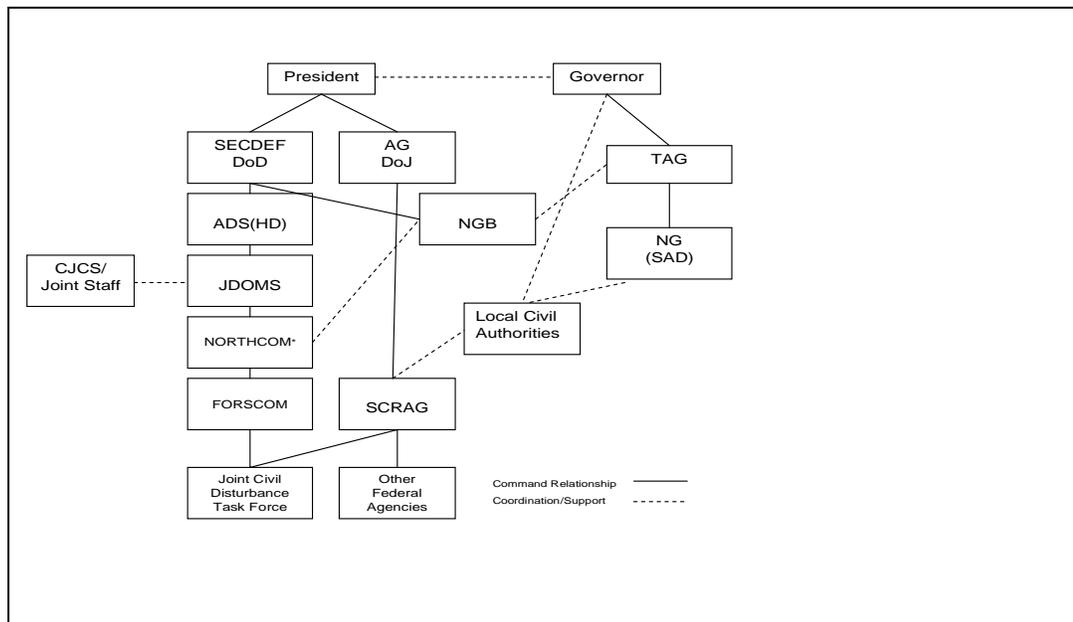


Figure 4-1, Relationship of Parties Involved in Civil Disturbance Operations

8. 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. In this capacity, they are not subject to the prohibitions of the PCA,⁵⁴ and can freely support state law enforcement missions. The National Guard is employed by the governor of the state only after all other state and local resources have been fully utilized, or when the situation is beyond the

⁵⁴ See *supra*, Chapter 2, Military Support to Civilian Law Enforcement, for a complete discussion on the Posse Comitatus Act.

capabilities of state and local civil authorities.⁵⁵ 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. In extreme circumstances, National Guard units may be federalized under Title 10 pursuant to a Presidential order.⁵⁶ Once federalized, the NG conducts its mission in accordance with Federal law and Garden Plot, as discussed in the next section.

Only NG personnel who have received civil disturbance training will be employed in civil disturbance operations. National Guard personnel who have not received this training will be used only in a supporting role.⁵⁷ NG units assigned an “on the street” civil disturbance mission will initially conduct training in accordance with FM 19-15, *Civil Disturbances*.⁵⁸ Subsequent annual refresher training will be conducted in accordance with guidance issued by the respective state Adjutant General and National Guard commander.⁵⁹ Training will be as realistic as possible and will cover topics such as: use of force; riot batons; apprehension and detention; media relations; and standards of conduct. Personnel authorized to carry firearms must receive qualification training and testing on the firearm to be carried before being issued the firearm.⁶⁰ In addition, commanders must ensure that personnel are adequately trained on assigned specialized equipment such as shotguns, riot control dispensers/agents, and other civil disturbance unique equipment.⁶¹ A sample National Guard Civil Disturbance Readiness Checklist can be found in NGR 500-1/ANGI 10-8101, Appendix E, Civil Disturbance Unit Readiness Checklist.

Use of force by NG personnel while in SAD status is governed by state law.⁶² NG personnel using federal property or equipment during a civil disturbance operation while in SAD status will comply with the following

⁵⁵ U.S. DEP’T OF ARMY, NATIONAL GUARD BUREAU REG. 500-1/ANG 10-8101, MILITARY SUPPORT TO CIVIL AUTHORITIES, para. 4-1 (1 Feb. 1996) [hereinafter NGR 500-1].

⁵⁶ See *infra* Chapter 10, Reserve Components, for a complete discussion of National Guard status.

⁵⁷ NGR 500-1, *supra* note 57, para. 4-4.

⁵⁸ U.S. DEP’T OF ARMY, FIELD MANUAL 19-15, CIVIL DISTURBANCES, (25 Nov. 1985) [hereinafter FM 19-15].

⁵⁹ NGR 500-1, *supra* note 57, para. 4-5.

⁶⁰ *Id.* para. 4-4.

⁶¹ *Id.* para. 4-5.

⁶² *Id.* para. 4-6.

guidelines, unless state law is more restrictive, in which case state law will control:

- The use of force must be restricted to the minimum degree consistent with mission accomplishment;
- The use of deadly force can be justified only by extreme necessity. It is authorized only where all three of the following circumstances are present:
 - lesser means have been exhausted or are not available;
 - the risk of death or serious bodily harm to innocent persons is not significantly increased by its use;
 - the purpose of its use is one or more of the following:
 - self-defense to avoid death or serious bodily harm, including the defense of other persons;
 - prevention of a crime that involves a substantial risk of death or serious bodily harm (for example, setting fire to an inhabited dwelling or sniping);
 - prevention of the destruction of property vital to public health or safety;
 - detention or prevention of the escape of a person who, during the detention or on the act of escaping, presents a clear threat of loss of life or serious bodily harm to another person.⁶³

Apprehension of civilians will be left to civilian law enforcement authorities as much as possible. If apprehension of a civilian person by NG personnel is necessary, NG personnel will use guidelines issued by the state Attorney General in accordance with state law.⁶⁴ A sample *After Action Review Format* for NG Civil Disturbance missions NGR 500-1/ANGI 8101, Appendix C, National Guard Military Support After Action Report Format.

E. THE DEPARTMENT OF DEFENSE CIVIL DISTURBANCE PLAN (GARDEN PLOT)

⁶³ *Id.*

⁶⁴ *Id.* para. 4-6(d).

The Department of Defense Civil Disturbance Plan, named “GARDEN PLOT,”⁶⁵ provides guidance and direction for planning, coordinating, and executing military operations during domestic civil disturbances.

1. GARDEN PLOT Mission

Broadly stated, the GARDEN PLOT mission is to conduct civil disturbance operations throughout the United States and its territories and possessions to assist civil authorities in restoring law and order.⁶⁶ 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.⁶⁷ The GARDEN PLOT mission statement does not allow the joint civil disturbance task force commander to undertake preservation missions.⁶⁸ 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.⁶⁹ Care should be taken before a military commander accepts missions that are routine maintenance of civil order.

⁶⁵ GARDEN PLOT, *supra* note 37, at preface. Originally published in 1991, the plan does not reflect numerous changes since that date including creation of Department of Homeland Security, creation of US Northern Command and increased joint nature of military operations.

⁶⁶ *Id.* at Basic Plan, para. 3.

⁶⁷ The preservation of law and order is the responsibility of state and local governments and law enforcement authorities. DODD 3025.12, *supra* note 6, para. 4.1.3; FM 19-15, *supra* note 59, at 1-3.

⁶⁸ See DODD 3025.12, *supra* note 6, 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.”

⁶⁹ FM 19-15, *supra* note 59, at 1-3.

2. GARDEN PLOT Plan

The GARDEN PLOT plan provides the basis for all preparation, deployment, employment, and redeployment of Department of Defense component forces, including National Guard forces called to active federal service, for use in domestic civil disturbance operations, in support of civil authorities as directed by the President.⁷⁰ The concept of a civil disturbance operation is three phased: Phase I, Deployment; Phase II, Employment; and Phase III, 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.⁷¹

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 intelligence 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) issues orders to be prepared to deploy within six hours.

CIDCON 2 reflects that 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.

⁷⁰ The DoD CONPLAN can also be supplemented by supporting plans published by the Combatant Commander and the Army Service Component Command. In CONUS, USNORTHCOM FUNCPLAN and FORSCOM FUNCPLAN would be used by the Joint Civil Disturbance Task Force for planning, training, and operations.

⁷¹ 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. See Garden Plot, *supra* note 37, at (Annex A) (Appendix 1) para. 5.

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.

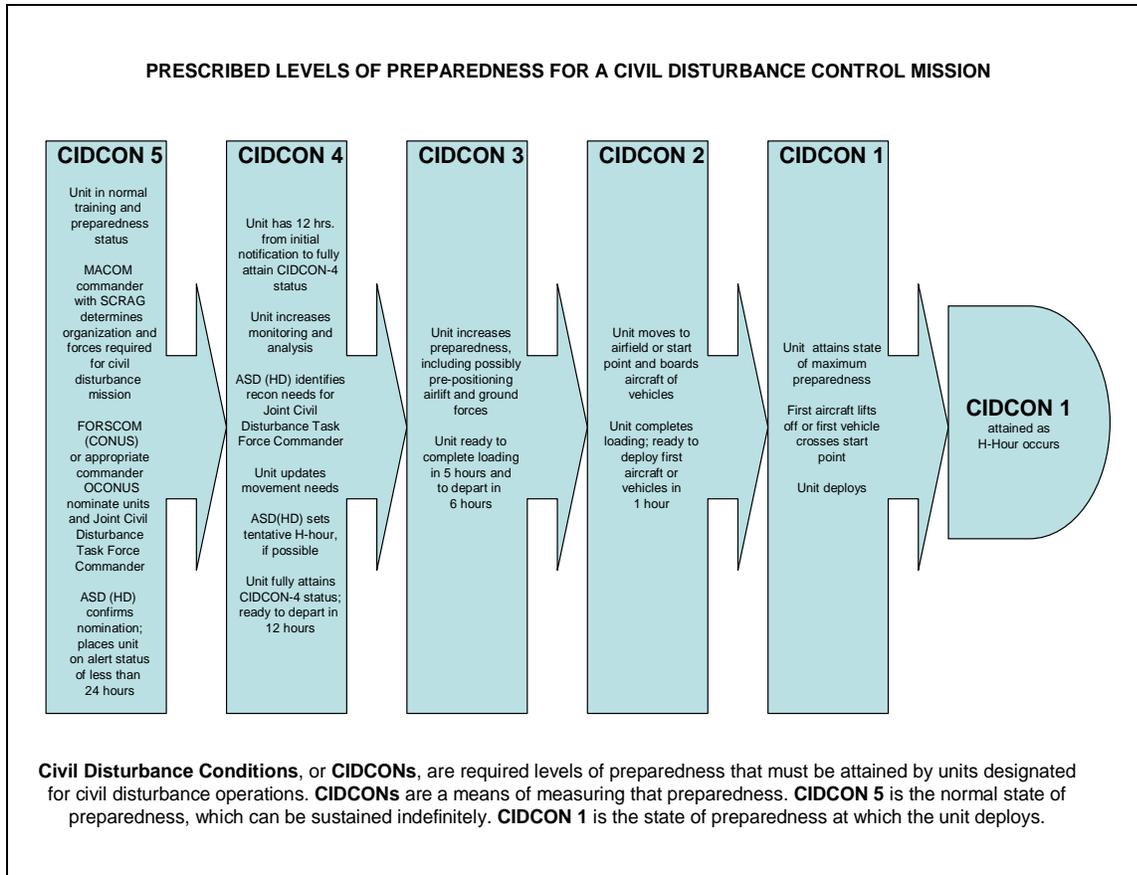


Figure 4-2, CIDCON levels of preparedness

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.⁷²

⁷² 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 6, 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.”).

Throughout the employment of military forces, the Commander will maintain liaison with the SCRAG, state law enforcement representatives, and municipal authorities. This liaison will be maintained until termination of the civil disturbance mission. The Joint Civil Disturbance Task Force Commander will accept missions from the SCRAG, and, if reasonably possible, within the framework of his orders, comply with requests from civil authorities.⁷³

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 CC 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.⁷⁴

On order of the ASD(HD), 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. GARDEN PLOT Rules for the Use of Force⁷⁵

The CJCS SROE do not apply to civil disturbance missions. Rules of Engagement (often called “Rules for the Use of Force” in domestic operations) for GARDEN PLOT operations are contained in Appendix 1 to

⁷³ AR 500-50, *supra* note 6, para. 3-3b.

⁷⁴ AR 500-50, *supra* note 6, para. 3-3b.

⁷⁵ Although Garden Plot stills uses the phrase “Rules of Engagement,” it is common to refer to such rules in a domestic setting as “Rules for the Use of Force.”

Annex C (Concept of Operations) to GARDEN PLOT. Special instructions to guide the conduct of military forces involved in civil disturbance operations are issued in Appendix 8 to Annex C to GARDEN PLOT. Included in these special instructions, at Tab A, is a pocket card that should be reprinted and issued to all participating forces. General principles guiding the use of force are discussed below.

a. Minimum Necessary Force

In carrying out the Task Force mission, the Commander must ensure that all operations adhere to the minimum necessary force principle. This principle should guide the Task Force in all actions from selection of appropriate operational techniques to the choice of options for arming the troops.⁷⁶ For example, riot control agents, crowd control formation and riot batons should not be used if saturation of an area with military forces will accomplish the mission.⁷⁷ The use of scout or sentry dogs is prohibited.⁷⁸

b. Use of Deadly Force

Commanders are authorized to use non-deadly force to control disturbances, to prevent crimes, and to apprehend or detain persons who have committed crimes. The level of force used must be that which is reasonably necessary under the circumstances.⁷⁹

The use of deadly force is justified only by extreme necessity. Accordingly, its use is not authorized for the purpose of preventing activities that do not pose a significant risk of death or serious bodily harm (e.g., not used for curfew violations or looting). If a mission cannot be accomplished without the use of deadly force, and deadly force is not permitted under the guidelines authorizing its use, accomplishment of the mission must be delayed until sufficient non-deadly force can be brought to bear.

⁷⁶ GARDEN PLOT, *supra* note 37, at C-1-6.

⁷⁷ FM 19-15, *supra* note 59, at 7-1.

⁷⁸ GARDEN PLOT, *supra* note 37, at C-1-12.

⁷⁹ *Id.*, at C-1-6; FM 19-15, *supra* note 59, at 7-4. Rules for the use of non-deadly force are not yet resolved.

The use of deadly force is authorized only where all three of the following circumstances are present:

- Lesser means have been exhausted or are unavailable;
- The risk of death or serious bodily harm to innocent persons is not significantly increased by use; and
- The purpose of its use is one or more of the following:
 - self- defense against a hostile person or force to avoid imminent death or serious bodily injury posed by the hostile person;
 - prevention of a crime which involves an imminent danger of death or serious bodily harm (for example, setting fire to an inhabited dwelling or sniping), including the defense of other persons;
 - prevention of the destruction of public utilities or similar critical infrastructure vital to public health or safety, damage to which would imperil life;⁸⁰ or
 - detention or prevention of the escape of persons who have committed or attempted to commit one of the serious offenses referred to in the sub-bullets above, but only if escape of the persons would pose an imminent danger of death or serious physical injury to military or law enforcement personnel or to any other person.

Military personnel have the right under law to use reasonably necessary force to defend themselves against violent, dangerous and life threatening personal attack. The limitations above are not intended to infringe this right, but to prevent the unauthorized or indiscriminate firing of weapons and the indiscriminate use of other types of deadly force.

GARDEN PLOT requires that three policies regarding the use of deadly force be observed. First, "[w]hen firing ammunition, the marksman should, if possible, aim to wound rather than to kill." Judge advocates should be aware that the concept of "aiming to wound" is controversial, requires extensive training, and the Attorney General has found this to be a potentially ineffective law enforcement technique that increases the danger for the law enforcement officer. Judge advocates should emphasize the

⁸⁰ GARDEN PLOT, *supra* note 37, at C-1-10. Troops assigned to security missions must know if a particular facility or activity is so vital to the health and safety of the public that the use of deadly force would be justified to protect it. This determination will generally be made by the SCRAG and passed to the JTFC.

inherent right of self-defense when addressing this matter. Second, GARDEN PLOT requires that when possible, "a clear warning to the individual or group that use of such force is contemplated or imminent" should precede the use of deadly force. Third, GARDEN PLOT prohibits warning shots.

Soldiers must be cautioned that if they are issued live ammunition, they are authorized to load and fire their weapon only on order of an officer. If no officer is present, loading and firing should be in accordance with the following guidance: "you will load or fire your weapon only when required to protect your own life or the lives of others; to protect specific property designated as vital to public health or safety damage to which would imperil life; or to prevent the escape of persons endangering life or vital facilities; you are not authorized to use firearms to prevent offenses which are not likely to cause death or serious bodily harm nor endanger public health or safety."⁸¹

Even when deadly force is authorized, the use of the full firepower of a unit to produce extensive casualties is only authorized as a last resort when the failure to use such firepower would result in the imminent overthrow of the government, continued mass casualties, or similar grievous conditions.⁸²

The immediate nature of civil disturbance operations may not allow for extensive training in the hours prior to deployment. The rules for the use of force contained in GARDEN PLOT are unclassified and should be widely disseminated and trained with well in advance of a unit being directed to conduct a civil disturbance operation. Judge Advocates participating in training should be thoroughly familiar with the limitations on the use of force contained in GARDEN PLOT.

c. Arming Orders

Arming orders can be used by the Joint Civil Defense Task Force Commander to ensure unity of the Task Force's outward force posture and to prevent unintended escalations in the show and use of force. The level of force shown by troops during civil disturbance operations should be

⁸¹ All information for the use of deadly force comes directly from Garden Plot. These rules are restated in FM 19-15, *supra* note 59, Chapter 7.

⁸² GARDEN PLOT, *supra* note 37, at C-8-6.

appropriate to the current threat and the principle of minimum force keeping in mind that the presence of loaded weapons or fixed bayonets may invite the unnecessary use of deadly force or provoke adverse reaction. Each of the options below represents escalation in the level of force shown during civil disturbances. If necessary, the arming orders can be modified to include additional weapons such as batons and pistols.⁸³ While arming orders may be used to effectively prevent unintended escalation, JAs should always stress the right to self-defense when briefing these orders.

	Rifle	Bayonet	Ammunition Magazine/Clip	Chamber
AO-1	At Sling	In scabbard	In pouch on belt	Empty
AO-2	At Port	In scabbard	In pouch on belt	Empty
AO-3	At Port	Fixed	In pouch on belt	Empty
AO-4	At Port	Fixed	In weapon	Empty
AO-5	At port	Fixed	In weapon	Round chambered

Figure 4-3, Arming Orders

d. 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.⁸⁴ Civilians taken into custody should be transferred to civilian law enforcement authorities as soon as possible.

All members of the force must remember that state and federal criminal law and procedure govern apprehension. Apprehension is justified only on the basis of probable cause to believe that an offense has been committed and that the person to be apprehended committed the offense. Soldiers should not question detainees beyond basic 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

⁸³ See Arming Orders from deployment to LA Riots, reprinted in *International Law Note*, Civil Disturbance Rules of Engagement: Joint Task Force Los Angeles, ARMY LAW., Sept. 1992, at 32.

⁸⁴ GARDEN PLOT, *supra* note 37, at C-1-12; AR 500-50, *supra* note 6, para. 1-3d.

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.⁸⁵

e. Search and Seizure

Garden Plot anticipates 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.⁸⁶ 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 removed from the individual and seized.⁸⁷

(2) Incident to Apprehension

A person lawfully detained may be searched for weapons or

⁸⁵ See FM 19-15, *supra* note 59, Chapter 12, for basic procedural guidelines for detention of civilians by military forces.

⁸⁶ GARDEN PLOT, *supra* note 37, at C-1-14.

⁸⁷ *Id.* at C-1-12; FM 19-15, *supra* note 59, at 12-3.

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.⁸⁸

(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 violence⁸⁹

(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.⁹⁰

(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.⁹¹

(6) Plain View

During the course of otherwise lawful activity, military forces may

⁸⁸ FM 19-15, *supra* note 59, at 12-3.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

seize any unlawful weapons or objects related to criminal activity which they observe in plain view.⁹² 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.⁹³ A hand receipt or some similar document should be prepared when items of personal property are seized from an individual.⁹⁴

f. Confinement Facilities

The Joint Civil Disturbance Task Force should not operate a detention facility.⁹⁵ 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,⁹⁶ the Joint Civil Disturbance Task Force commander must seek the approval of the SCRAG or Combatant Commander to set up a temporary detention facility.⁹⁷

⁹² *Id.*

⁹³ GARDEN PLOT, *supra* note 37, at C-8-10 encourages same-sex searches. FM 19-15, *supra* note 59, at 12-4 requires same-sex searches and recommends any “qualified” person, such as a medical professional, be called upon to assist with the search when no military member of the same sex is available to conduct the search.

⁹⁴ U.S. DEP’T OF ARMY, FIELD MANUAL 19-10, MILITARY POLICE LAW AND ORDER OPERATIONS, Ch. 9 (30 Sept. 1987) [hereinafter FM 19-10] contains extensive information on conducting searches.

⁹⁵ FM 19-15, *supra* note 59, at 12-13; GARDEN PLOT, *supra* note 37, at C-1-12; *see generally*, DODD 3025.12, *supra* note 6, para. 4.2.7 (“DoD Components shall not take charge of any function of civil government unless absolutely necessary under conditions of extreme emergency.”).

⁹⁶ 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. Garden Plot, *supra* note 37, at E-5. Garden Plot 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.

⁹⁷ *Id.* at C-1-12, E-5; AR 500-50, *supra* note 6, para. 1-3; FM 19-15, *supra* note 59, at 12-13.

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.⁹⁸ 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.⁹⁹

g. Riot Control Agents

The deployment and use of riot control agents is allowed under GARDEN PLOT and as a matter of U.S. policy.¹⁰⁰ 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.¹⁰¹ Aerial riot control dispensers should not be used where ground dispensers are available and can accomplish the desired result.¹⁰²

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.

⁹⁸ *E.g.*, U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM (15 Sept. 1996). *See also* FM 19-10, *supra* note 96, at 12-14.

⁹⁹ GARDEN PLOT, *supra* note 37, at E-5.

¹⁰⁰ *Id.* at C-1-11; 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 19-15, *supra* note 59, Chapter 9.

¹⁰¹ *See* U.S. COMMANDER IN CHIEF ATLANTIC COMMAND FUNCTIONAL PLAN 2502-97, CIVIL DISTURBANCE PLAN, Appendix 4 to Annex E (Legal) para. 2m (23 July 1998). Pursuant to UCP 99, *supra* note 53, the name of US Atlantic Command was changed to US Joint Forces Command.

¹⁰² GARDEN PLOT, *supra* note 37, at C-1-11.

b. Intelligence

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

c. Claims

Negligent or wrongful acts or omissions of military forces assisting law enforcement during civil disturbances may be covered under the Federal Tort Claims Act (FTCA).¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ The ACO in whose geographical area a claims incident occurs is primarily responsible for investigating and processing the claim.¹⁰⁶ 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.¹⁰⁷ 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

¹⁰³ 28 U.S.C. §§ 1346, 2671-2680.

¹⁰⁴ Garden Plot, *supra* note 37, at E-6.

¹⁰⁵ U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 1-11k (31 Dec. 1997).

¹⁰⁶ *Id.* para. 2-2.

¹⁰⁷ *Id.* para. 1-17(c).

Joint Task Force can also assist by collecting information concerning the status of National Guard troops operating within the area.¹⁰⁸

d. Medical Support

Medical personnel will wear the distinctive medical arm brassard when performing medical duties.¹⁰⁹ 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.¹¹⁰ Civilians admitted to military treatment facilities should be transferred to a civilian hospital as soon as medically feasible.¹¹¹

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.¹¹² 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.¹¹³ 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.¹¹⁴

¹⁰⁸ 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>.

¹⁰⁹ GARDEN PLOT, *supra* note 37, at E-1-2.

¹¹⁰ *Id.* at E-1-1.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 18 U.S.C. §§ 231-233.

¹¹⁴ *Id.* § 232 which states,

The term "law enforcement officer" means any officer or employee of the United States, any State, any political subdivision of a State, or the District of Columbia, while engaged in the enforcement or prosecution of any of the criminal laws of the United States, a State, any political subdivision of a State, or the District of Columbia; and such term shall specifically include

Close coordination with local governmental authorities can assist the Joint Civil Disturbance Task Force Commander in accomplishing the mission. Except in the unlikely event of martial law, federal forces are unable to impose restrictions on the civil population. However, local governments may be able to implement such restrictions to aid in the control of lawlessness. The Joint Civil Disturbance Task Force Commander may make recommendations to local governments concerning the appropriateness of various restrictions and then assist local authorities in carrying them out.¹¹⁵

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 Army 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.¹¹⁶ 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.¹¹⁷ Commanders are authorized to approve the loan or lease of equipment as required to save human life, prevent human suffering, or reduce property damage or destruction.

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.

¹¹⁵ FM 19-15, *supra* note 59, at 6-11, 6-12.

¹¹⁶ 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]; AR 500-50, *supra* note 6, para. 4-2a. DoDD 3025.12, *supra* note 6, 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. DoD (AS (HLD)) has not yet addressed this area. *See also* NGR 500-1, *supra* note 56, Chap. 3-1, which governs the loan or lease of National Guard property.

¹¹⁷ AR 700-131, *supra* note 118, at Table 2-1.

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.¹¹⁸ Equipment for non-federal law enforcement agencies must be leased under the leasing statute, which requires both a lease agreement and a surety bond.¹¹⁹ 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.¹²⁰ See DOPLAW Handbook, Vol. II, App. 4-14, *Loan, Lease and Donation of Army Material*.

¹¹⁸ 31 U.S.C. § 1535.

¹¹⁹ 10 U.S.C. § 2667; *see also* AR 700-131, *supra* note 118, paras. 2-7, 2-8 (discussing loan/lease agreements and surety bonds).

¹²⁰ AR 700-131, *supra* note 118, para. 2-7a.

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CHAPTER 5. NATIONAL PLAN FOR CONSEQUENCE MANAGEMENT

KEY REFERENCES:

- Executive Order 12241 - National Contingency Plan
- Executive Order 12472 - Assignment of National Security and Emergency Preparedness Telecommunications Functions
- Executive Order 12580 - Superfund Implementation
- Executive Order 12657 - Federal Emergency Management Agency Assistance in Emergency Preparedness Planning at Commercial Nuclear Power Plants
- Executive Order 13286 - Amendment of Executive Orders, and Other Actions, in Connection with the Transfer of Certain Functions to the Secretary of Homeland Security
- Executive Order 12777 - Implementation of Section 311 of the Federal Water Pollution Control Act of Oct. 18, 1972, as amended, and the Oil Pollution Act of 1990.
- PDD 39 - U.S. Policy on Counterterrorism
- PDD 62 - Protection Against Unconventional Threats to the Homeland and Americans Overseas
- PDD 63 - Critical Infrastructure Protection
- Homeland Security Presidential Directive 5 - Management of Domestic Incidents
- 42 U.S.C. § 5121, *et. seq.*, - The Stafford Act
- 42 U.S.C. § 9605
- 50 U.S.C. § 2061, *et. seq.*
- Pub. L. No. 107-296
- DoDD 3025.1, *Military Support to Civil Authorities*
- DoD 3025.1-M, *Manual for Civil Emergencies*
- National Oil and Hazardous Substances Pollution Contingency Plan
- National Incident Management System (NIMS)
- National Response Plan (NRP)
- Notice of Change to the National Response Plan

A. 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.¹ 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."² 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.

Generally, Stafford Act assistance is rendered upon request from a state governor(s) 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. Table 5-1 provides a brief overview of the roles and responsibilities of federal agencies for emergency and disaster assistance to states. 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.

With the Stafford Act, Congress has delegated to the President emergency powers he may exercise in the event of a major disaster or emergency. It addresses disaster relief programs, disaster preparedness and assistance, hazard mitigation, and federal assistance for losses sustained in disasters. The Stafford Act lists the roles and responsibilities of federal agencies and departments in providing both major disaster and emergency

¹ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et. seq.*, as amended by Pub. L. No. 106-390 (2000) [hereinafter The Stafford Act].

² *Id.* § 5121.

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assistance and delineates the types of assistance that affected state(s) may receive from the federal government.

Table 5-1. 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.
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	Prepare, sponsor, and direct federal response plans and programs for emergency preparedness; provide hazard mitigation assistance in the form of property acquisition & relocation assistance ³
Department of Defense	Upon President’s direction, provide “emergency work” to protect life and property prior to declaration of major disaster or emergency
ANRC 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.

³ Per § 507 of the Homeland Security Act, Pub. L. No. 107-296, FEMA retained all functions assigned to it under the Stafford Act and remains the lead federal agency for the Federal Response Plan (FRP). The National Response Plan (NRP) was released in December 2004 and during a phased implementation process during the first year, the Initial NRP, FRP, U.S. Government Domestic Terrorism Concept of Operations Plan (CONPLAN), and Federal Radiological Emergency Response Plan (FRERP) will remain in effect during the first 120 days. A copy of the NRP is located at DOPLAW Handbook, Vol. II at Appendix 5-24 or online at: http://www.dhs.gov/dhspublic/interweb/assetlibrary/NRP_FullText.pdf.

To facilitate the provision of federal assistance in both major disasters and emergencies, the Act authorizes the President to appoint a Federal Coordinating Officer (FCO) immediately after declaring that a major disaster or emergency exists to coordinate the relief efforts of all federal agencies. The Act also requires the President to request that a state governor designate a State Coordinating Officer (SCO) for the purpose of coordinating state and local disaster assistance efforts with those of the federal government.⁴ 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.⁵ 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.⁶ 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.

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:

⁴ 42 U.S.C. § 5143.

⁵ *Id.* § 5144.

⁶ 44 C.F.R. 206.24 (2003).

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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 chapter to supplement the efforts and available resources of states, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.⁷

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.⁸

The President's powers after the declaration of a major disaster include the authority to provide the following, among others, to states and

⁷ 42 U.S.C. § 5122(2).

⁸ *Id.* § 5170.

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.⁹ 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.¹⁰

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.¹¹

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.¹² In any emergency, the President may direct

⁹ See *id.* §§ 5171-5186.

¹⁰ *Id.* §5170(b).

¹¹ *Id.* § 5122(1).

¹² *Id.* § 5193.

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any federal agency, with or without reimbursement, to use the authorities and resources granted to it under federal law in support of state and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe.¹³ 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.¹⁴

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.”¹⁵ 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

¹³ *Id.* § 5192.

¹⁴ *Id.* § 5192(a).

¹⁵ *Id.* § 5191(a).

Defense for a maximum of ten days before the declaration of either an emergency or a major disaster.¹⁶ 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 federal-state-local preliminary damage assessment, indicating that damages are of sufficient severity to warrant assistance under the Act.¹⁷ An incident of WMD terrorism is quite likely to be of sufficient severity to warrant an emergency 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.

B. THE NATIONAL RESPONSE PLAN (NRP)¹⁸

The NRP, last updated on 25 May 2006¹⁹, became effective on 15 December 2004 with a phased implementation process during the first year.

¹⁶ *Id.* § 5170b(c).

¹⁷ National Response Plan, Dec. 2004, at 52.

¹⁸ A copy of the complete NRP is located at DOPLAW Handbook, Vol. II, App. 5-24 or online at: http://www.dhs.gov/dhspublic/interweb/assetlibrary/NRP_FullText.pdf.

¹⁹ A copy of the Notice of Change to the National Response Plan is located at: http://www.dhs.gov/interweb/assetlibrary/NRP_Notice_of_Change_5-22-06.pdf.

The following table summarizes the critical modifications of CH-1 of the Notice of Change (9 May 2006):

	Topic	Background	Affected NRP Sections
A	Multiple Joint Field Offices	This change explicitly clarifies that multiple Joint Field Offices may be established in support of an incident (for both regional-level and nationwide incidents).	Page 28 Page 34 Page 68 ESF #5-2

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During the first 180 days of this process the Initial National Response Plan, Federal Response Plan, U.S. Government Domestic Terrorism Concept of Operations Plan, and Federal Radiological Emergency Response Plan remain in effect.

B	Principal Federal Official (PFO) and Federal Coordinating Officer (FCO) roles and responsibilities	This change clarifies PFO and FCO roles and responsibilities, and provides the flexibility to designate a single individual as both PFO and FCO (with additional Deputy PFO and FCO designations as appropriate) during certain highly complex or geographically dispersed incidents other than terrorism (e.g. a hurricane with multi-state impact).	Page 33 Page 34
C	DoD JTF Commander and JTF HQ	This change provides that if a JTF is established, consistent with operational requirements, its command and control element will be collocated with the PFO at the Joint Field Office to ensure coordination and unity of effort.	Page 28 Page 42
D	Structure of the JFO Sections	This change provides for the integration of the Emergency Support Functions into the JFO Sections rather than as stand-alone entities.	Page 27 Page 37
E	Domestic Readiness Group	This change recognizes the formation of the HSC Domestic Readiness Group (DRG) and explains the roles and responsibilities of the DRG relative to other NRP entities.	Page 10 Page 17 Page 22 Page 23 Page 52 Page 75
F	Catastrophic Incident Annex	This change broadens the scope of the Catastrophic Incident Annex and differentiates response procedures for no-notice incidents as opposed to those allowing for pre-incident staging of Federal assets.	Page 43 Catastrophic Incident Annex
G	Quick Reference Guide	This change provides a new Supplement to the National Response Plan for the quick reference of senior government, non-government organizations, and private sector leadership.	Page xii Page xvi Page 97
H	Interagency Incident Management Group and Homeland Security Operations Center	This change reflects the establishment of the National Operations Center as the successor to the Homeland Security Operations Center, and reformulates the former IIMG as a senior advisory council and adjudication body for the Secretary of Homeland Security in his role as the Federal incident manager.	All occurrences in the NRP
I	Incident of National Significance	This change clarifies the applicability of the National Response Plan through scaled and flexible activation of NRP coordination and reporting mechanisms.	All occurrences in the NRP
J	ESF #13 Coordinator	This change removes the Department of Homeland Security as a co-coordinator and primary agency for ESF #13 – Public Safety and Security. The Department of Justice will have sole responsibility as ESF Coordinator and primary agency.	ESF #13
K	Mitigation	This change recognizes the reorganization of the DHS Mitigation program within ESF-14 and the Joint Field Office Operations Section which occurred after the NRP was implemented in April 2005.	Page 12 Page 29 Page ESF v Page ESF vii ESF #14

The NRP establishes a comprehensive, national, all-hazards approach to domestic incident management across a spectrum of activities. It is predicated on the National Incident Management System (NIMS). 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 authorities. It assumes that incidents are typically managed at the lowest possible geographic, organizational, and jurisdictional level.

1. Incidents of National Significance

The NRP distinguishes between incidents that require DHS (DHS) coordination, termed "Incidents of National Significance," and the majority of incidents occurring each year that are handled by responsible jurisdictions or agencies through other established authorities and existing plans. Incidents of National Significance are those high-impact events that require a coordinated and effective response by an appropriate combination of federal, state, local, tribal, private-sector, and nongovernmental entities in order to save lives, minimize damage, and provide the basis for long term community recovery and mitigation activities.

2. Roles and Responsibilities

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

- Governor
- Local Chief/Executive Officer
- Tribal Chief/Executive Officer
- Secretary of Homeland Security
- Attorney General
- Secretary of Defense
- Secretary of State
- Nongovernmental Organizations (NGOs)
- Private Sector
- Citizen Involvement

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3. Emergency Support Functions (ESFs)

The NRP, like previous federal response plans establishes a coordination mechanism to provide assistance to state, local, and tribal governments or to federal departments and agencies conducting missions of primary federal responsibility. These ESFs may be selectively activated for both Stafford Act and non-Stafford Act incidents. Table 5-2 lists the scope and the designated coordinating agencies.

Table 5-2: Emergency Support Functions Specified in the NRP

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, Housing, and Human Resources	Department of Homeland Security/FEMA
7	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	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

4. NRP Coordinating Structures

The following NRP coordinating structures are used to manage Incidents of National Significance.

a. 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.

b. Area Command (Unified Area Command)

An organization established to oversee the management of multiple incidents that are each being handled by an Incident Command System (ICS) organization or to oversee the management of large or multiple incidents to which several Incident Management Teams have been assigned. Area Command has the responsibility to set overall strategy and priorities, allocate critical resources according to priorities, ensure that incidents are properly managed, and ensure that objectives are met and strategies followed. Area Command becomes Unified Area Command when incidents are multi jurisdictional. Area Command may be established at an Emergency Operations Center (EOC) facility or at some location other than an ICP.

c. Local Emergency Operations Center (EOC)

The physical location at which the coordination of information and resources to support local incident management activities normally takes place.

d. State Emergency Operations Center (SEOC)

The physical location at which the coordination of information and resources to support state incident management activities normally takes place.

e. Homeland Security Operations Center (HSOC)

The HSOC is the primary national-level hub for domestic incident management operational coordination and situational awareness. The HSOC is a standing 24/7 interagency organization fusing law enforcement, national intelligence, emergency response, and private-sector reporting. The HSOC facilitates homeland security information-sharing and operational coordination with other federal, state, local, tribal, and nongovernmental EOCs. In order to perform these functions, the HSOC will establish and maintain real-time communications links to other federal emergency agencies, as well as those at the state, regional, and nongovernmental level.

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f. Interagency Incident Management Group (IIMG)

The IIMG is a federal headquarters-level multi agency coordination entity that facilitates federal domestic incident management for Incidents of National Significance. The Secretary of Homeland Security activates the IIMG based on the nature, severity, magnitude, and complexity of the threat or incident. The Secretary of Homeland Security may activate the IIMG for high-profile, large-scale events that present high probability targets, such as National Special Security Events (NSSEs), and in heightened threat situations. The IIMG is comprised of senior representatives from DHS components, other federal departments and agencies, and nongovernmental organizations, as required. The IIMG membership is flexible and can be tailored or task-organized to provide the appropriate subject-matter expertise required for the specific threat or incident.

g. National Response Coordination Center (NRCC)

The NRCC is a multi-agency center that provides overall federal response coordination for Incidents of National Significance and emergency management program implementation. FEMA maintains the NRCC as a functional component of the HSOC in support of incident management operations. The NRCC monitors potential or developing Incidents of National Significance and supports the efforts of regional and field components. The NRCC resolves federal resource support conflicts and other implementation issues forwarded by the Joint Field Office (JFO). Those issues that cannot be resolved by the NRCC are referred to the IIMG.

h. Regional Response Coordination Center (RRCC)

The RRCC is a standing facility operated by FEMA that is activated to coordinate 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 NRP coordination responsibilities. The RRCC establishes communications with the affected state emergency management agency and the NRCC, coordinates deployment of the Emergency Response Team-Advance Element (ERT-A) to field locations, assesses damage information, develops situation reports, and issues initial mission assignments.

i. 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. The SIOC maintains direct connectivity with the HSOC and IIMG. The SIOC, located at FBI Headquarters, supports the FBI's mission in leading efforts of the law enforcement community to detect, prevent, preempt, and disrupt terrorist attacks against the United States. The SIOC houses the National Joint Terrorism Task Force (NJTTF). The mission of the NJTTF is to enhance communications, coordination, and cooperation among federal, state, local, and tribal agencies representing the intelligence, law enforcement, defense, diplomatic, public safety, and homeland security communities by providing a point of fusion for terrorism intelligence and by supporting Joint Terrorism Task Forces (JTTFs) throughout the United States.

j. Joint Field Office (JFO)

The JFO is a temporary federal facility established locally to coordinate operational federal assistance activities to the affected jurisdiction(s) during Incidents of National Significance. The JFO is a multi-agency center that provides a central location for coordination of federal, state, local, tribal, nongovernmental, and private-sector organizations with primary responsibility for threat response and incident support. The JFO enables the effective and efficient coordination of federal incident-related prevention, preparedness, response, and recovery actions. The JFO utilizes the scalable organizational structure of the National Incident Management System (NIMS) Incident Command System (ICS). The JFO organization 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 ICS 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. When

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incidents impact the entire nation or multiple States and localities, multiple JFO's may be established regionally. In these situations, one of the JFOs may be designated to serve as the primary JFO and provide strategic leadership and coordination for the overall incident management effort, as designated by the Secretary of Homeland Security.

k. Joint Operations Center (JOC)

The JOC Branch 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 JOC Branch ensures management and coordination of federal, state, local, and tribal investigative/law enforcement activities. 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.

5. Field-Level Organizational Structures which Manage the Incident in the Field

a. JFO Coordination Group

The following are potential members of the JFO Coordination Group:

- ***Principal Federal Official (PFO)***. The PFO is personally designated by the Secretary of Homeland Security to facilitate federal support to the established ICS Unified Command structure and to coordinate overall federal incident management and assistance activities across the spectrum of prevention, preparedness, response, and recovery. The PFO ensures that incident management efforts are maximized through effective and efficient coordination. The PFO provides a primary point of contact and situational awareness locally for the Secretary of Homeland Security. However, the Secretary may, in other than

terrorism incidents, choose to combine the roles of the PFO and Federal Coordinating Officer (FCO) (see below) in a single individual to help ensure synchronized federal coordination. In situations where the PFO has also been assigned the role of the FCO, deputy FCOs for the affected States will be designated to provide support to the PFO/FCO and facilitate incident management span of control.

- ***Federal Coordinating Officer (FCO)***. The FCO 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). In Stafford Act situations where a PFO has not been assigned, the FCO provides overall coordination for the federal components of the JFO and works in partnership with the State Coordinating Officer (SCO) to determine and satisfy state and local assistance requirements.
- ***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 intelligence/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 of National Significance 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. In non-Stafford Act situations when a federal department or agency acting under its own authority has requested the assistance of the Secretary of Homeland Security to obtain support from other federal departments and agencies, DHS designates an FRC. In these situations, the FRC coordinates support through interagency agreements and memoranda of understanding (MOUs).

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- ***State/Local/Tribal Official(s)*** like a State Coordinating Officer (SCO), who serves as the state counterpart to the FCO and manages the state's incident management programs and activities.
- **Governor's Authorized Representative**, who represents the governor of the impacted state and local area representatives.
- ***Senior Federal Officials (SFOs) from other federal departments or agencies.***

b. JFO Coordination Staff

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

- ***Chief of Staff.*** The JFO Coordination Staff may include a Chief of Staff and representatives providing specialized assistance, which may include support in the following areas: safety, legal counsel, equal rights, security, infrastructure liaison, and other liaisons.
- ***External Affairs Officer.*** The External Affairs Officer provides support to the JFO leadership in all functions involving communications with external audiences. External Affairs includes: Public Affairs, Community Relations, Congressional Affairs, State and Local Coordination, Tribal Affairs, and International Affairs, when appropriate. Resources for the various External Affairs Functions are coordinated through ESF #15. The External Affairs Officer also is responsible for overseeing operations of the Federal Joint Information Center (JIC) established to support the JFO. The JIC is a physical location where public affairs professionals from organizations involved in incident management activities work together to provide critical emergency information, crisis communications, and public affairs support. The JIC serves as a focal point for the coordination and dissemination of information to the public and media concerning incident prevention, preparedness, response, recovery, and mitigation.

- ***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.

c. JFO Sections

- **Operations Section**

- Response and Recovery Operations Branch
- Law Enforcement Investigative Operations Branch/Joint Operations Center (JOC)
- For National Special Security Events (NSSEs), a third branch, the Security Operations Branch, or Multi agency Command Center (MACC).

- **Planning Section**

- Logistics Section
- Finance and Administration Section (Comptroller)

d. JFO Response Teams

Joint field-level organizational structures also include response teams that are ready to deploy in response to threats or incidents. These teams include the following:

- ***ERT Advance Element (ERT-A)***. The ERT-A conducts assessments, and initiates coordination with the state and initial deployment of federal resources. It is headed by a team leader from FEMA and is composed of program and support staff and representatives from selected ESF primary agencies. Each FEMA region maintains an ERT

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ready to deploy during the early stages of an incident to the state EOC or to other locations to work directly with the state to obtain information on the impact of the event and to identify specific state requests for federal incident management assistance. The affected area to establish field communications, locate and establish field facilities, and set up support activities.

- ***National Emergency Response Team (ERT-N)***. The National Emergency Response Team (ERT-N) deploys for large-scale, high-impact events, or as required. An ERT-N may pre-deploy based on threat conditions. The Secretary of Homeland Security determines the need for ERT-N deployment, coordinating the plans with the affected region and other federal agencies. The ERT-N includes staff from FEMA Headquarters and regional offices as well as other federal agencies.
- ***Federal Incident Response Support Team (FIRST)***. The FIRST is a forward component of the ERT-A that provides on-scene support to the local Incident Command or Area Command structure in order to facilitate an integrated inter jurisdictional response. The FIRST is designed to be a quick and readily deployable resource to support the federal response to Incidents of National Significance. The FIRST deploys within two hours of notification, to be on-scene within twelve hours of notification. FEMA maintains and deploys the FIRST. Upon the subsequent deployment of an ERT, the FIRST integrates into the Operations Section of the JFO.
- ***Domestic Emergency Support Team (DEST)***. The DEST may be deployed to provide technical support for management of potential or actual terrorist incidents. Based upon a credible threat assessment, the Attorney General, in consultation with the Secretary of Homeland Security, may request authorization through the White House to deploy the DEST. The PFO and a small staff component may deploy with the DEST to facilitate their timely arrival and enhance initial situational awareness. Upon arrival at the JFO or critical incident location, the DEST may act as a stand-alone advisory team to the FBI SAC providing required technical assistance or recommended operational courses of action.
- ***Other Field-Level Organizational Structures Response Teams:***

- Damage assessment teams
- The Nuclear Incident Response Team (NIRT)
- Disaster Medical Assistance Teams (DMATs)
- HHS Secretary's Emergency Response Team
- DOL/OSHA's Specialized Response Teams
- Veterinarian Medical Assistance Teams (VMATs)
- Disaster Mortuary Operational Response Teams (DMORTs)
- National Medical Response Teams (NMRTs)
- Scientific and Technical Advisory and Response Teams (STARTs)
- Donations Coordination Teams
- Urban Search and Rescue (US&R) task forces and incident support teams
- Federal Type 1 and Type 2 Incident Management Teams (IMTs)
- Domestic Animal and Wildlife Emergency Response Teams and mitigation assessment teams

6. Implementation of the NRP

After the President has made a major disaster or emergency declaration, 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, now a part of the DHS (DHS), serves as the lead federal agency (LFA) for disaster response and recovery activities. Consequently, 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, the DHS regional director, and the FCO.²⁰ Under the NRP, the Secretary of DHS appoints a FCO, who is responsible for coordinating the delivery of federal assistance to 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.

²⁰ National Response Plan, Dec. 2004.

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Of particular relevance to a WMD terrorist event is the NRP's terrorism incident annex. Presidential Decision Directive (PDD)-39 and the NRP bifurcate the federal approach to WMD response into crisis management and consequence management functions. The NRP defines crisis management as "measures to identify, acquire, and plan the use of resources needed to anticipate, prevent, and/or resolve a threat or act of terrorism."²¹ Consequence management is defined by the NRP as "measures to protect public health and safety, restore essential government services, and provide emergency relief to governments, businesses, and individuals affected by the consequences of terrorism."²² The distinction between crisis management and consequence management is a defining attribute of the pre-9/11 approach to WMD incident management. Labeling crisis management as predominately a law enforcement response, the NRP assigned lead federal agency responsibilities for crisis management to the Department of Justice (DOJ). On the other hand, FEMA (DHS) maintained lead federal agency responsibility for consequence management under the NRP. This division, established by PDD-39, placed DOJ in the overall LFA role for threats or acts of terrorism within U.S. territory. Under the NRP, overall LFA responsibility is transferred from the Attorney General to the Secretary of DHS upon resolution of the crisis management portion of the response.

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

The NRP is implemented concurrently with other inter-agency federal response plans, agency-specific emergency operations plans developed under statutory authorities other than the Stafford Act, and inter-agency memoranda of understanding (MOUs). Interagency response plans that may be implemented concurrently with the NRP included: the National Plan for Telecommunications Support in Non-Wartime Emergencies (NTSP);²³ the National Oil and Hazardous Substances Pollution Contingency Plan;²⁴ the

²¹ *Id.* App. 1.64

²² *Id.*

²³ National Plan for Telecommunications Support in Non-Wartime Emergencies, Office of Science and Technology Policy, Jan. 1992. 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 Telecommunications Support Plan or NTSP].

²⁴ 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

Federal Radiological Emergency Response Plan (FRERP);²⁵ and the USG CONPLAN²⁶ developed pursuant to PDD 39.²⁷ As described above, the National Response Plan (NRP), integrates most of the aforementioned response plans, as well as the Federal Response Plan (FRP), and serves as the federal government's sole interagency response plan covering all types of disasters and emergencies and encompassing all response functions. The development of the NRP 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 NTSP was authorized by Executive Order 12472²⁸ to provide for the management of telecommunications support for federal entities in non-wartime emergencies. ESF #2 of the NRP supplements the NTSP 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.²⁹ 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

preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants.

²⁵ Federal Radiological Emergency Response Plan (FRERP), 61 F.R. 90, 8 May 1996, pp. 20943-20970 provides a concept of operations for responding to any peacetime radiological emergency that has actual, potential, or perceived radiological consequences within the U.S. The FRERP will be superseded after the initial 120 days of the implementation of the NRP (December 2004).

²⁶ The United States Government Interagency Domestic Terrorism Concept of Operations Plan (CONPLAN), Jan. 2001, provides an overall concept of operations for the federal government's response to a threatened or actual terrorist event, particularly one involving WMD. The CONPLAN will be superseded after the initial 120 days of the implementation of the NRP (December 2004).

²⁷ Presidential Decision Directive 39, (U.S. Policy on Counterterrorism), June 1995.

²⁸ Exec. Order No. 12472, (Assignment of National Security and Emergency Preparedness Telecommunications Functions), 3 Apr. 1984, as amended by Exec. Order No.13286.

²⁹ 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.

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U.S. Coast Guard, now a DHS entity, is 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 NRP has not yet been activated. Once the NRP is activated, FEMA has the lead for consequence 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 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.³⁰

Public Law 96-295 and Executive Orders 12241 and 12657 authorized the development of the FRERP.³¹ The plan sets out the concept of operations for federal agencies to respond to peacetime radiological emergencies. Pursuant to the plan, the Department of Energy is responsible for coordinating off-site monitoring and assessment of the situation and the EPA handles response coordination after the immediate emergency. However, the identity of the LFA depends on the circumstances and location of the incident and could be any of a number of agencies. Thus, the Nuclear Regulatory Commission (NRC) is the LFA for both radiological emergencies involving nuclear facilities licensed by NRC or licensed by an Agreement State and shipment of radioactive materials licensed by NRC. The EPA is the LFA for radiological emergencies involving nuclear facilities not licensed, owned, or operated by a federal agency or an agreement state; shipment of materials not licensed or owned by a federal agency or an agreement state; and impacts from foreign or unknown sources. DOE is the LFA for radiological emergencies involving nuclear facilities owned or operated by DOE or radioactive materials shipped by or for DOE. The Department of Defense is the LFA for radiological emergencies

³⁰ Exec. Order No. 12580, (Superfund Implementation), 23 Jan. 1987, as amended.

³¹ Nuclear Regulatory Commission Appropriations Authorization Act, Pub. L. No. 96-295 (1980); Exec. Order No. 12241, (National Contingency Plan), 29 Sept. 1980, as amended by Exec. Order No. 12657, (Federal Emergency Management Agency Assistance in Emergency Preparedness Planning at Commercial Nuclear Power Plants), 18 Nov. 1988.

involving: nuclear facilities owned or operated by DoD; radioactive materials shipped by or for DoD; and DoD satellites containing radioactive materials. NASA is the LFA for radiological emergencies involving satellites containing radioactive materials. Supporting agencies include Department of Agriculture (DOA), Department of Commerce (DOC), DoD, Department of Health and Human Services (HHS), Department of Interior (DOI), Nuclear Regulatory Commission (NRC), Department of Housing and Urban Development (HUD), Department of Transportation (DOT), and Department of State (DOS). The FRERP provides for the LFA to coordinate federal response in the absence of a Stafford Act major disaster or emergency declaration, with FEMA coordinating non-radiological support pursuant to the Federal Response Plan. The FCO, under the NRP, coordinates the federal response when there is a Stafford Act declaration with respect to the radiological emergency.

PDD-39 authorized the USG CONPLAN. The plan primarily coordinates crisis and consequence management functions to optimize federal response to actual or potential terrorist threats or incidents, particularly those involving WMD. PDD-39 and the CONPLAN designate the FBI as the lead federal agency for crisis management and FEMA as the lead federal agency for consequence management. Primary supporting agencies include DoD, DOE, EPA, and HHS. The CONPLAN complemented, rather than superseded, the FRP, to include the Terrorism Annex and both are being replaced and phase out by the NRP. While the CONPLAN further detailed the crisis management functions of the FBI, as well as coordination of the crisis and consequence management phases, consequence management functions are performed in accordance with the NRP.

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.³² The Act established the DHS, and consolidated the consequence management missions, assets, and personnel of numerous federal departments and agencies into a single department.³³ The primary missions

³² Homeland Security Act of 2002, Pub. L. No. 107-296 (2002) [hereinafter The Homeland Security Act].

³³ *Id.* § 101.

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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.³⁴

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. Key consequence management functions, personnel, and assets that were transferred to the Secretary of DHS are represented in Table 5-3.³⁵

Table 5-3: Functions, Personnel, and Assets Transferred to the DHS

Function/Personnel/Asset Transferred	Transferring Department/Agency	Receiving DHS Directorate
FEMA, including functions of the Director of FEMA	N/A (Independent Agency)	Emergency Preparedness and Response
Integrated Hazard Information System “FIRESAT”	National Oceanic and Atmospheric Administration	Emergency Preparedness and Response
National Domestic Preparedness Office	Federal Bureau of Investigation	Emergency Preparedness and Response
Domestic Emergency Support Teams	Department of Justice	Emergency Preparedness and Response
Office of Emergency Preparedness	Department of Health and Human Services	Emergency Preparedness and Response
National Disaster Medical System	Department of Health and Human Services	Emergency Preparedness and Response
Metropolitan Medical Response System	Department of Health and Human Services	Emergency Preparedness and Response
Strategic National Stockpile	Department of Health and Human Services	Emergency Preparedness and Response
Nuclear Incident Response Team*	Department of Energy	Emergency Preparedness and Response
National Communications System	Department of Defense	Information Analysis and Infrastructure Protection
Coast Guard	Department of Transportation	Reports Directly to the Secretary
Secret Service	Department of the Treasury	Reports Directly to the Secretary
Customs Service	Department of the Treasury	Border and Transportation Security
Transportation Security Administration	Department of Transportation	Border and Transportation Security

³⁴ *Id.* § 101(b).

³⁵ *Id.* §§ 503, 201(9), 403.

Function/Personnel/Asset Transferred	Transferring Department/Agency	Receiving DHS Directorate
Federal Protective Service	General Services Administration	Border and Transportation Security

* The Nuclear Incident Response Team includes technical response elements of the Department of Energy and the Environmental Protection Agency. In the event of an actual or threatened terrorist attack, major disaster, or other emergency within the United States, the Nuclear Incident Response Team operates as an organization unit of DHS, subject to the direction of the Secretary of DHS. Absent an actual or threatened terrorist attack, major disaster, or other emergency, the Secretary of Energy and the Administrator of the Environmental Protection Agency maintain responsibility for organizing, training, and equipping their respective entities that comprise the Nuclear Incident Response Team.

The Emergency Preparedness and Response Directorate maintains responsibility for providing the federal government's response to terrorist attacks and major disasters. 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 Emergency Preparedness and Response directorate to build 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.³⁶ In sum, the Homeland Security Act served as the foundation for the government to reorganize and consolidate WMD consequence management assets and personnel under a single federal agency. Further, it served as the legal impetus for a revised approach to WMD incident management, pursuant to Homeland Security Presidential Directive 5, discussed below.

9. HSPD-5 and the Federal Response Structure

Homeland Security Presidential Directive 5 (HSPD-5), "Management of Domestic Incidents," established a new approach to federal emergency management of WMD events.³⁷ The approach is founded upon ensuring that all levels of government across the nation have a single, unified, national approach toward managing domestic incidents. Pursuant to the Homeland Security Act of 2002, HSPD-5 tasked the Secretary of Homeland Security to

³⁶ The Homeland Security Act, *supra* note 31, § 502.

³⁷ Homeland Security Presidential Directive 5, (Management of Domestic Incidents), 28 Feb. 2003.

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develop and administer a NRP 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 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 behind the NRP and the 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. The NRP establishes the federal government's response policy, whereas the NIMS will serve as the operational arm of the NRP.

HSPD-5 also reaffirmed the Secretary of Homeland Security's responsibility as the principal federal official for domestic incident management. HSPD-5 tasked the Secretary of Homeland Security with coordinating the federal government's resources in response to, or recovery from terrorist attacks, major disasters or other emergencies. This coordination responsibility exists when any one of the following four conditions applies: (1) a federal department or agency acting under its own authority has requested the assistance of the Secretary; (2) the resources of state and local authorities are overwhelmed and federal assistance has been requested by the appropriate state and local authorities; (3) more than one federal department or agency has become substantially involved in responding to the incident; or (4) the secretary has been directed to assume responsibility for managing the domestic incident by the President.³⁸ Table 5-4 summarizes the roles and responsibilities established by HSDP-5.

HSPD-5 also eliminates the previous division between crisis management and consequence management treating the two "as a single, integrated function, rather than as two separate functions."³⁹ 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 NRP, 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

³⁸ *Id.*

³⁹ *Id.*

Attorney General’s authority as the lead official for conducting criminal investigation of terrorist acts or terrorist threats.⁴⁰

Table 5-4: Roles and Responsibilities Established by HSPD - 5

Homeland Security Presidential Directive 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 (NRP)
Attorney General	Sec. 8 Reaffirms the Attorney General’s role as having lead responsibility for criminal investigations of terrorist acts or terrorist threats.

a. National Incident Management System

The NIMS serves as the operational arm of the NRP.⁴¹ The NIMS is the underlying architecture that governs the full range of the United States incident management efforts from awareness, prevention and preparedness, to response and recovery. Essentially, it provides the “nuts and bolts” for the approach of the U.S. government to domestic incident management. The NIMS, published on 1 March 200, notes five key features:⁴²

(1) Standardization of incident management for all hazards and all levels of government

The NIMS incorporates the Incident Command System (ICS) and Multi-Agency Coordination Systems (MACS) as the command structure for

⁴⁰ *Id.*

⁴¹ National Incident Management System (1 Mar. 2004) 3 [hereinafter NIMS] is located online at: http://www.fema.gov/pdf/emergency/nims/nims_doc_full.pdf .

⁴² *Id.* at 5-7.

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response to all hazards at all levels of government. There currently is no universal federal structure for responding to domestic incidents.⁴³

(2) Extension of incident management into the awareness, prevention, and preparedness domains

As of July 2003, NIMS is intended to provide a system of local, state and federal Prevention and Preparedness Councils (PPCs). PPCs will be responsible for integrating awareness, prevention, and preparedness activities into a unified structure that will provide an ongoing MACS for all potential and impending hazards. Presently, there is no unified national approach to pre-incident planning with state and local governments and organizations.⁴⁴

(3) Facilitation of the flow of resources in pre-incident planning and post-incident execution

NIMS will provide a standardized mechanism for managing the flow of financial and physical resources before, during, and after an incident occurs. Currently, no systematic process exists at both the pre-incident and post-incident stages of an incident to facilitate the flow of resources between federal, state, and local governments.⁴⁵

(4) Establishment of a Common Operating Picture that Promotes Useful Information Flow at all Levels of Government

Because the NIMS approach to domestic incident management is based upon the ICS and MACS, the result will be a standardized continuum to account for effective, reliable, and timely information management, communications, and intelligence sharing across federal, state, and local levels of government.⁴⁶

⁴³ The ICS and MACS emanated from the National Interagency Incident Management System (NIIMS), developed by the fire services, to govern how fire teams from multiple states and organizations could work together to respond to large wildfires more safely and efficiently.

⁴⁴ NIMS, *supra* note 40. at 6.

⁴⁵ *Id.*

⁴⁶ *Id.*

(5) Strategic Development of New Technologies and Provision of Scientific Support to Enhance Pre- and Post-Incident Operations at All Levels of Government

The NIMS will provide the architecture for science and technology support to the NRP at both the operational and developmental phases. That is, the NIMS will provide expert advice and technical systems during an incident and will identify and prioritize unmet technical needs prior to an incident.⁴⁷

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.⁴⁸

10. National Response Plan and WMD incident management

Guidance relevant to WMD incident management includes:

Federal reporting requirements. Each federal department or agency is directed to report the initiation of a federal department or agency plan to respond to an incident, submission of requests for assistance to or receipt of a request from another federal agency, and receipt of requests for assistance from state or local governments, non-governmental organizations, or the private sector to DHS.

State reporting requirements. State governments are requested to report to DHS the activation of State Emergency Operation Centers, emergency declarations made under state or local authorities, and activation of state mutual-aid agreements or compacts.

Designation of a single DHS Interagency Coordinating Body. During a WMD incident, the Secretary of Homeland Security will designate a single interagency coordinating body to perform the functions of separate bodies under existing plans.

Designation of Federal Incident Management Officials. The Secretary of Homeland Security may designate federal incident

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 17.

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management officials to serve as the DHS representative to oversee federal incident management activities in the field at the regional, state or local level. These officials will be responsible for coordinating the activities of the Lead Federal Agencies and supporting agencies; overseeing the allocation of resources; coordinating the clearance and dissemination of information; and providing updated information to the Secretary on activities and conditions.

C. SUMMARY

The NRP and NIMS have instituted a paradigmatic shift in the approach of the federal government to domestic incident management. Although requests for assistance from a state governor will still formally initiate the response from the federal government during a WMD incident, the manner in which the federal government provides such assistance is changing. Consolidation, unification, and systemization are the unifying themes of these key changes.

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DoD RESPONSE FOR CONSEQUENCE MANAGEMENT

CHAPTER 6.

DoD RESPONSE FOR CONSEQUENCE MANAGEMENT¹

KEY REFERENCES:

- Unified Command Plan 04
- CJCS CONPLAN 0500-98 - Military Assistance to Domestic Consequence Management Operations in Response to a Chemical, Biological, Radiological, Nuclear, or High-Yield Explosive Situation
- DoDD 3025.dd - Defense Support of Civil Authorities
- DoD 3025.dd-M - Defense Support of Civil Authorities
- CJCSI 3110.16 - Military Capabilities, Assets and Units for Chemical, Biological, Radiological, Nuclear, and High Yield Explosive Consequence Management Operations
- Joint Pub. 3-26 - Homeland Security

A. INTRODUCTION

Deliberate and inadvertent chemical, biological, radiological, nuclear, and high-yield explosives (CBRNE) releases are one of the great challenges facing the United States today. Within the spectrum of potential CBRNE related crises, a terrorist attack on US soil presents daunting challenges for civilian authorities. Unintentional CBRNE releases, whether the result of accidents or natural events, could create similar catastrophic results for civil authorities.

The National Response Plan (NRP) for management of the consequences of CBRNE was addressed in Chapter 5. In addition, that chapter discussed that under the NRP the term "Incident Management" was introduced with a view toward eliminating the distinction between crisis and consequence management. Even with the publication of NRP, these terms remain in effect and remain useful to describe the two different approaches in response to a CBRNE incident.

¹ This Chapter deals with consequence management as it relates to CBRNE.

The Department of Defense (DoD) plays a vital role in NRP by providing advice, assistance and assets in support of the Lead Federal Agency (LFA). As with other forms of military assistance, DoD will provide resources for consequence management when the response or recovery requirements are beyond the capabilities of local, state, and federal civil authorities and when requested by the LFA.² This chapter will address the structure and process by which this support is provided.

B. STRUCTURE

1. The Office of the Assistant Secretary of Defense for Homeland Defense (ASD(HD)). This office was established pursuant to the National Defense Authorization Act of Fiscal Year 2003.³ The ASD(HD) is the DoD Executive Agent for defense support of civilian authorities (DSCA), including consequence management.

2. At the same time that the Office of ASD(HD) was established, the Joint Director of Military Support (JDOMS) assumed the functions and responsibilities of the Army's former Office of Director of Military Support to the Joint Chiefs of Staff. JDOMS produces military orders for DSCA, including consequence management.

3. U.S. Northern Command (USNORTHCOM). The Department of Defense established U.S. Northern Command in 2002 to consolidate under a single unified command existing missions that were previously executed by other military organizations.⁴ The command's mission is homeland defense and civil support.⁵ USNORTHCOM has been designated as the supported command to conduct CBRNE CM operations in support of a LFA in the 48 contiguous states the District of Columbia, Alaska, Puerto Rico and

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

³ Bob Stump National Defense Authorization Act of 2003, Pub. L. No. 107-314, § 902.

⁴ Unified Command Plan 2002.

⁵ More specifically, United States Northern Command's missions is to:

a. Conduct operations to deter, prevent, and defeat threats and aggression aimed at the United States, its territories, and interests within the assigned area of responsibility; and

b. As directed by the President or Secretary of Defense (SECDEF), provide military assistance to civil authorities including consequence management operations.

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the US Virgin Islands.⁶ USNORTHCOM determines the appropriate level command and control level for DoD forces based on the magnitude of the response.

4. One of USNORTHCOM'S subordinate commands, Joint Task Force Civil Support (JTF-CS) is the primary DoD asset dedicated to consequence management.

C. PROCESS

When directed, DoD responds to a CBRNE event in accordance with Department of Defense Directive (DoDD) 3025.dd,⁷ DoD 3025.dd-M,⁸ CJCS CONPLAN 0500,⁹ and the NRP.¹⁰ The request for military assistance for consequence management would normally come from the LFA. Under the NRP, the Federal Emergency Management Agency (FEMA), within the Department of Homeland Security (DHS), would most likely be the LFA in a CBRNE event.

Figure 6-1 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) 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

⁶ Joint Strategic Capabilities Plan (JSCP) 02 Change 1, February 2005 (Classified as Top Secret). The Concept Plan (CONPLAN) is currently referred to as USNORTHCOM CONPLAN 0500-05 and is in draft.

⁷ U.S. DEP'T OF DEFENSE, DIR. 3025.DD, DEFENSE SUPPORT OF CIVIL AUTHORITIES (to be published in June 2006).

⁸ U.S. DEP'T OF DEFENSE, MAN. 3025.DD, DEFENSE SUPPORT OF CIVIL AUTHORITIES (to be published in June 2006).

⁹ Chairman of the Joint Chiefs of Staff Concept Plan 0500-98, Military Assistance to Domestic Consequence Management Operations in Response to a Chemical, Biological, Radiological, Nuclear, or High-Yield Explosive Situation [hereinafter JCS Concept Plan 0500-98].

¹⁰ The National Response Plan was published in December 2004 and was effective 15 December 2004. At that time, the phasing out of the Initial National Response Plan (INRP), the Federal Response Plan (FRP), the U.S. Government Domestic Terrorism Concept of Operations Plan (CONPLAN), and the Federal Radiological Emergency Response Plan (FRERP) began. The NRP is located at DOPLW Handbook, Vol. II at App. 5-24. The NRP serves to orchestrate the various federal plans for disaster assistance into one comprehensive plan. The NRP further established the processes and structure for the delivery of federal assistance to manage the consequences of any major disaster or emergency declared under the Stafford Act.

then orders the Commander, JTF-CS, to conduct consequence management operations.

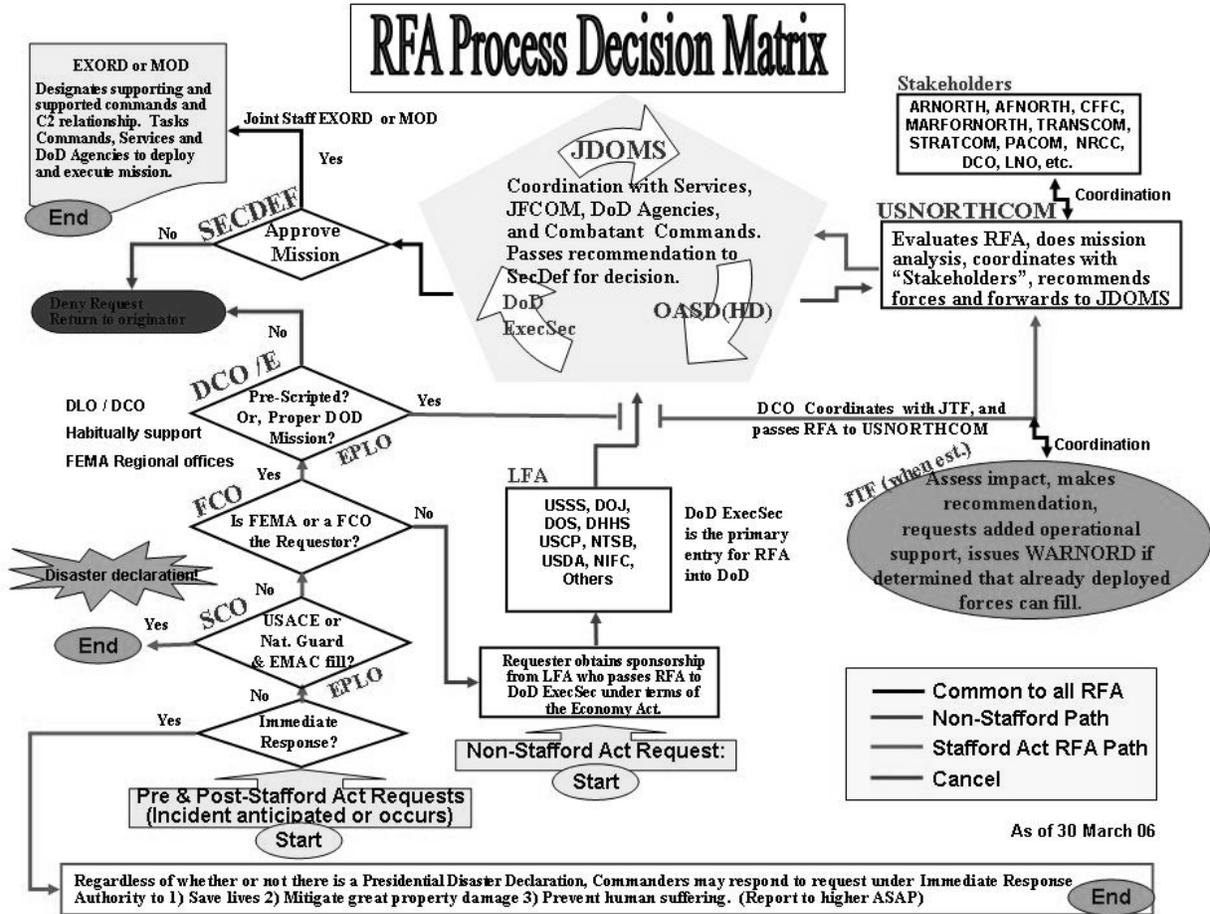


Figure 6-1. Request for Assistance

There are five phases of military support in consequence management:

- shaping;
- staging;
- deployment;
- consequence management operations; and
- transition.¹¹

¹¹ USNORTHCOM CONPLAN 0500-05 (DRAFT)

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The responding units always remain under DoD command and control. DoD will transition missions to civilian organizations as soon as circumstances permit.

The units performing consequence management operations will normally not be armed. Nevertheless, the unit may deploy with weapons stored in containers. The Rules for the Use of Force in CJCS CONPLAN 0500¹² provide authority for the use of force, including deadly force, for individual and unit self-defense.

D. SOME KEY DoD CBRNE RESPONDERS

1. Joint Task Force Civil Support

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 consequence management (CM) operations in response to CBRNE incidents, and a source of response plans for essential DoD support to the LFA. JTF-CS's mission is to plan and integrate DoD support to the designated LFA (usually DHS/FEMA) for domestic CBRNE consequence management. When directed by Commander, USNORTHCOM, 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 NRP 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 1999,¹³ JTF-CS provides both an operational capability and an

¹² JCS Concept Plan 0500-98, *supra* note 6, Ann. C, App. 6.

¹³ Even though the Unified Command Plan for 1999 doesn't specifically mention JTF-CS, the SECDEF memo accompanying the plan when it was forwarded notified the President of the United States that the SECDEF intended to establish a standing Joint Task Force for Civil Support. The unit would report to the SECDEF through the U.S. Joint Forces Command and the Chairman of the Joint Chiefs of Staff. Its principle focus would be to plan for and integrate DoD's support to the lead federal agency that would have

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.

CBRNE refers to a chemical, biological, radiological, nuclear, or high yield explosive situation or incidents. It does not differentiate between accidents, acts of nature, and terrorism. The term weapons of mass destruction (WMD) refers to weapons that are capable of a high order of destruction and/or of being used in such a manner as to destroy large numbers of people. Weapons of mass destruction can be high explosives or nuclear, biological, chemical, and radiological weapons, but exclude the means of transporting or propelling the weapon where such means is a separable and divisible part of the weapon. JTF-CS does not have a crisis management mission, so it does not focus on the cause of a CBRNE incident. The unit's focus is entirely on consequence management. Planning for and integrating DoD's support to the LFA to manage the consequences of a domestic CBRNE incident is the same regardless of the incident's cause.

For JTF-CS, the effects of the CBRNE incident are the enemy. Instead of focusing on finding and stopping what caused the CBRNE situation, JTF-CS focuses on determining the potential effects, such as injuries, sickness, physical damage, and chemical contamination. An assessment of the harm caused assists JTF-CS in determining the methods of response that DoD could potentially be called upon to support. By efficiently and effectively anticipating the requests for DoD support, JTF-CS is able to deliver a timely response to save lives, prevent further injury, and provide temporary critical life support.

JTF-CS has three distinct execution groups. The first group encompasses 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

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.

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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 a Command Assessment Element (CAE) to the incident area. The CAE's purpose is to establish "ground truth" concerning what emergency assets and capabilities are either at-hand or available to emergency managers through intrastate or interstate compacts. The CAE 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 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.

The second JTF-CS execution group involves deployment of the command post. Upon receipt of an execution order, JTF-CS is prepared to reform into two smaller command posts to ensure continuity of operations at home station, while deploying forward to the incident site. Depending upon the magnitude of the CBRNE incident, JTF-CS may deploy a small forward command post, a larger forward command post, or the entire headquarters.

The final execution group consists of Joint Planning Augmentation Cells (JPACs) and Joint Technical Augmentation Cells (JTACs) to work with and train other commands. JPAC teams consist of 5-15 people with extensive consequence management planning skills who can help other staffs plan for and respond to CBRNE incidents in their immediate area of responsibility, while not stripping JTF-CS of its own response capability should the need arise. JTACs provide similar technical assistance when requested by overseas combatant commanders facing CBRNE incidents.

The JTF-CS concept of operations begins with planning. The command's CBRNE-focused mission allows JTF-CS to plan in advance and thus anticipate what types of DoD assets might be required to provide a tailored and timely response to a CBRNE incident in a particular community.

For example, after a biological attack, JTF-CS anticipates requests for Strategic National Stockpile (SNS) support, medical augmentation support, disease/bio-contamination support, and mortuary affairs support. The SNS is a supply of drugs, vaccines, and other medical products and devices maintained by the Secretary of Health and Human Services to help ensure

public health during emergencies. SNS support may include subtasks such as receiving pallets at the aviation point of debarkation, breaking down the stockpile medications into distribution-sized packets, transporting the SNS to distribution sites, storing the SNS, and assisting with distribution of medicine and supplies to the end users. Medical augmentation support includes providing tailored packages of medical support personnel to augment existing care facilities and establishing additional assessment, treatment, or care capacity. Disease/bio-contamination support involves assisting DHS and the Center for Disease Control with disease containment; conducting contact tracing; supporting isolation or quarantine efforts within DoD authority; and assisting with vaccination or other prophylaxis programs. Finally, mortuary affairs support involves collecting and transporting remains to temporary collection sites and designated storage facilities; identifying and cataloging remains; and mortuary affairs materiel re-supply.

In response to nuclear, radiological, chemical, or high yield explosives incidents, JTF-CS anticipates requests to perform search and rescue to extract injured personnel and triage, treat, and transport them to medical facilities. JTF-CS assets might also be required to provide medical augmentation to increase treatment capacity, and man “worried well” centers and extended care facilities. Further, JTF-CS assets might be tasked to survey, mark, and monitor the incident site, and decontaminate people and facilities. JTF-CS might also be tasked to provide various forms of evacuee support from feeding to transportation and housing. Finally, depending upon the type of incident, explosive ordinance disposal might be required.

JTF-CS is a deployable headquarters only. When called upon to perform its mission, the headquarters will be augmented with various units possessing the military occupational specialties required to mitigate the effects of a CBRNE incident. An initial entry force of approximately 3,000 service members will be augmented as necessary by force packages tailored to the particular type of incident and response required. These forces will be formed into four subordinate task forces with specific response missions.

Task Force Response will conduct sampling operations to locate the extent of chemical, biological and radiological hazards. The task force will mark hazard boundaries and submit samples for identification. Emergency decontamination personnel will act to save lives and limit the spread of contamination.

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Task Force Medical will focus on distribution of medical supplies, shot teams, hospital augmentation of special skills, providing definitive medical care, and technical support. The task force will also provide care for civilians rescued by Task Force Response.

Task Force Support will provide direct and general logistical support to the JTF. Task Force Support will also manage the LFA's mission assignments for transportation and mortuary affairs support. The task force may support local authorities in providing temporarily displaced civilians with shelter, sanitation, food, and other forms of assistance.

Finally, Task Force Troops will focus on meeting the needs of JTF personnel so that they can focus on their jobs.

2. National Guard Weapons of Mass Destruction Civil Support Teams

In response to the Defense Against Weapons of Mass Destruction (WMD) Act, DoD created National Guard Rapid Assessment and Initial Detection (RAID) teams to respond to incidents involving WMD. The RAID teams were created within the National Guard because the Secretary of Defense recognized that the National Guard is "forward deployed for civil support."¹⁴ In October 1998, Congress authorized and funded the first ten RAID teams. In January 2000, Secretary of Defense Cohen directed that an additional 17 teams be established and that the name of the teams be changed to WMD-Civil Support Teams (WMD-CSTs). On November 15, 2001, Secretary of Defense Donald H. Rumsfeld announced the stationing plan for five additional WMD-CST teams. In 2004, DoD notified Congress of the fielding plan of 23 additional WMD-CSTs, which once completed will bring the total to fifty-five teams.¹⁵

The WMD-CST is designed to deploy rapidly to assist local first responders.¹⁶ Each WMD-CST contains 22 full-time National Guard Soldiers and airmen and consists of five elements: command, operations, administrative/logistics, medical, and survey.

¹⁴ U.S. Secretary of Defense Report to Congress pursuant to FY00 National Defense Authorization Act § 1036, 2 (24 Feb. 2000).

¹⁵ As of July 2006, eight of the twelve teams authorized in the DoD Appropriations Act of 2004, are certified with the four remaining teams nearing completion of the certification process. All 32 of the teams authorized in fiscal years 1999-2001 have already been certified bringing the total number of certified teams to 40. Congress authorized a total of 55 WMD-CSTs, enough to field one team in every state, territory and the District of Columbia. The final eleven teams were authorized in fiscal year 2005 and they will be certified by March 2007.

¹⁶ *Id.*

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;
- 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)¹⁷ for nuclear, biological and chemical (NBC) detection and the Unified Command Suite (UCS) for communications.¹⁸ WMD-CST capabilities are specifically designed to complement civilian responders.¹⁹ 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.²⁰ If the teams are called to Federal Active Duty Title 10, they will normally be attached with operational control to JTF-CS.²¹

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 10.²²

¹⁷ *Id.* at 3. MALS is based on system used by the Marine Corps' Chemical Biological Incident Response Forces with enhanced biological detection capability.

¹⁸ *Id.* The UCS, built by the Navy, provides communication interface across the ICS frequencies, military command and control elements, and technical support assets.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 5.

²¹ *Id.*

²² *Id.* at 6. *See infra* Chapter 10, Reserve Components, for a discussion of interstate compacts.

3. Response Task Force

DoD established Response Task Force (RTF) Headquarters within the military components to support the Defense Coordinating Officer (DCO) under the NRP. See *Chapter 5, Disaster Assistance*, for a discussion of the NRP and the role of the DCO. When directed by the Commander of NORTHCOM the Commander of Fifth US Army/Army North (ARNORTH) deploys a tailored RTF and conducts CBRNE CM operations to assist federal, state, local and tribal authorities within USNORTHCOM Operational Area.

The RTF contains a Rapid Assessment Element (RAE) as well as reconnaissance and decontamination elements. The WMD-CSTs are important components of RTF plans, even though they are primarily state units. The RTF works closely with Joint Forces Command USJFCOM and JTF-CS. The relationship between the RTF and JTF-CS is still being developed.

The RTF can provide either a reinforcing or a redundant command and control capability when JTF-CS is decisively engaged in an incident. In addition, they are capable of providing command and control for incident management beyond pure Consequence Management of incidents involving CBRNE (e.g., they can command DoD response to other DSCA situations).²³

²³ See National Response Plan, December 2004 at 41. A copy of the complete NRP is located at DOPLAW Handbook, Vol. II, App. 5-24.

CHAPTER 7. MILITARY SUPPORT TO SPECIAL EVENTS

KEY REFERENCES:

- 10 U.S.C. § 2012 - Support and Services for Eligible Organizations and Activities Outside the Department of Defense
- 10 U.S.C. § 2554 - Provision of Support for Certain Sporting Events
- PDD 62 - Protection Against Unconventional Threats to the Homeland and Americans Overseas
- DoDD 1100.20 - Support and Services for Eligible Organizations and Activities Outside the Department of Defense
- DoDD 2000.15 - Support to Special Events

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 Olympic Games, Presidential Inaugurations, and international meetings. The IRT program allows commanders to conduct training in the civilian community, but benefit to the community must be incidental to the training.¹ 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 military support to certain sporting events, such as the Olympics or World Cup soccer.² In addition to sporting events, other special events may be designated by the

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

² 10 U.S.C. § 2554.

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

Secretary of Defense for support.³ Such support may be provided on a reimbursable basis or may be funded by specific appropriations.⁴



Figure 7-1, DoD Support to Special Events⁵

1. Types of Events

a. Sporting Events

Support to certain sporting events is specifically authorized by 10 U.S.C. § 2554. Sporting events are planned programs of athletic

provide assistance for the World Cup Soccer Games, the Goodwill Games, the Olympics, and any other civilian sporting event in support of essential security and safety at such event, but only if the Attorney General certifies that such assistance is necessary to meet essential security and safety needs.

³ U.S. DEP'T OF DEFENSE, DIR. 2000.15, SUPPORT TO SPECIAL EVENTS, para. 3.1 (21 Nov. 1994) [hereinafter DoDD 2000.15].

⁴ *Id.* para. 4.4.

⁵ Map produced by U.S. Army Forces Command.

competition and related activities.⁶ The authorizing legislation specifically mentions the World Cup Soccer Games, the Goodwill Games and the Olympics.⁷ Other sporting events previously supported include the World Alpine Ski Championships and the Special Olympics. Military forces provided extensive support during the 1996 Olympic Games held in Atlanta, Georgia.

U.S. Joint Forces Command (JFCOM) and U.S. Army Forces Command (FORSCOM) supported the 2002 Olympic Games in Utah.⁸ Commander JFCOM formed Joint Task Force-Olympics (JTF-O) on January 16, 2001.⁹ Routine support approved by the Secretary of the Army for this event included aviation, communications, explosive ordnance disposal, physical security, and temporary facilities.¹⁰ JTF-O received requests for assistance from the U.S. Olympic Planning Committee and the Salt Lake Olympic Planning Committee.¹¹ With the establishment of U.S. Northern Command (USNORTHCOM) on September 11, 2003, it is clear that similar future support missions would be assigned to USNORTHCOM vice JFCOM.

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 and Universal Postal Union Congress.¹² DoD may also support designated "national special security events" when tasked to do so. These events included the Democratic and Republican National Conventions of 2000 and will also cover the Conventions in 2004.

(1) Events Not Declared National Security Events

⁶ DoDD 2000.15, *supra* note 3, para. 4.4.

⁷ 10 U.S.C. § 2554(a).

⁸ See U.S. Forces Command, Slide Presentation, 2001 Winter Olympic Games, Joint Task Force-Olympics FORSCOM Augmentation (22 Feb. 2001) [hereinafter FORSCOM Presentation].

⁹ Message, 181815Z Jan 01, Commander in Chief, Joint Forces Command, subject: USCINCJFCOM JTF-Olympics Stand Up Announcement (18 Jan. 2001).

¹⁰ Message 141555Z Mar 00, Commander in Chief, Joint Forces Command, subject: USCINCJFCOM 2000 XIX Olympics PLANORD Feedback (14 Mar. 2000).

¹¹ FORSCOM Presentation, *supra* note 8.

¹² DoDD 2000.15, *supra* note 3, para. 3.1.

The Secretary of Defense may designate "non-athletic international or national events to receive support."¹³ 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.¹⁴ 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).¹⁵ The Attorney General and the Secretary of the Treasury may designate an event as a national special security event.¹⁶ The Secret Service is responsible for security design, planning and implementation at NSSEs.¹⁷ Military assets provided in support of NSSEs may include explosive ordnance disposal (EOD) teams, technical escort units (TEU),¹⁸ and Chemical/Biological Immediate Response Forces (C/BIRF).¹⁹

DoD supported 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 1999.²⁰ All three had been designated NSSEs. Prior to the WTO conference, Combatant Commanders were directed to be prepared to provide support in the event of a request from the Lead Federal Agency (LFA). The Washington National Guard conducted activities pursuant to the Washington State Comprehensive Emergency Management Plan in support of the WTO.

¹³ *Id.*

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

¹⁵ 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, Vol. II, at App 5-8.

¹⁶ U.S. ATLANTIC COMMAND, JOINT TASK FORCE – CIVIL SUPPORT IMPLEMENTATION PLAN, para. 2.3.1 (23 Sept. 1999) (FOUO) (on file with the Center for Law and Military Operations).

¹⁷ *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).

¹⁸ TEU teams are capable of detecting, rendering safe, and transporting chemical and biological devices.

¹⁹ USMC C/BIRF is capable of decontaminating persons affected by chemical or biological hazards.

²⁰ Message, 180715Z Oct 99, Department of the Army, subject: World Trade Organization (WTO) Ministerial Conference (18 Oct. 1999).

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 are made by the federal, state, or local agency responsible for providing law enforcement, security, or safety services for the event.²¹ Often, this means that local police or a FBI field office requests the military support. The Attorney General must then certify that the specific categories of support are "necessary to meet essential security and safety needs."²² Once a request is certified, the support is coordinated through the Assistant Secretary of Defense for Homeland Defense [ASD(HD)] and Joint Director of Military Support office (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)²³.

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.²⁴ Some of the other types of assistance that may be authorized include equipment, personnel, technical support, managerial advice or guidance.²⁵ 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.²⁶ Security or safety related support has precedence over logistical assistance.²⁷

²¹ 10 U.S.C. § 2554(a).

²² *Id.*

²³ Memorandum, Deputy Secretary of Defense, subject: Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense (25 Mar. 2003).

²⁴ 10 U.S.C. § 2554(b).

²⁵ DoDD 2000.15, *supra* note 3, para. 3.2.

²⁶ 10 U.S.C. § 2554 (b)(1) & (2).

²⁷ DoDD 2000.15, *supra* note 3, para. 4.3.

c. Funding Support

Military support may be provided on a reimbursable or nonreimbursable basis. Logistical and security support for international sporting competitions may be paid, in part, from the support for international sporting competitions (SISC) defense account.²⁸ Organizations requesting logistically focused assistance for other types of special events must agree to reimburse DoD.²⁹ Such assistance must be reimbursed in accordance with applicable laws.³⁰

C. INNOVATIVE READINESS TRAINING

Innovative Readiness Training (IRT) provides the military "hands-on" readiness training opportunities, while at the same time, they 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.

Civil-military innovative readiness training programs are conducted within the U.S., its territories and possessions by our military. Our military forces deployed overseas participate in a similar program known as Humanitarian and Civic Assistance Program. Civil-military innovative readiness training programs help address serious community needs in our own country.

The IRT Program is the only avenue for commanders to conduct military training in the civilian community while simultaneously providing support and services to civil authorities and other eligible civilian organizations and activities.³¹ IRT is conducted by combat support units and individuals off base and within communities throughout the U.S., its

²⁸ Pub. L. 104-208, div. A, title V, §5802, 110 Stat. 3009-522 (1996).

²⁹ 10 U.S.C. § 2554 (b)(3).

³⁰ *Id.* § 377; U.S. DEP'T OF DEFENSE, REG. 7000.14-R, VOL. 2, DEPT. OF DEFENSE FINANCIAL MANAGEMENT REGULATION (June 2000).

³¹ 10 U.S.C. § 2012; *implemented by* U.S. DEP'T OF DEFENSE, DIR. 1100.20, SUPPORT AND SERVICES FOR ELIGIBLE ORGANIZATIONS AND ACTIVITIES OUTSIDE THE DEPARTMENT OF DEFENSE (12 Apr. 1997) [hereinafter DoDD 1100.20]; 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.

territories and possessions. These units and individuals hone skills required by their mission essential task list (METL) while working in partnership with the community in a manner that avoids competing with the private sector. IRT missions fall outside of the MACA umbrella. This, along with Immediate Response actions,³² are the only instances where DoD forces will be employed outside of DoD installations without receiving an EXORD from higher operational authority.

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. Background

The precursor to today's IRT Program was the 1992 Civil-Military Cooperative Action Program.³³ Under this program, projects were required to benefit the community, but guidance did not require assessment of a project's training value. Instead, the assistance provided was required to be consistent with a unit's military mission. In 1995, DoD created the Directorate of Civil-Military Programs in the Office of the Assistant Secretary of Defense for Reserve Affairs (OASD/RA). The Directorate is primarily responsible for providing policy and program oversight for IRT Programs. In 1996, the DoD Civil-Military Cooperative Action Program was repealed and replaced with DoD Directive 1100.20, *Support and Services for Eligible Organizations and Activities Outside Department of Defense*.³⁴ This is the only authority for conducting activities within a community in a training status. It does not apply to community relations activities covered under DoD Directive 5410.19, *Armed Forces Community Relations* or volunteer participation in a non-duty status. In response to a 1998 Government Accounting Office report,³⁵ DoD instituted more stringent

³² U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (18 Feb. 1997); U.S. DEP'T OF DEFENSE, DIR 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (15 Jan. 1993) contain detailed guidance on the exercise of Immediate Response Authority (IRA).

³³ Pub. L. No. 102-484, div. A, title X, § 1081(b)(1), 106 Stat. 2515 (1992).

³⁴ Pub. L. No. 104-106, div. A, title V, § 571(a)(1), 110 Stat. 353 (1996).

³⁵ GOVERNMENT ACCOUNTING OFFICE, REPORT, CIVIL MILITARY PROGRAMS: STRONGER OVERSIGHT OF THE INNOVATIVE READINESS TRAINING PROGRAM NEEDED FOR BETTER COMPLIANCE (GAO Code 703219/OSD Case 1534) (12 Mar. 1998).

guidelines for determining the total project cost of IRT support and ascertaining if IRT participation significantly increased training costs.³⁶ See DOPLAW Handbook, Vol. II, App.7-6, *IRT Policy*.

2. 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.³⁷ Such assistance must be provided incidental to training or be otherwise authorized by law.³⁸ 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 services.³⁹

a. Requests for Assistance

Requests for assistance must come from a "responsible official" of an "eligible organization."⁴⁰ A "responsible official" is "an individual authorized to represent the organization or activity regarding the matter of assistance to be provided."⁴¹ There are three categories of "eligible organizations." Any federal, regional, state or local government entity is an eligible organization.⁴² 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.⁴³

The request for IRT assistance must specify that the requested assistance is not reasonably available from a commercial entity.⁴⁴ In determining whether assistance from a commercial entity is "reasonably

³⁶ IRT Policy, *supra* note 1.

³⁷ 10 U.S.C. § 2012 (1998); DoDD 1100.20, *supra* note 31.

³⁸ 10 U.S.C. § 2012(a).

³⁹ DoDD 1100.20, *supra* note 31, para. 4.2.

⁴⁰ 10 U.S.C. § 2012(c)(1).

⁴¹ DoDD 1100.20, *supra* note 31, para. 4.4.1.1.

⁴² 10 U.S.C. § 2012(e)(1).

⁴³ *Id.* § 2012(e)(3).

⁴⁴ *Id.* § 2012(c)(2).

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."⁴⁵ If commercial entity assistance is reasonably available, the requesting individual must certify the commercial entity agrees to the provision of such services by the military.⁴⁶

b. IRT Program Assistance-Nature and Requirements

A requesting organization may request Innovative Readiness Training assistance of a military unit or individual members. However, the requested IRT assistance must meet three requirements. First, the requested IRT assistance 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).⁴⁷ 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).⁴⁸ Second, the provision of the requested IRT assistance cannot adversely affect the quality of training or otherwise interfere with a unit or its members' ability to perform military functions.⁴⁹ Third, the provision of IRT assistance cannot result in a significant increase in training costs.⁵⁰

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.⁵¹ In such cases, volunteers will meet manpower requests, and assistance other than manpower will be extremely limited.⁵² Military

⁴⁵ DoDD 1100.20, *supra* note 31, para. 4.4.1.2.

⁴⁶ 10 U.S.C. § 2012(c)(2).

⁴⁷ *Id.* § 2012(d)(1)(A)(i).

⁴⁸ *Id.* § 2012(d)(1)(A)(ii).

⁴⁹ *Id.* § 2012 (d)(1)(B).

⁵⁰ *Id.* § 2012 (d)(1)(C).

⁵¹ *Id.* § 2012 (d)(2).

⁵² DoDD 1100.20, *supra* note 31, para. 4.4.2.1.3.

vehicles may only be used, for instance, to provide transportation of personnel to and from the work site.⁵³ The use of military aircraft is prohibited in these instances. The second and third requirements still exist in such cases.

3. Legal Considerations for IRT Projects

a. Approval Authority for IRT Projects⁵⁴

OASD/RA approval is required of all projects that require additional funding from OASD/RA and all projects that require Office of the Secretary of Defense General Counsel's review of eligibility.⁵⁵ All IRT project requests received directly from requestors that lack military unit sponsors must also be forwarded to OASD/RA.⁵⁶ Major Commands (MACOMs) generally approve other IRT projects. For projects that do not require additional funding or OSD review, the Office, Chief Army Reserve and the Army National Guard are considered MACOMs. A general officer or equivalent approval signature is required for all IRT requests.⁵⁷ Additional requirements may exist if the proposed IRT project crosses multiple fiscal years.⁵⁸

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,

⁵³ *Id.*

⁵⁴ IRT Policy, *supra* note 1, Encl. 1, at 2.

⁵⁵ 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.

⁵⁶ IRT Policy, *supra* note 1, Encl. 1, at 2.

⁵⁷ *Id.* Encl. 1, at 3.

⁵⁸ *Id.*

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.⁵⁹

(3) IRT Project Requests-The Review Process

All IRT project requests must be reviewed for full compliance with applicable guidelines and law. All IRT project requests must be reviewed and endorsed by the Staff Judge Advocate, U.S. Property and Fiscal Officer or Federal Budget Officer, and Plans, Operations and Training officials.⁶⁰ 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.⁶¹

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

⁵⁹ *Id.* Tab A, at 3.

⁶⁰ *Id.* Encl. 1, at 2.

⁶¹ *Id.* Tab A, at 4.

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.⁶² 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.

⁶² *Id.* Tab A, at 2.

SPECIAL EVENTS

CHAPTER 8.
MISCELLANEOUS DOMESTIC SUPPORT OPERATIONS

KEY REFERENCES

- 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
- PDD-63, Critical Infrastructure Protection
- EO 12241 - National Contingency Plan (NCP)
- 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
- DoDD 3020.26 - Continuity of Operations (COOP) Policy and Planning
- DoDD 3020.36 - Assignment of National Security Emergency Preparedness (NSEP) Responsibilities to DoD Components
- DoDD 3025.13 - Employment of Department of Defense Resources in Support of the United States Secret Service
- DoDD 3150.5 - DoD Response to Improvised Nuclear Device (IND) Incidents
- DoDD 3150.8 - DoD Response to Radiological Accidents
- DoDD 4500.9E - Transportation and Traffic Management
- DoDD 5030.50 - Employment of Department of Defense Resources in Support of the United States Postal Service
- DoDD 5160.54 - Critical Asset Assurance Program (CAAP)
- DoDD 6000.12 - Health Services Operations and Readiness
- AR 500-2, Search and Rescue (SAR) Operations
- AR 500-4/AFR 64-1 - Military Assistance to Safety and Traffic (MAST)
- NGR 500-1/ANGI 10-8101, Military Support to Civil Authorities

A. INTRODUCTION

Domestic support operations include a variety of lesser-known types of support. Field Manual 100-19, *Domestic Operations*,¹ broadly divides domestic support operations into four categories: disaster and domestic emergency assistance, environmental missions, missions in support of law enforcement, and community assistance. Some of the support missions not previously discussed in this Handbook are addressed here.

B. DISASTER AND DOMESTIC EMERGENCY ASSISTANCE

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

1. Military Assistance to Safety and Traffic

¹ U.S. DEP'T OF ARMY, FIELD MANUAL 100-19/U.S. MARINE CORPS, FLEET MARINE FORCE MANUAL 7-10, DOMESTIC SUPPORT OPERATIONS, 1-2 (1 July 1993)[hereinafter FM 100-19]. FM 100-19 has been superceded by U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS (July 2003).

² *Id.*

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

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).

DOMESTIC SUPPORT OPERATIONS

The Military Assistance to Safety and Traffic (MAST) program is an interagency effort among Department of Transportation (DOT), Department of Health and Human Services (HHS), and the Department of Defense (DoD).⁴ DoD support to MAST is governed by DoD Directive (DoDD) 4500.9E, *Transportation and Traffic Management*.⁵ 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.⁶ The emergencies for which military support is envisioned are:⁷

- Evacuation of accident victims,
- Inter-hospital transfer of patients, or
- The transport of key medical personnel or blood and human organ transfer.

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.⁸

⁴ 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), para. 3a (15 Jan. 1982) [hereinafter AR 500-4]; *see also* U.S. DEP'T OF ARMY, REG. 500-2, SEARCH AND RESCUE (SAR) OPERATIONS, para. 3c (15 Jan. 1980) [hereinafter AR 500-2].

⁵ U.S. DEP'T OF DEFENSE, DIR. 4500.9E, TRANSPORTATION AND TRAFFIC MANAGEMENT (12 Feb 2005) [hereinafter DoDD 4500.9E].

⁶ *Id.* at para. 3.11 (“Employment of Military Resources for Military Assistance to Safety and Traffic (MAST): 3.11.1. Military units shall assist civilian communities in providing medical emergency helicopter services beyond the capability of that community.”).

⁷ AR 500-4, *supra* note 4, para. 3a.

⁸ DoDD 4500.9E, *supra* note 5 at para. 3.11.3.

Military units shall not perform emergency medical evacuation missions if support can be provided by civilian contractors.⁹ If civil or commercial ground or air ambulance services are operating in the same geographic area covered by a MAST program, a letter of operational agreement, to which the local commander is a signatory, must be negotiated between state and/or local officials or their representatives and these operators.¹⁰

DoD assets provide interim support until civilian assets become available.¹¹ As part of the MAST program, DoD provides air ambulances, air rescue helicopters, aircrews, medical personnel and equipment.¹² Any support provided must be without adverse impact to the unit's primary military mission.¹³ Reimbursement is not required. Medical helicopter units must operate within their allocated training hour program.¹⁴ Final approval authority for each mission rests with the local commander whose decision should be based on aircraft availability and military mission requirements.¹⁵

2. Search and Rescue Operations

To the extent possible, the armed forces have traditionally provided aid to civilians during distress.¹⁶ Generally, these missions are coordinated through the U.S. Air Force (USAF) (in the continental United States), the U.S. Coast Guard (USCG) (in Hawaii and U.S. territories), and the unified command (outside the continental United States). The Commanding General, U.S. Army Forces Command (CG FORSCOM) is responsible for coordinating Army SAR assistance to civil authorities.¹⁷ As the Army Search and Rescue (SAR) coordinator, CG FORSCOM may task installation

⁹ *Id.*, para. 3.11.1; *see also* AR 500-4, *supra* note 4, para. 4e.

¹⁰ AR 500-4, *supra* note 4, para. 4f.

¹¹ *Id.* para. 3a.

¹² *Id.*

¹³ DoDD 4500.9E, *supra* note 5, para. 3.11.2.

¹⁴ *Id.*

¹⁵ AR 500-4, *supra* note 4, paras. 4a, 4e.

¹⁶ AR 500-2, *supra* note 4, para. 4a.

¹⁷ *Id.* para. 5c.

DOMESTIC SUPPORT OPERATIONS

commanders directly to provide SAR resources and assistance as needed.¹⁸ Commands/installations providing SAR assistance must absorb costs incurred in SAR operations from existing funds.¹⁹ In addition to SAR missions in support of natural disasters, SAR missions include:

- Aerial drop of medicine, food, emergency supplies and livestock feed;
- Aeromedical evacuation of sick and injured; rescue of stranded personnel;
- Transport and guidance of surface rescue parties;
- Message drop and pick up;
- Courier service and communications;
- Wire-laying for emergency communications;
- Illumination for night operations;
- Photographic and reconnaissance missions;
- Insect control;
- Providing warning or information on:
 - areas to be evacuated
 - transportation facilities
 - available evacuation routes.²⁰

Army aircraft with a primary mission of aeromedical evacuation normally will not be used to conduct lengthy search operations or recovery of human remains.²¹ The recovery of human remains is the responsibility of civil authorities, and Army assistance in this area should only be considered when:

- Requested by authorized local authority;
- Military resources represent the only means of recovery (i.e., inaccessible or remote crash site, non-availability of commercial or civilian resources); and
- Recovery of human remains can be accomplished concurrently with the recovery of survivors, if such action does not jeopardize the survivors.²²

¹⁸ *Id.*

¹⁹ *Id.* para. 10.

²⁰ *Id.* para. 7.

²¹ *Id.* para. 4d.

²² *Id.* para. 4g.

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.²³ Efforts to incorporate CAP operations in support of non-DoD federal agencies into the NORTHCOM MACA construct are ongoing. Under the National Response Plan (NRP), the Federal Emergency Management Agency (FEMA) is the primary agency for Emergency Support Function (ESF) 9, Urban Search & Rescue.²⁴

Local commanders may also provide SAR assistance within their area when immediate assistance is required to save human lives, prevent human suffering, or to mitigate major destruction or damage to property, and time does not permit obtaining approval from higher headquarters.²⁵ Authority for conducting SAR missions also extends to requests from the Federal Aviation Administration (FAA) air traffic control agencies for in-flight Army aircraft to provide immediate assistance to aircraft in distress.²⁶ All other direct requests for SAR assistance from civil authorities will be referred to the Air Force Rescue Coordination Center (AFRCC) or appropriate USCG Rescue Coordination Center²⁷ As in any immediate response operation, such actions should be coordinated with FORSCOM.

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.²⁸ When ordered by the President, DoD may be called upon to provide sufficient materials, supplies, equipment, services, and personnel to enable the USPS

²³ *Id.* para. 3a.

²⁴ The National Response Plan (NRP) was published in December 2004. At that time phasing out of the INRP, FRP, CONPLAN, and FRERP began. The NRP is located at DOMOPS Handbook, Vol. II at Appendix 5-24.

²⁵ AR 500-2, *supra* note 4, para. 4a.

²⁶ *Id.* para. 4c.

²⁷ *Id.*

²⁸ 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].

to safeguard, process, and deliver the mail in areas affected by postal work stoppages.²⁹

Authority to support the USPS rests in the President's authority to use the armed forces to prevent interference with transporting the mail³⁰ and the authority for interdepartmental transfer of services and equipment prescribed by the Economy Act³¹ and implemented by DoD Instruction (DoDI) 4000.19, *Interservice and Intragovernmental Support*.³² Upon Presidential declaration of a national emergency, selective mobilization of the RC to support the USPS is authorized by 10 USC § 12301.³³ 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*.³⁴ The NDMS is a joint partnership sponsored by DoD, the Department of Veterans Affairs (DVA), HHS, and FEMA. Responsibilities of each member are spelled out in an MOU between the agencies. DoDD 6000.12 defines the role of the military health care system in joint federal, state, and local mutual medical aid.³⁵ Major components of NDMS include medical response, patient evacuation, and definitive medical care in

²⁹ *Id.* para. 4. (“POLICY AND RESPONSIBILITIES; 4.1. Authority. Legal authority for the employment of military resources at the direction of the President to reestablish and maintain essential postal service may be found in section 686 of Title 31, U.S. Code, and section 411 of Title 39, U.S. Code.”).

³⁰ *In re Debs*, 158 U.S. 564 (1895).

³¹ The Economy Act of 1932, 31 U.S.C.A. § 1535 (1983), implemented by 39 U.S.C. § 411 (Cooperation with other Government Agencies).

³² U.S. DEP’T OF DEFENSE, INSTR. 4000.19, INTERSERVICE AND INTRAGOVERNMENTAL SUPPORT, para. 4.4 (9 Aug. 1995).

³³ 10 U.S.C. §§ 12301-12304; *see also* DoDD 5030.50, *supra* note 28, para. 4.4.1.

³⁴ U.S. DEP’T OF DEFENSE, DIR. 6000.12, NATIONAL DISASTER MEDICAL SYSTEM (NDMS), Enclosure 1, References, E1(m) (28 Dec. 1988) [hereinafter DoDD 6000.12] (Note: DoDD 6000.12 superseded DoDD 6010.17).

³⁵ *Id.* para. 4.

participating non-federal hospitals throughout CONUS. DoDD 6000.12 requires annual exercises of NDMS and assigns specific responsibilities to Services, CINCs, and Defense Agencies.

Under the NRP, ESF 8, Public Health and Medical Services, HHS is the primary agency.³⁶ The Public Health Service (PHS), an agency of the DHHS, leads this effort by directing the activation of the NDMS.³⁷ 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, equipment and supplies;
- Patient evacuation;
- In-hospital care;
- Food/drug/medical device safety, worker health and safety;
- Radiological, chemical and biological hazards;
- Mental health care, public health information, vector control, potable water and waste disposal;
- Victim identification/mortuary services;
- Veterinary services.³⁸

The NDMS may be activated by the Director, FEMA, or the Assistant Secretary of Health, HHS, in response to a U.S. domestic disaster.³⁹ The federal government will respond to the crisis by using the NDMS to supplement state and local medical resources. DoD components participate to the extent compatible with U.S. national security. The NDMS Operations Support Center (OSC), once activated, responds to medical tasks from the Federal Coordinating Officer (FCO) at the Disaster Field Office (DFO). The DFO includes the Continental United States Army Defense Coordinating Officer, along with the regional point of contact from the PHS and the NDMS Liaison Officer. The NDMS OSC assigns Disaster Medical

³⁶ NRP, *supra* note 24, at 12.

³⁷ *Id.*, at Annex ESF #8 (Health and Medical Services).

³⁸ *Id.*

³⁹ DoDD 6000.12, *supra* note 34, para. 4.9.

Assistance Teams (DMATs) to the disaster site to help local authorities with medical management of casualties.⁴⁰

5. Animal and Plant Disease Eradication

In the event of an actual or imminent outbreak of a foreign plant or animal disease or invasion of a foreign pest, DoD provides assistance to the U.S. Department of Agriculture (USDA), Administrator for Animal, Plant, and Health Inspection Service (APHIS). Although there is no military directive governing this type of support, has been a memorandum of agreement with the Department of Agriculture for such support.⁴¹ The Secretary of the Army, as DoD's executive agent, has designated the Commander in Chief (CINC) Joint Forces Command (JFCOM) as the supported CINC for DoD support to USDA.⁴²

COMFORSCOM, as directed by CINCJFCOM, provides personnel, equipment, supplies, and services to support the Regional Emergency Animal Disease Eradication Organization (READEO) task force. The READEO is the USDA organization responsible for completing both animal and plant eradication missions. USDA reimburses DoD for actual cost, less pay and allowances.

6. Mass Immigration Emergency

The Department of Department of Homeland Security (DHS) is charged, in addition to other responsibilities, to enforce the laws of the United States dealing with immigration.⁴³ The majority of this responsibility is fulfilled by the routine daily operations of the U.S. Immigration and

⁴⁰ NRP, *supra* note 24, at Annex ESF #8 (Health and Medical Services).

⁴¹ See U.S. DEP'T OF DEFENSE, REG. 5030.49-R, CUSTOMS INSPECTION (27 May 1977) (Note: DoD 5030.49-R was cancelled and replaced by DoD 4500.9-R, PART V, in March 2003).

⁴² The Secretary of the Army is also the Executive Agent for Customs Inspections. *Id.* para. 3002.

⁴³ U.S. COMMANDER IN CHIEF, ATLANTIC COMMAND, FUNCTIONAL PLAN 2503-97, SUPPORT OF DOJ/INS MASS IMMIGRATION EMERGENCY (U), Plan Summary, para. 2C(3) (30 Nov.1997); *see also* Memorandum from Deputy Assistant U.S. Attorney to United States Attorney Southern District of California, subject: Assistance by State and Local Police in Apprehending Illegal Aliens, para. II F (5 Feb. 1996) *available at* <http://www.usdoj.gov/olc/immstopo1a.htm>.

Customs Enforcement (ICE)⁴⁴ 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).

7. Improvised Nuclear Device Incidents

DoDD 3150.5, *DoD Response to Improvised Nuclear Device (IND) Incidents*, provides DoD policy for military assistance to the FBI during an improvised nuclear device (IND) incident.⁴⁵ An IND is a device incorporating radioactive materials designed to result in the dispersal of radioactive material or in the formation of a nuclear-yield reaction.⁴⁶ In the Continental United States (CONUS) and in U.S. territories and possessions, the FBI is the Lead Federal Agency (LFA) for addressing IND incidents. Outside CONUS and U.S. territories and possessions, the Department of State (DOS) is the LFA.⁴⁷ The Assistant Secretary of Defense (International Security Affairs) acts as the DoD Executive Agent.⁴⁸ DoDD 3150.5

⁴⁴ ICE is the investigative arm of the Department of Homeland Security (DHS). The agency is comprised of several components from the former Immigration and Naturalization Service (INS), the U.S. Customs Service, and the Federal Protective Service (FPS). The agency combines the investigative, detention & 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. The plan was effective on June 9, 2003.

⁴⁵ U.S. DEP'T OF DEFENSE, DIR. 3150.5, DOD RESPONSE TO IMPROVISED NUCLEAR DEVICE (IND) INCIDENTS, paras. 1, 4 (24 Mar. 1987).

⁴⁶ *Id.* para. E.2.1.6.

⁴⁷ *Id.* para. E2.1.8.

⁴⁸ *Id.* para. 5.2.1.

establishes responsibilities for command and control (C2), operational response, research and development, and EOD policy.⁴⁹ DoDD 3150.5 directs the Secretary of the Army to:

- Provide a trained response team of EOD personnel and other required support for responding to IND incidents on Army installations in CONUS, the CONUS land mass (except for those installations specifically assigned as a responsibility of the Navy, Air Force, or Marine Corps), and other areas as directed by the National Command Authority (NCA) through the Joint Chiefs of Staff (JCS);
- Submit IND countermeasures technology and training requirements to the Executive Manager for DoD Explosive Ordnance Disposal Technology and Training (EODT&T) in accordance with DoD 5160.62; and
- Fund Army IND response team training, exercises, and operations.⁵⁰

The DoD response team must be prepared to deploy within four hours of notification of an IND incident.⁵¹ The DoD response team will be under the command and control of the DoD senior representative, provided by the responsible Service or CINC, who shall establish coordination with the LFA. The FBI Special Agent in Charge (SAC) will be the senior U.S. Government official and will coordinate and communicate with local authorities.⁵²

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."⁵³ 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).⁵⁴ The FRERP establishes

⁴⁹ See *id.* para. 5.

⁵⁰ *Id.* para. 5.8.

⁵¹ *Id.* para. 6.4.

⁵² *Id.* para. 6.3.

⁵³ U.S. DEP'T OF DEFENSE, DIR. 3150.8, DO D RESPONSE TO RADIOLOGICAL ACCIDENTS, E2.1.5 (24 Mar. 87) [hereinafter DoDD 3150.8].

⁵⁴ *Id.* para. 1.2.

an organized and integrated capability for timely, coordinated response by Federal agencies to peacetime radiological emergencies.⁵⁵ The Defense Nuclear Agency is assigned the lead role in coordinating plans with other federal agencies.⁵⁶ CINCJFCOM provides assistance to an affected area in support of the LFA and under the overall coordination of a Senior Federal Official, such as a FCO.

The President, through Executive Order (EO) 12241, instructed the Director of FEMA to publish a plan to protect public health and safety in the event of an accident at a nuclear power plant as part of the National Contingency Plan.⁵⁷ EO 12241 is located at DOPLAW Handbook, Vol. II, App. 8-4. Pursuant to EO 12657, FEMA is required to provide assistance in emergency preparedness planning at commercial nuclear power plants.⁵⁸ EO 12657 is DOPLAW Handbook, Vol. II, App. 8-7. 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.⁵⁹ 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

⁵⁵ 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).

⁵⁶ DoDD 3150.8, *supra* note 54, para. 5.1.1.

⁵⁷ Exec. Order No. 12241, National Contingency Plan (Sept. 29, 1980).

⁵⁸ Exec. Order No. 12657, Nuclear Facility Accidents, Contingency Planning (Nov. 18, 1988).

⁵⁹ 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>.

is beyond the capabilities of available resources.⁶⁰ DoD provides support pursuant to a memorandum of understanding (MOU) between DoD, the USDA, and the Department of the Interior (DOI).⁶¹ A copy of the MOU is located at DOPLAW Handbook , Vol. II, App. 8-12.

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.⁶² The NIFC is the nation's support center for wildland firefighting⁶³ and is a joint operation of the DOI and USDA.⁶⁴ Seven federal agencies operate from the NIFC and work together to coordinate and support wildland fire and disaster operations. These agencies are:

- Bureau of Indian Affairs (BIA)
- Bureau of Land Management (BLM)
- Forest Service (USFS)
- Fish and Wildlife Service (USFWS)
- National Park Service (NPS)
- National Weather Service (NWS)
- Office of Aircraft Services (OAS)⁶⁵

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.⁶⁶ In early 1993 the name

⁶⁰ DoD 3025.1-M, *supra* note 60, ch. 3 (Disasters), para. B3a.

⁶¹ MOU-USDA/DOI, *supra* note 60; *see also* U.S. DEP'T OF ARMY, REG. 500-60, EMERGENCY EMPLOYMENT OF ARMY AND OTHER RESOURCES, App. B (1 Aug. 1981) [hereinafter AR 500-60]; COMFORSCOM Func Plan 2501-00, *supra* note 60, at App. 27, para. 1e(1).

⁶² NRP, *supra* note 24, at 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 60, App. 27, para. 1c(1).

⁶³ DoD 3025.1-M, *supra* note 60, para. B.3.a, b; MOU-USDA/DOI, *supra* note 60, 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>.

⁶⁴ DoD 3025.1-M, *supra* note 60, para. B.3.b.

⁶⁵ *See* NIFC - The Agencies At NIFC at <http://www.nifc.gov/nifcagcy.html>; *see also* COMFORSCOM Functional Plan 2501-00, *supra* note 60, App. 27, para., 1c(1).

⁶⁶ *See* NIFC History at <http://www.nifc.gov/nifcmiss.html> ("Boise' Interagency Fire Center" is the phrase referred to in AR 500-60, *supra* note 62, at para. 2-6 and 2-15, and MOU-USDA/DOI, *supra* note 60, rather than NIFC).

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.⁶⁷ This group consists of representatives of each of the federal wildland firefighting agencies. Representatives from the General Services Administration, the U.S. military, and state forestry services may also participate. The federal and state representatives of this group are responsible for responding to wildland fires and other emergency events. Depending on the national fire situation, the MAC group helps set priorities for critical, and occasionally scarce, equipment, supplies and personnel.

The National Interagency Coordination Center (NICC) is located within the NIFC. The NICC was established in 1975 to provide logistical support and intelligence for wildland fires across the nation. However, because NICC is an "all-risk" coordination center, it also provides support in response to other emergencies such as floods, hurricanes and earthquakes. The NICC coordinates supplies and resources across the U.S., and provides support to incidents in foreign countries. The NICC is staffed jointly by BLM and USFS.⁶⁸ When activity warrants, NICC operates 24 hours a day, seven days a week.⁶⁹

The NICC uses a three-tiered coordination system to respond to wildland fires.⁷⁰ First, a wildland fire is initially managed by the local agency that has fire protection responsibility for that area.⁷¹ Engines, ground crews, smokejumpers, helicopters with water buckets, and air tankers may all be used for initial suppression. Various local agencies may work together, sharing personnel and equipment, to fight new fires and those that escape initial action. If a wildland fire grows to the point where local personnel and equipment cannot contain the fire, the responsible agency contacts one of the eleven Geographic Area Coordination Centers (GACC), which is the second tier response. The GACC will locate and dispatch

⁶⁷ See NIFC Multi-Agency Coordinating Group at <http://www.nifc.gov/nifcmiss.html>.

⁶⁸ See COMFORSCOM Func Plan 2501-00, *supra* note 60, at App. 27, para. 1c (1).

⁶⁹ See NICC Organization at <http://www.nifc.gov/nifctour/nicc.html>.

⁷⁰ See NICC Coordination System at <http://www.nifc.gov/nifctour/nicc.html>.

⁷¹ See NICC Geographic Area Coordination Centers at <http://www.nifc.gov/fireinfo/geomap.html>.

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, Vol. II, App.8-13, *NIFC Area Coordination Centers*.

The NIFC can request DoD assistance in one of two ways.⁷² 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 the response is to an emergency under the Stafford Act, NIFC requests military assistance from FEMA, which coordinates with DOMS. DOMS notifies the supported CINC, 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 CINC.⁷³ 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.⁷⁴ For example, during the summer of 2000, ten states provided more than 1,500 NG Soldiers and airmen who served in SAD status.⁷⁵ 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

⁷² DoD 3025.1-M, *supra* note 60, para. B.3.a; MOU-USDA/DOI, *supra* note 60, at III. POLICY, paras. A-B.

⁷³ DoD 3025.1-M, *supra* note 60, para. B.3.d.

⁷⁴ This is distinguished from Title 32 and Title 10 status for NG personnel. See *infra* Chapter 10, Reserve Components.

⁷⁵ See DoD News Release, *More Troops Tabbed to Battle Montana Wildfires*, Aug. 23, 2000 at <http://www.defenselink.mil/briefings/>.

assistance from DoD. More than 4,600 active duty Soldiers, Marines and airmen were committed to augment federal and local firefighters and law enforcement officials. NIFC instituted a "Preparedness Level 5" indicating that all federal firefighting resources were fully committed.

The ANG and AFR use the USFS owned Modular Airborne Fire Fighting System (MAFFS), when requested, to assist with wildland firefighting during extreme conditions.⁷⁶ Congress established the MAFFS Program in the early 1970s as a wildland fire program, not a military program. The objective of the MAFFS program is to provide emergency capability to supplement the existing commercial air tanker support on wildfires. The NICC can activate the MAFFS when all other contract air tankers are committed, or are otherwise unable to meet requests for air operations. The request for MAFFS activation is approved by the national MAFFS liaison officer, who is the USFS director at NIFC. This request is then formally submitted to DOMS. Governors of states where NG MAFFS units are stationed may activate MAFFS missions within their state boundaries when covered by a memorandum of understanding with the USFS. In accordance with military requirements for initial qualification and recurrent training, MAFFS crews are trained every year with Forest Service national aviation operations personnel.

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)

⁷⁶ DoD 3025.1-M, *supra* note 60, 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 C-130 cargo/utility aircraft to be converted to wildland firefighting airtankers 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 airtanker pilots observe the accuracy of their retardant drops on the edge of the fire.

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.⁷⁷ 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).⁷⁸

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.⁷⁹ DOMS coordinates the DoD response in support of FEMA and the NCP.⁸⁰ 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

⁷⁷ FM 100-19, *supra* note 1, at 1-3.

⁷⁸ 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].

⁷⁹ FRP, *supra* note 24, at Emergency Support Function #10 Hazardous Materials Annex.

⁸⁰ 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].

of appropriate federal departments and agencies, including DoD.⁸¹ See DOPLAW Handbook, Vol. II, App. 8-5, *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 FRP 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.⁸² 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.⁸³

The RRTs provide regional planning and preparation before a pollution incident as well as coordination and advice after an incident occurs.⁸⁴ 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.⁸⁵

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

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

⁸² FRP, *supra* note 24, at ESF No. 10, *Relation to Existing Response under the NCP, the National Response System, and the National and Regional Response Teams*.

⁸³ NCP, *supra* note 79, at § 30.5, Definition.

⁸⁴ FRP, *supra* note 24, at ESF No. 10.

⁸⁵ *Id.*

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.⁸⁶

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.⁸⁷ Requests for assistance go through the White House Military Office or DoD Executive Secretary.⁸⁸

2. 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 DoDD 5160.54, *Critical Asset Assurance Program (CAAP)*, implements EO 12656 for DoD.⁹⁰ DoD policy is to identify assets vital to national defense mobilization, sustainment, and employment,⁹¹ and to assure the integrity, availability, survivability, and capability of these critical assets to support vital DoD missions.⁹² The heads of DoD components will identify assets critical to their operations.⁹³ The Defense Investigative Service, in

⁸⁶ National Response Center, "National Response System," at <http://www.nrc.uscg.mil/nrsinfo.htm>.

⁸⁷ 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).

⁸⁸ *Id.* para. 3.4.2

⁸⁹ EO 12656, *supra* note 3, at § 204.

⁹⁰ U.S. DEP'T OF DEFENSE, DIR. 5160.54, CRITICAL ASSET ASSURANCE PROGRAM (CAAP) (20 Jan. 1998) [hereinafter DoDD 5160.54] (Note: DoDD 5160.54 rescinded DoDD 5160.54, DoD KEY ASSET PROTECTION PROGRAM (KAPP)).

⁹¹ *Id.* para. 4.1.

⁹² *Id.* para. 1.2.

⁹³ *Id.* para. 5.7

conjunction with the appropriate DoD component, conducts surveys of nominated assets.⁹⁴ An overview of the DoD CAAP program is included at *Appendix 8-14, Critical Asset Assurance Program*. See also *Appendix 8-3, PDD-63*.

3. 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.⁹⁵ 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.⁹⁶ See DOPLAW Handbook, Vol. II, App.4-11, *EO 12656, Emergency Preparedness*. See also *Appendix 8-15, 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 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.⁹⁷ DoDD 3020.36 also requires the identification of alternate headquarters, emergency relocation sites, and other permanent facilities to be used during emergencies.⁹⁸

4. 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.⁹⁹ Army Regulation 75-14/OPNAVINST 8027.1E/ARF 136-8/MCO 8027.1B, *Interservice Responsibilities for*

⁹⁴ *Id.* para. 5.3.3.1.

⁹⁵ EO 12656, *supra* note 3, § 202.

⁹⁶ U.S. DEP'T OF DEFENSE, DIR. 3020.26, CONTINUITY OF OPERATIONS POLICY AND PLANNING, para. 4.1 (Oct. 1988).

⁹⁷ 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).

⁹⁸ *Id.*

⁹⁹ U.S. DEP'T OF ARMY, REG. 75-15, RESPONSIBILITIES AND PROCEDURES FOR EXPLOSIVE ORDNANCE, para. 1-7 (1 Nov. 1978). AR 75-15 does not apply to the Army Reserves or Army National Guard.

Explosive Ordnance Disposal, delineates EOD areas of responsibilities for the Army, Navy, Marine Corps, and Air Force.¹⁰⁰

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."¹⁰¹ It also includes providing "explosive ordnance disposal support to the Departments of Energy and Justice in the neutralization of improvised nuclear devices in accordance with current agreements and directives."¹⁰² 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.

¹⁰⁰ *Id.* paras. 1-1, 2-1. The Army has EOD responsibility on Army installations and on landmass areas not specifically assigned as the responsibility of the Navy, Marine Corps, or the Air Force. The Department of the Navy is responsible for: EOD activities on Navy installations; explosive ordnance in the physical possession of the Navy; in assigned operational areas; within the oceans and contiguous waters, up to the high water-mark of sea coasts, inlets, bays, harbors, and rivers; in any rivers, canals or enclosed bodies of water; and for the rendering safe and disposal of underwater explosive ordnance. The Department of the Air Force and the Marine Corps have EOD responsibility on their own installations, for explosive ordnance in their physical possession, and in assigned operational areas.

¹⁰¹ *Id.* para. 1-4.

¹⁰² *Id.*

E. COMMUNITY ASSISTANCE

The most frequently conducted domestic support operations involve community assistance.¹⁰³ 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.¹⁰⁴ 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,¹⁰⁵ may provide services to certain eligible youth and charitable organizations.¹⁰⁶ The eligible organizations are:

- Boy and Girl Scouts of America;
- Boys and Girls Clubs of America;
- Young Men's and Young Women's Christian Associations (YMCA/YWCA);
- Civil Air Patrol;
- U.S. Olympic Committee;
- Special Olympics;
- Campfire Boys and Girls;
- 4-H Clubs; and
- Police Athletic Leagues.¹⁰⁷

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

¹⁰³ FM 100-19, *supra* note 1, at 1-3.

¹⁰⁴ *Id.*

¹⁰⁵ 32 U.S.C. § 502.

¹⁰⁶ *Id.* § 508.

¹⁰⁷ *Id.* § 508(d).

assistance, and communications services. The Special Olympics are specifically authorized air transportation.¹⁰⁸

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.¹⁰⁹ 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.¹¹⁰

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.¹¹¹ See *Chapter 8, 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".¹¹² 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.¹¹³

¹⁰⁸ *Id.* § 508(b).

¹⁰⁹ *Id.* § 508(c).

¹¹⁰ *Id.* § 508(a).

¹¹¹ 10 U.S.C. § 2012(a).

¹¹² 32 U.S.C. § 509.

¹¹³ *Id.* § 509(a).

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.¹¹⁴ 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.¹¹⁵ Usually, the governor will delegate the establishment, organization and administration of the Program to the state Adjutant General (TAG).

The Challenge Program is not cost-free.¹¹⁶ 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.¹¹⁷ See DOPLAW Handbook, Vol. II, App. 8-16, *NG Domestic Program Costs*. 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.¹¹⁸

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).¹¹⁹ 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

¹¹⁴ *Id.* § 509(g).

¹¹⁵ *Id.* § 509(c).

¹¹⁶ *Id.* § 509(d).

¹¹⁷ *Id.* § 509(h).

¹¹⁸ *Id.* § 509(j).

¹¹⁹ *Id.* § 509(g).

other provision of law, relating to federal liability for tortious conduct of employees.¹²⁰

4. Additional Assistance Programs

FM 100-19 authorizes Army involvement in a wide variety of national assistance programs focusing on economic and social issues.¹²¹ 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.¹²²

¹²⁰ *Id.* § 509(h).

¹²¹ *See* FM 100-19, *supra* note 1, ch. 8.

¹²² *Id.*

CHAPTER 9
INTELLIGENCE OVERSIGHT AND INFORMATION HANDLING
DURING DOMESTIC AND DOMESTIC SUPPORT OPERATIONS

KEY REFERENCES FOR INTELLIGENCE OVERSIGHT:

- 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, PUBLIC LAW 108-458 [S. 2845] Dec. 17, 2004
- EO 12333 - U.S. Intelligence Activities, 4 Dec 81
- DoDI 5210.52 - Security Classification of Airborne Sensor Imagery and Imaging Systems, 18 May 1989
- DoDD 5240.1 - DoD Intelligence Activities, 25 Apr 88
- DoD 5240.1-R - Procedures Governing the Activities of DoD Intelligence Components That Affect U.S. Persons, Dec 82
- DIAR 50-30 - Security Classification of Airborne Sensor Imagery, 25 June 1997
- 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
- AFRPD 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 Department of the Navy, 21 Apr 05
- SECNAVINST 3850.2C - Department of the Navy Counterintelligence, 21 Jul 05
- MCWP 2-1 - Intelligence Operations, 10 Sep 03

- MCWP 2-14 - Counterintelligence, 13 Jul 04
- MCWP 2-x series on Intelligence

KEY REFERENCES FOR INFORMATION HANDLING:

- 5 U.S.C. §552a - The Privacy Act (as amended)
- DoDD 5400.11-R - DoD Privacy Program, Aug 83
- DoDD 5200.27 - Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense, 7 Jan 80

A. INTRODUCTION

The Department of Defense (DoD) has traditionally conducted limited domestic and domestic support operations. (Domestic operations are any military operation conducted in the U.S. where DOD is the lead federal agency. An example would be a homeland defense (HLD) operation. Domestic support operations specifically involve domestic support to civil authorities (DSCA).) Since the events of 9/11 and hurricane season 2006, DoD involvement in domestic and domestic support operations has grown. Domestic operations have increased as the government fights the war on terror and domestic support operations are on the rise due to the increase in natural disasters. The stand up of US Northern Command in 2002 established a combatant commander in charge of both HLD and DSCA.

The judge advocate's role is especially important during domestic and domestic support operations as the parameters under which DoD operates are different in the U.S. than they are overseas. For example, the lines between counterintelligence and force protection information are now blurred. Whereas one typically dealt with foreign information and the other domestic, both now involve elements of foreign and domestic information. Military commanders' need for information and intelligence within the homeland is on the rise – they expect force protection information and counterintelligence to be integrated into domestic and domestic support operations due to a heightened awareness of potential terrorist threats. These needs and expectations pose unique issues in the information and intelligence gathering arena. DoD intelligence components are subject to one set of rules referred to as intelligence oversight. Everyone else in DoD, except the MCIO's, are 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.

In light of today’s changing environment, commanders and their staffs should carefully consider the different rules when planning domestic and domestic support operations. This section examines the proper role of DoD intelligence components during these operations; the rules regarding the collection, retention, and dissemination of information about U.S. persons; and the Judge Advocate’s (JAs) responsibilities in this area.

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

DoD intelligence components¹ have traditionally had limited involvement in domestic and domestic support operations. There are two reasons for this. One, as mentioned before, until recently DoD itself has not typically conducted many domestic or domestic support operations. Two, when these types of operations have been conducted, the role of DoD

¹ DoD intelligence components are defined in DoD 5240.1 as all DoD Components conducting intelligence activities (defined as foreign intelligence or counterintelligence), including the following:

- a. The National Security Agency/Central Security Service (NSA/CSS).
- b. The Defense Intelligence Agency (DIA).
- c. The offices within the Department of Defense for the collection of specialized national foreign intelligence through reconnaissance programs.
- d. The Office of the Deputy Chief of Staff for Intelligence (ODCSINT), U.S. Army.
- e. The Office of Naval Intelligence (ONI).
- f. The Office of the Assistant Chief of Staff, Intelligence (OACSI), U.S. Air Force.
- g. Intelligence Division, U.S. Marine Corps.
- h. The Army Intelligence and Security Command (USAINSCOM).
- i. The Naval Intelligence Command (NIC). [No longer in existence]
- j. The Naval Security Group Command (NSGC).
- k. The Air Force Intelligence Agency (AFIA).
- l. The Electronic Security Command (ESC), U.S. Air Force.
- m. The counterintelligence elements of the Naval Security and Investigative Command (NSIC). [Now called the Naval Criminal Investigative Service (NCIS)]
- n. The counterintelligence elements of the Air Force Office of Special Investigations (AFOSI).
- o. The 650th Military Intelligence Group, Supreme Headquarters Allied Powers Europe (SHAPE).
- p. Other intelligence and counterintelligence organizations, staffs, and offices, or elements thereof, when used for foreign intelligence or counterintelligence purposes. The heads of such organizations, staffs, and offices, or elements thereof, shall, however, not be considered as heads of the DoD intelligence components for purposes of this Directive.

intelligence components has been limited due to its mission to conduct DoD “intelligence activities.”² Current DoD policy interpretation is that intelligence activities only include foreign intelligence (FI) and counterintelligence (CI).³ There is little need for FI or CI in a domestic support operation. And when FI or CI is needed for a domestic operation, the intelligence oversight rules limit what can be collected. Now that both of these operations have increased, there is a greater need for intelligence assets and capabilities.

DoD intelligence components are governed by four primary references. 50 U.S.C. § 401 et seq, The National Security Act of 1947 establishes a comprehensive program for national security and defines the roles and missions of the intelligence community and accountability for intelligence activities. Executive Order (EO) 12333, *United States Intelligence Activities*, lays out the goals and direction of the national intelligence effort, and describes the roles and responsibilities of the different elements of the US intelligence community.⁴ DoD Directive (DoDD) 5240.1, *DoD Intelligence Activities*,⁵ and DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that affect United States Persons*⁶ 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 collect, produce, and disseminate FI and CI. Implicit in this authorization, by the definition of FI and CI, is a requirement that such intelligence relate to the activities of international terrorists or, foreign powers, organizations, persons, and their

² DoD 5240.1

³ “*Foreign intelligence*” means information relating to the capabilities, intentions, and activities of foreign powers, organizations, or persons, but not including counterintelligence except for information on international terrorist activities. Exec. Order No. 12,333, U.S. Intelligence Activities, para. 3.4(d) (Dec. 4, 1981) [hereinafter EO 12333]. “*Counterintelligence*” means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, or persons, or international terrorist activities, but not including personnel, physical, document, or communications security programs. *Id.* para. 3.4(a).

⁴ *Id.*

⁵ U.S. DEP’T OF DEFENSE, DIR. 5240.1, DO D INTELLIGENCE ACTIVITIES (25 Apr. 1988) [hereinafter DoDD 5240.1].

⁶ DoD 5240.1-R, *supra* note 1.

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agents. Moreover, to the extent that DoD intelligence components are authorized to collect FI or CI within the United States, they may do so only in coordination with the Federal Bureau of Investigation (FBI), which has primary responsibility for intelligence collection within the United States.⁷

When DoD Intelligence Components are conducting FI or CI, the intelligence oversight (IO) rules apply. These rules govern the collection, retention, and dissemination of information concerning U.S. persons.⁸ A U.S. person includes many unincorporated associations and U.S. corporations (e.g., “Joe’s Diner”).⁹ Special emphasis is given to the protection of the constitutional rights and privacy of U.S. persons so the IO rules generally prohibit the acquisition of information concerning the domestic activities¹⁰ of any U.S. person.¹¹ In accordance with EO 12333, DoD has established IO rules in DoDD 5240.1 and DoD 5240.1-R, which apply to all DoD intelligence components.¹²

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.¹³ Procedures 2 through 4 provide the sole authority by which DoD components may collect, retain, and disseminate information concerning U.S. persons. Procedures 5-10 set forth the applicable guidance with respect to the use of certain collection

⁷EO 12333, *supra*, note 2, para 1.14(a); Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation (5 April 1979); and Supplement to 1979 FBI/DoD Memorandum of Understanding: Coordination of Counterintelligence Matters Between the FBI and DoD (20 June 1996).

⁸ Judge Advocates must read these authorities before advising a commander on the collection of information in a domestic support operation.

⁹ See note 5, *supra*, which contains the definition of a U.S. person.

¹⁰ “*Domestic activities*” refers to activities that take place within the United States that do not involve a significant connection with a foreign power, organization, or person. DoD 5240.1-R, Procedure 2, para. B3.

¹¹ “*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 2, para. 3.4(i).

¹² DoDD 5240.1, *supra* note 7, para. 2.3, does not apply to authorized law enforcement activities carried out by DoD intelligence components having a law enforcement mission.

¹³ *Id.* 4.2.1.

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. See also *Appendix 9-11, Policy Guidance for Intel Support in CONUS*.

In the absence of any foreign nexus, DoD intelligence components generally perform non-intelligence activities. A non-intelligence activity would be any activity that is conducted by or with a DoD Intelligence Component asset or capability, but which does not involve FI or CI. For example, the collection, retention, production, and dissemination of maps, terrain analysis, and damage assessments for a DSCA mission. When 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 for domestic operations or domestic support operations, 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.

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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 often needed when conducting domestic operations, especially 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 directive is very explicit and should be referred to when determining authority for this type of information.

D. JUDGE ADVOCATE RESPONSIBILITIES

Judge Advocates are responsible for the following: advising the commander and staff on all intelligence law and oversight matters within their purview; advising on the permissible acquisition and dissemination of information on non-DoD affiliated persons and organizations; recommending legally acceptable courses of action; establishing, in coordination with the Head Intelligence Officer (J-2/G-2/S-2/N-2) and the Inspector General (IG), an intelligence oversight program that helps ensure compliance with applicable law and policy; reviewing all intelligence plans, proposals, and concepts for legality and propriety; and training members of the command who are engaged in intelligence activities on all laws, policies, treaties, and agreements that apply to their activities.

In order to properly perform these duties, JAs advising commanders during domestic and domestic support operations 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

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requirement to report and investigate questionable activities and certain federal crimes.¹⁴ 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.

¹⁴ DoD 5240.1-R, *supra* note 1, at procedure 15.

CHAPTER 10.
**RESERVE COMPONENTS, NATIONAL GUARD, CIVIL AIR
PATROL, U.S. COAST GUARD - STATUS AND RELATIONSHIPS**

KEY REFERENCES

- DoDD 1205.18 - Full-Time Support (FTS) to the Reserve Components
- DoDD 1215.6 - Uniform Reserve, Training and Retirement Categories
- DoDD 1235.10 - Activation, Mobilization, and Demobilization of the Ready Reserve
- DoDI 1215.18 - Reserve Component Member Participation Requirements
- DoDI 1215.19 - Uniform Reserve, Training and Retirement Category Administration
- DoDD 5125.1 - Assistant Secretary of Defense for Reserve Affairs
- DoDD 6025.13 - Medical Quality Assurance (MQA) in the Military Health System (MHS)

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

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.

different types of duties that are authorized in particular personnel categories. The Assistant Secretary of Defense for Reserve Affairs (ASD(RA)), 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

³ U.S. DEP'T OF DEFENSE, DIR 5125.1, ASSISTANT SECRETARY OF DEFENSE FOR RESERVE AFFAIRS (2 Mar 1994) [hereinafter DoDD 5125.1].

⁴ See DOPLAW Handbook, Vol. II, App 10-1, 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 (1 Sept. 1994); 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).

The USAR's mission is to meet Department of the Army contingency operations and mobilization requirements.⁸ There are over 200,000 Soldiers in the USAR, most with Combat Support and Combat Service Support missions; these Soldiers are generally the most utilized of all the Reserve Components. Troop Program Unit, discussed in paragraph C.1.a.(1), below, train together to mobilize as units. The USAR is particularly suited for civil support missions, with 97 percent of the Army's Civil Affairs expertise. One of the missions performed solely by the USAR is Weapons of Mass Destruction (WMD) consequence management support provided by chemical 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

⁸ AR 140-1, *supra* note 6, 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

3. U. S. Naval Reserve (USNR)¹¹

The Naval Reserve is composed of both commissioned units (self-contained, deployable assets with both personnel and mission equipment and hardware) and augmentation units (non-hardware units that provide trained manpower to active Navy units). The USNR is a significant force multiplier for the Navy and Marine Corps and represents 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

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. 1001.20B, STANDARDIZED POLICY AND PROCEDURE FOR ACTIVE DUTY FOR SPECIAL WORKS (ADSW) AND ONE-YEAR RECALL PROGRAM (12 Jun. 2000); U.S. DEP'T OF NAVY, SEC'Y OF NAVY, INSTR. 1001.36A, UNIFORM TRAINING AND RETIREMENT CATEGORIES OF THE DEPARTMENT OF NAVY RESERVE COMPONENTS (9 Apr. 2002); U.S. DEP'T OF NAVY, SEC'Y OF NAVY, INSTR. 1200.1A, FULL-TIME SUPPORT PERSONNEL IN THE NAVAL AND MARINE CORPS RESERVE (30 Jan. 1998).

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).

The USCGR is the military RC of the USCG, an agency within the Department of Homeland Security. Under Title 14 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 than 30 days in any four-month period and not more than 60 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.

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 force or 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 12408.¹⁶ 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

¹⁴ 14 U.S.C. § 712.

¹⁵ 10 U.S.C. §§ 101(c), 10101.

¹⁶ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DoD DICTIONARY OF MILITARY TERMS (9 Jun. 2004) [hereinafter JP 1-02].

other words, guardsmen in a “state status” pursuant to Article I, Section 8, Clause 16 of the Constitution.¹⁷

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, i.e. members of the NGUS but not when they are on State Active Duty or Title 32 orders, statuses under state command and control. 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.¹⁸

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 status guard personnel always receive federal military retirement credit for the performance of duty. Similarly, Title 32 guard 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

¹⁷ See 10 U.S.C. § 101; 32 U.S.C. §§ 301, 307.

¹⁸ See DOPLAW Handbook, Vol. II, App. 10-2 for a comparison the National Guard in their different statuses.

In 1903, the organized militia (*i.e.*, the National Guard) was created.¹⁹ 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.²⁰ 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.²¹ 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.²²

c. Federal Missions

¹⁹ 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).

²⁰ National Defense Act of 1916, 64 Pub. L. 85, § § 69-73, 111. *See also* *Perpich*, 496 U.S. 334, 343-44.

²¹ National Guard Act of 1933, 73 Pub. L. 64, § 18. *See also* *Perpich*, 496 U.S. 334, 345-46.

²² 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.

Like the other RCs, ARNGUS/ANGUS²³ members and units augment the Armed Forces during wars or other conflicts. To become a NGUS member, the guardsman or unit must also be "federally recognized."²⁴ To be federally recognized, the guardsman or unit must meet prescribed federal

²³ When ANG members enter Title 10 active duty, they are transferred from their ANG units and assigned to the Air National Guard Readiness Center (ANGRC), either directly or to a detachment of the ANGRC created for the purpose of deploying forces in support of an active duty mission. The ANGRC is a Field Operating Agency (FOA) of HQ USAF that executes NGB policy for the ANG and ANGUS and exercises elements of command and control over ANGUS units and members. It is a Title 10 organization with a 32 U.S.C. § 104 commander appointed on G-series orders. The ANGRC commander, currently a brigadier general, also serves as the Deputy Director of the ANG Directorate and is on Title 10 orders. *See also* U.S. DEP'T OF AIR FORCE, INSTR. 10-402, MOBILIZATION PLANNING, para 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.

²⁴ 10 U.S.C. §§ 10105, 10111, 10503(7), 12201, 12211, 12212; 32 U.S.C. § 105(b).

standards.²⁵ 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.²⁶ The other way is pursuant to the power of Congress to call out the militia to enforce federal law, suppress insurrections, or repel invasions; under this authority the NG is “called” to duty as part of the militia of the United States.²⁷ Congress has given the President the authority to call the NG to active duty for these purposes.²⁸

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,²⁹ 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”).

(1) National Guard Bureau (NGB)

²⁵ 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).

²⁶ U.S. CONST. art. 1, § 8, cl. 12; *Perpich*, 496 U.S. at 334; 10 U.S.C. §§ 12301-12304.

²⁷ 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.

²⁸ 10 U.S.C. §§ 331-333.

²⁹ 32 U.S.C. § 708.

NGB, a statutory, joint bureau within DoD, serves as the NG channel of communications between the Army and Air Force and the 54 states and territories.³⁰ 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 Force guidance, prescribing and monitoring training discipline and requirements, and supervising and administering the budgets of the ARNG and ANG.³¹

The Chief, NGB, a lieutenant 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.³² 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.³³ The USPFO's staff provides supply, transportation, internal review, data

³⁰ 10 U.S.C. § 10501.

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

³² NATIONAL GUARD BUREAU, REG. 130-6/AIR FORCE NATIONAL GUARD INSTRUCTION 36-2, UNITED STATES PROPERTY AND FISCAL OFFICER APPOINTMENT, DUTIES AND RESPONSIBILITIES (17 Dec. 1999).

³³ 32 U.S.C. § 708(c).

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 Special Works (ADSW), in a Title 10 status to support the ANG and ARNG at federal headquarters levels.³⁴ As noted above, some “AGR” tours are also in a 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.³⁵ 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.³⁶

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

³⁴ 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).

³⁵ 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.

³⁶ U.S. DEP’T OF DEFENSE, INSTR. 1215.19, UNIFORM RESERVE, TRAINING AND RETIREMENT CATEGORY ADMINISTRATION, para. E.2.2 (12 Dec. 2000) [hereinafter DoDI 1215.19].

Forces during a time of war or national emergency.³⁷ 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

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 14 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.³⁸

(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.

³⁷ *Id.* para. E.2.2.1. 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.

³⁸ U.S. DEP'T OF DEFENSE, DIR. 1215.13, RESERVE COMPONENT MEMBER PARTICIPATION POLICY, para. 3.1 (14 Dec. 1995).

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.³⁹

(3) Active Guard and Reserve (AGR) Program

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

b. Individual Ready Reserve (IRR)

The IRR is a manpower pool of pre-trained individuals who have already served in Active Component units or in the Selected Reserve and have some part of their Military Service Obligation (MSO) remaining. Some members volunteer to remain in the IRR beyond their MSO or contractual obligation and participate in programs providing a variety of professional assignments and opportunities for earning retirement points and military benefits.⁴⁰ 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.⁴¹

2. Standby Reserve

The Standby Reserve consists of personnel who are maintaining their military affiliation without being in the Ready Reserve, but have been

³⁹ DoDI 1215.19, *supra* note 35, para. E2.2.1.1.5. The Army National Guard and the Air National Guard do not have IMA programs.

⁴⁰ *Id.* para. E2.2.1.2. 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.*

⁴¹ *Id.* The Air National Guard does not have an inactive status.

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.⁴²

3. Retired Reserve

This category consists of all Reserve personnel transferred to the Retired Reserve. These individuals may voluntarily train, with or without pay.⁴³ All members retired for having completed the requisite years of active duty service (Regular or Reserve), regardless of the retired list where assigned, may be ordered to active duty when required by the Secretary of the Military Department concerned.⁴⁴

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, contributory support, humanitarian operations, and at such other times as the national security may require. All training duty planned and performed by RC members should capitalize on RC capabilities to

⁴² *Id.* para. E2.2.1.3.1. 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.

⁴³ *Id.* para. E2.2.1.4. The Retired Reserve consists of the following retired categories: (1) Reserve members who have completed the requisite qualifying years creditable for non-regular retired pay and are receiving retired pay (at, or after, age 60); (2) those who have completed the requisite qualifying years creditable for non-regular retired pay and are not yet 60 years of age, or are age 60 and have not applied for non-regular retirement pay; (3) those members retired for physical disability; (4) members who have completed 20 years of service creditable for regular retired pay, or are 30-percent or more disabled and otherwise qualified; (5) Reserve members who have completed the requisite years of active service and are receiving regular retired or retainer pay (regular enlisted personnel of the Navy and Marine Corps with 20 to 30 years of active Military Service who are transferred to the Fleet Naval Reserve or the Fleet Marine Corps Reserve on retirement, until they have completed 30 years of total active and retired or retainer service, are not included in this category); and (6) Reserve members drawing retired pay for other than age, service requirements, or physical disability.

⁴⁴ 10 U.S.C. § 688.

accomplish operational requirements while maintaining their mission readiness for overseas and domestic operations.⁴⁵ Each military department has its own regulations and instructions that implement these training and support duties. Generally reservists perform either training or support.⁴⁶

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 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.⁴⁷

b. Inactive Duty for Training (IDT)

⁴⁵ DoDI 1215.19, *supra* note 35, para. 6.3. Combatant commanders have oversight responsibility for the training and readiness of assigned guard and reserve forces

⁴⁶ Reservists may perform inactive duty (ID), which is authorized duty other than for training performed by members of an RC not on active duty. It consists of Muster Duty to meet the continuous screening requirements established by 10 U.S.C. §10149, and Funeral Honors Duty (FHD). DoDI 1215.19, *supra* note 35, para. 6.2.3.

⁴⁷ U.S. DEP'T OF DEFENSE, DIR. 1215.6, UNIFORM RESERVE TRAINING AND RETIREMENT CATEGORIES, para. 4.3.2 (14 Mar. 1997) [hereinafter DoDD 1215.6]; DoDI 1215.19, *supra* note 35, para. 6.2.4.2.

This training is used to provide structured individual and unit training, or educational courses to RC members. It includes regularly scheduled training periods, additional training periods,⁴⁸ and equivalent training. It is funded by the Reserve Component.⁴⁹ IDT includes Initial Active Duty for Training (IADT), which provides basic military and technical skills training required for all enlisted accessions.⁵⁰

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.)

2. Support

RC members may be placed on Active Duty Other than for Training (ADOT), which includes the categories of active duty for special work (ADSW), Active Guard and Reserve (AGR) duty, and involuntary AD. Support may also be provided during FTNGD, discussed above.⁵¹

a. Active Duty for Special Work (ADSW)

⁴⁸ Additional IDT periods are for the use of drilling Reservists who are not military technicians. They include additional training periods (ATPs) for units, components of units, and individuals for accomplishing additional required training; additional flying and flight training periods (AFTPs) for primary aircrew members for conducting aircrew training and combat crew qualification training; and Readiness management periods (RMPs) to support the following functions in preparing units for training: the ongoing day-to-day operation of the unit, accomplishing unit administration, training preparation, support activities, and maintenance functions. DoDI 1215.19, *supra* note 35, para. 6.2.2.6.3.

⁴⁹ DoDD 1215.6, *supra* note 46, 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. DoDI 1215.19, *supra* note 35, para. 6.2.2.

⁵⁰ DoDI 1215.19, *supra* note 35, para. 6.5.4.1.4.

⁵¹ DoDD 1215.6, *supra* note 46, para. 4.4.

The purpose of ADSW is to provide the necessary skilled manpower assets to support existing or emerging requirements. Because the purpose of ADSW is to provide temporary support, these tours are normally limited to 139 days or fewer in one fiscal year.⁵² Services manage the program with their own directives.⁵³ ADSW 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. ADSW also may be funded by the RC to support RC functions.

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

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.

⁵² ADSW tours exceeding 180 days are accountable against active duty strengths. DoDI 1215.19, *supra* note 35, para. 6.2.4.3.1.2.

⁵³ See e.g., U.S. DEP'T OF ARMY, REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS (30 Jun. 1999).

⁵⁴ 10 U.S.C. § 101(d)(6)(A). Other statutes include 10 U.S.C. §§ 10211, 10302, 12310, and 12402.

⁵⁵ DoDI 1215.19, *supra* note 35, para. 6.2.4.3.3. See also 10 U.S.C. §§ 12301, 12302, 12304, and 14 U.S.C. § 712.

⁵⁶ 10 U.S.C. § 10216.

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 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

⁵⁷ U.S. DEP'T OF DEFENSE, DIR. 1235.10, ACTIVATION, MOBILIZATION, AND DEMOBILIZATION OF THE READY RESERVE, para. 4.1. (1 Jul. 1995) [hereinafter DoDD 1235.10].

⁵⁸ See generally *id.*; JOINT CHIEFS OF STAFF, JOINT PUB. 4-05, JOINT DOCTRINE FOR MOBILIZATION PLANNING (22 Jun. 1995).

⁵⁹ DoDD 1235.10, *supra* note 56; JP 1-02, *supra* note 15.

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 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.

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.

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 services. 14 U.S.C. § 1. The various functions of the Coast Guard include search and rescue, aids to navigation, administration of the merchant vessel safety laws, port safety, recreational boating safety, administration and enforcement of water pollution control laws, and general maritime law enforcement, drug interdiction, immigration, and fisheries.

In peacetime the Coast Guard operates as part of the Department of Homeland Security. 14 U.S.C. § 2. However, upon a declaration of war 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. 14 U.S.C. § 3. 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 service. 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" under Title 14. The Coast Guard does not require Title 10 authority to participate in the national defense of the United States.

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, a military service, and a branch of the armed forces of the United States, the Coast Guard has legal authority to conduct both Maritime Homeland Security Law Enforcement (MHLS) and Maritime Homeland Defense (MHL D) depending on the circumstances.

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

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.

(USNORTHCOM) and supported by other agencies, would take the lead in carrying out MHL D 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 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

⁶² 10 U.S.C. § 311.

⁶³ U.S. CONST. art. II, §2, cl. 1.

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.

provisional organizations pursuant to NGB Memorandum 10-5/38-101 until the Joint Staff approval cycle has been completed approving the Joint Table of Distribution. The joint HQs will replace the STARCs and ANG Headquarters in each state and any other joint headquarters currently existing in the states.

2. Title 32 Status

When performing duty pursuant to Title 32, U.S. Code, a National Guard member is under the command and control of the state but paid with Federal funds. The majority of ARNG Soldiers are traditional Guard personnel, sometimes referred to as "M-Day (Mobilization Day) Guardsmen" because of the weekend drills of inactive duty training (IDT) and annual training (AT). Each year, such NG Soldiers are required to perform 48 IDT drills and 15 days of AT. The operations of NG units in Title 32 status are controlled by the individual states, supplemented by funding from federal sources pursuant to federal regulations.⁶⁷ Federal recognition of NG units and associated funding is conditioned upon the unit 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

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

⁶⁸ 32 U.S.C. §§ 107-109.

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

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

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.

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.

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 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

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).

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).

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.

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. ADSW*⁸¹

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

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).

⁸⁰ 32 U.S.C. § 709.

⁸¹ Active duty for special work – previously described in Section D.2.a., above.

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 ADSW 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 civilian employees 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.”

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

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.

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.

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

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

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

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

⁸⁴ See also *Perpich 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.

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 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

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.

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

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.*

status.⁹⁶ Thus it is unclear if Title 32 guardsmen would receive FTCA coverage when treating civilians not otherwise entitled to military medical care. Moreover, if, as discussed earlier, National Guard personnel cannot perform operations in a Title 32 status, it is possible that such “operational” activities will not be within the scope of employment.

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.

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

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, which means 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.

F. 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-

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 56.

⁹⁸ See also U.S. DEP’T OF AIR FORCE, INSTR. 10-2701, ORGANIZATION AND FUNCTION OF THE CIVIL AIR PATROL (21 Dec. 2000); 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).

combat missions on behalf of DoD pursuant to statute and a Cooperative Agreement. The USAF provides policy and oversight of the CAP in its auxiliary status and can also provide personnel, logistical, and financial support and assistance. CAP missions are limited by internal and FAA regulations as well as by those statutes that restrict activities of military organizations (*e.g.* PCA). Missions accomplished by CAP in its auxiliary role normally include disaster relief, search and rescue and counter-drug, although changes to statutes, doctrine and policy are contemplated to better incorporate the CAP into the USNORTHCOM MACA force structure and thereby allow the CAP to become more active in a broader range of homeland security missions.

The CAP is organized into eight geographical regions and performs three primary programs: Emergency Services (assisting federal, state, and local agencies), aerospace education, and cadet education. Although the USAF has overall responsibility for the CAP when it performs search and rescue missions, the USA provides oversight for disaster relief missions.

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

G. 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 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.

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

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.

RESERVE COMPONENTS

RULES FOR USE OF FORCE FOR FEDERAL FORCES

CHAPTER 11. RULES FOR USE OF FORCE FOR FEDERAL FORCES DURING DOMESTIC OPERATIONS

KEY REFERENCES

- U.S. Constitution, Article II, Sections 1 (Executive Powers Clause), 2 (Commander in Chief Clause), and 3 (Execution of Laws Clause)
- IV Amend., U.S. Constitution
- V Amend., U.S. Constitution
- VIII Amend., U.S. Constitution
- 10 U.S.C. § 331, et seq - Insurrection Act
- 10 U.S.C. § 2310(c)
- 18 U.S.C. § 242
- 18 U.S.C. § 1385 - Posse Comitatus Act
- 50 U.S.C. § 2301 et seq - Defense Against WMD Act
- 50 U.S.C. §§ 2301-2367
- 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
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- AR 190-14, Use of Force for Law Enforcement and Security
- 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

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 within or outside the US and its territories, 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 both homeland defense missions and defense support to civil authorities missions. These rules do not apply to National Guard forces in either state active duty or Title 32 status. JAs should coordinate with their National Guard counterparts when operating in a joint environment for situational awareness of the rules 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).

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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 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.

Use of force practice is one of the few areas in which the legal competence of the JAs can potentially cause 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 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 are asked to train service members on domestic operational RUF or use of force policies for law enforcement and security operations. JAs are also assigned duties as a legal advisor to a unit executing domestic operations. JAs may also advise or review an investigation into an incident involving the use of force by a service member. Finally, JAs may be involved in civil or criminal proceedings for a use of force incident as a military trial counsel, military trial defense counsel, Special Assistant US Attorney, or as an Army attorney assisting in defensive federal litigation.

The most difficult use of force situation a JA might encounter is drafting or reviewing operational Rules for Use of Force. In most cases, these RUF would already be established 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?²
- What kind of interaction and exposure to the general public will your service members face?
- What training resources are available for pre-deployment RUF training?

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

² Judge Advocates should base their draft RUF and legal guidance on the worst case 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.

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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 to be issued firearms or other non-lethal weapons.³ Some argue that standard military firearms are not the ideal types of weapons for service members to employ in most domestic operations because standard military ammunition will over-penetrate the human body, therefore creating a serious threat to innocent bystanders.⁴

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

³ Army use of force policy advocates arming Soldiers with non-lethal equipment such as military police batons, OC pepper spray, and military working dogs.

⁴ See e.g., J.M. DiMAIO, GUNSHOT WOUNDS: PRACTICAL ASPECTS OF FIREARMS, BALLISTICS, AND FORENSIC TECHNIQUES at 145-46, 310 (CRC Press 1993). As discussed in the DiMaio text, military rounds are more likely to pass through the human body while causing less damage than expanding ammunition. Since a person will continue to shoot until the threat stops or ammunition is exhausted, it is common for shootings with military style full metal jacket (FMJ) ammunition to result in a much higher number of rounds expended. This is one of the factors that led to the high number of rounds fired by the NYPD officers involved in the shooting of West African immigrant, Amadou Diallou, 4 February 1999. In that case, four officers fired 41 rounds in approximately 4 seconds. The higher the number of rounds fired and passing through an attacker, the higher the risk to innocent bystanders.

firearms engagements at closer than 10 yards, or on how to defend oneself using bare hands. Finally, service members trained on unarmed combatives,⁵ must know which of these are deadly and 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.⁶ In addition, very few service members receive training on 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 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.⁷

⁵ U.S. DEP'T OF ARMY, FIELD MANUAL FM 3-24.150, COMBATIVES (18 Dec. 2002).

⁶ Military police and special operations Soldiers are probably the only general population in the Army that routinely learn and understand these rules.

⁷ 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 isn't, then the agent is free to consider other lesser alternatives. One demonstration of this danger is the "Tueller Drill." The drill demonstrates that a police officer reacting to an attack with an edged or impact weapon has to start the draw from a standard police holster before the attacker gets within seven yards in order to fire a shot before being cut or struck. This is based on an average time of 1.5 seconds to draw and fire two aimed shots. Then-Sergeant Dennis Tueller, Salt Lake City Police Department, introduced the concept of the "reactionary gap" in a 1983 article in S.W.A.T. Magazine. This article and its drills have become widely accepted throughout the use of force and law enforcement community. See Dennis Tueller, *How Close is Too Close?*, S.W.A.T. MAGAZINE, Mar. 1983 (available online at http://www.theppsc.org/Staff_VIEWS/Tueller/How.Close.htm).

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Reducing reaction time is a critical factor in saving a service member faced with an attack. Despite this factor, RUF drafters routinely add provisions to the RUF which will increase that reaction time. In fact, “Hick’s Law” is a psychological theory that quantifies this by showing that every response option the service member is required to consider in RUF proportionately increases the service member’s reaction time.⁸ One common law enforcement drill demonstrates this. The officer is directed to “issue a verbal warning if feasible without increasing the danger to the service member or innocent bystanders” before firing in self-defense. This drill can demonstrate that this common RUF requirement could delay a service member’s defensive response by up to 1.75 seconds.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 consider these reactions and effects when drafting the RUF. They 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 PERSONNEL TO USE 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.

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

⁸ There are even mathematic expressions that quantify this increase in "choice reaction time" or CRT.

⁹ This is especially important since this is a requirement imposed by policy, not by law.

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.

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 MACDIS operations (Military Assistance for Civilian Disturbances)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 seizures.¹⁷ The U.S. Supreme Court has described this standard as an objective measurement based on the facts and circumstances known to the

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.

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"

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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 properly 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 traditional RUF impose on our service members. Whether these are imposed as a result of a conscious decision to adopt conservative rules or through a mistaken belief that Federal law requires such rules is difficult to determine. Judge Advocates involved in drafting 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.

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).

One reason for overly restrictive RUF provisions is that JAs are mistaken in their understanding of the law. 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

Federal courts do not require that service members employ “minimum force necessary” or that they employ deadly force as only a “last resort.” The courts have generally held that the issue is solely whether deadly force was reasonably necessary. They have declined to impose a requirement to use minimum force.²³ Nor do they require the use of feasible lesser force alternatives to avoid the use of justified deadly force.²⁴

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*.²⁵ However, in defensive use of force there appears to be no such requirement in law. The SRUF do not require a verbal warning, but do apply a reasonability requirement, i.e., the force must be reasonable in intensity, duration and magnitude based on the totality of the circumstances.

3. Denial of Deadly Force in Self-Defense

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

²⁴ *E.g.*, *Deering v. Reich*, 183 F.3d 645, 652-53 (7th Cir. 1999).

²⁵ *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

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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 defense, however, JAs must ensure that service members, acting as part of a unit, understand that their individual right of self defense may be restricted. 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. RUF 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

Unit commanders always retain the inherent right and obligation to exercise unit self defense in response to hostile acts or demonstrated hostile intent. Unless otherwise directed by the unit commander, service members may use deadly force when it appears reasonably necessary against a hostile act or demonstrated hostile intent. Individual self defense is a subset of unit self defense and as such may be limited by the unit commander when an individual service member is acting as part of a unit. Unit self defense includes the defense of other DOD forces in the vicinity.

b. Defense of Others

Service members may use deadly force in defense of non-DOD persons in the vicinity, when directly related to the assigned mission.

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. Examples of such assets include nuclear weapons; nuclear command, control, and communication facilities; and designated restricted areas containing strategic operational assets, sensitive codes, or special access programs (SAP).²⁶

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. Examples include portable missiles, rockets, arms, ammunition, explosives, chemical agents, and special nuclear material. On-scene DOD commanders are authorized to classify property as inherently dangerous.

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.

6. Circumstances for use of deadly force

²⁶ *Id.* E2.1.2.3.2.

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When directly related to the assigned mission, deadly force may be used in the following circumstances:

a. Prevention of serious crime against persons

Service members may use deadly force when it appears reasonably necessary to prevent a serious crime involving imminent death or serious bodily harm (hereinafter referred to in this chapter as “serious crime”). Examples of such crimes include murder, armed robbery, aggravated assault, arson of an inhabited dwelling or structure, or “sniping.” Serious crime is a critical term to the definition of a number of the following authorities to use deadly force.

b. Escape

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 offense

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

Unit commanders may augment the SRUF as necessary by submitting a request for mission-specific RUF to the Chairman, Joint Chiefs of Staff for SecDef approval. Unit commanders may also restrict mission-specific RUF approved by SecDef. However, SecDef must be notified of any restrictions placed on SecDef approved RUF through the Joint Staff.

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 and the execution of domestic operations 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*.²⁷ In fact, one reported Supreme Court *Bivens* case involves an Army Soldier and use of force against a civilian.²⁸

a. A critical element in defensive Federal litigation in use of force cases is the application of Qualified Immunity

Litigators should understand that this immunity is a critical pre-trial measure to forestall unnecessary burdens on the government and its representatives and can serve as a bar to trial.

²⁷ 403 U.S. 388 (1971).

²⁸ *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.

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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 liability has also been extended to apply to supervisors. Supervisors and those who are involved in the use of force policy and training decisions 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.²⁹ Fortunately, *Bivens* cases have not yet established such supervisory liability for leaders and legal advisors.

2. Federal Criminal Liability

Service members could be held criminally liable for unconstitutional or illegal use of force. 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.³⁰

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.³¹

²⁹ 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.

³⁰ 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.

³¹ *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.

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 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.³² 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,³³ Air Force Instruction 51-301, Civil Litigation,³⁴ Navy Instruction 5800.7D, and Manual of the Judge Advocate General (JAGMAN)³⁵ outlines Service

³² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2002).

³³ U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION (19 Sep. 1994).

³⁴ U.S. DEP'T OF AIR FORCE, INSTR. 51-301, CIVIL LITIGATION (1 Jul. 2002).

³⁵ 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)

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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.

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.³⁶

G. COMMON ISSUES IN DRAFTING RUF

When domestic operations planning and execution occur, JAs are often called upon to 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 we send in potentially dangerous situations. Judge Advocates often adopt an extremely conservative approach in an effort to prevent an unfortunate confrontation between service members and civilians. This approach can increase the danger to all by making it difficult for service members to defend themselves in a manner that quickly

³⁶ 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.

eliminates or prevents an evolving threat situation. In striking this balance JAs must know the controlling law in order to make reasoned decisions about how to advise commanders and RUF drafters. RUF practitioners should carefully consider how they structure the following kinds of provisions.

1. Requirements to Use "Minimum Force Necessary"

As discussed above, Federal use of force law does not require the use of minimum force or force as a last resort. The law only requires that deadly force must be objectively reasonable.

2. Warning Shots

The SRUF prohibit warning shots within the US and its territories. An exception applies for force protection of US Navy and Naval Service vessels. See Enclosure M, CJCSI 3121.01B.

3. Rules Requiring Existence of a Precondition rather than a "Reasonable Belief" of a Fact

Sometimes, sloppy draftsmanship can result in a duty to observe an actual threat rather than allowing for a reasonable perception of a threat. This can rob the service member of a legal defense of mistake of fact that is recognized by Federal decisional law. The court could potentially impose the higher duty standard because the Army has imposed the standard in the RUF.

4. Mandatory Verbal Warnings

As discussed above, Federal law only requires verbal warnings in fleeing felon use of force incidents. The SRUF has no such requirement, but does include a de-escalation provision. When time and circumstances permit, the threatening force should be warned and given the opportunity to withdraw or cease threatening actions.

5. Duty to Retreat

As discussed above, this can be imposed expressly, or it can be inadvertently imposed by limiting the service member's use of defensive

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force to that authorized by the State law of self defense. The RUF should make to reference to State law. The SRUF provides the guidance on the use of force.

6. Denial of Right to Use Deadly Force in Self-Defense

Some poorly drafted RUF have even prohibited service members from using deadly force to defend themselves against deadly force threats and attacks.

RULES FOR THE USE OF FORCE NATIONAL GUARD OPERATIONS

CHAPTER 12. RULES FOR THE USE OF FORCE IN DOMESTIC NATIONAL GUARD OPERATIONS

KEY REFERENCES

- 10 U.S.C. Chapter 15 - Insurrection Act
- 18 U.S.C. § 1385 - The Posse Comitatus Act (PCA)
- 28 U.S.C. §§ 1346, 2671 - 2680 Federal Tort Claims Act
- 32 U.S.C. § 502 - Required drills and field exercises
- NGR 500-1 - Military Support to Civil Authorities
- Emergency Management Assistance Compact (EMAC)

A. INTRODUCTION

The National Guard is at all times, except when called or ordered to federal active duty,¹ a state² government entity.³ Nowhere is the effect of this Constitutionally-derived⁴ status greater in domestic National Guard operations than in National Guard rules for the use of force (RUF).⁵ The policies of the Department of Defense and service regulations governing

¹ Members of the National Guard are called to duty under 10 U.S.C. §§ 331-333 and are ordered to duty under 10 U.S.C. §§ 12301-12304.

² “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.

³ *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

⁴ The National Guard, recognized as the “militia” in the U.S. Constitution, 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. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter SROE] or the draft federal Standing Rules for the Use of Force for U.S. Forces (SRUF), CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (draft 8 Aug. 2003) [hereinafter draft SRUF]. References in this Chapter to the SRUF are to the 8 Aug. 2003 draft of the SRUF.

RUF apply to elements of that Department but not to the states.⁶ As a result, the law that is the basis for the RUF applicable to the National Guard of a state while in any status but federal active duty status is the criminal law of the state in which a National Guard unit is located.⁷ It is the drafting and application of state National Guard RUF, derived from state law and National Guard policy,⁸ which is the subject of this chapter.⁹

B. RUF AND STATE CRIMINAL LAWS

1. State Law Applicable to Both Title 32 and SAD Statuses

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.,” U.S. DEP'T OF ARMY, REG. 500-50, CIVIL DISTURBANCES (21 Apr. 1972) applies to “the Department of the Army;” U.S. DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT (1 July 1983) applies to the “Active Army and the Army National Guard (in Federalized status)” and U.S. DEP'T OF ARMY, REG. 525-13, ANTITERRORISM (1 Apr. 2002) [hereinafter AR 525-13] applies to the Active Army and “the Army National Guard of the United States (ARNGUS).”

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 also applies as well 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 In at least one case, National Guard policy states that use of force is governed by state law. See U.S. DEP'T OF ARMY, NATIONAL GUARD REG. 500-1, MILITARY SUPPORT TO CIVIL AUTHORITIES, para. 4-6 (1 Feb. 1996) [hereinafter NGR 500-1]. This paragraph also provides minimum rules for the use of force as a condition of using federally owned equipment. Under those provisions, states may impose more but not less restrictive RUF. These minimum RUF for civil disturbance missions are also repeated in the National Guard Bureau Civil Disturbance Handbook, see U.S. DEP'TS OF ARMY AND AIR FORCE, NATIONAL GUARD BUREAU, NATIONAL GUARD CIVIL DISTURBANCE HANDBOOK, para. 3-2 (1 Feb. 1996) [hereinafter NGB Civil Disturbance Handbook].

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 3.

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Most National Guard operations in support of civil authorities are in support of *state* civil authorities and are undertaken on a state-funded status basis, usually referred to as “state active duty” (SAD) status.¹⁰ These types of operations include relief from natural disasters, quelling of or providing security during civil disturbances, and assistance to civil authorities during other state emergencies, such as strikes at state institutions. The notable operational exceptions to the norm of performing support to civil authorities in SAD status are, and have been, innovative readiness training, discussed in Chapter 7, operations in support of the Olympic Games,¹¹ and the 2001-2002 National Guard airport security mission (hereinafter airport security mission), in which thousands of National Guard personnel provided additional security at hundreds of civilian airports at the request of President Bush following the 11 September 2001 terrorist attacks on the World Trade Center and the Pentagon.¹² Both the Olympic Games missions and the airport security mission were undertaken in a Title 32 status.¹³ As explained

¹⁰ State active duty [SAD] status is 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.

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 to the Governors. National Guard operations as “other duty” under 32 U.S.C. § 502(f) has not, to this author's knowledge, been used before and is not a duty status likely to be used for anything but extraordinary circumstances, requiring approval at the secretarial level, in the future.

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 (STARAC), 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) (“armory security people were in a Title 32 status for the majority of the time”).

Not discussed in this chapter are National Guard operations performed in support of civil authorities while in a federal active duty status. An example of such a task would be border a security mission in which National Guard units were ordered to active duty under 10 U.S.C. §12302 to support federal civil authorities along the U.S. borders with Canada and Mexico. The missions in which National Guard personnel serve in a federal active duty status are governed by federal law and policy.

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.

in detail in Chapter 10, both SAD and Title 32 statuses are non-federal statuses, to which state law applies.¹⁴ As such, each state had to take into account its criminal laws when drafting RUF for the Title 32 Olympic Games missions and the airport security mission, the difference being only that in the case of the two Olympic Games missions¹⁵, each mission was executed entirely within one state, while the airport security mission was executed in nearly all of the 54 National Guard jurisdictions.¹⁶ In the case of the airport security mission, over 50 different RUF were used. Although most RUF addressed similar subjects, the specific implementation of these subject areas varied from state to state.¹⁷ Examples of state RUF referred to throughout this chapter are, unless otherwise indicated, the RUF of the airport security mission.

2. Subjects For Inclusion in State RUF for the National Guard

Regardless of whether a state National Guard mission utilizing RUF, usually in support of civil authorities, is executed in a Title 32 or SAD status, the subjects appropriate for National Guard state RUF are derived from the mission operation plan or operation order [hereinafter OPLAN/OPORDER].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 such as the defender's home or work place. The RUF also covers 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 detail of

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 state status National Guard officers and was kept distinct from the command authority of any active Army federal support element.

¹⁷ In 2003, the Counterdrug and Operational Law Team of the Chief Counsel's Office, National Guard Bureau, collected and reviewed virtually all of the state RUF used in the airport security mission. All these RUF are retained by that office in both paper and electronic format.

¹⁸ For a list of those subjects to be included in an operation plan or operation order (OPLAN/OPORDER) for civil disturbance operations, see NGB Civil Disturbance Handbook, *supra* note 8, at para. 5-3e.

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these basic RUF subjects are included in all National Guard RUF is mission-dependent.¹⁹

A lesson learned by Judge Advocates (JAs) assigned to the State Area Command (STARC), New York Army National Guard, during the 11 September 2001 terrorist attacks and consequence management was that state standing RUF for domestic operations must be developed and trained prior to real-world missions. Prior to 11 September, the NYARNG had a Domestic Emergency Standard Operating Procedure (DESOP), but it did not contain a RUF; likewise, a RUF was absent from the initial OORDER.²⁰

Included as Appendix 12-7 is a list of both basic RUF subjects and those RUF subjects appropriate for National Guard law enforcement, law enforcement support, and security missions. This list was developed from those subjects addressed by the states in the RUF used for the airport security mission. Some of the possible basic and mission-dependent RUF for law enforcement, law enforcement support, or security missions taken from that list are discussed below.

a. Subjects Appropriate for Inclusion in All RUF

(1) Approval of Changes to RUF

An important element appropriate for inclusion in virtually all state National Guard RUF is a statement as to the authority of commanders of subordinate elements to change the RUF. If the authority to change the RUF is to be allowed, the “authority to change” paragraph should state which part(s) of the RUF may be changed, in what manner they may be changed, and by whom. Usually, if authority to change the RUF is denied, change is still allowed upon approval of either the Adjutant General or task force commander, or by granting subordinate elements the authority only to make the RUF more restrictive. If authority to change the RUF is wholly denied, that should be made clear in the change paragraph.

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.

²⁰ NYARNG Transcript, *supra* note 12, at 185.

(2) Right of Self-Defense

Another element appropriate for inclusion in all RUF, even for unarmed security missions during or after a wide spread natural disaster, is the right to exercise reasonable and necessary force in self defense. Inclusion is appropriate because that right, in a manner similar to the SROE and the SRUF,²¹ is not waived or lost for an SAD or Title 32 mission where RUF are appropriate.²² Mission analysis²³ and state law²⁴ 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.²⁵ Unfortunately, the Adjutant General had not promulgated such regulations. Therefore, the JAs drafted Department of Military and Naval Affairs (DMNA) Regulation 27-13, Carrying of Firearms and Use of Force, which was approved by the Governor’s Counsel Office on 29 September 2001.²⁶

²¹ See SROE and draft 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.

²² The SROE and the draft SRUF, *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.

²³ 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.

²⁴ 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.

²⁵ N.Y. LAWS § 265-20

²⁶ NYARNG Transcript, *supra* note 12, at 51.

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The RUF must also address such state law topics as the right to defend others,²⁷ the duty to retreat doctrine,²⁸ the use of deadly force to prevent escapes,²⁹ whether a warning must be given before the employment of deadly force in self defense,³⁰ whether proportionality is required of the defender,³¹ and whether the place where the right of self defense is exercised makes any legal difference.³²

(3) Special Orders

Many states writing RUF for the airport security mission included such matters as: training (including training scenarios), military bearing and appearance, immunity, standards of conduct and treatment of civilians, safety, referral of news media personnel to National Guard public affairs, discussion of the mission with others, and handling of suspicious persons, vehicles, and activities. While many states did not include all or even any of these topics in the RUF for the airport security mission, these subjects are nevertheless important for some types of missions. Whether to include them in the RUF or directly in the mission OPLAN/OPORD is determined by the state Adjutant General or task force commander.

²⁷ 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).

²⁸ In the airport security mission RUF, several states included the necessity to retreat in the RUF because retreat was required by state law. *See, e.g.*, Connecticut airport security mission RUF para. IIIC(b) and CONN. GEN. STAT. § 53a-19(b).

²⁹ 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).

³⁰ 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.

³¹ 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.

³² 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.

b. Role of State Law Generally in Determining Law Enforcement, Law Enforcement Support, and Security Mission RUF

There are certainly variations between the states in the National Guard's authority to take actions requiring use of force in a law enforcement,³³ law enforcement support,³⁴ or security operation. For example, some states by statute give the National Guard all the authority of peace officers.³⁵ In other states, the National Guard has only those peace officer-type powers enjoyed by the population at large.³⁶ Other states take a middle position and provide that the National Guard has specific peace officer authority only in specified situations.³⁷ Depending upon the language of the state statutes involved, these grants of or limitations on the National Guard's authority to act as peace officers may apply to National Guard personnel conducting operations in a Title 32 status, an SAD status, or both.³⁸ Regardless, the National Guard JA must participate in the effort to

³³ 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.

³⁴ Law enforcement support for the purposes of the National Guard is usually taken to mean assistance provided to civilian law enforcement agencies at their direction or request. It may mean something else for the purposes of the application of the PCA to active duty federal military forces.

³⁵ 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).

³⁶ *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, that provision was not used because to be designated as peace officers the Act also required a lengthy training period. *See* NYARNG Transcript, *supra* note 12, at 52.

³⁷ *See, e.g.,* GA. CODE ANN. § 38-2-6 to 38-2-6.1.

³⁸ 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

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tailor the RUF to the particular mission and the policies of the state Adjutant General, even if those needs and policies dictate a more restrictive RUF than is actually allowed by state law.³⁹

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.⁴⁰ 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 or OPORD should expressly so state and deny the use of force for the specified purpose. Conversely, if National Guard personnel are to be allowed to take some law enforcement-type actions in 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 state that right and then address the degree of force, if any, that is authorized for National Guard personnel in taking those law enforcement-type actions for mission accomplishment, self defense, or both.

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.”

³⁹ 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).

⁴⁰ For civil disturbance support operations, the use of force is governed by NGR 500-1, which provides that U.S. DEP’T OF ARMY, FIELD MANUAL 19-15, CIVIL DISTURBANCES (25 Nov. 1985) is to be used “as a guide.” *See* NGR 500-1, *supra* note 8, para. 4-6 (specifying minimum RUF as a condition for use of federal property, for “civil disturbance” missions, as defined in §II of App. E). Some states used the language and format of those minimum RUF for the purposes of the airport security mission even though they did not technically apply.

For example, if a law enforcement support or security mission includes guarding certain buildings or real property, the RUF must then address whether persons entering or leaving the property may be detained and questioned or searched by National Guard personnel. If that detention and questioning and/or search is authorized, even as a last resort when civilian law enforcement personnel are unavailable, then the RUF must state whether force may be used to enforce that detention and questioning and/or search. If force is authorized, the RUF must then state whether that force includes only non-deadly force or both non-deadly and deadly force. If detention, questioning, and/or searching is not allowed, or if those measures are allowed but supporting measures of force are not authorized, the RUF must clearly so state, in order that National Guard personnel do not have to determine for themselves whether to stop, question and/or search, or to use deadly or non-deadly force to enforce a request to stop and question and/or submit to the search.

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.⁴¹ 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 a lack of understanding may have legal consequences. In the airport security mission, for example, state RUF cumulatively defined the following terms (among others): 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;

⁴¹ 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.

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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 offensive or defensive weapons with the capability to kill or severely injure another are to be issued for the mission, then the RUF must provide for positive control by experienced NCOs or officers. This control includes the employment of the firearms and ammunition or other weapons. One method to exercise this control is to specify how Soldiers will carry their weapons, ammunition, and other ancillary equipment. This control can be expressed through arming orders, a technique often adopted from the DoD Civil Disturbance OPLAN (GARDEN PLOT). 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 are to be carried and where ammunition is to be kept at hand, 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 are to be issued to the National Guard personnel for the purposes of mission accomplishment or self defense.⁴² Below is an example of arming orders, including firearms as well as other weapons, used by the Indiana National Guard for the airport security mission.

⁴² 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 servicemembers 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.

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

* Leave safety on until ready to fire

(4) THREATCON Levels Matched to RUF

Several states adopted RUF for the airport security mission in which the level of force authorized for mission accomplishment by National Guard personnel was dependent upon the threat condition or THREATCON⁴³ presented at a facility or on a particular day.⁴⁴ One way to make RUF dependent upon THREATCON level is through use of arming orders in which the arming order number (condition of readiness of the firearm or other weapon) is dependent upon the THREATCON then in effect.⁴⁵

⁴³ 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) and AR 525-13, *supra* note 6. These regulations, however, are not applicable to the Army National Guard in an SAD or Title 32 status.

⁴⁴ 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.

⁴⁵ The THREATCON levels provided in NGBP 190-1/ANGP 208-2, *supra* note 43, provide for increased security measures depending on the particular THREATCON level then in effect. See *id.* App. A, paras. A-7 to A-10.

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(5) Special Orders

There are other subjects appropriate for inclusion in National Guard RUF for law enforcement, law enforcement support, or security missions that directly or indirectly concern use of force. The relationship of National Guard personnel to civilian law enforcement personnel,⁴⁶ taking action at the direction of civilian law enforcement,⁴⁷ defense of others, pursuit of suspects, retention of evidence,⁴⁸ use of restraints, reports of firearm discharge,⁴⁹ 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 Cross Border Operations

National Guard forces have for many years crossed state borders for both training in a Title 32 status for their federal mission and for assisting, in an SAD status, neighboring states in natural disaster-type operations. Many of those cross-border operations, especially training missions, have no doubt involved units with side arms and even large crew-served weapons. Of course, this long-followed practice of state border crossing does not make

⁴⁶ 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, para. 4-6d, 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.

⁴⁷ Acting at the direction of federal personnel, such as Transportation Security Administration or Federal Aviation Authority personnel, will help support the argument that National Guard members are shielded by federal Supremacy Clause immunity from state criminal charges. *See* text *infra*, subparagraph C.2.; *also see*, *West Virginia v. Laing*, 133 F. 887 (4th Cir. 1904) and *James River Apartments, Inc. v. Federal Hous. Admin.*, 136 F. Supp. 24 (D. Md. 1955), in which persons who otherwise had no federal or other governmental status were given federal Supremacy Clause immunity by judicial opinion because they acted at the behest of federal officials. Another benefit of taking law enforcement-type action only at the express request or direction of law enforcement personnel may be that National Guard members are in those cases provided with state immunity from civil or criminal prosecution. *See, e.g.*, UTAH CODE ANN. § 76-2-404 and CONN. GEN. STAT. § 53a-22(d)-(e).

⁴⁸ DA Form 3316R (Detainee Turnover Record) may be used to inventory items taken from detainees.

⁴⁹ ARNG Airport Security Instruction, *supra* note 46, 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.

any such border crossing lawful. There are, in fact, legal impediments in some states that suggest the opposite. For example, Section 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.” In these examples, the Montana Constitution section could be read to preclude entry into that state of armed National Guard personnel from another state to assist in providing security during or following a large-scale natural disaster. The Texas provision could be read to prohibit National Guard forces from other states from entering Texas for training for their federal mission at a state or Federally-owned maneuver training reservation without approval of the governor.

If there are no Federal military regulations with the force and effect of law making such a border crossing lawful,⁵⁰ then any state law such as the Montana or Texas provisions referred to above may control that crossing and, depending upon the breadth of the proscription, its impact may be beyond the arming of the force.⁵¹ Federal Supremacy Clause immunity⁵² 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 may be successfully used as a defense to a violation of a statute like the Texas statute requiring approval of the governor, then State RUF would not appear to be an issue in cross-border operations (unless the RUF themselves are unconstitutional),⁵³ except for those operations undertaken in an SAD status.⁵⁴

⁵⁰ The author has searched for Army regulations and National Guard regulations explicitly requiring or allowing federally-funded cross-border training missions but has found no such regulations. Some regulations governing training of National Guard units at the Combat Training Centers assume that a National Guard unit from one state may cross a state border for the purposes of federal training missions, but those regulations do not themselves specifically authorize or require that crossing. *See, e.g.*, DEP’T OF ARMY, REG. 350-50, COMBAT TRAINING CENTER PROGRAM (24 Jan. 2003).

⁵¹ The Texas statute cited in the text, unlike the Montana Constitutional provision, makes no reference to arms or weapons and would therefore seem to prohibit any “military force,” armed or not, from entering Texas without the approval of the Governor.

⁵² *See text infra* subparagraph C.2.

⁵³ For an example of unconstitutional RUF, *see Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997).

⁵⁴ 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,

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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.⁵⁵ 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).⁵⁶ 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.⁵⁷

EMAC, like all Congressionally-approved interstate compacts, now has the status of Federal law⁵⁸ and is applied in the same manner as Federal statute.⁵⁹ 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,⁶⁰ but also that any peace officer powers (and the attendant use of force to enforce those

supra note 13, para. 2-1a(9), and federal Supremacy Clause, immunity may be available to protect that mission or part of that mission.

⁵⁵ 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.

⁵⁶ 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 servicemembers from other states. NYARNG Transcript, *supra* note 12, at 35-6.

⁵⁷ 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].

⁵⁸ *See, e.g.*, Texas v. New Mexico, 462 U.S. 554 (1983).

⁵⁹ *See, e.g.*, Skamania County v. Woodall, 16 P.3d 701 (Wash. 2001).

⁶⁰ 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.

powers) granted by the requesting state's statutes only to the National Guard forces of that state⁶¹ may be granted to the National Guard forces of the sending state by the use of one or more EMAC supplemental agreements.⁶²

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.⁶³ This provision is untested in the courts⁶⁴ but its apparent intent is to apply the PCA to National Guard operations, by denying the use of EMAC to the National Guard⁶⁵ in situations where the PCA would prevent the active components of the Army and Air Force from providing direct law enforcement services. Under most situations, this proscription will have little impact on National Guard cross border operations and the RUF because National Guard activities are usually limited to providing law enforcement support to civil authorities, rather than providing direct law enforcement service.⁶⁶ National Guard JAs should be mindful of this limitation, however,

⁶¹ See ARK. CODE ANN. §12-61-112(a).

⁶² 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 56, 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.

⁶³ *See* EMAC, *supra* note 56, 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”).

⁶⁴ 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.

⁶⁵ 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.

⁶⁶ *See* NGR 500-1, *supra* note 8, para. 2-2. The National Guard instruction governing the airport security mission contemplated cross border operations but provided that National Guard forces were not to

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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.⁶⁷ 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 mission⁶⁸ and in the context of National Guard personnel in both a Title 32 federal training state status under state RUF⁶⁹ and in an SAD status for the purposes of a state emergency under state RUF. As previously discussed at the beginning of this chapter, state criminal law and therefore state RUF apply to both missions in a Title 32 and in an SAD status. 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.⁷⁰

a. Active Duty Federal Mission

Although the early history of the doctrine of federal Supremacy Clause immunity⁷¹ began somewhat before the case was decided,⁷² 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

participate in law enforcement operations unless in exigent circumstances. ARNG Airport Security Mission Instruction, *supra* note 46, paras. 2-1e, 2-8.

⁶⁷ See, e.g., Airport security mission RUF for the states of Nevada, New Jersey, and New York (on file with CLAMO).

⁶⁸ 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.

⁶⁹ This was the case in the airport security mission.

⁷⁰ 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.

⁷¹ See U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

⁷² A U.S. Supreme Court case predating *Neagle* is *Tennessee v. Davis*, 100 U.S. 257 (1880).

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,⁷³ defamation,⁷⁴ assault,⁷⁵ and murder in the course of guarding prisoners of the U.S. Army.⁷⁶ 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.⁷⁷

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 this case for the killing of an innocent bystander. In *United States v. Lipsett*, 156 F. 65 (W.D. Mich. 1907), the court examined the manual of guard duty used for training and controlling the duties of military guards assigned to military prisoners. The Court found that under the language of the manual, it was the duty of the guard to

⁷³ *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).

⁷⁴ *Howard v. Sikula*, 627 F. Supp. 497 (S.D. Ohio 1986).

⁷⁵ *Lima v. Lawler*, 63 F. Supp. 446 (E.D. Va. 1945) and *Commonwealth v. Johnson*, 297 F.Supp. 877 (W.D. Pa. 1969).

⁷⁶ *In re Fair*, 100 F. 149 (C.C.D. Neb. 1900) and *United States v. Lipsett*, 156 F. 65 (W.D. Mich. 1907).

⁷⁷ 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).

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respond to an attempted escape by first calling for the escapee to halt and, if the escapee did not halt, it was then the guard's duty to fire upon the escaping prisoner.⁷⁸ In this case, a conviction for manslaughter of the innocent bystander was prevented by the federal court, based largely upon the court's understanding of the guard's federal duties to shoot at the escaping prisoner if there was no other way to prevent the escape, as prescribed in the manual of guard duty.

The only reported case found involving federal RUF denominated as such is a non-military civil case involving the RUF used by the FBI in the shootings and stand off 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's duties be found in a proper case to have denied the victim's 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

Discussed at the beginning of this chapter was the fact that National Guard personnel in a Federal training or "other duty" status under 32 U.S.C. 502 are, under the rationale of *Perpich*,⁷⁹ a state military force and their RUF are derived from the application of state criminal and civil law to their military mission. Under this analysis, the best defense to the possibility of a *state* criminal charge⁸⁰ for violation of *state* criminal law in the course of compliance with *state* RUF are any or all of the following:

- A state statute providing *criminal* immunity for National Guard personnel.⁸¹

⁷⁸ *Lipsett*, *supra* note 76, at 68.

⁷⁹ *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

⁸⁰ 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.

⁸¹ 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. LAW § 235. *See also*, NEV. REV. STAT. 412.154(1). In the case of the

- An agreement with the State Attorney General (possibly at the time the state Attorney General gives any approval of the RUF⁸²) that National Guard personnel will not be prosecuted criminally for good faith compliance with the National Guard RUF.⁸³
- Extension of the doctrine of Federal Supremacy Clause immunity to National Guard personnel if acting under Federal control.

As regards the application of Federal Supremacy Clause immunity to a state military force, National Guard JAs must be prepared to argue the application of that doctrine by the accumulation of such indicia of a federal mission as state-issued but 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,⁸⁴ execution of the mission details at the direction of federal authorities such as the employees of the Transportation Security Administration or other 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. All of these factors should be considered when arguing that Federal Supremacy Clause immunity applies to National Guard personnel in a state status and, therefore, those personnel are protected from state criminal charges in implementing state RUF. As the case law clearly indicates, Federal Supremacy Clause immunity should be applied to a case involving a federal mission regardless of whether the subject of that protection is a federal employee.⁸⁵ Judge Advocates also should consider

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).*

⁸² Under NGR 500-1, *supra* note 8, para. 4-6d, the state Attorney General must provide guidelines for “arrest and formal legal procedures.” The ARNG airport security instruction required the National Guard RUF used for that mission be reviewed by the state Attorney General. ARNG Airport Security Instruction, *supra* note 46, para. 3-6a

⁸³ 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).

⁸⁴ 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).

⁸⁵ 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

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other arguments, however, as there are yet no good cases applying Federal Supremacy Clause immunity to National Guard personnel when in a Title 32 or SAD status, only good arguments.

3. RUF in Mixed National Guard and Active Component Operations

Given the doctrine of Federal Supremacy Clause immunity, it should be clear that 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 acting in a Title 32 or SAD status. For this reason, National Guard JAs acting in domestic law enforcement support or security operations involving both active component and National Guard personnel executing a mission in a state status should pay close attention to the RUF for those operations if active duty Soldiers and National Guard Soldiers serve similar roles or have similar duties. The RUF applicable to National Guard personnel in those situations must be most respectful of 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.⁸⁶

D. ROLE OF THE NATIONAL GUARD JUDGE ADVOCATE

1. Writing

Judge Advocates should assist their commands not only in crafting or providing assistance in the crafting of the written RUF themselves, but also in drafting related documents, such as information papers, memoranda of

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) (informer cooperating with FBI charged with attempting to bribe a city policeman).

⁸⁶ 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."

law, and memoranda of agreement with supported civil authorities.⁸⁷ Those agreements may themselves contain provisions such as hold harmless paragraphs⁸⁸ to which the National Guard JA will want to contribute. If the RUF used by the National Guard in a law enforcement, law enforcement support, or security mission refers the reader to or adopts existing RUF currently used by a state law enforcement agency such as the state police or highway patrol, the National Guard JA must review with great care other documents relied upon for RUF. Those documents should be carefully reviewed to ensure their compatibility with National Guard personnel, weapons, and the mission, as envisioned by the Adjutant General or task force commander, and individually written provisions specifically applicable to National Guard personnel should be crafted by the JA if necessary

2. Negotiating

National Guard JAs will want to determine whether the RUF, MOA, OPLAN/OPORD, training documents, and other matters providing for and implementing the RUF are comprehensive, accurate in their representation of policy and the law, and well understood by those persons writing them. If they are not, or if any or all parts of those matters have been left to the JA, the JA will need to insert his or her self into the RUF process to bring his or her experience, interpretations, and concerns to the fore. If the experience of other collaborators in working with interpretation of law and the command's legal office is limited, the National Guard JA will need to apply negotiating skills to meld legal requirements with operational needs. It may also be necessary or possible for the National Guard JA to negotiate with players outside the state military department, such as the state Attorney General or local prosecutors, to be sure the interests of the National Guard, particularly in the carrying and use of firearms, are well protected. This was the case, for example, in New York after the 11 September 2001 terrorist attacks on the World Trade Center. New York Army National Guard JAs assisted in drafting the governor's airport security plan, including RUF, which was staffed through the Adjutant General and the Governor's Counsel Office, and approved by the Governor on 29 September 2001.⁸⁹

⁸⁷ 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 46, para. 2-8a.

⁸⁸ See, e.g., Memorandum of Understanding with the Kansas National Guard and supported airports, para. 11 (on file with CLAMO).

⁸⁹ NYARNG Transcript, *supra* note 12, at 184.

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3. Counseling

The primary focus of the National Guard JA's counseling skills will be the state Adjutant General, the Deputy Chief of Staff for Operations, the Plans, Operations, and Training Officer, the Plans, Operations, and Military Support Officer, or other officer leading military support to civil authorities, and Task Force or other commanders of subordinate elements, in advising them of legal requirements. This is particularly true of counseling on minimum legal requirements necessary for protection of Soldiers from civil and criminal liability in applying the mission RUF.

4. Training

National Guard JAs should seek opportunities to assist trainers responsible for ensuring that individual Soldiers learn and apply the correct standards for using non-deadly and deadly force. In this role, JAs can write or assist in writing information papers, write legal memoranda on governing legal principles on the use of force and liability limitations, write or review training vignettes, and attend Soldier briefings. JAs may also wish to advise commanders to obtain a Soldier's certification that training has been attended, as was done by several states for the purposes of the airport security mission.⁹⁰

⁹⁰ See, e.g., State of Nevada Military Department Legal Annex to Rules of Engagement, para. VI 10 and Rhode Island Task Force Green Security Detail, App. A (Rules for the Use of Force) (copies on file with CLAMO).

CHAPTER 13.

DOMESTIC SUPPORT OPERATIONS FUNDING

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 - Insurrections
- 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)

DOPLAW HANDBOOK

- National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-139, § 8131 (Emergency Response Fund, Defense)
- National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-208, § 5802 (Support to International Sporting Competitions – Defense)
- National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1031, (as amended, Authority to Provide Additional Support for Counter-Drug Activities of Mexico)
- National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1033 (Authority to provide Additional Support for Counter-Drug Activities of Peru and Colombia)
- National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 1021 (Extension and Restatement of Authority to Provide Department of Defense Support for Counter-Drug Activities of other Governmental Agencies)
- National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 302
- National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-248, Title II Operation and Maintenance
- DoDD 1100.20 - Support and Services for Eligible Organizations and Activities Outside the Department of Defense
- DoDD 2000.15 - Support to Special Events
- DoDD 3025.15 - Military Assistance to Civil Authorities
- DoDD 3025.1 - Military Support to Civil Authorities
- DoD 3025.1M - Manual for Civil Emergencies
- DoDD 3025.12 - Military Assistance for Civil Disturbances
- DoDD 5200.31 - Single Manager for DoD Military Working Dog Program
- DoDD 5525.5 - DoD Cooperation With Civilian Law Enforcement Officials
- DoDD 5525.10 - Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions
- DoD Financial Management Regulations (FMR) 7000.14-R, vol. 12, ch. 6
- NGR 500-1/ ANGI 10-8101 - Military Support to Civil Authorities
- NGB 500-2/ ANGI 10-801 - National Guard Counterdrug Support
- CJCS Instruction 3710.01A - DoD Counterdrug Support

- AR 75-14/OPNAVINST 8027.1G/MCO 8027.1D/AFR 136-8 - Interservice Responsibilities for Explosive Ordinance Disposal
- AR 75-15 - Responsibilities and Procedures for Explosive Ordinance Disposal
- AR 190-12 - Military Working Dogs
- AR 500-2 - Search and Rescue (SAR) Operations
- AR 500-4 - Military Assistance to Safety and Traffic (MAST)
- AR 500-50 - Civil Disturbances
- AR 500-51 - Support to Civilian Law Enforcement
- AR 500-60 - Disaster Relief
- AR 700-131 - Loan and Lease of Army Material
- AR 725-1 - Special Authorization and Procedures for Issues, Sales, and Loans
- SECNAVINST 5820.7B - Cooperation With Civilian Law Enforcement Officials
- OPNAVINST 3440.1C - 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
- DoD Civil Disturbance Plan GARDEN PLOT
- FM 100-19 - Domestic Support Operations
- Office of the Defense Coordinator for Drug Enforcement Policy and Support Policy of 26 Jan 1995, Priorities, Policies, and Procedures for Department of Defense Counterdrug Support to Domestic Drug Law Enforcement Agencies
- 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. 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) authorization acts; (4) DoD appropriations acts; (5) agency regulations; and (6) Comptroller General decisions.

Under the Constitution, Congress raises revenue and appropriates funds for federal agency operations and programs. *See* U.S. CONST., art. I, § 8. Courts interpret this constitutional authority to mean that Executive Branch officials, e.g., commanders and staff members, must find affirmative authority for the obligation and expenditure of appropriated funds.¹ *See, e.g., U.S. v. MacCollom*, 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 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

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.

Congress imposes fiscal controls through three basic mechanisms, each implemented by one or more statutes. The U.S. Comptroller General, who heads the Government Accountability Office (GAO), audits executive agency accounts regularly and scrutinizes compliance with the fund control statutes and regulations. The three basic fiscal controls are as follows: (1) Obligations and expenditures must be for a proper purpose; (2) Obligations must occur within the time limits applicable to the appropriation (e.g., O&M funds are available for obligation for one fiscal year); and (3) Obligations must be within the amounts authorized by Congress.

1. Purpose

Although each fiscal control is important, the “purpose” control is most likely to become an issue during military operations. The Purpose Statute provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” *See* 31 U.S.C. § 1301(a). Thus, expenditures must be authorized by law (permanent legislation or annual appropriations act) or be reasonably related to the purpose of an appropriation. Judge Advocates should ensure, therefore, that an expenditure fits an appropriation (or permanent statutory provision), or is for a purpose that is necessary and incident to the general purpose of an appropriation; the expenditure is not prohibited by law; and the expenditure is not provided for otherwise, *i.e.*, it does not fall within the scope of some other appropriation.

A corollary to the Purpose control is the prohibition against augmentation. *See* Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); *cf.* 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law). Appropriated funds designated for a general purpose may not be used for another purpose for which Congress has appropriated other funds. Secretary of the Navy, 20 Comp. Gen. 272 (1940). If two funds are equally available for a given purpose, an agency may elect to use either, but once the election is made, the agency must continue to charge the same fund. *See* Funding for Army Repair Projects, Comp. Gen. B-272191, Nov. 4, 1997, 97-2 CPD P141. 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 retains funds from a source outside the normal fund distribution process, an augmentation has occurred and the Miscellaneous Receipts Statute is violated. *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). When the retained funds are expended, this generally 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 augmentation prohibition. There are intra- and intergovernmental acquisition authorities that allow augmentation or retention of funds from other sources. *See, e.g.*, Economy Act, 31 U.S.C. § 1535. The Economy Act authorizes a federal agency to order supplies or services from another federal agency. For these transactions, the requesting agency must reimburse the performing agency fully for the direct and indirect costs of providing the goods and services. *See* Washington Nat'l Airport; Fed. Aviation Admin., B-136318, 57 Comp. Gen. 674 (1978) (depreciation and interest); Obligation of Funds Under Mil. Interdep'tal Purchase Requests, B-196404, 59 Comp. Gen. 563 (1980); *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, *O&M funds*, the appropriation most prevalent in an operational setting, are available for one year; *procurement appropriations* are available for three years; and *construction funds* have a five-year period of availability. If funds are not *obligated* during their period of availability, they expire and are unavailable for new obligations (e.g., new contracts or changes outside the scope of an existing contract). Expired funds may be used, however, to adjust existing obligations (e.g., to pay for a price increase following an in-scope change to an existing contract). The “bona fide needs rule” provides that funds are available only to satisfy requirements that arise during their period of availability, and will affect which fiscal year appropriation you will use to acquire supplies and services. *See* 31 U.S.C. § 1502(a).

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 expenditure or incurring an obligation *in excess of* a formal subdivision of funds, or *in excess of* amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a) (31 U.S.C. § 1517); or accepting voluntary services, unless authorized by law (31 U.S.C. § 1342).

Commanders must ensure that fund obligations and expenditures do not exceed amounts provided by higher headquarters. Although over obligation of an installation *O&M* account normally does not trigger a reportable ADA violation, an over obligation locally *may* lead to a breach of a formal *O&M* subdivision at the Major Command level. *See* 31 U.S.C. § 1514(a) (requiring agencies to subdivide and control appropriations by establishing administrative subdivisions); 31 U.S.C. 1517; DFAS-IN 37-1, ch. 4.

Commanders must investigate suspected violations to establish responsibility and discipline violators. Regulations require “flash reporting” of possible ADA violations. DoD 7000.14-R, Financial Management Regulation, vol. 14; DFAS-IN 37-1, ch. 4. If a violation is confirmed, the command must identify the cause of the violation 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) and the President to Congress also is required 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 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).

C. MILITARY ASSISTANCE TO CIVIL AUTHORITIES

The military's mission is to fight and win the nation's wars. DoD will cooperate with civil authorities, but the relationship is generally one of *support*—the civilian authorities retain *primary* responsibility. The starting point for *all* DoD support is DoD Directive (DoDD) 3025.15. 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;

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- 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 3710.01A.
- 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, AR 500-4.
- 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, impact on DoD budget.
- Appropriateness - whether the requested mission is in the interest of DoD to conduct.
- 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

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

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 (1 Feb. 1996) [hereinafter NGR 500-1]; U.S. DEP'T OF ARMY, REG. 500-60, DISASTER RELIEF (1 Aug. 1981); 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).

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 Federal Emergency Management Agency (FEMA) directs and coordinates the federal response on behalf of the President. The Federal Emergency Management Agency has prepared the *Federal Response Plan*, which defines twelve Emergency Support Functions (ESF's) for which certain federal agencies have either a primary or supporting role. The DoD (Corps of Engineers) is the primary agency for ESF #3, Public Works and Engineering. The DoD is a supporting agency for all others.

The Federal Emergency Management Agency appoints a Federal Coordinating Officer (FCO), typically the senior FEMA official on-scene. Because of the likelihood of DoD involvement, a Defense Coordinating Officer (DCO) is assigned to the FCO. The DCO, an O-6 or above, is identified from a Training Support Brigade (TSB). Training Support Brigades are located throughout the continental United States (CONUS). Training Support Brigade commanders are dual hatted as DCOs. The DCO will be the FCO's single point of contact for DoD support. The FCO issues Mission Assignments, defining the task and maximum reimbursement amount, to the federal agencies.

The Department of Defense is reimbursed by FEMA for the incremental costs of providing support pursuant to the DCO's tasking in response to the FEMA mission assignment. Incremental expenses are reimbursed, or those incurred by the agency providing the military assistance that—but for the request for assistance—would not otherwise have incurred these expenses. The Department of Defense Financial Management Regulation (FMR) 7000.14-R, vol. 12, ch. 6., para. 060204, lists the following costs as eligible for reimbursement:

- Overtime, travel, and per diem of permanent DoD civilian personnel.
- Wages, travel, and per diem of temporary DoD civilian personnel assigned solely to performance of services directed by the Executive Agent.
- Travel and per diem of active duty military, and costs of reserve component personnel called to active duty by a federal official who is assigned solely to the performance of services directed by the Executive Agent.

- 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 (ASD(HD)) 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) agent. The JDOMS coordinates and monitors the DoD effort. The JDOMS normally produces the Execute Order and obtains the SECDEF's signature for a given mission. USNORTHCOM (CONUS, Puerto Rico, and the Virgin Islands) and USPACOM (Alaska, Hawaii, and Pacific possessions and territories) are responsible for developing disaster response plans and for the execution of those plans. They may form a Joint Task Force for this purpose.

1. Immediate Response Authority

Immediate response authority permits local military commanders to act immediately to save lives, prevent human suffering, and mitigate great property damage in imminently serious conditions when time does not permit approval from higher headquarters. Types of support authorized include rescue, evacuation, and emergency treatment of casualties; emergency restoration of essential public services; emergency removal of debris and explosive ordnance; and recovery and disposal of the dead. This type of support is provided on a reimbursable basis, but assistance should

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) 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. The DERF is no year money, but the money in the fund may be expended.

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. The FEMA is under no obligation to reimburse the DoD for response actions taken prior to a Presidential Declaration. If no one reimburses the affected command, the costs of the Immediate Response assistance are funded through unit O&M. This is the most likely outcome. In some 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, which involves 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 the force of choice in these areas. Law enforcement duties that involve military functions may be permissible (e.g., guarding a military supply depot).

F. CIVIL DISTURBANCES³

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); U.S. DEP’T OF DEFENSE CIVIL DISTURBANCE PLAN (GARDEN PLOT) (15 Feb. 1991).

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 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 execute 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. Our role is to support the civilian authorities, not replace them. Civilian authorities have more experience in law enforcement than does the typical service member. Once

the President directs the employment of military forces (federal), then this is a DoD mission and O&M is used to cover the cost.

G. SUPPORT TO CIVILIAN LAW ENFORCEMENT.⁴

Although certain activities could be considered law enforcement type activities, they do not violate the PCA because they do not involve use of military personnel to provide direct assistance. With proper approval, DoD activities may make equipment (including associated supplies and spare parts), base facilities, or research facilities available to federal, state, or local law enforcement officials for law enforcement purposes. (This authority is expanded for chemical or biological incidents.)

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.

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 ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT, ch. 2, sec. 2 (1 Jul. 1983) [hereinafter AR 500-51]; U.S. DEP'T OF NAVY, SEC'Y NAV INSTR. 5820.7B, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, para. 8 (28 Mar. 1988) [hereinafter SECNAVINST 5820.7B]; U.S. DEP'T OF AIR FORCE, INSTR. 10-802, MILITARY SUPPORT TO CIVIL AUTHORITIES, Attachment 4 (18 Apr. 2002)[hereinafter AFI 10-802.

- Detection, monitoring, and communication of the movement of surface traffic outside of the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside the boundary.
- Aerial reconnaissance.
- Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with and directing said vehicle to a specific location.
- Operating equipment to facilitate communications.
- Subject to joint approval by SECDEF and Attorney General:
 - Transportation of civilian law enforcement personnel along with any other civilian or military personnel who are supporting, or conducting, a joint operation with civilian law enforcement personnel;
 - Operation of a base of operations; and
 - Transportation of suspected terrorists from foreign countries to the U.S. for trial (so long as the requesting Federal law enforcement agency provides all security for such transportation and maintains custody over the suspect through the duration of the transportation).

1. Economy Act

Pursuant to 10 U.S.C. § 377, the support provided between federal agencies under these authorities is reimbursable under the Economy Act, unless the support is provided in the normal course of training or operations, or the support results in a substantially equivalent training value. Under 31 U.S.C. §1535, an Economy Act Order may be placed by the head of an agency (delegable down to a warranted contracting officer) with another agency. The order may be a Military Interdepartmental Purchase Request (MIPR) or a Memorandum of Understanding (MOU) for support. 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 type of support to be rendered and reimbursement to be provided.

2. Miscellaneous Receipts

The Miscellaneous Receipts Statute, 31 U.S.C. § 3302, requires that any dollars received by an agency must go into the General Treasury unless there is a positive authority like the Economy Act that allows an agency to retain the money. Although the language in 10 U.S.C. § 372 *et. seq.* authorizes support to state and local civilian law enforcement agencies, the reimbursement provision in 10 U.S.C. § 377 provides no mechanism for reimbursement except for support between federal agencies. If commanders loan equipment to state or local CLEAs under this authority, any reimbursement obtained would go into Miscellaneous Receipts. It is important to note that reimbursement is required, unless the law allows a waiver. The only way to avoid this problem is for the commander to lease the equipment under 10 U.S.C. § 2667. The Leasing Statute provides a mechanism for reimbursement. If a loan is authorized, there must be no adverse impact on national security or military preparedness. (Specific details regarding the Leasing Statute are in Section L of this Chapter)

The SECDEF is the approval authority for any requests for potentially lethal support, including loans of arms, combat and tactical vehicles, vessels, aircraft, or ammunition. For the Army, HQDA (DALO-SMS) may approve requests for non-lethal equipment in excess of sixty days. The installation commander may approve all other equipment requests if loan/lease is for sixty days or less. The HQDA (DAMO-ODS) may approve requests for use of installation or research facilities (AR 500-51, para. 2-5). 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 5820.7B, para. 9e(3). 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, para. 3-1).

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 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,

⁵ 10 U.S.C. §§ 373, 375, 377; 50 U.S.C. §§ 2312, 2315; DoDD 5525.5, *supra* note 4, Encl. 4; AR 500-51, *supra* note 4, ch. 3; SECNAVINST 5820.7B, *supra* note 4, paras. 9.a.(4)-(5); AFI 10-802, *supra* note 4.

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. Weapons of Mass Destruction

Congress has directed that DoD provide certain expert advice to federal, state, and local agencies with regard to weapons of mass destruction (WMD). This training is non-reimbursable because Congress has appropriated specific funds for these purposes. 50 U.S.C. § 2312 permits training in emergency response to the use or threat of use of WMD, and 50 U.S.C. § 2315 permits a program of testing and improving the response of civil agencies to biological and chemical emergencies. The Department of Energy runs the program for responses to nuclear emergencies.

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 (AR 500-51, para. 3-1d). For the Navy and Marine Corps, it is the Secretary of the Navy (SECNAVINST 5820.7B, 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.

6. 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

⁶ 10 U.S.C. § 371; DoDD 5525.5, *supra* note 4, Encl. 2; AR 500-51, *supra* note 4, ch. 2, sec. 1; SECNAVINST 5820.7B, *supra* note 4, para. 7; AFI 10-802, *supra* note 4, ch. 4.

shall be taken into account in planning and execution of military training and operations (10 U.S.C. § 371(b)).

H. COUNTERDRUG SUPPORT⁷

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 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-

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. 3710.01A, DoD COUNTERDRUG SUPPORT (30 Mar. 2004); NATIONAL GUARD BUREAU, REG. 500-2/ANGI 10-801, NATIONAL GUARD COUNTERDRUG SUPPORT (3 Mar. 2000) [hereinafter CJCSI 3710.01A].

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. 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 3710.01A. Non-operational support—that which does not involve the active participation of DoD personnel—including the provision of equipment only, use of facilities, and formal schoolhouse training, is requested and approved in accordance with DoDD 5525.5 and implementing Service regulations, discussed above.

For operational support, the Secretary of Defense is the approval authority. The approval will typically be reflected in a CJCS-issued deployment order.

The SECDEF has delegated approval authority for certain missions to Combatant Commanders, with the ability for further delegation, but no 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 3710.01A. 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, FY90 NDAA, Congress directed the armed forces, to the maximum extent practicable, to conduct training exercises in declared drug interdiction areas. In § 1031, FY 97 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 98 NDAA, Congress authorized, and provided additional funding specifically for, enhanced support to Colombia and Peru. Section 1021, FY 04 NDAA, expands the list of eligible countries to include Afghanistan, Bolivia, Ecuador, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan. This authority to provide support to any one of these governments under § 1021 expires 30 Sept. 2006.

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

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.

transportation to and from the work site. The use of Government aircraft is prohibited.

Operations and Maintenance funding expenditures are authorized for expendable readiness training items only. These may include, but are not limited to, the following: fuel; equipment lease; travel; training supplies; and incidental costs to support the training not normally provided for a deployment. Innovative Readiness Training O&M 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

⁹ 10 U.S.C. § 2564; U.S. DEP’T OF DEFENSE, DIR. 2000.15, SUPPORT TO SPECIAL EVENTS (21 Nov. 1994)(hereinafter DoDD 2000.15).

important to note that this statutory provision does not apply to Special Olympics and The Paralympics because these events are authorized and funded under a different authority, the Support for International Sporting Competitions (SISC) account that funds support of International Sporting Competitions. Support provided under 10 U.S.C. § 2564 is reimbursable under the Economy Act, unless the support is provided in the normal course of training or operations, or the support results in a substantially equivalent training value.

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.

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

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).

provides a comprehensive list of the categories of equipment that may be loaned or leased, and the proper approval authority. Army material loaned or leased in response to a natural or manmade disaster will be reported to JDOMS as soon as possible. The property officer who is accountable for the equipment loaned or leased will keep all records of loans of DoD material. Loans are made at no additional cost to the government. Borrowers are responsible for all incremental costs (costs above the normal Army operating expenses) and these will be identified and added into the loan agreement.

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

- Any overtime pay and pay of additional civilian personnel required to accompany, operate, maintain, or safeguard borrowed equipment;
- Travel and per diem expenses of Army personnel (military and civilian);
- Packing, crating, handling, and shipping from supply source to destination and return, to include port loading and off loading;
- All transportation, including return for repair and renovation;
- Hourly rate for the use of Army aircraft;
- Petroleum, oils, and lubricants (including aviation fuel);
- The cost of material lost, destroyed, or damaged beyond economical repair;
- Utilities (gas, water, heat, and electricity);
- Any modification or rehabilitation or real property that affects its future use by the Army;
- Overhaul of returned material;
- Repair parts used in maintenance and renovation;
- Price decline of borrowed stock fund material at which returned property can be sold;
- Issue and turn-in inspection labor costs;
- Charges for the use of vehicles, except 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 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., 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. AR 500-4, para. 8. 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. AR 500-4, para. 5b. 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. AR 500-4, para. k. 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. AR 58-1.

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 bases. 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

¹¹ U.S. DEP'T OF DEFENSE, DIR. 3025.1-M, DOD MANUAL FOR CIVIL EMERGENCIES (Apr. 2001); U.S. DEP'T OF ARMY, REG. 500-4, MILITARY ASSISTANCE TO SAFETY AND TRAFFIC (MAST) (15 Jan. 1982).

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).

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 such assistance is required in the interest of public safety. AR 190-12, para. 4-7a. Requests for assistance may only be honored from civilian authorities, *not* private citizens. AR 190-12, para. 4-7c(1). *Narcotics dogs will not be used for civilian agency missions and Military Working Dog will not be used to track or search for suspects.* AR 190-12, para. 4-7c(3) and (7). 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. 4-7c(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 Attorney General may request DoD assistance

¹³ U.S. DEP’T OF DEFENSE, DIR. 5200.31, SINGLE MANAGER FOR DoD WORKING DOGS PROGRAM (7 Sep. 1983); U.S. DEP’T OF ARMY, REG. 190-12, MILITARY WORKING DOGS (30 Sep. 1993).

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.

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).

1. Miscellaneous Exceptions

DoDD 5525.5, Encl. 4, para. A.2.e., contains a list of statutes containing express authorization for the use of military forces to enforce the civil law. Among them are protection of the President, Vice President, and other dignitaries, assistance in the case of crimes against members of Congress, foreign officials, or involving nuclear materials.

