

**STATEMENT BY
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ARIZONA DEPARTMENT OF EMERGENCY & MILITARY AFFAIRS
REGARDING
DEFENSE SUPPORT OF CIVIL AUTHORITIES: A VITAL RESOURCE IN THE
NATION'S HOMELAND SECURITY MISSION
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INTRODUCTION¹

As the number of overseas deployments of U.S. forces continues to decline, the focus of military planners has begun to shift to domestic operations to include disaster preparedness, emergency response, and homeland security. But the military departments' renewed focus on domestic operations merely highlights a mission that the National Guard has capably executed for the past 379 years. The National Guard has performed this critical domestic response duty while simultaneously engaging in combat operations around the globe. From the Pequot War in 1634 to the current Overseas Contingency Operations, National Guard troops have been involved in every major military campaign in this nation's history. Thus, the National Guard is uniquely trained and situated as the first line of support to the nation's communities if first responders and local resources are overwhelmed.²

The National Guard is the modern-day militia, the formation of which predates the founding of our country. The Massachusetts National Guard traces its lineage to the first regiments established by the General Court of the Massachusetts Bay Colony in 1636. Each of the states, the U.S. territories and the District of Columbia (referred to herein as "the states") have equally rich histories. Militia units patterned after the English militia system were common throughout the colonies and played a central role in our nation's fight for independence. They also assured the security of new states as the nation expanded westward. Because of the critical militia role in the birth and expansion of our nation, the right of the states to raise, maintain and employ their own military forces (known since 1824 as the "National Guard") is guaranteed by the US Constitution and the constitutions and statutes of the several states.³

Consistent with the citizen-soldier model of the early militias, the present day National Guard is embedded in the local communities. The Soldiers and Airmen that comprise the National Guard are members of the communities – policemen and firemen, small business owners, carpenters, civil engineers, plumbers, and mechanics. This fact provides intangible benefits. First, response time during an emergency is much shorter for National Guard troops than their federal counterparts because the majority of Guardsmen are already located in and

¹ Maj Gen McGuire submits this written testimony and corresponding oral testimony in his state capacity as the Director of the Arizona Department of Emergency and Military Affairs and on behalf of the Governor of the State of Arizona. Neither the written testimony nor Maj Gen McGuire's oral statements to the Subcommittee have been reviewed by the Department of Defense

² See ADP 3-28, Defense Support of Civil Authorities, July 2012 ("Most domestic disasters require no federal military assistance. State and federal emergency management agencies receive the military assistance needed from the National Guard in state active duty or Title 32 status.").

³ The majority of this paragraph taken by permission from Major General (Retired) Timothy J. Lowenberg, *The Role of the National Guard in National Defense and Homeland Security*, <http://www.ngaus.org/sites/default/files/pdf/primer%20fin.pdf> (last visited June 6, 2015).

around the affected area. Second, relationships already exist between Guardsmen and local officials, first responders and residents because, again, the Guardsmen live and work in the community. Third, affected communities benefit from a response force that can bring not only military capabilities but also civilian skills such as carpentry, mechanical, civil engineering, and business negotiation. And fourth, National Guard troops have hometown familiarity with the geographic layout of the affected community, combined with an understanding of the most at-risk areas. Put another way, with nearly 3,300 installations in 2,700 communities around the country, the National Guard is America's "forward deployed" homeland response force.⁴ Accordingly, any proposal to impose "proportionate" cuts on the various military branches must consider the effect an arbitrary cut would have on this critical homeland response force.

THE NATIONAL GUARD AS THE PREFERRED DOMESTIC RESPONSE FORCE

Disasters typically begin and end locally, and most are managed at the local level. It is therefore the goal of any emergency response plan to be able to resolve an event at the lowest possible level of jurisdiction – our cities and counties. Local first responders are the first line of defense during any emergency or disaster that strikes our homeland. The nation's local first responders are supported by the "Whole Community," a concept that recognizes preparing for and responding to emergencies is the collective responsibility of our citizens, local governments, faith-based and non-profit organizations, and the private sector in conjunction with state, tribal, and federal government agencies. The Whole Community concept is essential to the National Preparedness System. Developed in response to Presidential Policy Directive 8: National Preparedness, the National Preparedness System is based upon and driven by the National Preparedness Goal – "A secure and resilient nation with the capabilities required across the whole community to prevent, protect against, mitigate, respond to, and recover from the threats and hazards that pose the greatest risk." The existing National Incident Management System (NIMS) provides the foundation on which the National Preparedness System is built, and has developed over time to guide the Whole Community in the response and management of a disaster or emergency, from local first responders and across all levels of government, while recognizing the sovereignty and responsibility of state.

The National Preparedness System is broken into five preparedness frameworks: Prevention, Protection, Mitigation, Response, and Disaster Recovery. The National Response Framework provides the structure to enable the Whole Community response. Local first responders address nearly 85% of the disasters and emergencies that impact our communities on daily basis.⁵ Occasionally, disasters and emergencies occur that exceed the resources and abilities of our local first responders; and in those rare cases where our first responders are not sufficiently able to respond and recover from a disaster or emergency the response escalates to higher levels of government through the National Response Framework – first the state, then multiple states, and finally federal. This scalability is the essential strength of the National Incident Management System, and enables the Whole Community to meet and manage incidents involving all threats and hazards — regardless of cause, size, location, or complexity. Although

⁴ See Exhibit 1.

⁵ Lt Col Mike Domingue, New Hampshire National Guard, "National Guard Civil Support," *National States Geographic Information Council*, http://www.nsgic.org/public_resources/Sun-Dominge-National-Guard-Briefing-for-NSGIC.pdf (last visited June 6, 2015).

the scalability includes the ability to integrate national resources, the National Incident Management System and National Response Framework respect the sovereignty of the states and recognize that command and control of the disaster or emergency response remains with the state(s) or lowest level of jurisdiction.

As an event grows in size or complexity, the National Response Framework guides the incorporation of additional resources from the Whole Community to respond, from city to county and then to the state level. At the state level, the incident is managed through the state's emergency manager and no matter how large or small the incident becomes, the state remains in control of all response assets, federal or otherwise. There are three models for the state emergency manager found among the states and territories. A majority of the states and territories, 37, have a stand-alone emergency manager, five states assign the Adjutant General of the National Guard the dual role of state emergency manager, and 12 states assign the Adjutant General the roles of state emergency manager and homeland security advisor.⁶ The Governor ultimately exercises command and control of the response to an emergency or disaster through his or her emergency manager. As a state institution, one of the tools available to the Governor is his or her National Guard, and the Governor can task the National Guard to provide Military Support for Civil Authorities (MSCA) missions to help in the response. In addition, the Governor can request assistance from neighboring states through the Emergency Management Assistance Compact (EMAC), which has been ratified by all states and territories.

If the event exceeds the resources and ability of the state to respond, the Governor will then request assistance from the federal government through FEMA. It is important to note that the resourcing agent for all federal resources, including requests for support from the U.S. Department of Defense (DoD) not related to the state's National Guard MSCA mission, is FEMA. Despite the DoD's "immediate response" authority, FEMA manages and assigns requests for federal assistance to the most capable organization.⁷

Capability is more than force structure: it is the ability to provide the most effective, versatile, scalable support to the local community – the type of support only found in the National Guard. In the 5% of emergencies and disasters that require assistance beyond the resources and capabilities provided by the National Guard, neighboring states, and non-DoD federal agencies, FEMA will task the DoD to respond.⁸ The request for DoD resources, however, does not transfer command and control of the incident to the DoD. Instead, in a properly executed response to an emergency or disaster, it brings those DoD resources to the incident and works at the direction of the Governor and state emergency manager through a Dual Status Commander as part of the National Response Framework. Despite the additional resources that the DoD brings, its support to civil authorities is slow and mission assignment cumbersome because providing those resources requires Secretary of Defense authorization. The National Guard, because it is locally based and responsive to the state, is the first line of support

⁶ See Exhibit 2

⁷ DoD Directive 3025.18, also known as the "Immediate Response Authority," grants federal military commanders and/or responsible DoD civilian officials the ability to act from a request by a competent civilian authority to save lives, prevent human suffering, or mitigate great property damage within the United States.

⁸ Domingue.

to your constituents' first responders once local resources are overwhelmed. Beyond being the first choice, it is also most appropriate choice based on applicable legal authorities.

THE ROLE OF THE NATIONAL GUARD IN DSCA OPERATIONS

National Guard (NG) units, under the control of their respective state governor and their “The Adjutants General” (TAGs), have traditionally been the primary military responders in domestic operations and emergencies. The use of federal forces to support state and local governments was, and remains, the exception rather than the rule. Federal forces are generally used only after state resources are exhausted or overwhelmed and federal assistance has been requested by state officials.⁹

As detailed above, management of natural disasters and similar incidents is based upon the principal of “tiered response.” Pursuant to that concept, response and support to affected areas begin at the lowest level of government and escalate to the next tier based upon requirements. Each successive level of government maintains enough capability to carry out the responsibilities imposed upon it by law. Each has some reserve capability to address exceptional circumstances that occur within its jurisdiction. When an incident overwhelms the capacity of any level of government, it calls upon the next higher level of government for support. The key players in the tiered response framework are local, tribal, state, and federal governments.¹⁰

To understand the role of the National Guard in national defense and homeland security, one must understand the constitutional and statutory provisions governing use of military force by the federal and state governments. Governors and federal officials must also have a clear understanding of current and evolving national defense and homeland security strategies and the organizational structure, funding sources and operational capabilities of today's Army and Air National Guard.¹¹

Several statutes govern the use of military forces in response to a natural or man-made disaster. The first is the *Stafford Act*.¹² The *Stafford Act* is the primary legal authority for federal emergency and disaster assistance to state and local governments. It authorizes the President to issue major disaster declarations and authorizes federal agencies to provide assistance to states overwhelmed by disasters. Most of the *Stafford Act* provisions come into play after an emergency request from a state's Governor. The *Stafford Act* also sets the guidelines for reimbursements from federal funds to federal agencies and states. As is the case with many of the legal authorities governing disaster relief, the *Stafford Act* “is based on the premise that most

⁹ CDR Dave Sherry and LCDR Robert Pirone, *Domestic Operational Law Handbook* (CLAMO, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia, 2013), 3.

¹⁰ ADP 3-28, 3.

¹¹ Lowenberg, 1.

¹² *The Robert T. Stafford Disaster Relief and Emergency Assistance Act*, 42 U.S.C. § 5121, *et seq.*, as amended by the *Post-Katrina Emergency Management Reform Act of 2006*, Pub. L. No. 109-295 (2007), and the *Sandy Recovery Improvement Act of 2013*, Pub. L. No. 113-2 (2013).

incidents begin and end locally and are managed on a daily basis at the lowest possible geographical, organizational, and jurisdictional level.”¹³

One of the oldest and most restrictive of the laws applicable to Defense Support to Civilian Authorities is the *Posse Comitatus Act (PCA)*.¹⁴ The *PCA* prohibits the use of federal troops for law enforcement purposes, with some limited exceptions. But while the *PCA* restricts the use of federal troops in law enforcement roles, such as traffic control points or patrolling in the aftermath of a disaster, National Guard troops serving in their state capacities are exempt from the restrictions of the *PCA*. The federal versus state characteristics of the National Guard are discussed in greater detail below.

One of the few exceptions to the *PCA*'s prohibition on use of federal troops for law enforcement purposes is the *Insurrection Act*,¹⁵ which permits the President to use the armed forces to enforce the law when: (1) there is an insurrection within a state, and the state legislature (or Governor if the legislature cannot be convened) requests assistance from the President; (2) a rebellion makes it impracticable to enforce the federal law through ordinary judicial proceedings; or (3) 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.¹⁶

As a unique state-based military force (albeit largely funded by the federal government and trained in accordance with federal standards), the National Guard is the only military force shared by the states and the federal government. It is a ready operational force accessible to the states for both state and combined state and federal purposes *and* to the federal government for federal purposes.¹⁷

State Active Duty

States are free to employ their National Guard forces under state control for state purposes and at state expense as provided in the state's constitution and statutes. In doing so, Governors, as commanders-in-chief, can directly access and utilize the Guard's federally assigned aircraft, vehicles and other equipment so long as the federal government is reimbursed for the use of fungible equipment and supplies such as fuel, food stocks, etc. This is the authority under which Governors activate and deploy National Guard forces in response to floods, earthquakes, wild fires and other natural disasters. It is also the authority under which Governors deploy National Guard forces in response to human-caused emergencies such riots (e.g., World Trade Organization meeting, Seattle, 1999), civil unrest (e.g., World Bank meeting, District of Columbia, 2000) and terrorist attacks (e.g., World Trade Center attacks, New York City, Washington DC and Pennsylvania, September 11, 2001). Unlike active duty and federal military reserve forces such as the Army and Air Force Reserves, all National Guard personnel and equipment (or so much thereof as are not already “federalized”) are directly accessible to the

¹³ Sherry and Pirone, 25.

¹⁴ 18 U.S.C. 1385.

¹⁵ 10 U.S.C. §§ 331–334.

¹⁶ Sherry and Pirone, 82 (citing 10 U.S.C. §§ 331 – 333).

¹⁷ This paragraph taken in its entirety by permission from Lowenberg, 1.

Governor in state or local emergencies and as otherwise provided by state law. Such service is performed in accordance with state law; National Guard members performing duty at the call of the Governor are therefore said to be in “State Active Duty status”, meaning, among other things, that command and control rests solely with the Governor and the state or territorial government. Execution of state active duty missions is accomplished by delegation of authority from the Governor to the Adjutant General.¹⁸

Title 32 Duty

The Militia Clause found in Article 1, Section 8 of the U.S. Constitution also authorizes use of the National Guard under continuing state control but in the service of the federal government to “execute the laws of the Union, suppress insurrections and repel invasions”. These provisions are unique to the National Guard and are the authority by which Governors answered the President’s request for deployment of National Guard forces to our nation’s airports following the terrorist attacks of September 11, 2001. State controlled National Guard forces were deployed by Governors at federal expense and in compliance with prescribed federal operational standards to assure aerial port security and compliance with federal interstate commerce and aviation laws. Unlike subsequent border security missions (described below), National Guard forces mobilized within hours and promptly deployed to airports where they remained under state control for the duration of the 6-month airport security mission. These arrangements preserved state-level management of National Guard personnel and assured maximum flexibility for responding to other unforeseen or emerging state and federal requirements.¹⁹

These and similar domestic military missions have been performed by the National Guard at various times since September 11, 2001 under the authority of Title 32, section 502(f) of the United States Code (USC); National Guard members performing such duty are therefore commonly said to be serving in “Title 32 duty status”, meaning, among other things, that command and control remains with the Governor and the state or territorial government even though the Guard forces are being employed “in the service of the United States” for a primary federal purpose or a shared state-federal purpose.²⁰

Notwithstanding clear Constitutional authority for these arrangements (state control of Guard operations having a primary federal purpose or a shared state-federal purpose), DoD officials frequently questioned the Guard’s *statutory* authority for Title 32 domestic operations. Statutory authority for National Guard training at federal expense is clear. The argument, however, was that 32 USC 502(f), which authorizes use of the National Guard at federal expense but under continuing state control for “training *or other duty*” is somehow intended to authorize training only, as opposed to duties such as military support to civil authorities. Some of these DoD officials therefore questioned President Bush’s request for National Guard Title 32 operational assistance at the nation’s airports in 2001-2002, subsequent support for federal

¹⁸ Ibid, 2.

¹⁹ Ibid.

²⁰ Ibid.

border security agencies and other periodic National Guard assistance to federal and state civil authorities. Enactment of 32 USC 901 *et seq.*, resolved much of this claimed ambiguity by authorizing the Secretary of Defense to “provide funds to a Governor to employ National Guard units or members to conduct homeland defense activities that the Secretary determines to be necessary and appropriate.” See 32 USC 902.²¹

The statute defines “homeland defense activities” as activities “undertaken for the military protection of the territory or domestic population of the United States, or of the infrastructure or other assets of the United States determined by the Secretary of Defense as being critical to national security, from a threat or aggression against the United States.” (32 USC 901(1)). The Secretary of Defense may request domestic use of National Guard forces and fund such operations (as was done with the Governors’ support for airport security in 2001-2002). “A Governor of a State may [also] request funding assistance for the homeland defense activities of the National Guard of [their] State.” (32 USC 906). 32 USC 901 *et seq.* explicitly authorizes use of the National Guard under continuing state control but at federal expense, when approved by the Secretary of Defense, for a wide variety of operations, including, when appropriate, protection of oil refineries, nuclear power plants and other critical infrastructure and responding to catastrophic natural disasters and adaptive human threats.²²

Title 10 Duty

The War Powers Clause of the U.S. Constitution grants the federal government plenary authority to raise military forces and to employ such forces, including mobilized (sometimes referred to as “federalized”) National Guard units, under federal control and at federal expense for national defense purposes. This is the authority under which the federal government mobilizes and deploys National Guard units and personnel for combat, combat support and combat service support missions at home and throughout the world. Such service is performed under the authority of Title 10 USC; service members performing such duty are therefore commonly said to be in “Title 10 duty status”, meaning, among other things, that command and control rests solely with the President and the federal government.²³

Since the Army, Navy, Air Force, Marine and Coast Guard Reserves, like their active duty counterparts, are federal military forces wholly controlled by the federal government, they are *not* directly accessible by Governors and duty performed by such personnel is always in “Title 10 status”. When performed within the United States, Title 10 duty (including Title 10 duty performed by National Guard personnel) is subject to a number of legal restrictions, including, as stated above, provisions of the Posse Comitatus Act (18 USC 1385), which severely limit the use of federal military forces in support of domestic law enforcement operations.²⁴

²¹ Ibid.
²² Ibid.
²³ Ibid, 3.
²⁴ Ibid.

When employed at home or abroad in Title 10 status, National Guard forces are stripped of all state control and become indistinguishable elements of the federal military force. This was the authority used by the federal government to mobilize and deploy National Guard forces to augment federal law enforcement agencies at the Canadian and Mexican borders in the spring and summer of 2002. In stark contrast to the speed and efficiency with which Governors deployed National Guard Soldiers and Airmen to airports (more than 450 airports were secured within a matter of hours or days), it took more than six (6) months for the DoD to agree to a Memorandum of Understanding with the U.S. Border Patrol and increased security at our nation's borders was delayed until these negotiations and legal arrangements had been finalized.²⁵

Duty Statuses Summarized

Federal and state constitutions and statutes provide the primary authority for use of military force by the federal and state governments. These provisions, in so far as they apply to the National Guard, reflect the constitutional balance of power between the sovereign states and the central federal government. National Guard forces are unique among all other military components in that they may be used in one of three legally distinct ways:

- (1) by the Governor for a state purpose authorized by state law (State Active Duty); or
- (2) by the Governor, with the concurrence of the President or the President's designee (e.g., the Secretary of Defense), for shared state/federal purposes or for a primary federal purpose (Title 32 Duty); or
- (3) by the President for a federal purpose authorized by federal law (Title 10 duty).²⁶

When in State Active Duty or Title 32 status, National Guard forces remain under the operational, tactical and administrative control of the Governor and the state government. This authority is reposed in the Governor as commander-in-chief and executed by the Adjutant General, as the state's senior military commander. By contrast, Title 10 military forces (active duty, reserve and "federalized" National Guard forces) are under the exclusive control of the President and the federal government and are beyond the access, control or supervision of the Governor even when operating within his or her state.²⁷

THE DUAL STATUS COMMANDER CONCEPT

In responding to a complex catastrophe, there is a potential for confusion in the chain of command between the response initiated at the State level National Guard forces, and the federal active duty and reserve forces provided by the DoD for DSCA operations. In reviewing the responses to modern catastrophes, the first lesson learned to preserve the respect for civil authorities is establishing a clear chain of command. Second, coordination and operational unity of effort between the state and federal efforts must be maintained. Finally, imposing multiple

²⁵ Ibid.

²⁶ See Exhibit 3.

²⁷ Ibid.

voices from different uniformed services on stressed local, state and federal civilian agencies must be avoided.²⁸

The 2012 National Defense Authorization Act, found in Public Law 112-81, fused earlier legislative efforts from both the Council of Governors and the DoD to enable individual states and the DoD to coordinate their efforts through a single commander. The Dual Status Commander concept involves a command arrangement that legally authorizes one military officer, usually a National Guard officer, to assume simultaneous but mutually exclusive command authority over both National Guard forces and Title 10 federal military forces. While state and federal military forces maintain separate and distinct chains of command, the Dual Status Commander is capable of leading all military forces and directs their response efforts. This achieves a level of unity of effort that was unachievable or difficult prior to implementation of this construct. The unique command architecture of the Dual Status Commander respects the various constitutional and legal considerations governing the use of military forces in a domestic capacity. It further alleviates the tension experienced in past responses between states and the federal government during complex disaster mitigation.²⁹

Ultimately, nobody knows a state better than its Governor; the individual elected by the people and accountable to them during their time of greatest need. The Governor, working with his or her state Adjutant General, will continue to lead disaster response and recovery efforts within their state. A Dual Status Commander allows them to do it better by ensuring all types of DoD support work together within the Governor's intent. It allows the President and Secretary of Defense to bring the weight of unique DoD capabilities and national capacity to bear when our citizens most need it, and when the interests of the entire country are at stake. And, it allows US Northern Command to achieve its vision of working with partners to outpace threats and support the American people in their times of greatest need.³⁰

Dual Status Commanders have successfully been employed for multiple planned events since 2004 and multiple unplanned wildfires and hurricanes. Most notably, Dual Status Commanders were used during the G8 Summit at Sea Island, GA in 2004; at the Republican and Democratic National Conventions in both 2004 and 2008; and the G20 Summit in Pittsburgh, PA in 2009. Dual Status Commanders were also employed for Hurricane Irene in 2011, the Colorado wildfires in 2012, the Colorado floods of 2013, Tropical Storm Isaac in 2012, and Hurricane Sandy in October of 2012.³¹ The Governor for the state of New Jersey, the Title 10 Commander for US Northern Command, and the Chief of the National Guard Bureau all heralded the successful use of Dual Status Commanders in the response to Hurricane Sandy.³²

²⁸ Ryan Burke and Sue McNeil, *Toward a Unified Military Response: Hurricane Sandy and the Dual Status Commander* (Strategic Studies Initiative, The U.S. Army War College Press, Carlisle Barracks, Pennsylvania, April 2015), 53-78.

²⁹ Schumacher, Ludwig J. "Dual Status Command for No-Notice Events: Integrating the Military Response to Domestic Disasters." *Homeland Security Affairs* 7, Article 4 (February 2011).

³⁰ Gen. Charles H. Jacoby, Jr., and Gen. Frank J. Grass "Dual-Status, Single Purpose: A Unified Military Response to Hurricane Sandy" <http://www.ang.af.mil/news/story.asp?id=123339975> (last visited June 6, 2015).

³¹ Brig Gen Richard J. Hayes, Jr. "DOD Response Under the Stafford Act: A Call to Action." (*Joint Forces Quarterly*, Issue 77, 2nd Quarter 2015, St. Louis, Missouri) 84-86.

³² Jacoby and Grass.

CONSIDERATIONS FOR THE WAY FORWARD

Since the deployment of Dual Status Commanders to both preplanned, as well as no-notice/limited-notice incidents, improvements at both the state and federal levels can be made. Future modifications must preserve the authority of a state Governor to manage incidents in the state and mitigate the risk of failed state and federal coordination mechanisms.

Difficulties in Receiving 32 USC 502(f) Authority and Resourcing

The DoD receives – and often denies – requests from states for the Secretary of Defense to approve 100% DoD-funded operations under 32 USC 502(f).³³ The current articulated criteria for a 502(f) operation from the DoD are: (1) effects of event are catastrophic; (2) the event is national in character; and/or (3) requires a significant multi-state National Guard response.³⁴ In April of 2012, The DoD’s Reserve Forces Policy Board published its report on New Policies and Clearer Funding Flows for Reserve Component Operations in the Homeland. In this report, the Reserve Forces Policy Board discussed the denial of requests for 502(f) funding and recommended that the Office of the Secretary of Defense should collaborate with the National Guard to develop clearer guidelines and criteria.³⁵ This recommendation would provide greater predictability for state leaders regarding the likelihood of approval by the Secretary of Defense for state requested operations under Section 502(f). Additionally, the Board recommended that the DoD should work with Department of Homeland Security, FEMA and the Office of Management and Budget to clarify in writing the policy for the reimbursement of the pay of both National Guard and Reserve forces when assigned missions by the Secretary of Defense for purposes of conducting disaster relief operations. Specifically, the dialogue should cover possible revision of 44 CFR 206.8 or the creation of an agreement in writing between DoD and FEMA regarding reimbursement for the military pay of National Guard personnel employed for disaster operations under 32 USC 502(f).³⁶

Title 10 Awareness of the Dual Status Commander Construct

Of the noted areas needing improvement, perhaps none is more important than DSCA education for senior military leaders.³⁷ While there are many subject matter experts in all things related to defense support of civil authorities, there appears to be a critical gap in DSCA knowledge among some senior military commanders. As evidenced by the failure to follow mission assignment processes and the notable confusion over the role and authority of the Dual Status Commander. It appears that some senior leaders, often with decision making authority, lack the required knowledge to ensure their decisions fall within established legal, financial, and doctrinal barriers of DSCA operations. The critical triad of DSCA considerations—the legal, financial, and doctrinal guidelines—were abused during the Sandy response in New York, in many cases due to a lack of DSCA knowledge among commanders and their support staffs.³⁸

³³ Memorandum for the Secretary of Defense from MajGen Arnold L. Punaro, USMCR (Ret), Chairman, Reserve Forces Policy Board, Re: Report of Reserve Forces Policy Board on New Policies and Clearer Funding Flows for Reserve Component Operations in the Homeland, April 9, 2012.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Burke and McNeil, 106.

³⁸ Ibid, 73-74.

Some of the Title 10 Active Duty officers who participated in Hurricane Sandy suggested overturning the National Response Framework and that prepositioning Title 10 forces was the preferred strategy, rather than activating National Guard troops through Emergency Management Assistance Compact and other sourcing mechanisms.³⁹ Aggressive posturing of Title 10 forces risks complicating the incident response framework on multiple levels, including command and control confusion and functional interoperability. A Governor should be able to enlist the aid of a local Title 10 engineer unit in a flood, but even the unmatched capabilities found in active duty units must be applied in a coordinated fashion.

After Action Reports indicate that US Army Corps of Engineers commanders were equally unfamiliar with the Dual Status Commander construct.⁴⁰ In this case, Title 10 forces attached to Task Force Pump and in support of the US Army Corps of Engineers as the lead federal agency for Emergency Support Function-3 were assigned missions beyond the scope of any pre-approved mission assignments for Title 10 forces. Reports suggest that the US Army Corps of Engineers personnel were unaware of certain Title 10 restrictions for federal military forces and did not have an effective process in place to facilitate coordination with the Dual Status Commander.⁴¹

Additionally, the Marine Corps' arrival on Staten Island resulted from a series of conversations outside of the established chain of command and perhaps without consideration for normal Title 10 request for assistance procedures.⁴² A number of After Action Reports support the claim that the Commandant of the Marine Corps, through the II Marine Expeditionary Force commanding general directed the 26th Marine Expeditionary Unit (MEU) commander to deploy his unit to the USS Wasp off the coast of New York. The guidance from the Commandant instructed the MEU to: "Get to New York City, go ashore, do good, and relieve the suffering that is occurring."⁴³ As a result, without a mission assignment or notifying the Dual Status Commander, Marines carried out their orders and began support efforts on November 4, 2012. Except for justifying the Marine Corps' arrival on Staten Island as Immediate Response Authority, the legal basis for the Marines' activity on Staten Island during Hurricane Sandy remains questionable and ambiguous.⁴⁴

Impacts of Sequestration and a Reduction in Force on the CBRN Response

The Chemical, Biological, Radiological, and Nuclear (CBRN) Response Enterprise is composed of both Title 10 Active Duty and Title 32 National Guard forces which are divided into state assigned/resourced units and teams, and allocated federal response forces. Forces assigned to state National Guard command and control include 57 Weapons of Mass Destruction – Civil Support Teams (WMD-CSTs) with 22 personnel in each, with one in every state (two in FL, CA and NY), plus one in the District of Columbia and each of the U.S. territories within US Northern Command's area of responsibility. There are also 17 CBRNE Enhanced Response Force Packages (CERFPs), and 10 Homeland Response Forces (HRFs). The federal response

³⁹ Ibid, 80.

⁴⁰ Ibid, 74.

⁴¹ Ibid.

⁴² Ibid, 90.

⁴³ Ibid, 64.

⁴⁴ Ibid, 95.

force includes the Defense CBRN Response Force (DCRF) and the Command and Control CBRN Response Element (C2CRE).⁴⁵

A review of the different emergency concept plans through the lens of the National Response Framework, indicates that a nation's comprehensive defense strategy and robust capability to manage chemical and biological events resides primarily with the Title 32 National Guard forces. In every state, National Guard WMD-CSTs, CERFP, and HRFs stand ready to deploy at the direction of the Governor to integrate under the on-scene incident commander in support of the civilian LFA. Title 10 allocated forces would deploy on US Northern Command's order to further augment local teams.

Any reduction in force as a result of sequestration must ensure that this CBRN capability is not diminished in any form. In fact, any realistic application of sequestration must consider preservation of the fundamental state ability to respond to CBRN incidents before divesting federal DoD capacities from the National Guard. The United States is strengthened by having 54 individual states and territories that can handle immediate needs and only seek federal assistance when it is truly required.

Future Missions for Homeland Response in Cyber Security

For all of the same statutory reasons presented, the National Guard is the most appropriate force to augment community, private business, and state partners in the event of a cyber-incident affecting the health and welfare of our citizens necessitating an emergency response. We should respond in the same manner for these types of incidents utilizing the existing National Response Framework with the established protocols in the National Incident Management System. If the event exceeds state capabilities and first responders are overwhelmed, the same Dual Status Commander concept to integrate DoD capabilities into a coordinated response should be utilized.

⁴⁵ LCDR David M. Aliberti, "Preparing for a Nightmare: USNORTHCOM's Homeland Defense Mission against Chemical and Biological Attack." (U.S. Naval War College, Newport, Rhode Island, May 2014).