

## Two Hats Are Better Than One: The Dual-Status Commander in Domestic Operations

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### I. Introduction

The event is scheduled and has been nationally advertised. It will draw tens of thousands of political supporters from across the United States, including leading presidential candidates, and will be broadcast during primetime on a major television network in high definition.

The local and state authorities where the event will be held are relieved that the National Security Council (NSC) has designated the event a National Special Security Event (NSSE).<sup>1</sup> Consequently, the U.S. Secret Service (USSS) is in charge of securing the event on behalf of federal authorities.<sup>2</sup> The USSS is coordinating with the host city regarding overall security and has requested the Department

of Defense (DoD) provide capabilities to assist the USSS in securing the site. In response to the request, U.S. Northern Command (USNORTHCOM), the geographic combatant command responsible for securing the homeland, intends to deploy explosive ordnance disposal (EOD) teams, bomb-sniffing dogs, and parts of its Chemical, Biological, Radiological, Nuclear and High Yield Explosives (CBRNE) Consequence Management Reaction Force (CCMRF)<sup>3</sup> to the area. It is also working with the National Guard Bureau (NGB)<sup>4</sup> to coordinate with the state's National Guard (NG).

The state plans to initially mobilize its NG forces in a State Active Duty (SAD) status<sup>5</sup> and has planned title 32, U.S. Code,<sup>6</sup> training exercises to coincide with the event. Because this is a "national event," and in light of limited state resources, the state is also sending a request through NGB to the Office of the Secretary of Defense (SECDEF),

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<sup>1</sup> The Secretary of the Department of Homeland Security, after consultation with the Homeland Security Council, is responsible for designating events as National Special Security Events (NSSEs). Homeland Security Presidential Directive 7, Critical Infrastructure Identification, Prioritization, and Protection, 39 WEEKLY COMP. PRES. DOC. 1816 (Dec. 17, 2003). The Secretary and the Homeland Security Council consider a number of factors when designating an NSSE, such as (1) the anticipated attendance by dignitaries, (2) the size of the event, and (3) the significance of the event. Department of Homeland Security, *Fact Sheet: National Special Security Events* (Dec. 28, 2006), [http://www.dhs.gov/xnews/releases/pr\\_1167323822753.shtm](http://www.dhs.gov/xnews/releases/pr_1167323822753.shtm).

<sup>2</sup> When directed by the President, the U.S. Secret Service (USSS) is authorized to participate, under the direction of the Secretary of Homeland Security, in the planning, coordination, and implementation of security operations at special events of national significance, as determined by the President. 18 U.S.C.A. § 3056(e)(1) (Westlaw 2010). The USSS partners with federal, state, and local law enforcement and public safety officials with the goal of coordinating participating agencies to provide a safe and secure environment for the event and those in attendance. Dep't of Homeland Sec., *Fact Sheet: National Special Security Events* (Dec. 28, 2006), [http://www.dhs.gov/xnews/releases/pr\\_1167323822753.shtm](http://www.dhs.gov/xnews/releases/pr_1167323822753.shtm). See also U.S. Secret Serv., National Special Security Events, <http://www.secretservice.gov/nsse.shtml> (last visited May 14, 2010).

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<sup>3</sup> The CBRNE CCMRF is a federal military task force comprised of both Active and Reserve component capabilities. The CCMRF's primary role when responding to a CBRNE event is to augment the consequence management efforts of the first responders. The current structure relies heavily on the Army, with limited capabilities provided by the other services. On 1 October 2008, the Army assigned approximately 2900 of the 4700 Department of Defense (DoD) personnel to the Commander, USNORTHCOM for CCMRF-One. The Army CCMRF forces include robust command and control, comprehensive decontamination of personnel and equipment, hazardous material handling and disposal, air and land transportation, aerial evacuation, and sustainment. U.S. Dep't of Army, Chemical, Biological, Radiological, Nuclear and High Yield Explosive (CBRNE) Consequence Management Reaction Force (CCMRF), [http://www.army.mil/aps/09/information\\_papers/cbrne\\_consequence\\_mgmt\\_ccmrf.html](http://www.army.mil/aps/09/information_papers/cbrne_consequence_mgmt_ccmrf.html) (last visited May 14, 2010).

<sup>4</sup> The NGB is the channel of communications on all matters pertaining to the NG, the Army NG of the United States, and the Air NG of the United States between (1) the Department of the Army and the Department of the Air Force, and (2) the several states. 10 U.S.C. § 10501(b) (2006).

<sup>5</sup> U.S. DEP'TS OF ARMY AND AIR FORCE, NATIONAL GUARD REG. 500-1/AIR NATIONAL GUARD, INSTR. 10-8101, NATIONAL GUARD DOMESTIC OPERATIONS para. 3-2a(a) (13 June 2008) [hereinafter NGR 500-1] ("Unless ordered into federal service, National Guard Soldiers and Airmen serve in a State Active Duty or Title 32 status, under a state chain of command, with the Governor as commander in chief."). *Id.* para. 3-2(a)(1)(a). State Active Duty is duty performed under state law with state funding.

<sup>6</sup> National Guard, 32 U.S.C. (2006).

requesting the SECDEF approve the state's NG members to serve in a state-controlled, federally-funded, 32 U.S.C. § 502(f)(2) "operational" status.<sup>7</sup> As it stands, at the time of the event, there will be within the area of operations, federal (title 10, U.S. Code) military personnel and NG personnel serving in either an SAD status or under title 32, U.S. Code.<sup>8</sup> A single commander, referred to as a dual-status commander (DSC), will command both the state NG and federal Active Duty forces in a mutually exclusive manner so as to keep distinct the federal *and* state chains of command. At first blush, it introduces a very different construct: one commander, two chains of command. This newest construct, both in theory and in operation, has presented military leaders new options and new opportunities to plan how to meld the unique capabilities and command and control structures of both federal and state forces into agile and complementary forces prepared to meet the ever-changing challenges in domestic operations.

The DSC is a statutorily authorized construct. Under the construct, the President must authorize and the governor must consent for a specified officer to command both federal and state forces.<sup>9</sup> Although a non-traditional concept not frequently utilized, the DoD is comfortable with the DSC arrangement as it has proven successful before—at such highly visible events as the G-8 Summit at Sea Island, Georgia, in 2004; Operation Winter Freeze in 2005; the Republican and Democratic National Conventions of 2004 and 2008; and the G-20 Summit in 2009. Those unfamiliar with the construct may question its authority, the need for supporting agreements, and its ability to adapt to catastrophic national events such as a large-scale terrorist attack or like-type calamities. Quite frankly, many of the military members, both active and NG, who will ultimately serve under this DSC have many questions, too.

In order to answer those questions, this article will demonstrate how, since 2004, the operational use of the DSC construct has increased the ability of the U.S. and state governments to secure events of national significance. Through this discussion, the reader will recognize that the DSC construct is a not only legal, but offers a very adaptive, alternative command relationship that only strengthens the abilities of the federal and state forces to accomplish their missions. More importantly, it provides a common operating picture to both sovereigns, thereby allowing for greater efficiency, less redundancy, and greater unity of effort.

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<sup>7</sup> See Major Christopher R. Brown, *Been There, Doing That in a Title 32 Status, The National Guard Now Authorized to Perform its 400-Year Old Domestic Mission in Title 32 Status*, ARMY LAW., May 2008, at 31–32.

<sup>8</sup> Also within the area of operations may be State Defense Forces, which are those state militia forces organized and maintained under state law not belonging to the NG. 32 U.S.C. § 109(c). Discussion of the command of State Defense Forces is outside the scope of this article.

<sup>9</sup> *Id.* § 325(a)(2).

## II. The Dual-Status Commander

Under the Constitution, the President serves as the commander-in-chief of the Army and Navy.<sup>10</sup> State governors command their respective organized militias, i.e., their NG forces<sup>11</sup> except when called to federal service.<sup>12</sup> Consequently, only the federal chain of command may command title 10 forces, and only the state chain of command may command its NG forces when serving in a SAD status or under title 32. There are, however, specific federal statutory authorities allowing for designated DSCs to serve in a hybrid federal and state status.

The DSC may not command both the federal and state military personnel *simultaneously*.<sup>13</sup> Rather, this "dual status" authorizes the DSC to command both federal and state forces in a mutually exclusive manner. A DSC may be either (1) a NG officer who becomes federalized and retains his or her state NG status<sup>14</sup> or (2) a Regular Army officer who receives a state NG commission while retaining his or her federal military status.<sup>15</sup>

The DSC provides for a unity of effort so state and federal forces operating in the same space can perform interrelated missions. Rather than having separate federal and state level commanders directing the activities of the separate and various federal and state military forces, likely resulting in a duplication or conflict of efforts, the DSC is able to ensure both forces' efforts are carried out efficiently. As succinctly stated by the then-commander of USNORTHCOM, Admiral Timothy Keating, when testifying to the Senate Armed Services Committee,

This centralized command and control construct provides both the federal and state chains of command with a common operating picture through the eyes of the [DSC.] It also enables the [DSC] to maximize his or her federal and state

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<sup>10</sup> U.S. CONST. art. 2, § 2.

<sup>11</sup> Congress created the "organized militia," known as the NG, in 1903. The Dick Act, ch. 196, 32 Stat. 775 (1903). Consequently, the NG consists of the constitutionally authorized militias of the states that receive federal funding to train for a federal military mission. See *generally id.*

<sup>12</sup> National Guard members can be federalized as members of their respective Reserve components, i.e., the Army or Air NG of the United States. 10 U.S.C. § 10101 (2006). National Guard members can also be federalized as members of the militia under title 10, chapter 15, U.S. Code (the Insurrection Statutes).

<sup>13</sup> *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990). See also Jeff Bovarnick, *Perpich v. United States Department of Defense: Who's in Charge of the National Guard?*, 26 NEW ENG. L. REV. 453, 459 (1991).

<sup>14</sup> 32 U.S.C. § 325(a)(2).

<sup>15</sup> *Id.* § 315.

capabilities, as well as facilitate unity of effort from all assigned forces.<sup>16</sup>

#### A. The National Guard Dual-Status Commander Under 32 U.S.C. § 325

The U.S. Supreme Court stated in *Perpich v. Department of Defense*, “In a sense, all [National Guard members] now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time.”<sup>17</sup> Therefore, when called into federal service under the provisions title 10, members of the NG generally lose their NG (state) status. Federal statutory law dictates this bifurcation of service at 32 U.S.C. § 325(a)(1):

(a) Relief required.

(1) Except as provided in paragraph (2), each member of the Army National Guard of the United States or the Air National Guard of the United States who is ordered to active duty *is relieved from duty in the National Guard of his State or Territory, or of Puerto Rico, or the District of Columbia*, as the case may be, *from the effective date of his order to active duty* until he is relieved from that duty.<sup>18</sup>

In 2004, however, Congress passed 32 U.S.C. § 325(a)(2), allowing for an NG commander to hold both a federal and state commission, that is, “dual status.” The statute reads:

(a) Relief required.

...

(2) An officer of the Army National Guard of the United States or the Air National Guard of the United States *is not relieved from duty in the National Guard of his State, or of the Commonwealth of Puerto Rico, Guam, or the Virgin Islands or the District of Columbia*, under paragraph (1) *while serving on active duty if—*

(A) the President authorizes such service in both duty statuses; and

(B) the Governor of his State, or of the Commonwealth of Puerto Rico,

Guam or the Virgin Islands, or the commanding general of the District of Columbia National Guard, as the case may be, consents to such service in both duty statuses.

(b) Advance Authorization and Consent. The President and the Governor of a State or Territory, or of the Commonwealth of Puerto Rico, or the commanding general of the District of Columbia National Guard, as applicable, may give the authorization or consent required by subsection (a)(2) with respect to an officer in advance for the purpose of establishing the succession of command of a unit.<sup>19</sup>

Since 2004, DSCs serving under 32 U.S.C. § 325 have been used for numerous high-profile domestic events. While DSCs serving under 32 U.S.C. § 325 have been loosely referred to as a “dual-hat commanders,” in order to comply with the Supreme Court’s guidance and its three-hat analogy in *Perpich*, these officers actually enjoyed a “dual-status.” To be consistent with *Perpich*, the DSC must exercise his command responsibilities in both his state NG and title 10 statuses, but never at the same time. In terms of *Perpich*, the DSC carries his state militia hat in one hand and his federal hat in the other, but may only “wear” one at a time. In practice, the DSC wearing his NG hat receives orders from the governor or state chain of command and orders the state forces to perform these missions. In the alternative, wearing his title 10 hat, orders received from the President or the federal chain of command are issued to title 10 subordinates to perform their title 10 mission. It is important to note that the governor has no authority to order, through the DSC, title 10 forces to perform any mission. Similarly, the President may not order, through the DSC, state NG forces to perform any mission. The respective sovereigns have command authority only over their own forces.

#### B. The Regular Army or Air Force Dual-Status Commander Under 32 U.S.C. § 315

Federal statutory law at 32 U.S.C. § 315 requires the Secretaries of the Army and Air Force to detail commissioned officers of both the Army and Air Force to the Army NG and Air NG of each state, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands.<sup>20</sup> For these detailed officers, the statute further allows that

<sup>16</sup> *Hearing Before the Senate Armed Services Committee*, 109th Cong. (2005), available at <http://armed-services.senate.gov/statemnt/2005/March/Keating%2003-15-05.pdf> (statement of Admiral Timothy J. Keating, Commander, N. Am. Aerospace Def. Command and USNORTHCOM).

<sup>17</sup> *Perpich*, 496 U.S. at 347.

<sup>18</sup> 32 U.S.C. § 325(a)(1) (emphasis added).

<sup>19</sup> *Id.* § 325(a)(2) (emphasis added).

<sup>20</sup> *Id.* § 315(a) (stating that the Secretaries of the Army and Air Force “shall” detail commissioned officers to the separate NGs) (emphasis added). The statute further allows for the Secretary of the Army and Secretary of the Air Force to also detail enlisted members to the Army and Air NG but does

[w]ith the permission of the President, [these Regular Army or Regular Air Force officers] so detailed *may accept a commission in the Army National Guard or the Air National Guard*, as the case may be, terminable in the President's discretion, *without prejudicing his rank and without vacating his regular appointment.*<sup>21</sup>

While the statute allows for such a duty status, the U.S. Constitution reserves to the states the authority to appoint their own militia officers;<sup>22</sup> therefore, state law must then be consulted to determine state requirements for officer appointments in its NG.<sup>23</sup>

The authority for a Regular Army officer to concurrently hold both a state NG and federal title 10 commission dates back to 1916.<sup>24</sup> While initial plans have been developed to employ a DSC under 32 U.S.C. § 315 for recent domestic operations,<sup>25</sup> a title 10 DSC under this statute has not yet been used in the domestic operational environment.

### III. Dual-Status Commander Agreements

As a result of planning for multiple DSC operations over the past several years, DoD, NGB, and many states have learned that such operations justify deliberate preparation. Among these preparations is an agreement

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not provide the authority for them to become members of those NGs. *Id.* § 315 (b).

<sup>21</sup> *Id.* § 315(a). State law may require a state commission to command state troops or to administer justice under the State Code of Military Justice. Otherwise, acceptance of a state commission appears to be an honorary event for practical purposes, as the officer's Regular Army status is paramount. E-mail from Mr. William Berkson, Senior Attorney, Nat'l Guard Bureau, Arlington, Va., to Major Christopher R. Brown, Assoc. Professor, Int'l & Operational Law Dep't, The Judge Advocate Gen. Legal Ctr. & Sch., U.S. Army, Charlottesville, Va. (Mar. 8, 2010, 13:28 EST) (on file with authors).

<sup>22</sup> U.S. CONST. art. I, § 8, cl. 15.

<sup>23</sup> See, e.g., LA. REV. STAT. ANN. § 29:13.A (2010) ("All persons qualified according to the laws of Louisiana and the United States of America . . . may be commissioned by the governor as officers in the national guard."); *id.* § 29:12 (requiring assistant adjutant generals holding rank of brigadier general be a citizen of the state and member of national guard for at least three years immediately prior to appointment).

<sup>24</sup> June 3, 1916, ch. 134, § 100, 39 Stat. 208.

<sup>25</sup> Hurricane Katrina was not an NSSE; however, President Bush proposed a title 10 dual-status commander structure to Louisiana Governor Blanco during the Hurricane Katrina response, but she rejected it. Hurricane Katrina, Lessons Learned for Army Planning and Operations 64, available at [http://www.rand.org/pubs/monographs/2007/RAND\\_MG603.pdf](http://www.rand.org/pubs/monographs/2007/RAND_MG603.pdf). The authors are unaware of any historical use of a dual-status commander under 32 U.S.C. § 315.

approving a nominated officer as the DSC, as well as an agreement that lays out the legal, operational, fiscal, and administrative responsibilities of the federal forces and the state NG forces. Our discussion will focus on the legal issues.

The nominated officer, typically a general officer, must be vetted and agreed upon by representatives of both sovereigns. Next, the governor (or his or her delegate) must consent and the President (or his or her delegate) must authorize the appointment of the nominated commander.<sup>26</sup> Often simultaneous to this process, operators and legal counsel from NGB, DoD/USNORTHCOM, and the state prepare and execute a detailed Memorandum of Agreement (MOA). In drafting the MOA, various statutory, regulatory, and command relationship issues are considered and documented to provide for the successful execution and use of the DSC. Signatories are typically the governor and the President or their respective delegates. The MOAs have become fairly standardized documents but are adjusted to address operation-specific issues, as well as to incorporate lessons learned from previous events utilizing a DSC. The DSC construct was most recently employed during the 2009 G-20 Summit in Pittsburgh, Pennsylvania. This particular MOA (G-20 MOA),<sup>27</sup> located in the appendix, reflects the most up-to-date language, and one should look at its particular provisions in relation to the following discussion.

#### A. Mutually Exclusive Chains of Command

It is well understood that the President serves as the commander-in-chief of the federal armed forces and the governor controls his or her organized militia, the NG, while serving in a state status. There is no authority for a title 10 commander to give a lawful order to state forces serving in a SAD status or under title 32. Similarly, there is no authority for a state commander serving in a SAD status or under title 32 to give a lawful order to title 10 forces.

The DSC, however, serves in both the federal and state chains of command and commands both federal and state forces. To remain consistent with the three-hat analogy outlined in *Perpich*,<sup>28</sup> the commander must exercise command over state and federal forces in a mutually exclusive manner. Clear understanding and application of this issue is of such import that the implementing MOAs contain several related provisions. The G-20 MOA, for example, documents these "mutually exclusive chains of

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<sup>26</sup> 32 U.S.C. § 325(a)(2).

<sup>27</sup> The purpose of the G-20 Summit was to convene world leaders who represent eighty-five percent of the world's economy. Memorandum of Agreement Between Robert Gates, Secretary of Defense, and Edward G. Rendell, Governor, Commonwealth of Pennsylvania 1 (Sept. 10, 11, 2009) [hereinafter G-20 MOA] (appendix) (copy of signed original on file with authors).

<sup>28</sup> *Perpich v. Dep't of Def.*, 496 U.S. 334, 347 (1990).

command,”<sup>29</sup> and requires that these separate chains of command “recognize and respect the [DSC]’s duty to exercise all authority in a completely mutually exclusive manner, i.e., either in a federal or state capacity, but never in both capacities at the same time.”<sup>30</sup> The G-20 MOA further requires the DSC to “describe the status of all forces in writing. The purpose of this requirement is to avoid assigning federal responsibilities to state forces and avoid assigning state responsibilities to federal forces.”<sup>31</sup>

The G-20 MOA also memorializes other necessary considerations regarding the separate state and federal chains of command. It recognizes that the governor, through the adjutant general, commands the state NG and recognizes that the command and control of other NG forces flowing into the state, if applicable, “will be determined by prior coordination between those states.”<sup>32</sup> This provision recognizes that NG forces may flow into one state (the receiving state) from another (the sending state) in support of the receiving state’s designated mission. It is important to understand that the governor of the sending state remains the commander in chief of his or her state NG forces even while serving outside of the sending state. Consequently, the governor of the sending state must grant the receiving state’s governor the authority to direct the activities of the sending state’s NG forces while within the receiving state.<sup>33</sup> This is typically accomplished through the Emergency Management Assistance Compact (EMAC)<sup>34</sup> or through a separate MOA among the participating states.<sup>35</sup>

<sup>29</sup> G-20 MOA, *supra* note 27, at 1.

<sup>30</sup> *Id.* (emphasis in original).

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.* at 1, 2.

<sup>33</sup> This is, in effect, but not technically, tactical control (TACON).

TACON . . . may be delegated to commanders at any echelon at or below the level of combatant command and exercised over assigned or attached forces or military capabilities or forces made available for tasking. TACON typically is exercised by functional component commanders over military capabilities or forces made available for tasking. It is limited to the detailed direction and control of movements or maneuvers. TACON provides sufficient authority for controlling and directing the application of force or tactical use of combat support assets within the assigned mission or task.

JOINT CHIEFS OF STAFF, JOINT-PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS, at III-5 (17 Sept. 2006) (C1, 13 Feb. 2008). Because the sending state retains “command authority” over its NG personnel even while serving outside of the state, there is no “assignment” or “attach[ment]” of forces. The sending (commanding) state, however, gives the receiving state the authority to direct the movements and maneuvers of the sending state’s NG Soldiers while within the receiving state.

<sup>34</sup> The Emergency Management Assistance Compact (EMAC) is “a congressionally ratified organization that provides form and structure to interstate mutual aid. Through EMAC, a disaster impacted state can request and receive assistance from other member states quickly and efficiently,

Regarding the federal chain of command, the G-20 MOA specifically recognizes the DSC as a federal, title 10 officer subject to the orders of the President, the Secretary of Defense, and the designated federal chain of command.<sup>36</sup> While the federal forces may be tasked to provide support to civil authorities who are enforcing the law,<sup>37</sup> the G-20 MOA requires the DSC to ensure the federal military forces do not provide direct support to these agencies and, thereby, violate the Posse Comitatus Act (PCA).<sup>38</sup> Note that this provision is not applicable to state-controlled, NG forces; the PCA does not apply to the NG when under state control.<sup>39</sup>

When ordering title 10 forces to perform this mission, the DSC must don his “federal hat.” When directing state NG forces, which may be conducting law enforcement activities in accordance with state law, the DSC must instead don his “state” hat so as not to run afoul of the Posse

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resolving two key issues upfront: liability and reimbursement.” Emergency Management Assistance Compact, <http://www.emacweb.org/> (last visited Feb. 11, 2009). Congress approved EMAC through a joint resolution passed in 1996. Pub. L. No. 104-321, 110 Stat. 3877.

<sup>35</sup> Article IV of EMAC states

Each party state shall afford to the emergency forces of any party state, while operating within its state limits under the terms and conditions of this compact, the same powers (*except that of arrest unless specifically authorized by the receiving state*), duties, rights, and privileges as are afforded forces of the state in which they are performing emergency services.

EMAC, Emergency Management Assistance Compact, Model EMAC Legislation, <http://www.emacweb.org/?13> (last visited Mar. 8, 2009) (emphasis added). During the 2005 Operation Winter Freeze operation in New Hampshire, NG forces from Vermont and New York supported the New Hampshire Governor in the state controlled portion of the operation.

<sup>36</sup> “The [DSC], as a federal officer ordered to active duty under Title 10 (of the U.S. Code) is subject to the orders of the President, the Secretary of Defense, and the Commander, USNORTHCOM, or those federal officers ordered to act on their behalf.” G-20 MOA, *supra* note 27, at 2.

<sup>37</sup> Military Support for Civilian Law Enforcement Agencies, 10 U.S.C. ch. 18 (2006).

<sup>38</sup> “In accordance with the Posse Comitatus Act, direct civilian law enforcement activities are not to be performed by Federal forces supporting the Summit.” G-20 MOA, *supra* note 27, at 2. The Posse Comitatus Act reads:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the 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.”

18 U.S.C. § 1385 (2006).

<sup>39</sup> National Guard forces remain subject to state law, which may or may not authorize them to conduct law enforcement activities when in a state controlled duty status.

Comitatus Act or DoD policy.<sup>40</sup> This is a critical example of why the DSC cannot “wear” two hats at a time and is likely the most important operational and legally intensive aspect of the mutually exclusive chains of command.

## B. Serving Two Masters—The Federal Status Reigns Supreme

While serving in a dual-status, the DSC may run into conflicts between the two sovereigns he serves. For example, if the governor directs the DSC to use state forces to perform a non-law enforcement mission that the President has instead directed should be performed by federal forces, whose orders should the commander follow? Fortunately, to date, the DSC has not had to confront this issue; however, the MOA provides a “mission conflicts” process to address this issues should it arise. Past MOAs, including the G-20 MOA, direct the DSC to ensure there are no conflicts between federal and state mission taskings.<sup>41</sup> Where conflict exists, the DSC should notify both chains of command at the earliest opportunity, and both chains of command and the DSC must be involved in resolving such conflicts.<sup>42</sup>

Specifically, the G-20 MOA directs that where the mission conflict cannot be resolved, the DSC “should consult with a judge advocate from *both* the federal chain of command and the State chain of command.”<sup>43</sup> While the conflict is being resolved, the orders of the federal chain of command have supremacy.<sup>44</sup>

## C. Good Order and Discipline

Finally and importantly, the G-20 MOA distinguishes the disciplinary authority of the DSC regarding the separate state and federal forces. The Uniform Code of Military Justice (UCMJ) does not apply to NG forces serving in a SAD status or under title 32. United States Army regulations clearly state “ARNG Soldiers are not subject to the UCMJ while in State service under title 32, U.S. Code.”<sup>45</sup> Recognizing the lack of UCMJ jurisdiction, the G-

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<sup>40</sup> By policy, as directed by 10 U.S.C. § 375, the DoD generally extended the restrictions of the PCA to the U.S. Navy and Marine Corps. U.S. DEP’T OF DEFENSE, DIR. 5525.5, DO D COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (15 Jan. 1986) (C1, 20 Dec. 1989) (Administrative Reissuance).

<sup>41</sup> G-20 MOA, *supra* note 27, at 3.

<sup>42</sup> *Id.* at 4.

<sup>43</sup> *Id.*

<sup>44</sup> “While the conflict is being resolved, the dual-status commander will continue to execute his federal missions, and will continue to execute those State missions in areas not subject to the conflict.” *Id.*

<sup>45</sup> U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 21-2(b) (16 Nov. 2005).

20 MOA dictates that “[a]ll military justice issues concerning . . . National Guard forces will be determined in accordance with the [state’s] Code of Military Justice.”<sup>46</sup> Thus, for the 2009 G-20 Summit in Pennsylvania, the Pennsylvania Code of Military Justice applied to members of the Pennsylvania NG serving in SAD or under title 32. National Guard forces of sending states, however, are subject to the jurisdiction of their home state’s code of military justice. Addressing military justice issues for title 10 forces, the G-20 MOA declares, “[a]ll military justice issues for supporting federal forces will be determined in accordance with the [UCMJ].”<sup>47</sup>

## IV. Practical Considerations and Lessons Learned

As with all military operations, one learns a great deal by conducting actual operations. The seven previous events supported by the DSC construct are no different. The following discussion addresses lessons that have been either observed consistently or were of such import that a comment would benefit judge advocates and other participants supporting future DSC operations.

### A. Develop Rapport

It is critical for the separate NG and federal joint task forces (JTFs) to build a rapport well before the event. In the seven events where a DSC was used, the DSC’s state NG and federal staffs were, to varying degrees, integrated into a joint/combined staff. During the event, it was necessary for the joint/combined NG and federal staffs to work within the same battle rhythm and execute integrated processes and procedures. Lessons learned from this process reveal that trusting relationships and staff efficiencies cannot be fostered at the time of the event. Every effort should be made by NG and federal staff participants to attend and actively engage in integrated planning conferences, tabletop exercises, and staff briefings. These events build community, understanding of culture, and most importantly, trust. Quite frankly, as most NSSEs typically run for a very short duration, it is too late to build these relationships and understand the different state and federal cultures at the time of the event.

### B. Deputy Commanders

In order to ensure the federal and state chains of command and their respective operations remain separate, past DSCs have utilized two deputy commanders: one NG officer in state status and the other a title 10, federal military

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<sup>46</sup> G-20 MOA, *supra* note 27, at 2.

<sup>47</sup> *Id.*

officer. Under this construct, the NG deputy ensures the commander's "state" orders are given and acted upon by the assigned state NG forces. Similarly, the title 10 deputy ensures the DSC's "federal" orders are given and acted upon by assigned federal forces. In addition, the deputies coordinate between themselves to ensure operational gaps and seams are identified and addressed. State and federal forces have been observed to take cues from their NG and federal deputy commanders respectively. If the two deputies are unable to achieve and project a positive working relationship, the working relationship between the separate staffs and military personnel will likely be strained as well. Ultimately, the deputies play an enormous role in the DSC's ability to successfully command and control the two forces and achieve a unity of effort.

### C. Distinguish Federal and State Missions

Importantly, the deputies must ensure that their respective forces understand which tasks and missions are assigned to the separate NG and federal forces. As previously discussed, because the PCA<sup>48</sup> and DoD policy<sup>49</sup> restrict the use of federal forces in providing direct support to law enforcement, it is important to keep mission responsibility separate. It is, therefore, recommended that operation orders (OPORDs) clearly identify the force with the associated task. Additionally, all slide presentations and command publications should clearly depict which force is conducting which operation. For example, if NG forces have been tasked to assist law enforcement in maintaining security at a particular location, all forms of command communication should ensure that only NG forces are associated with this task. Though not required, some DSCs have directed separate NG and title 10 operations briefings and slides.

### D. Intelligence and Force Protection

One of the most critical responsibilities of the DSC's title 10 and NG judge advocates is ensuring assigned forces understand and distinguish Intelligence Oversight (IO) rules regarding the collection of intelligence on U.S. persons from rules pertaining to sensitive information regarding non-DoD-affiliated persons. Simply stated, IO rules apply to both state NG<sup>50</sup> and title 10 intelligence personnel.<sup>51</sup> Sensitive

information rules apply to all non-intelligence, DoD personnel.<sup>52</sup> Policies and procedures regarding collection, retention, dissemination, redaction, and purging of information used for intelligence or force protection purposes should be clearly delineated in OPORDs and standard operating procedures to ensure that there is an organized and structured approach to the handling of information about individuals. In addition, because of the application of IO rules to intelligence personnel, these personnel should only be tasked with missions associated with foreign intelligence<sup>53</sup> or counter-intelligence.<sup>54</sup>

Non-intelligence, force protection personnel, however, are not limited by these IO restrictions where there is a direct threat to the force. For example, if demonstrators become unruly and begin throwing bottles at policemen and others, including military personnel in the area, force protection personnel may collect this information and disseminate it to the force so that they may protect themselves from this activity. If an intelligence analyst were added to the force protection staff, however, this intelligence analyst would likely commit an IO violation by collecting the same information because of the limits on the type of information he or she can collect. Therefore, it is unwise to use intelligence personnel to augment the force protection staff because the IO rules would still apply to the intelligence personnel.<sup>55</sup> Due to the importance of this area of practice, one should expect a great deal of oversight not only from the Combatant Command but also NGB, the Joint Staff, and the Office of the Secretary of Defense.

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<sup>51</sup> Executive Order No. 12,333, U.S. Intelligence Activities, 46 Fed. Reg. 59,941 (4 Dec. 1981); 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).

<sup>52</sup> Sensitive information is unclassified, but is For Official Use Only (FOUO). U.S. DEP'T OF DEF., DIR. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE (7 Jan. 1980).

<sup>53</sup> Foreign intelligence is information relating to the capabilities, intentions, and activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. National Security Act of 1947, 50 U.S.C. § 401a (2006).

<sup>54</sup> Counterintelligence is information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. Joint Pub 1-2. Within the United States, the Federal Bureau of Intelligence (FBI) has primary responsibility for conducting counterintelligence and coordinating the counterintelligence efforts of all other U.S. Government agencies. Executive Order No. 12,333, 46 Fed. Reg. 59,941 para. 1.14(a).

<sup>55</sup> U.S. DEP'T OF DEF., DIR. 2000.12, DOD ANTITERRORISM (AT) PROGRAM (18 Aug. 2003) (certified current as of 14 Dec. 2007). The Department of Defense's AT program is one of several security-related programs that fall under the overarching Combating Terrorism and Force Protection programs. *Id.* para. 4.8.

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<sup>48</sup> See discussion *supra* note 38.

<sup>49</sup> See discussion *supra* note 40.

<sup>50</sup> National Guard Bureau Policy directs that the provisions of DoD 5240.1-R are applicable to all NG intelligence personnel, and the provisions of DoDD 5200.27 are applicable to all NG non-intelligence personnel serving in title 10 or title 32 status. Memorandum, Chief, National Guard Bureau, to the Adjutant Generals of All States, Puerto Rico, the U.S. Virgin Islands, Guam, and the Commanding General of the District of Columbia, subject: NGB Policy for Handling of U.S. Persons Information (18 June 2008).

## E. Check Out the Orders

It is important that someone verify that all personnel assigned are serving under the appropriate duty orders. That means that NG forces must be on title 32 or SAD orders. Similarly, federal forces must be on title 10 orders. This is important because orders are the fundamental documents in establishing military justice jurisdiction as well as protections under the Uniformed Services Employment and Reemployment Rights Act, Federal Tort Claims Act, and various state laws providing NG personnel with authorities, benefits, and protections. State law may, for example, grant members of the NG with law enforcement authorities. Without orders reflecting the appropriate state status, one could argue that a NG Soldier had no more authority than a civilian.

It is equally important to ensure the DSC carries two sets of orders: both title 10 and title 32. Without both types, the commander may not have authority to issue lawful orders to either force or be afforded the protections and authorities identified above. Even though the governor and the President may have consented and authorized the officer to serve as the DSC, orders must be cut to confer proper and appropriate status.

## V. Conclusion

Some have called the DSC a “success story” and point to the efficiencies and synchronization of the title 10 and NG staffs as bringing together the best of the title 10 and title 32 systems, processes, and capabilities. Major General Randall R. Marchi, the 2009 G-20 DSC, said, “I can’t see how an operation like this can be . . . efficiently done without a dual-status commander. A parallel command construct likely would have failed to capitalize on this synergy.”<sup>56</sup> Similarly, Brigadier General William Hudson, 2008 Democratic National Convention Dual-Status Commander said, “Dual Status is the right way to go for planned NSSEs.”<sup>57</sup>

The ability of a single DSC to achieve unity of effort of state and federal forces to assist the USSS and the state in securing an NSSE greatly enhances both sovereigns’ situational awareness and their overall ability to secure an event and protect the American people. It does so by capitalizing on the military expertise of both sovereign military forces, increasing efficiency by reducing duplicative effort, providing synergy, and ensuring unity of effort among federal and state uniformed forces.<sup>58</sup>

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<sup>56</sup> E-mail from Mr. Mario Carillo, Standing Joint Force Headquarters, USNORTHCOM, Colorado Springs, Colo., to Colonel John T. Gereski, Dir., Operations Law, USNORTHCOM, Colorado Springs, Colo. (Apr. 29, 2010, 12:22 MST) (on file with authors). Mr. Carillo is involved with the compilation of after action reports (AARs) of domestic operations for USNORTHCOM.

<sup>57</sup> *Id.*

<sup>58</sup> G-20 MOA, *supra* note 27, at 3.

## Appendix

### MEMORANDUM OF AGREEMENT CONCERNING AUTHORIZATION, CONSENT, AND USE OF DUAL-STATUS COMMANDER PURSUANT TO 32 U.S.C. § 325 FOR THE PITTSBURGH SUMMIT 2009

1. Purpose. This Memorandum of Agreement (MOA) outlines the separate chains of command and responsibilities of the dual-status commander for the Pittsburgh Summit of G-20 Leaders (hereinafter “the Summit”), which will be held September 24- 25, 2009, in Pittsburgh, Pennsylvania, for the purpose of convening world leaders who represent 85 percent of the world’s economy. The President of the United States, or his designee, and the Governor of the Commonwealth of Pennsylvania, by executing this MOA have provided authorization and consent for the activation of this commander pursuant to 32 U.S.C. § 325(a)(2). The commander’s activation is not expected to exceed 15 days, beginning on or about September 15, 2009, and ending on or about September 30, 2009.

2. Mutually Exclusive Chains of Command. The dual-status commander will receive orders from a Federal chain of command and a State chain of command. As such, the dual-status commander is an intermediate link in two distinct, separate chains of command flowing from different sovereigns. Although the dual-status commander may receive orders from two chains of command, those chains of command must recognize and respect the dual-status commander’s duty to exercise all authority in a completely mutually exclusive manner, *i.e.*, either in a Federal or State capacity, but never in both capacities at the same time. This MOA contains special procedures to maintain the required separation of State and Federal chains of command.

#### A. State Command and Control.

1. The Pennsylvania Governor, through his Adjutant General, will provide command and control over the supporting National Guard forces. As a member of the Pennsylvania National Guard in a State status, the dual-status commander is subject to the orders of the Governor through the Adjutant General of the Commonwealth of Pennsylvania.
2. The dual-status commander, acting pursuant to State authority, may issue orders to National Guard forces serving in a State status (*i.e.*, Title 32 or State Active Duty).
3. Command and control of National Guard forces provided to Pennsylvania from other states, if applicable, will be determined by prior coordination between those states and Pennsylvania. Authority for those forces to provide support in Title 32 status must be granted in advance by the Secretary of Defense.

4. All military justice issues concerning Pennsylvania National Guard forces will be determined in accordance with the Pennsylvania Code of Military Justice. Military Justice issues concerning National Guard forces from states other than Pennsylvania will be determined in accordance with those states' codes of military justice.

B. Federal Chain of Command.

1. The Commander, U.S. Northern Command (USNORTHCOM), will provide command and control over the supporting Federal forces. The dual-status commander, as a Federal officer ordered to active duty under Title 10 (of the U.S. Code), is subject to the orders of the President, the Secretary of Defense, and the Commander, USNORTHCOM, or those Federal officers ordered to act on their behalf.
2. The dual-status commander, acting pursuant to Federal authority, may issue orders to Federal forces, *i.e.*, active duty forces, including reserve forces serving on active duty such as Federalized National Guard forces (Title 10 status). In accordance with the Posse Comitatus Act, direct civilian law enforcement activities are not to be performed by Federal forces supporting the Summit.
3. All military justice issues for supporting Federal forces will be determined in accordance with the Uniform Code of Military Justice as implemented by applicable Military Department regulatory guidance.

3. Missions.

A. *State Military Mission:* Plan, coordinate, and provide requested, authorized, and approved support to lead Federal agencies, and State agencies performing activities related to the Summit.

B. *Federal Military Mission:* Plan, coordinate, and provide requested, authorized, and approved support to lead Federal agencies performing activities related to the Summit.

4. Purpose of Dual-Status Command Structure. Utilizing a dual-status commander allows the efficient use of both Federal and State authorities to execute authorized missions in support of Federal and State agencies for the Summit. This relationship will capitalize on the military expertise of both sovereign military forces, reduce duplicative effort, provide synergy, and ensure unity of effort. The dual-status commander will have enhanced situational awareness through this dual status, and both Federal and State chains of command will have a common operating picture. This enhanced situational awareness will ensure optimal tasking and mission accomplishment by State and Federal military forces.

5. Compliance with Federal and State law. The dual-status commander must comply with all State and Federal laws appropriate to the mission while executing his duties. If the dual-status commander perceives that orders provided by the Federal or State chain of command may violate Federal or State law or create a potential conflict of interest or mission conflict, the dual-status commander must immediately inform both chains of command of the perceived problem.

6. Sharing of Documentation. To avoid miscommunication, the Federal and State chains of command should share all documents/guidance concerning their respective missions at the earliest possible opportunity.

7. Anti-terrorism/Force Protection Standards. During the Summit, the Pennsylvania National Guard agrees that National Guard Forces participating in activities related to the Summit will comply with anti-terrorism/force protection (AT/FP) guidance established by USNORTHCOM unless the Pennsylvania National Guard has established more stringent guidance. USNORTHCOM will provide AT/FP guidance in all warning, planning, alert, deployment, or execute orders. Any obstacles in achieving compliance with the paragraph will be resolved by the Adjutant General of Pennsylvania and the Commander, USNORTHCOM.

8. Mission Conflicts.

A. The dual-status commander should attempt to ensure there are no conflicts between Federal and State mission taskings. If the dual-status commander believes a conflict exists, he should notify both chains of command at the earliest possible opportunity. Both chains of command and the dual-status commander must be involved in the resolution of such conflicts.

B. In the event that a mission tasking conflict cannot be resolved, the dual-status commander should consult with a judge advocate from both the Federal chain of command and the State chain of command. While the conflict is being resolved, the dual-status commander will continue to execute his federal missions, and will continue to execute those State missions in areas not subject to the conflict.

9. Status. During the course of this mission, the dual-status commander shall describe the status of all forces in writing. The purpose of this requirement is to avoid assigning Federal responsibilities to State forces and to avoid assigning State responsibilities to Federal forces. If it becomes necessary to make a change to the status of forces, the dual-status commander will ensure both chains of command are aware of the necessity for such changes, but the dual-status commander does not have the authority to make those changes.

10. Delegation from Sovereigns. It is agreed and understood that the Federal and State sovereigns may delegate their command authority to intermediate officials or officers who will provide orders to the dual-status commander. This delegation will typically occur via written orders but may take another form in exigent circumstances.

11. Incapacity of the Dual-Status Commander. In the event that the dual-status commander becomes incapacitated, subordinates will need to be in place to assume command of both the Federal and State chains of command. For this reason, the dual-status commander needs a Federal status deputy commander and a State status deputy commander.

12. Effective Date. This MOA shall become effective after the signing of the document by the parties and upon the order to active duty of the dual-status commander. Upon the effective date of the MOA, the dual-status commander may maintain ongoing direct liaison authority with his Federal and State chains of command and exercise State authority and Federal authority as provided by those sovereigns.

13. Modifications to MOA. This MOA may be amended, revised, or extended by the written mutual agreement of the parties.

14. Termination. This MOA will automatically terminate upon the redeployment of forces from the performance of activities related to the Summit. If either party decides to withdraw from this MOA, it should do so in writing with sufficient notice to allow proper mission accomplishment, if possible, by the other party. Termination of this MOA will result in the release of the dual-status commander from duty in a Title 10 status.

-original signed -  
Robert Gates  
Secretary of Defense

9-10-09  
Date

-original signed -  
Edward G. Rendell  
Governor, Commonwealth of Pennsylvania

9-11-09  
Date