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A FRAMEWORK FOR NATIONAL GUARD EMPLOYMENT IN THE HOMELAND

by

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March 2019

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This thesis explores the doctrinal divide among homeland defense (HD), homeland security (HS), and defense support to civil authorities (DSCA) and questions whether these doctrinal spaces are adequately instructive to National Guard domestic action. The thesis explores the Department of Defense's (DoD) important contributions to HD and DSCA and the Guard's historical and contemporary roles in HD and HS. This work proposes that the DoD's reticence to describe its actions as HS creates a doctrinal void for the Guard. This thesis advances DSCA as theoretically and practically useful for the DoD but concurrently contravenes core principles of domestic response, which is practically inadequate for domestic Guard action. By exploring military action in large-scale, complex disasters and national special security events, this thesis provides insight into the legal, policy, and fiscal challenges and solutions for clearer domestic doctrine. The thesis explores whether the Guard can be better employed in disasters by adjudicating matters of defense over security and engaging in a federalism conversation aimed at discriminating between disasters that are "national matters" and those that are "state matters."

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A FRAMEWORK FOR NATIONAL GUARD EMPLOYMENT IN THE HOMELAND

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ABSTRACT

This thesis explores the doctrinal divide among homeland defense (HD), homeland security (HS), and defense support to civil authorities (DSCA) and questions whether these doctrinal spaces are adequately instructive to National Guard domestic action. The thesis explores the Department of Defense's (DoD) important contributions to HD and DSCA and the Guard's historical and contemporary roles in HD and HS. This work proposes that the DoD's reticence to describe its actions as HS creates a doctrinal void for the Guard. This thesis advances DSCA as theoretically and practically useful for the DoD but concurrently contravenes core principles of domestic response, which is practically inadequate for domestic Guard action. By exploring military action in large-scale, complex disasters and national special security events, this thesis provides insight into the legal, policy, and fiscal challenges and solutions for clearer domestic doctrine. The thesis explores whether the Guard can be better employed in disasters by adjudicating matters of defense over security and engaging in a federalism conversation aimed at discriminating between disasters that are "national matters" and those that are "state matters."

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LIST OF ACRONYMS AND ABBREVIATIONS

ANG	Air National Guard
CCARRLL-T	capability, cost, appropriateness, risk, readiness, legality, lethality, and time
CCMD	combatant command
CNGB	chief of the National Guard Bureau
CST	civil support team
DHS	Department of Homeland Security
DoD	Department of Defense
DCO	defense coordinating officer
DSC	dual-status commander
DSCA	defense support of civil authorities
ESF	emergency support function
FEMA	Federal Emergency Management Agency
HD	homeland defense
HS	homeland security
IG	Inspector General
JP	joint publication
LFA	lead federal agency
NGB	National Guard Bureau
NGCS	National Guard civil support
NIMS	National Incident Management System
NMSZ	New Madrid Seismic Zone
NORAD	North American Aerospace Defense Command
NRF	*National Response Framework*
NSHS	National Strategy for Homeland Security
NSSE	national special security event
SAD	State active duty
U.S.C.	*United States Code*
USERRA	Uniformed Services Employment and Reemployment Rights Act
USINDOPACOM	United States Indo-Pacific Command

USN	United States Navy
USNORTHCOM	United States Northern Command
WMD	weapons of mass destruction

EXECUTIVE SUMMARY

> The country's active, reserve, and National Guard forces . . . must continue to enhance their ability to provide support to civil authorities, not only to help prevent terrorism but also to respond to and recover from man-made and natural disasters that do occur.
>
> —Homeland Security Council[1]

U.S. strategic guidance to the Department of Defense (DoD) and the National Guard presses both organizations to assume important supporting roles in the homeland. To this end, the DoD propagates doctrine that describes three distinct domestic missions: homeland security (HS), homeland defense (HD), and defense support to civil authorities (DSCA).[2] The DoD's doctrine relating to civil support clarifies that these "are distinct operations."[3] However, these doctrinal distinctions are primarily designed to inform DoD action in the homeland, particularly DSCA, and National Guard action in narrowly impractical federal missions. If the DoD and the Guard are to provide effective support to civil authorities, then doctrine will need to be improved to provide for National Guard action across a more diverse continuum of domestic action.

The National Guards are able to serve at the extremes of—and in the space between—purely federal and purely state action. Their dual nature complicates discrete treatment within the DoD's doctrinal framework. DoD guidance describes the action of National Guards in the homeland in support of their governors and of DoD action via integration into domestic operations. The guidance does not adequately explain how the National Guard operates in the space between, apart from, or in cooperation with DoD action. This research examines the doctrinal and directive space between purely federal

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[1] Homeland Security Council, *National Strategy for Homeland Security* (Washington DC: Homeland Security Council, October 2007), 51, https://www.dhs.gov/xlibrary/assets/nat_strat_homelandsecurity_2007.pdf.

[2] Joint Chiefs of Staff, *Defense Support of Civil Authorities*, Joint Publication 3-28 (Washington, DC: Department of Defense, 2013), I-2, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_28.pdf?ver=2018-11-29-083820-613.

[3] Joint Chiefs of Staff, I-4.

National Guard action in support of the DoD and purely state action accomplishing state matters.

National Guards operate within their states under the governors' direction, can be activated in state active duty, and in this capacity, are funded from the state's budget. The DoD operates at the request of lead federal agencies supporting states' requests for assistance, and DoD forces are employed in accordance with DSCA regulations—from the federal budget. However, when National Guard forces from an unaffected state are employed in support of an affected state, the authorities, funding solutions, and federal and state demarcation become less clear. Hurricane response actions in 2017 demonstrate that senior emergency managers from the DoD and the National Guard are ill-equipped to adjudicate these doctrinal lines. The adjudication debate rested on a central question: Were the disasters a national concern and, therefore, a federal responsibility, or were the responses independent state matters? This then-unanswered question has implications for what doctrinal space National Guard forces should occupy.

Admittedly, it is the Guard's ability to operate as either a federal or a state entity that makes this doctrine so difficult to define. DoD guidance is justifiably written to serve its own purpose and to describe how it operates in the domestic environment. References to the Guard, therefore, naturally focus on its integration into DoD activities rather than operations distinct from DoD activities. DoD guidance describes how the Guard integrates into DoD operations but fails to consider that the DoD normally integrates into operations in which the Guard has primacy—in support of state-led response and recovery. National Guard units are the primary military responders in domestic operations and emergencies.[4] Nevertheless, DoD doctrine and directives remain largely silent in recognizing the Guard's obvious leadership role in military homeland security roles.

Doctrinarians looking to discriminate between domestic mission spaces should look to precedent within homeland defense; large-scale, complex disasters; and national special security events (NSSEs). These situations serve to clarify the domestic actions of

[4] Ted Martin and Corey Thomas, eds., *Domestic Operational Law: 2018 Handbook for Judge Advocates* (Charlottesville, VA: Center for Law and Military Operations, 2018), 3.

the DoD and the Guard and hint toward ways to improve existing military doctrine. HD missions are well described in domestic doctrine, and legislation, policy, and guidance all provide clear instruction for how the Guard should integrate into these activities. HD is well defined because its doctrine lays upon unambiguous legislation and policy derived from relatively recent modifications to Title 32 of the *U.S. Code* (U.S.C.). Similar clarity in Title 10 and Title 32 provide equally useful insight for National Guard counter-drug units and weapons of mass destruction–civil support teams. These federally funded, state-controlled teams regularly accomplish nationally significant HD and HS missions.

When Guard personnel responded to Hurricane Katrina, they did so through bottom-up engagement in keeping with the *National Response Framework* and under the authority and direction of their governors. At the same time, a state-to-federal conversation immediately sought to determine whether the emergency was a national or state concern. This federalism debate led to presidential disaster declarations that opened the doors to assistance from federal agencies including the Federal Emergency Management Agency and the DoD. Additionally, the assistant secretary of defense agreed to federally fund the state-controlled National Guard response as it accomplished homeland security missions. While the Katrina response is a good model for debating federalism and funding, the DoD immediately worked to ensure the results of this particular debate did not establish precedent. The changes it made to DSCA regulations aimed to clarify that the DoD could not afford to fund Guard disaster response and that DSCA would no longer be approved based on a governor's request. The DoD's current doctrine is built on the premise that missions like these are not authorized by law. From a financial perspective, the 2017 hurricane season was more devastating than the 2005 season that saw Katrina. A major earthquake associated with the New Madrid Seismic Zone would vastly eclipse either of these events, and effective response would hinge on proper Guard employment. Clearly, some policy action is required to bridge the practical reality that federally funded, state-controlled Guard personnel are critical enablers in large-scale, complex disasters with the legal reality of fiscal restrictions imposed on the DoD.

NSSEs point toward an established mode of adjudicating matters of scale, federalism, jurisdiction, and funding. When events like the Super Bowl exceed local

capabilities or capacities, local executives have a mechanism for petition that attempts to adjudicate federal and state equities. Federal and state officials consider the size, federal participation, significance, size, location, duration of the event, media coverage, threat environment, and the availability of state or local resources. This conversation provides an objective model that could be duplicated or emulated for use in the same kind of federal–state conversations that differentiate Guard action in the homeland.

The DoD struggles to adjudicate the Guard's dual nature. Its existing doctrine and directives do not anticipate Guard action in response to large-scale, complex disasters, and there is room for new, or clearer, directives describing how the Guard operates domestically outside DoD strictures. New guidance should adjudicate the jurisdictional space between HD and HS and provide a way to engage in a federalism discussion to differentiate disasters that are national matters from disasters that are state matters. State Guards engaged in state matters respond in state active duty and accomplish HS actions. For national matters, especially in the context of large-scale, complex disasters, new policy needs to more effectively guide the Guard in accomplishing federally funded, state-controlled HS. Ultimately, legislators need to look for improvements to Title 32 of the *U.S. Code*, which relates to Guard training, or to the language in Title 42, which relates to the Stafford Act. These improvements will serve as the foundation to improve guidance and remove legal and fiscal barriers to new DoD doctrine able to guide National Guard domestic action more effectively.

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Eighteen months ago, Dr. Bellavita and Dr. Fernandez pressed our cohort to define homeland security, and we were struck by its intangibility. Dr. Bellavita was our Morpheus, pressing our class full of Neos to question the premises behind domestic concepts most of us took for granted. Concurrently, Department of Defense and National Guard leaders have been embroiled in conversations that show homeland security and homeland defense are *not* ideas that can be taken for granted. These sometimes-intangible ideas profoundly affect how military forces provide support in disasters. There are a few passionate policy advocates who are trying to answer some of the same questions I pose in this paper, and I thank them for their encouragement in this process and for their ongoing work. A special thanks goes to Damon, Chad, and the whole team at the National Guard Bureau's J5 (especially Jeff L., the "52-gang," and Brad), who continue to seek clarity in these important spaces.

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Bureau, Texas, Florida, Puerto Rico, the United States Virgin Islands, California, New Mexico, and the citizens of Arkansas (and that's just the past 18 months).

I cannot thank my family enough. In my youth, my mother never stopped learning. Her master's thesis encouraged important advances in healthcare and was a practical reminder that one person's ideas can literally change the world. My fathers achieved comparable academic achievements and served as role models of lifelong intellectual inquiry. I thank my siblings for their love, for believing in me, and for being perennial cheerleaders.

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Finally, I acknowledge the Holy Spirit. Good education should push us to question the presumptions that make up our thought. This questioning can be exhilarating, and it can also be agonizing. Our cohorts have debated matters of immigration, racial tension within and outside our borders, terrorism, threats to critical infrastructure, the implications of emerging technology, and threats to democracy itself. Some of our classmates have been at the center of these issues. Eighteen months of intellectual inquiry into these contentious issues—amid a demanding career, community and church commitments, and my responsibilities as a husband and father—would not have been possible without my grounding faith. I pray God blesses you as he has blessed me.

I. INTRODUCTION

This thesis proposes that adjudicating whether a disaster is a national or state matter has important implications for how federal agencies, the Department of Defense (DoD), and the National Guards should respond.[1] When Guard units operate within their states under the governors' direction, they are often accomplishing parochial state matters. When the DoD operates at the behest of lead federal agencies and is reimbursed from the federal budget, it is implicitly accomplishing federal matters. However, when National Guard forces from an unaffected state are employed in support of an affected state, the federal-to-state demarcation becomes less clear. This research analyzes why this demarcation is unclear and what guidance contributes to this ambiguity.

The DoD has three distinct domestic missions: homeland security (HS), homeland defense (HD), and defense support to civil authorities (DSCA).[2] The DoD's core military doctrine relating to civil support clarifies that these terms "are not interchangeable."[3] Although several directives describe how National Guard forces can be integrated into homeland defense and attempt to describe National Guard roles in DSCA, limited national guidance relates to the Guard's (or even the DoD's) role in *homeland security*. This paucity of guidance exists despite the *National Strategy for Homeland Security*'s direction that active-duty Guard and reserve forces must improve their combined capacity to prevent terrorism and support both manmade and natural disaster response and recovery.[4] For DoD and Guard administrators to operate effectively in the homeland, they must have clear

---

[1] The National Guards (plural) are 54 distinct and independent Guards representing their respective states and territories. The use of the National Guard (singular) refers to all 54 operating as a single military component. The reference to "state Guards" throughout this thesis includes the four non-state Guards (Puerto Rico, the U.S. Virgin Islands, Guam, and Washington, DC), and the "state governor" is the chief executive over these Guards.

[2] Joint Chiefs of Staff, *Defense Support of Civil Authorities*, Joint Publication 3-28 (Washington, DC: Department of Defense, 2013), I-2, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_28.pdf?ver=2018-11-29-083820-613.

[3] Joint Chiefs of Staff, I-2.

[4] Homeland Security Council, *National Strategy for Homeland Security* (Washington DC: Homeland Security Council, October 2007), 51, https://www.dhs.gov/xlibrary/assets/nat_strat_homelandsecurity_2007.pdf.

guidance delineating HD, HS, and DSCA action. Although these activities describe domestic action, they have important differences with implications to domestic military support in general.

Disaster response activities occur under the guidance and protection of the law. The constitutional and legal systems of checks and balances that guide daily government action in the homeland apply equally to military disaster response. For example, the American idea of federalism creates a necessary balance and tension between national and state authorities, even within homeland security considerations. These foundational principles provide the framework within which agencies like the DoD and state Guards must operate. However, the Guard occupies a space between the purely federal and purely state and, therefore, complicates discrete treatment within this framework. DoD doctrine and instructions describe its own operations in the homeland as well as state National Guard integration into DoD domestic action but do not adequately guide National Guard operations within the homeland *apart* from DoD action. This research examines how federalism affects the doctrinal and directive space between purely federal National Guard action in support of the DoD accomplishing matters of national concern and the Guard's state action accomplishing state matters.

In addition to the implications of federalism that relate to the (governmental) level of domestic action, jurisdictional considerations relate to the type of domestic mission. When the DoD and the Guard operate in the homeland, the action needs to be adjudicated to determine whether it is a matter of HD or HS. HD is adequately defined in joint doctrine, but little military guidance describes or informs HS tasks or how these tasks differ from other domestic action. It is self-evident why the DoD should have primacy in its homeland defense role, and it is also reasonable to envision valuable DoD resources that could and should be made available to other federal agencies accomplishing HS activities in a disaster. What is missing in the doctrine is language for how the Guard is employed in the space between a purely HS response and an event in which DoD HD involvement becomes necessary.

Admittedly, the Guard's ability to operate as a federal or state entity makes this doctrine difficult to define. Figure 1 provides insight into the spectrum of missions,

authorities, jurisdictions, and fiscal environments within which the Guard operates. The overlapping spectrum is a key difficulty in providing guidance that is widely applicable to Guard action. DoD guidance serves its own purpose and describes how it operates in the domestic environment. References to the Guard, therefore, naturally focus on its integration into DoD activities rather than operations distinct from DoD activities. DoD guidance describes how the Guard integrates into DoD operations but fails to acknowledge that the DoD normally integrates into operations in which the Guard has primacy—in support of state-led response and recovery. National Guard resources have a preeminent role in domestic homeland security operations, and Guard soldiers and airmen are the nation's primary military response force.[5] Nevertheless, DoD doctrine and directives remain largely silent in recognizing the Guard's obvious leadership role in military homeland security roles.

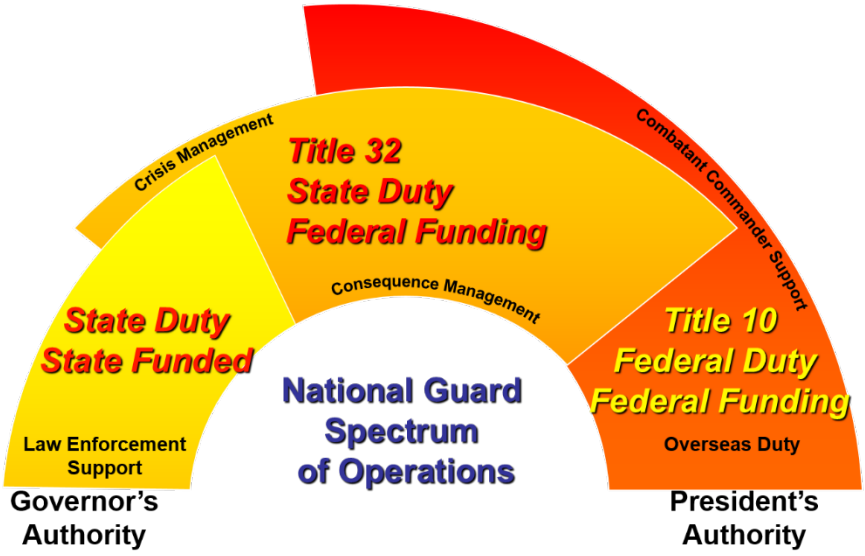

Figure 1. National Guard Role in the Full Spectrum of State and Federal Missions[6]

[5] Bryan Blackmore and Stan Fields, eds., *Domestic Operational Law: 2015 Handbook for Judge Advocates* (Charlottesville, VA: Center for Law and Military Operations, 2015), 3.

[6] Adapted from Frank Grass, "Unity of Effort" (presentation, United States Northern Command's Dual Status Commander Course, Colorado Springs, CO, January 2019).

In addition to the question of federalism and adjudication between activities that are homeland defense or security, this research also proposes that the size of a disaster factors into how the DoD and the Guard should operate. The magnitude of the disaster closely correlates with the federalism discussion and, thus, whether it is a federal or state matter. However, there are no definitive guides relating the two. Large hurricanes routinely strike multiple states along the east coast, but the response is often well within the capability and capacity of the local communities involved. Conversely, a single attack on the Twin Towers resulted in a national response. Likewise, Hurricane Katrina struck only a few states yet precipitated a national response. National special security events are pre-planned actions, such as the Super Bowl or World Series, where a local event assumes national significance. Events like these and large-scale, complex disasters should be explored for their ability to provide the DoD a doctrinal roadmap for navigating this discussion.

A. RESEARCH QUESTION

How should military doctrine for operations in the homeland be refined to better employ the National Guard?

B. RESEARCH DESIGN

This research developed out of the 2017 hurricane season when Hurricanes Harvey, Maria, and Irma led to a national disaster recovery effort. At the tactical level, National Guardsmen were instrumental in the success of these recovery efforts. However, senior Guard leaders deployed them amid a confusing blizzard of internal debate surrounding proper employment.[7] The debate rested on a central question: Were the disasters a national concern and, therefore, a federal responsibility, or were the responses independent state matters? This then-unanswered question has had implications for what doctrinal space National Guard forces should occupy.

[7] This information came from the author's involvement in daily teleconferences with the National Guard Bureau and state National Guard leadership during response operations to Hurricanes Harvey, Irma, and Maria in 2017.

This research is informed by domestic disasters like Hurricanes Katrina, Sandy, Harvey, Maria, and Irma and by the attacks on 9/11, but it is not an effort to explore these events specifically. This research is more interested in describing a workable framework for the next Hurricane Katrina than it is in describing the environment of past disasters. However, these past events are useful in pointing to the challenges associated with Guard employment in the homeland, and this thesis uses national catastrophic plans to validate the discussion. FEMA has described several national complex disasters, and these can be used as hypothetical scenarios within which to evaluate the limitations of existing law, doctrine, and instructions informing military use in the homeland.[8] These guiding documents are the foundational sources for the proposed research.

This thesis focuses on policy options analysis by looking at existing policy and developing an outline for improved or supplemental policy options. The elements, actors, and constitutional and legal variables all affect this policy landscape, so this thesis differentiates and contextualizes their contributions to this problem space. Proposed policy options are ultimately judged against their ability to address the problem of employing National Guard forces in the context of one of FEMA's national catastrophic disasters.

Several actors have interests and equities associated with this research. The literature review contains an undercurrent of debate wherein active duty and Guard leaders fiercely fight for preeminence in the homeland, often at the expense of the other's position. As the research explores the policy landscape associated with each actor, it acknowledges each perspective. A policy solution that corrects inequities for one party at the expense of another does not serve the overall homeland security community. Every effort was made to acknowledge the legitimate constraints, strengths, and legal boundaries associated with each actor's position in this landscape.

The research begins with insight into the history of the Guard and its role augmenting the DoD in U.S. combat operations. The thesis then describes HS, HD, and DSCA doctrines from the DoD's perspective and defines how and when the Guard operates

[8] FEMA has identified the New Madrid Seismic Zone earthquake, the Cascadia Subduction Zone earthquake and tsunami, and Major Gulf- or Atlantic-strike hurricanes as complex disasters worthy of significant, deliberate planning.

in these doctrinal spaces. HS, HD, and DSCA doctrinal spaces need to be understood before they can be used as lenses through which Guard action can be viewed. Guard action in support of these mission types is described on a national scale and as important actors at the state level. During these conversations, the thesis points to existing legislation or policy guidance that better enables action with HS, HD, or DSCA or where national- or state-level action is more clearly defined for the Guard. These exemplars are signposts pointing to solutions applicable to the larger doctrinal and fiscal friction points that must be overcome if Guard forces are to be better employed in the homeland.

Of all the variables associated with disaster response, most practitioners affirm two central questions guiding response: Who is in charge, and who is paying? These key ideas are used to analyze effective Guard use in FEMA's complex scenarios. The research design focuses on matters of economics and funding, authority, and command and control to assess whether proposed solutions address the shortfalls in existing guidance. At the conclusion of the thesis, these core issues serve as litmus tests for the ambiguity in existing doctrine, particularly in the context of a multi-state natural disaster, while providing insight into how that guidance should be modified. FEMA's catastrophic disasters serve as evaluative scenarios to test the effectiveness of current doctrine and to apply supplemental guidance that evolves from the research.

While ideas like HD and DSCA provide frameworks for DoD action in the homeland, they fail to consider other homeland security conditions outside these models. This thesis provides a policy outline describing the military homeland-security environment outside HD and makes a case for the National Guard being a primary actor in HS, not a secondary actor as implied in the DoD's DSCA guidance. Instead of forcing the DoD to adjudicate this jurisdictional minefield solely within its own doctrine and directives, new—or clearer—directives could better describe how the Guard operates domestically outside the DoD's (federal) strictures. This clarifying guidance should not describe how the Guard integrates into limited support roles for the DoD but how it supports discrete homeland security operations independent of, or in coordination with, the DoD. In the short term, this thesis may be most important in its ability to provide the Department of Homeland Security (DHS) insight into how to properly source military

support to homeland security activities and to codify how this should be accomplished. Ultimately, this work demonstrates that military doctrine for operations in the homeland—and legislation aimed at describing appropriate authorities and funding—must be refined to better employ the National Guard.

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II. LITERATURE REVIEW

This literature review follows discussions relating to the role of the National Guard in HS and specifically what doctrine guides the HS enterprise in the employment of DoD and Guard forces during domestic response operations. The literature review seeks to explain the history of the Guard as a strategic reserve to the DoD, accomplishing military objectives across the globe. This history points to concurrent relevance and increasing domestic demands in matters of homeland defense and homeland security. The literature describes how these domestic missions have evolved through the emergence of contemporary threats to national security and through an increasingly important military presence in disaster response. The attacks on 9/11 and the Hurricane Katrina response precipitated a national discussion on matters of HS, and the cited works demonstrate how this new concept informed and guided military action. After these events, federal agencies reorganized to address this priority mission area, and the DoD and the Guard sought to describe jurisdictional and doctrinal lines of demarcation. Literature focused on military action in the homeland often takes a position on these demarcations and invariably asserts either DoD or Guard primacy, often at the expense of the other. Ultimately, the literature points to the need for further discussion as the DoD and the Guard seek to better understand their roles in the homeland.

Most discussions relating to the role of the Guard in the homeland begin with its constitutional and historical foundation. Although not directly correlating with the modern HS narrative, some of the history alludes to the tension between the active component ("standing army") and the state-based reserve component ("militia"). Michael Doubler's history of the Army National Guard describes the constitutional separation of powers and the War Powers Act as the basis for the DoD and Guard as separate entities while outlining key legislative actions relating to their organization.[9] His work highlights the formative legislation that led to the modern military, with particular attention to the Militia Acts of

[9] Michael Doubler, *Civilian in Peace, Soldier in War… I Am the Guard: A History of the Army National Guard, 1636–2000* (Lawrence: University Press of Kansas, 2003).

1903 and 1908 and the National Defense Acts of 1916 and 1920. Significantly, the 1916 Act was the act that renamed the Militia as the National Guard. Doubler's work is academically rigorous and exhaustively annotated, providing scholars of Guard history a wealth of source documents for every conceivable period.

Two positions are considered axiomatic throughout this work. First, the Guard provides significant depth for the DoD in accomplishing its national security objectives across the globe, and second, the Guard has been a consistent actor in the homeland. Doubler's history makes these points effectively and, although his first tome ends in 2000, he has authored a similarly exhaustive three-volume account of the National Guard's role after 9/11 as a part of the war on terror.[10] These latter works take care to describe and assert the importance of Guard action in operations overseas, in HD, and as a homeland security force. Where DoD doctrinarians may be reserved about the Guard's role in homeland security, Doubler does not equivocate on the Guard's unique position in this doctrinal space. Scholarly works relating to the Guard's history, including one by Steenson, invariably cite Doubler.

Two defining moments in contemporary HS history are indisputably the terrorist attacks on September 11, 2001, and the hurricanes of 2005. There is a great deal of literature on both of these domestic disasters, and both the DoD and Guard played roles in the response and recovery after each event. However, the purpose of this thesis is not to analyze these events outside their utility in defining the legislative and policy environment that followed them. The 9/11 attacks led to a stream of homeland security presidential directives (HSPDs), which had to be interpreted and implemented by agencies tasked with defending the homeland. A series of key national policies were issued—including National Security Presidential Directive (NSPD)-1, *Organization of the National Security Council System*, and the *National Strategy for Homeland Security* (NSHS)—that unify the activities

[10] Michael Doubler, *The National Guard and the War on Terror: Operation Enduring Freedom and Defense Transformation* (Alexandria, VA: National Guard Bureau, 2006); Michael Doubler, *The National Guard and the War on Terror: Operation Iraqi Freedom* (Alexandria, VA: National Guard Bureau, 2008); Michael Doubler, *The National Guard and the War on Terror: The Attacks of 9/11 and Homeland Security* (Alexandria, VA: National Guard Bureau, 2008); and Michael Doubler, *Operation Jump Start: The National Guard on the Southwest Border, 2006–2008* (Arlington, VA: National Guard Bureau, 2008).

of all agencies with equity in domestic security.[11] The value of these directives lies in their influence on the DoD's policy decisions since their publication. On the first line of his introduction to the 2002 NSHS, President Bush notes the importance of 9/11, and in the 2007 NSHS, he adds Hurricane Katrina as a defining moment in the HS narrative.[12] In many ways, the 2002 NSHS and the 2007 NSHS are, respectively, responses to 9/11 and Hurricane Katrina. More explicitly, while 9/11 was the progenitor of contemporary dialogue on HS, Hurricane Katrina was its first test.

William DeMaso, writing as an Air Force fellow at Air University, authored *The Relationship between Homeland Defense and Homeland Security: U.S. Northern Command's Rubik's Cube* as an early, post-9/11 insight into the demarcations between HD and HS.[13] He intuited the growing need for doctrinal clarity as DHS and the DoD worked to describe jurisdictional boundaries and alliances. DeMaso concludes that HD and HS contribute to overall national security, but response and jurisdictional divisions need to be carefully considered in the context of each domestic disaster.[14] His work does mention the Guard and alludes to its unique ability to support activities across the spectrum of HS and HD. There is an imperative to use the lenses of HD and HS to play to the strengths of each organization and to determine modes of cooperation and mutual support. These perspectives instruct responsible agencies as they tackle future challenges while guiding supporting and integral agencies like the National Guard.

A literature review of the Guard would not be complete without mentioning Timothy J. Lowenberg's contributions to describing the Guard's role in HS and HD. While

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[11] Executive Office of the President, *Organization and Operation of the Homeland Security Council*, Homeland Security Presidential Directive 1 (Washington, DC: White House, 2001), https://www.hsdl.org/?view&did=1132; Executive Office of the President, *Organization of the National Security Council System*, National Security Presidential Directive 1 (Washington, DC: White House, 2001), https://www.hsdl.org/?view&did=462808; and Office of Homeland Security, *National Strategy for Homeland Security* (Washington, DC: Office of Homeland Security, 2002), https://www.dhs.gov/sites/default/files/publications/nat-strat-hls-2002.pdf.

[12] Office of Homeland Security, *National Strategy for Homeland Security*; and Homeland Security Council, *National Strategy for Homeland Security*.

[13] William DeMaso, *The Relationship between Homeland Defense and Homeland Security: U.S. Northern Command's Rubik's Cube* (Montgomery, AL: Air University, 2004), https://doi.org/10.21236/ADA426512.

[14] DeMaso, 46.

serving as the adjutant general of Washington State's National Guard, Lowenberg was a firm defender of Guard primacy in the homeland. In the aftermath of Katrina, the senior active-duty general officer charged with domestic military support advocated for increased authority during catastrophic disasters.[15] Lowenberg was adamantly opposed to this position, describing it as a "policy of domestic regime change."[16] Before that, his advocacy for the Guard led to the publication of a National Guard Association position paper, *The Role of the National Guard in National Defense and Homeland Security*.[17] In this paper, Lowenberg vigorously presses for several changes that lay the foundation for the Reserve Forces Policy Board, which is discussed later in this chapter. His unequivocal position cuts directly to core strategic tensions. While the literature that follows attempts to reconcile these tensions through reasoned appeals to DoD and Guard parity and cooperation as well as the refinement of command and control relationships in a total-force environment, Lowenberg presses further. He advances that the Guard's dual nature is best suited to bridge HD and HS actions at both the state and federal level.[18] Lowenberg specifically notes the ambiguity in doctrinal and policy guidance proposed in this thesis. He observes "bright lines" of demarcation between the DoD and DHS, respectively conducting HD and HS activities, and notes their jurisdictional and fiscal implications.[19] These bright lines form the basis of a question posed to the Strategic Studies Institute and the U.S. Army War College, noted at the conclusion of this literature review.

Besides his position as an adjutant general in Washington and as a National Guard judge advocate general, Lowenberg also served as chairman of the Homeland Security Committee of the Adjutants General Association and of the Governors Homeland Security

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[15] House of Representatives, *A Failure of Initiative: Final Report of the Select Bipartisan Committee to Investigate the Preparation and Response to Hurricane Katrina* (Washington, DC: Committee to Investigate the Preparation for and Response to Hurricane Katrina, February 15, 2006), 221.

[16] House of Representatives, 221.

[17] Timothy Lowenberg, *The Role of the National Guard in National Defense and Homeland Security* (Washington, DC: National Guard Association of the United States, September 1, 2005).

[18] Lowenberg.

[19] Lowenberg.

Advisors Council of the National Governors Association.[20] The National Guard Association's public obituary for Lowenberg notes his national renown and expertise in matters of HD and HS.[21] His insights should be at the core of any further discussion on the DoD's and the Guard's roles in the homeland and how HS and HD directives should guide their activities. General Lowenberg's writings continue to influence the guardsmen who advocate for these and other Guard initiatives.

Lowenberg was not alone in describing examples of disunity highlighted by Katrina. In 2006, the House of Representatives published a report on how well the nation prepared for and responded to Hurricane Katrina.[22] The nation's greatest domestic trial after 9/11 highlighted numerous HS processes that still required refinement. A key criticism from this document was ineffective DoD and DHS coordination.[23] This report points to a lingering uncertainty between the DoD and DHS that may be the first inkling of both agencies' attempts to grasp their roles in the homeland. A great deal of discussion also centers on the DoD's Northern Command (USNORTHCOM)—the command designed to lead DoD operations within the continental United States—and its interaction with the states. The 2006 report chastises the states and USNORTHCOM for failing to anticipate and plan for domestic emergency situations.[24] To that end, National Guard leaders propose that planning actions between the states and the military would be more effective if led by experienced Guard officers and not USNORTHCOM.[25]

Due to insights like this, the report is an appropriate place to begin discussing DoD and Guard roles in the homeland. Although this thesis points to ambiguity in definitions relating to HD, HS, and DSCA, the bipartisan committee that authored the report did not address these issues. The committee describes the complexity of state and federal

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[20] Lowenberg, "Former Washington TAG, Dies at Home," National Guard Association, August 29, 2017, https://www.ngaus.org/newsroom/news/lowenberg-former-washington-tag-dies-home-2.

[21] National Guard Association.

[22] House of Representatives, *A Failure of Initiative*.

[23] House of Representatives.

[24] House of Representatives, 222.

[25] House of Representatives, 223.

integration but stops short of advocating for a larger role for the Guard.[26] Despite Guard leaders like Lowenberg, who emphatically point to the Guard as the natural vehicle for this integration, the report does not support this claim. The overriding theme within the Katrina report, and military postmortems from Katrina, is a need for more robust command and control, communication, and integration. Ultimately, because the report's authors fail to take a position on how these challenges can be addressed doctrinally, the report's findings have become marching orders to the DoD, DHS, and the Guard to independently fortify their positions rather than define lanes of jurisdiction. It could even be argued that the report has been used as the basis of a national dialogue on whether certain premises of federalism need to be readdressed in the context of their impediment to effective disaster response.

Efforts to fortify DoD primacy and provide doctrinal clarity in the homeland are often pursued through appeals to increase federal jurisdiction in disasters. The most alarming example came in 2007 when Congress attempted to amend the Insurrection Act. Lieutenant Colonel Paul Sausville in his Army War College thesis highlights this act as a misguided effort to solve the challenges identified in the Katrina report by strengthening federal power and providing greater authority to the DoD.[27] Sausville points to the language in the act, in which Senator Warner recommends the review and amendment of "insurrection statutes" to more easily federalize the Guard into service under the DoD.[28] Warner and the other authors of this amendment understood the need for jurisdictional clarity and unity of action during disaster response, but they chose to disregard the other recommendations, proposing a more prominent role for the Guard. The act acknowledges the advantage of having a single voice for military involvement in the homeland but argues the DoD should assume that role. Sausville's paper is useful in describing the motivations for the act and the reasons why it was eventually repudiated and repealed. This act sought to expand the president's application of the Insurrection Act and, thereby, remove a key

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[26] House of Representatives, *A Failure of Initiative*.

[27] Paul Sausville, "DoD Response to Natural Disasters—Why the National Guard Is off Limits" (master's thesis, U.S. Army War College, 2008), http://www.dtic.mil/dtic/tr/fulltext/u2/a480193.pdf.

[28] Sausville. To federalize means to convert to Title 10 service. See definition in Appendix B.

barrier to Title 10 involvement in the HS mission. More profoundly for guardsmen, the Insurrection Act provides a means to federalize the Guard, decreasing the states' control of their Guard forces. Sausville shows how Congress strongly opposed this expansion of presidential powers and points to the federalization of the National Guard, subordinate to the DoD, as an unacceptable proposition. If a single entity is to have supremacy in the military HS dialogue, Sausville's paper goes a long way toward making the case that it cannot be the DoD.

At the same time that Sausville was defending state primacy in HS, Lieutenant Colonel Michael Steenson was advocating specifically for the Guard as the preeminent actor for HS. Steenson proposes the Guard as the obvious "interagency bridge" between the states and DHS as well as proposes National Guard primacy in military homeland security actions.[29] His thesis takes this argument to its natural conclusion, suggesting that clarity in roles between the DoD and the Guard should result in reorganization, resource rebalancing, and the proper allocation of domestic military funding. Steenson's thesis, though nine years old, still provides a sound solution to many of the problems that contemporary disasters highlight.

Steenson comes closest to Lowenberg in recommending solutions that address the larger strategic challenges associated with DoD and Guard interaction in the homeland. The scholarly work allocated to these challenges all centers on finding equilibrium between the DoD and the Guard at best—and marginalization of the National Guard at worst. Steenson appears to be alone in an effort to reconcile these differences by advancing a greater role for the Guard as a solution to these tensions. Although his work provides a solid framework upon which to describe the military HS environment, there is still more to do. Steenson's position is made by drawing from anecdote and common sense yet does not peer into the murky doctrinal divide between HS and HD.

Steenson makes several cases for Guard preeminence in matters of HS. He gets closest to strategic matters of doctrine and definitive propriety when he points to Guard

[29] Michael Steenson, "The National Guard: DoD's Interagency Bridge to Homeland Security" (master's thesis, National Defense University, 2008), http://www.dtic.mil/dtic/tr/fulltext/u2/a487129.pdf.

involvement in missions like civil disturbance operations, border security, and national special security events, where Guard forces are unconstrained by Posse Comitatus.[30] Sausville would remind readers that some might see these restrictions as mere legal loopholes to be circumvented; nonetheless, they do point the academic discussion more firmly toward Guard primacy in the homeland. Steenson points to National Guard civil support teams (CSTs) and counter-drug units as specific examples of HS successes in the homeland. He rightly points to the reassuring precedence of units like these, which are properly provisioned in law and backed with the financial resources to succeed in the homeland. He appeals to logic through the economy of the Guard, as a force capable of accomplishing missions as diverse as the active component but at a reduced cost, while noting the concurrent financial benefit through its nationally distributed presence.[31] However, an appeal to logic and precedence does not take the argument far enough. These arguments illustrate how the Guard can succeed, almost by exception, but not explicitly how the Guard should be employed—and when and why the DoD should not be.

While Sausville addresses an effort to adjudicate the internal military dialogue, the Katrina report also demands greater interagency cooperation. Steenson goes further to propose that the Guard should be that interagency bridge. Operations in the homeland will be successful when all levels up and down the government and across federal agencies cooperate. The Guard is uniquely qualified to serve as the connective tissue between all these domestic stakeholders. As a consequence, Steenson understands that even if the DoD and Guard can agree on their roles in the homeland, that alone may be insufficient. Doctrinal guidance and military support will be ineffective so long as the larger HS enterprise is unclear about military roles in disasters.

Most of the literature referenced for this work focuses on legal or jurisdictional demarcations associated with HD and HS. In defining boundaries between these mission areas, threats to the homeland must factor into the discussion. In the HD discussion, the threat landscape illustrates how threats, their magnitude, and their effects guide doctrinal

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[30] Steenson.

[31] Steenson.

demarcations. However, the threat of terrorism creates additional complexity and deserves separate treatment. The 9/11 attacks and their terroristic premise turned a normally outward-looking national security conversation inward. The national dialogue contained references to terrorism as a threat to the homeland, and as the DoD took the fight to the hills of Afghanistan, doctrinarians naturally assumed they should be free to prosecute their enemy in every domain and every geographical space. Of all the threats to the homeland, terrorism provides the greatest challenge to the DoD as it struggles with finding the demarcation between the terrorist threat that is a matter of homeland defense and the terrorist threat that is homeland security. A terrorist making his way across the paths and trails of Iraq, intent on transporting a weapon of mass destruction (WMD) to the United States, is an HD matter. When that same terrorist is making his way through the woods on the U.S.-side of the Canadian border, is it still HD, or has it become HS? The terrorist threat, described through questions like this, requires careful consideration for the DoD and DHS and implies concurrent complications for the Guard and other counter-terrorism enablers.

Colonel Jerry Cusic's Army War College thesis addresses the complicated terrorist threat landscape.[32] Cusic sees no ambiguity in the aforementioned scenario and does not hesitate with the appropriate demarcations. Cusic pays homage to Lowenberg's "bright lines" by describing a "seam" between HD and HS. He proposes the DoD should consider whether threats are matters of warfare or criminal acts.[33] The anecdote of the terrorist carrying a WMD through the northern states describes a criminal matter, firmly on the HS side of the seam, and Cusic makes a strong argument that the DoD should not have primacy in such a case. The DoD is legally constrained and ill-resourced domestically and should focus on stopping terrorists *before* they reach the United States.[34] Like many of the other Guard authors, Cusic is also quick to point out the Guard's ability to operate across this

[32] Jerry Cusic, "The Confusion of Homeland Security with Homeland Defense" (master's thesis, U.S. Army War College, 2009), http://www.dtic.mil/docs/citations/ADA500868.

[33] Cusic, 36.

[34] Cusic, 33.

seam as a force to augment both the DoD in defeating terrorists overseas and law enforcement in support of local domestic response.[35]

Literature associated with military action in the homeland would be incomplete without reference to how these conversations are captured within the DoD's own publications. Military joint doctrine is designed to present "fundamental principles and overarching guidance" with applicability to all members of the Armed Forces.[36] While tenants and principles of warfare span centuries of application and theory, doctrine must be malleable enough to respond to emerging national security priorities and the evolution of national policy. At the same time, the subordinate legal landscape is often extremely complex and nuanced. Matters of constitutional law often prescribe action in the homeland, and although military leaders often profess their familiarity with these matters, they are regularly admonished to keep their judge advocates close. A useful and regularly updated reference for military commanders operating in the homeland is published by the Army's Center for Law and Military Operations. The center's *Domestic Operational Law Handbook for Judge Advocates* is an essential aid to military leaders navigating domestic operations and efficiently consolidates their legal, doctrinal, and instructive landscape.[37] The handbooks from 2011, 2015, and 2018 are critical references and background for this work. Additionally, the National Guard's own judge advocate has published a domestic law and policy guide, which was updated in 2018, expressly in response to several legal issues raised during Guard involvement in the hurricanes and fires of 2017.[38]

Civilian uncertainty relating to military roles in disasters is an often-repeated lament in after-action reports. In their 2011 journal article, Apte and Heath note that civilian disaster relief professionals are unclear about the DoD's domestic roles and

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[35] Cusic, 36.

[36] Joint Chiefs of Staff, *Doctrine for the Armed Forces of the United States*, Joint Publication 1 (Washington, DC: Department of Defense, 2017).

[37] Jeffrey Spears, Brian Robinson, and Ben Gullo, eds., *Domestic Operational Law Handbook for Judge Advocates* (Charlottesville, VA: Center for Law and Military Operations, 2011); Blackmore and Fields, *Domestic Operational Law*; and Ted Martin and Corey Thomas, eds., *Domestic Operational Law: 2018 Handbook for Judge Advocates* (Charlottesville, VA: Center for Law and Military Operations, 2018).

[38] Christian Rofrano, *2019 Domestic Operations Law and Policy*, 2nd ed. (Arlington, VA: National Guard Bureau, 2018).

limitations during disaster response.[39] Their article proposes that disaster practitioners do not have clear guidance for how to employ the DoD in the homeland. The inability of civilian practitioners to differentiate among the Guard, reservists, and the DoD compounds this problem. Apte and Heath's article is useful because it references work polled directly from civilian emergency managers and, therefore, adds an empirical perspective to the challenges associated with military involvement in the homeland. The article proposes a need for shared awareness and coordination between civilian and military response communities and better insight into their respective roles and capabilities.[40]

Apte and Heath introduce a solution to enhanced mutual awareness, the dual status commander (DSC). The DSC, which Steenson briefly addresses in his work, resulted from recommendations in the Katrina report. Able to command both Title 10 and Guard forces, the DSC is described as a solution to the "disunity of effort" and a way to integrate DoD and Guard forces. Apte and Heath propose that military guidance be updated to describe the DSC and that this arrangement be communicated to civilian disaster practitioners. Their suggestion to incorporate a DSC into current DoD guidance has, for the most part, been implemented. This solution to creating unity of effort appears in numerous discussions of DoD and Guard interaction in the homeland. Policy papers, theses, and articles from the last decade are replete with discussions of the DSC as an HS panacea, able to solve all military-in-the-homeland ails. The adoption of this recommendation in the article by Apte and Heath and updated references to the DSC in doctrine are institutional acknowledgments of the need for unity. However, neither Apte and Heath nor Steenson question whether DSCs go far enough in creating unity between the DoD and the Guard. As the DSC manifests only in event response, it could be seen as a Band-Aid on disparate and disjointed institutional agendas. None of these authors takes the discussion far enough; all fail to note the institutional and doctrinal barriers to military operations in the homeland that necessitate the DSC in the first place.

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[39] Aruna Apte and Susan K. Heath, "Request and Response Processes for Department of Defense Support during Domestic Disasters," *Journal of Homeland Security and Emergency Management* 8, no. 1 (January 31, 2011), https://doi.org/10.2202/1547-7355.1824.

[40] Apte and Heath.

As USNORTHCOM and the Guard continue to refine their processes in the homeland, Guard practitioners have begun to gain greater insight into the foundational challenges associated with domestic response. In 2012, the Reserve Forces Policy Board (RFPB) proposed a series of recommendations that cut across several perceived inequities between the active and reserve components.[41] Among the seven recommendations, five are directly relevant to matters of Guard action in HS and HD. Two recommendations propose important clarification to activation authorities important to Guard operations in HS and HD while three propose fiscal improvements deemed essential to Guard deployment in disasters. If the after-action report from Katrina defines the problem—Sausville, as well as Apte and Heath, points to DoD efforts to resolve these problems—the RFPB is the reserve component's attempt to capture the solution narrative, making recommendations that would empower Guard domestic operations.

The board suggests that Guard employment in natural disasters is hampered by an inability to train for the domestic mission, that there is unclear guidance on how to employ federal funding of guardsmen in a disaster, and that a properly resourced, well-defined disaster response fund could "minimize financial risk to DoD accounts."[42] The recommendations are highly technical because they describe military problems to a senior military audience. There are, nevertheless, valuable insights into the challenges associated with military response in the homeland. This memorandum is especially useful in its introduction of the fiscal environment surrounding disasters. The RFPB does not shy away from the fiscal implications of disaster response and points to policy guidance that hampers response precisely because the financial factors are poorly articulated or contradictory. In other words, a purely theoretical solution that clarifies doctrine but is fiscally untenable is of no use.

Ryan Burke and Sue McNeil are two influential voices in matters of military action in the homeland. Burke and McNeil explore domestic DoD and Guard action in a 2015

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[41] Arnold Punaro, *Report of Reserve Forces Policy Board on New Policies and Clearer Funding Flows for Reserve Component Operations in the Homeland* (Washington, DC: Department of Defense, April 9, 2012).

[42] Punaro.

study of the military response to Hurricane Sandy.[43] In this work, they observe that the DoD's mission assignment process, which describes how DoD provides DSCA, does not adequately serve the needs of responding commanders and needs to be better defined.[44] Additionally, the authors return to the recommendations of the RFPB, asserting that dual-status commanders have been hampered by ambiguous language in 32 U.S.C. § 502f—a core paragraph in National Guard legal authority. Their paper proposes that the language should be revised to describe how to better access federal funding of National Guard personnel and asserts that federally funded, state-controlled guardsmen could be a more appropriate sourcing solution for DSCA than active-duty forces.[45] Clarity in sourcing and updates to the language in Title 32, *U.S. Code*, is central to the recommendations in this thesis.

Burke and McNeil were also asked to undertake perhaps the most radical exploration of the Guard's domestic roles. The project came at the behest of the Army War College's "Key Strategic Issues List," which proposes diverse research issues that must be addressed if the DoD is to serve the needs of the nation.[46] The 2014–2015 list's authors asked whether the National Guard should be realigned under the DHS.[47] The question explores whether the state Guards' ability to operate as either state or federal entities, depending on their operational authority, provides them an opportunity to operate in a homeland security role subordinate to DHS.[48] Although their federal role in support of the Army and Air Force is clear, the Strategic Studies Institute asks whether the domestic mission—to support states—might be better aligned with DHS, not the DoD. Answers to

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[43] Ryan Burke and Sue McNeil, *Toward a Unified Military Response: Hurricane Sandy and the Dual Status Commander* (Carlisle, PA: U.S. Army War College Press, 2015).

[44] Burke and McNeil, 99.

[45] Burke and McNeil, 104.

[46] Strategic Studies Institute, "Key Strategic Issues List: Army Priorities for Strategic Analysis" (Carlisle, PA: U.S. Army War College Press, June 17, 2014), 10, https://ia801304.us.archive.org/31/items/2014-15-Key-Strategic-Issues-List-2014/2014-15%20Key%20Strategic%20Issues%20List%20%282014%29.pdf.

[47] Sue McNeil and Ryan Burke, *Investigating the Benefits and Drawbacks of Realigning the National Guard under the Department of Homeland Security* (Carlisle, PA: U.S. Army War College Press, 2016).

[48] McNeil and Burke.

this question have important implications for the DoD's and the Guard's roles in the homeland. By answering this question in 2017, Burke and McNeil were forced to take the discussion beyond precedent and the anecdotes previous authors presented and to probe more deeply into the strategic and doctrinal environments within which the Guard operates. Although Burke and McNeil conclude that the Guard should *not* be aligned under DHS, their findings are still relevant for further study.

Burke and McNeil echo Cusic's "seam between HS and HD" idea, which provides a doctrinal baseline from which to differentiate roles and responsibilities among the Guard, DHS, and the DoD.[49] Their research is important because the conclusions are drawn from interviews with senior military and civilian domestic response practitioners. Although objective and doctrinally precise policy would be a preferred end state for this study, the subjective and practical HS landscape must also be acknowledged as relevant. Their work reiterates the complex legislative, legal, political, and fiscal environments that surround any Guard discussion and attempts to clear this haze.

Burke and McNeil's work is also important because its conclusion—not to place the Guard under DHS—results from arguments for each agency's roles that are applicable beyond their research question. The Guard's role as the DoD's operational reserve highlights the importance of its overseas roles. These important federal roles reinforce the services' stake in Guard success and effectiveness. Additionally, the paper points to the need for a "Hometown Force" responsive to local priorities and makes the same support-to-law-enforcement observations as Steenson does. Disappointingly, the authors propose recommendations more in line with Senator Warren's amendment to the Insurrection Act, looking for ways to more easily federalize the Guard.[50] Instead of exploring solutions that better define Guard roles in HS and HD, the authors propose a greater *federal* role from the Title 10 reserve force as a way to provide the surge capacity for the DoD while circumventing governors' wishes.[51] These recommendations fail to heed Sausville's

[49] McNeil and Burke.

[50] McNeil and Burke.

[51] McNeil and Burke. The Reserves, in this context, are the Title 10, part-time members of the active duty force, not Title 32 guardsmen.

warnings, and both of these recommendations marginalize the Guard in the homeland. While attempting to subordinate the Guard to federal authority, the report concedes the importance of the Guard. Despite the recommendations in favor of increased Title 10 authority, the authors do conclude with some language affirming the Guard's roles in the homeland. They credit the Guard's "imperative for domestic security and response requirements" and recognize its particular affinity for, and critical role in, appropriate domestic or overseas missions.[52] Clearly, even the most contemporary exploration of the DoD's and the Guard's roles in the homeland contains a certain element of equivocation and uncertainty.

This literature review has introduced a few of the works that most closely correlate with the matters of HS and HD as well as their implications for DoD and Guard operations in the homeland. The works provide insight into the complexity that surrounds military operations in the homeland while pointing to the need for refinement and research into better modes of military cooperation and integration. Moreover, the works indicate there is ample room for further discussion.

[52] McNeil and Burke.

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III. THE NATIONAL GUARD IN THE HOMELAND

This thesis proposes that DoD doctrine does not properly serve all National Guard action in the homeland. Exploring the relationship between the DoD and the Guard, some of the historical precedents that frame the current argument, and the military's roles in the homeland help to explain the doctrinal ambiguity. The discussion surrounding the Guard is invariably complicated by exhaustive background explanations describing the Guard's federal and state nature. This thesis assumes a certain familiarity with the National Guard. To make it accessible to DoD and other non-Guard readers, Appendix A includes a description of Guard duty statuses and serves as a useful primer. This chapter first describes the Guard's history, born of the early militia, highlighting its symbiotic relationship with the DoD and its dual nature as a state and federal resource. It then details the doctrinal landscape of homeland defense (HD) and homeland security (HS), thereby explaining defense support to civil authorities (DSCA) as a middle ground where the DoD can provide HS-aligned services during disasters. Finally, it explores HD, HS, and DSCA from the DoD's perspective, providing context for the challenges in the current environment, where doctrine designed to guide the DoD is hazy when applied to the Guard.

A. NATIONAL GUARD HISTORY

The DoD is a centrally controlled entity operating at the federal level of U.S. government. Its own directives and instructions reflect these organizational truths. Conversely, the Guard is composed of several distributed entities operating simultaneously at federal and state levels. It is, therefore, important to understand the history of the Guard and its dual nature as a national resource (collectively) and as independent state entities (separately). The National Guards of the states were founded on, and have evolved through, the idea of federalism, upon which the United States was built. The "militias" of the several states are partially autonomous organizations, which predate America's fight for independence, and have long held a central role in the security and defense of the homeland. From the very beginning, "the militia provided the foundation for military success in America" whether defending against internal threats or foreign invaders or

during emancipation from England.[53] During the American Revolution, the militia formed the basis of the new Continental Army and performed operations throughout the 13 colonies and across all eight years of the campaign.[54] These contributions "guaranteed the militia a permanent place as an enduring institution of the new United States" and provide an argument for why the Guard should remain separate and distinct from the DoD.[55]

Underscoring the Guard's importance, the Constitution "provide[s] for calling forth the Militia," a defense force that could be summoned for national service.[56] Additionally, the Second Amendment to the Constitution reaffirms the need for "a well regulated militia, being necessary to the security of a free State."[57] These constitutional premises are foundational to discussions about Guard actions in the homeland because they preempt any effort to marginalize the Guard. America's founding documents demand a regionally distributed militia force and intuit a benefit beyond a purely federal standing army.

The founder's distrust of a permanent standing force solidified the legitimacy and enduring role of the Guard, or states' militia, for the first 150 years of America's history.[58] Despite the inherent tensions between a regular standing force and a volunteer militia, legislation between 1898 and 1916 sought to align these two actors.[59] This legislative period culminated in the National Defense Act of 1916, which "called for a composite Army of Regulars, Guardsmen, and Army Reservists."[60] The designation of *National*

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[53] Doubler, *Civilian in Peace, Soldier in War*, 43.

[54] Doubler, *Civilian in Peace, Soldier in* War, 46.

[55] Doubler, *Civilian in Peace, Soldier in War*, 46.

[56] U.S. Const. art. I, § 8, cl. 15.

[57] U.S. Const. amend. II.

[58] William Fields and David Hardy, "The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History," *American Journal of Legal History* 35, no. 4 (October 1991): 395, https://doi.org/10.2307/845653.

[59] Doubler, *Civilian in Peace, Soldier in War*, 140.

[60] Doubler, *Civilian in Peace, Soldier in War*, 140.

A reservist is a Navy, Marine, Army or Air Force member whose service is similar to that of Guard personnel because they normally serve part-time. However, reservists augment the Title 10 force only under the authority of their service and ultimately the president. They are not under the control of a state governor, nor are they governed by Title 32 of the *U.S. Code* in the same way that a Guard soldier or airman is. (The Navy and Marines do not have Guard personnel.)

Guard stems from this act, which among other things, provided federal funding to the Guard and defined its role as the Army's principal trained reserve.[61] The First World War, the interwar years, and the Second World War that saw National Guardsmen on the beaches of Normandy and in the Pacific campaign solidified the Guard as the primary, federal reserve force.[62]

In light of the scale and complexity of modern-day military engagements, the Guard must quickly integrate into federal units charged with fighting America's wars. To this end, the *U.S. Code* prescribes rules for the management of the Guard. These laws ensure that the standards of training, discipline, heritage, doctrine, and culture between the Guard and the services are uniform.[63] Title 32 of the *U.S. Code* informs the Guard, and Title 10 guides the military in general. In 1952, Title 32 was modified to include a fifth chapter on training to clarify how drills, field exercises, and participation in military education serve the discipline and training objectives of the Guard's parent services.[64] While early iterations of the law stressed the importance of the Guard's warfighting skills and readiness to augment the active force, an important modification to the code was introduced in 1964. To provide latitude for domestic action, a subordinate chapter under chapter 5 allows guardsmen to "be ordered to perform training" as well as "other duty in addition to that prescribed [in normal monthly drills, training encampments, etc.]."[65] The words "other duty" provide a great deal of latitude to the Guard. However, the words are ambiguous enough that the DoD still grapples with parameters for the Guard's other duties. These two words in chapter five are an important milestone in the Guard's modern history, and their domestic implications are a recurrent theme throughout this thesis.

The Guard's integration with the services results in a unified "total force" and is why, to an outside observer, it should not be immediately clear whether a soldier standing

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[61] Doubler, *Civilian in Peace, Soldier in War*, 140.

[62] Doubler, 166, 178, 181.

[63] "The Services" mentioned in this paper are the Department of the Army and the Department of the Air Force.

[64] 32 U.S.C. §§ 501–507 (1952), https://www.loc.gov/item/uscode1952-012032005/.

[65] 32 U.S.C. §§ 501–507 (1964), https://www.loc.gov/item/uscode1964-007032005/.

on the street corner during a hurricane is active duty or in the National Guard. A regular soldier from the U.S. Army and a soldier from the Army National Guard wear identical uniforms and the same ranks and could even proudly display the same combat patches from overseas deployments. Their training, readiness, and appearance are practically indistinguishable right up to their left breast pockets, which both read "U.S. ARMY." These similarities testify to the effectiveness of the training and discipline of the Guard and provide practical examples of how seamlessly it has augmented the active duty in global and domestic matters.

Active-duty and National Guard personnel operating in overseas operations and alongside each other in the homeland exemplify effective and standardized training, equipment, and culture between the Guard and its service parents. However, these operational similarities do not prove alignment in matters of domestic doctrine. Two soldiers standing side by side on a flooded street in America may be indistinguishable in their training and appearance, but they could be operating in dramatically different doctrinal spaces, accomplishing completely separate missions. Rescued citizens may be ambivalent about differentiating one soldier's HD actions from the other's HS or DSCA action, but these demarcations can have profound implications for authority and financing. The following sections describe HD and HS to illuminate how the domestic landscape frames the mission environment for DoD and Guard members. Ultimately, by understanding these two doctrinal spaces, DoD and Guard doctrinarians can better understand how their soldiers and airmen can be better employed domestically.

B. HOMELAND DEFENSE

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.[66]

Homeland Defense is a doctrinal space with a long history, and the imperative to defend the United States originates at its very founding. The constitutional and congressional powers to provide for the common defense has resulted in a highly capable active-duty force in addition to the National Guard forces of the states.[67] The services, charged with this necessary mission, have worked to enhance their capability and capacity to provide for a common defense resulting in an active military force that is the most effective and capable in the world.[68]

The *U.S. Code* for armed forces propagates this constitutional imperative for activities within the homeland by directing the secretary of defense to write policy guidance and plans "for providing support to civil authorities" in the event of a nationally significant or catastrophic incident.[69] Title 10 of the *U.S. Code* describes two lines of effort for this domestic support: HD and DSCA.[70] The DoD interprets these constitutional and legal mandates and propagates written policy guidance through joint doctrine, DoD directives, and DoD instructions. These documents define the primary responsibility to the homeland as "the protection of US sovereignty, territory, domestic population, and critical

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[66] U.S. Const. pmbl.

[67] "To provide for organizing, arming, and disciplining, the Militia and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. art. I, § 8, cl. 16.

[68] Ryan Allen, "The 600-Pound Gorilla: Why We Need a Smaller Defense Department," *Joint Force Quarterly* 68 (2013): 39.

[69] 10 U.S.C. § 113 (2018).

[70] The term in the U.S.C. is "military support to civil authorities" (MSCA). The current term is DSCA, but the idea of MSCA and DSCA and their legal and doctrinal origins are the same. 10 U.S.C. § 113 (2018).

infrastructure against external threats and aggression, or other threats as directed by the President."[71]

America's regular standing force is composed of full-time soldiers, sailors, marines, and airmen. These military members are referred to as active-duty, regular, or standing forces and are administered by the Departments of the Army, Air Force, Navy, and Marine Corps, collectively under the Department of Defense, with the president of the United States as their commander in chief.[72] Active-duty members derive their authority from Title 10 of the *U.S. Code* and are, therefore, often referred to as the Title 10 force. In this thesis, the terms Army or Air Force are used to denote the force composed of Title 10 soldiers and airmen, respectively. Only the Army and the Air Force have National Guard counterparts in the Army National Guard and the Air National Guard.

The DoD's primary role is to support the U.S. National Defense Strategy (NDS). The unclassified summary of the 2018 NDS describes defense objectives of primary importance to the DoD.[73] These objectives center on the need to project force globally, defend the homeland, and remain a relevant component of international order. DoD objectives primarily, and rightly, center on ensuring the services project lethality. This document affirms that the DoD's roles in the homeland are primarily concerned with defense. This document asserts the DoD's role as a primary agent for homeland defense, and mentions homeland security only in the context of providing assistance to interagency partners, such as DHS, "to address areas of economic, technological, and informational vulnerabilities."[74]

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[71] Joint Chiefs of Staff, *Homeland Defense*, Joint Publication 3-27 (Washington, DC: Department of Defense, 2013).

[72] Although the Coast Guard is an "armed service" and a military branch, it falls under the Department of Homeland Security and Title 14 of the *U.S. Code*.

[73] James Mattis, *Summary of the 2018 National Defense Strategy: Sharpening the American Military's Competitive Edge* (Washington, DC: Department of Defense, 2018), https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf.

[74] Mattis, 5.

Joint Publication 3-27, *Homeland Defense*, is the authoritative guidance for commanders accomplishing or supporting homeland defense operations.[75] This doctrine describes a diverse strategic threat environment with implications for the National Defense Strategy. The threats from transnational actors create risks for the U.S. cyber domain and its critical infrastructure while presenting existential threats against the U.S. and its allies in the form of WMDs. The list of U.S. adversaries is no longer restricted to peer nation-states because even non-state actors have acquired the ability to challenge U.S. interests.[76] Amid this threat environment, as illustrated in Figure 2, common sense suggests the DoD should promulgate policy and guidance for defending the homeland.

Homeland Defense Strategic Threat Environment

- Increased capability for cyberspace operations against the United States Government, Department of Defense, and nations' critical infrastructures
- Continued desire of transnational terrorists to attack United States with variety of weapons and means (including chemical, biological, radiological, and nuclear [CBRN]/weapons of mass destruction [WMD])
- Continued proliferation of CBRN/WMD capabilities
- Ongoing rogue nation threats
- Active transnational criminal organizations
- Ongoing illegal immigration/special interest aliens
- Presence of homegrown violent extremists
- Continued traditional threats from nation-states (including intercontinental ballistic missiles)

Figure 2. The Threat Environment as Outlined in JP 3-27[77]

The two combatant commands (CCMDs) charged with primacy in the homeland are United States Northern Command (USNORTHCOM) and United States Indo-Pacific Command (USINDOPACOM). Their primacy in matters of HD means that practically all other commands within the DoD portfolio assume subordinate and supporting roles in

[75] Joint Chiefs of Staff, *Homeland Defense*.

[76] Joint Chiefs of Staff, I-5.

[77] Source: Joint Chiefs of Staff, I-4.

accomplishing HD missions. USNORTHCOM's genesis and missions originate partially from existential threats dating back to the Cold War and partially as a response to the 9/11 attacks in 2001.[78] When it was created on October 1, 2002, no "single military commander . . . [had been] charged with protecting the U.S. homeland since the days of George Washington."[79]

Although USNORTHCOM was born from the fires of 9/11, its cultural heritage dates back to threats from the Cold War. HD missions in a Cold War environment are not difficult to envision. Soviet aerospace threats, such as bombers flying across the polar cap intent on penetrating U.S. airspace, demanded a strategic deterrent force ready to meet them.[80] The strategic nuclear threat alone led to the creation of the only bi-national command, the North American Aerospace Defense Command (NORAD).[81] NORAD is a U.S. and Canadian command expressly concerned with "aerospace warning, aerospace control, and maritime warning for North America."[82] Because the commander of USNORTHCOM is also the commander of NORAD, it is not hard to see how this historical and strategically imperative homeland defense mission could consume its mission narratives. However, as a new command with a new charter to unify DoD action in the homeland, USNORTHCOM had to mature beyond its NORAD roots as it grappled to define its reason for being. Its commanders worked to define themes or mission areas that supported the National Defense Strategy. USNORTHCOM focuses on threats to the

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[78] U.S. Northern Command, *A Short History of United States Northern Command* (Colorado Springs, CO: U.S. Northern Command, Office of History, March 2014), http://www.northcom.mil/Portals/28/Documents/A%20Short%20History%20of%20USNORTHCOM%20%28current%20as%20of%20March%202014%29.pdf.

[79] U.S. Northern Command, *A Short History of United States Northern Command*, 5.

[80] John Lacomia, *A Brief History of NORAD* (Colorado Springs, CO: North American Aerospace Defense Command, 2013), 12, http://www.norad.mil/Portals/29/Documents/A%20Brief%20History%20of%20NORAD%20(current%20as%20of%20March%202014).pdf.

[81] NORAD and USNORTHCOM were initially separate organizations. To align often-overlapping mission demands, the two organizations consolidated into one command center on May 8, 2008. U.S. Northern Command, *A Short History of United States Northern Command*, 9.

[82] "North American Aerospace Defense Command," North American Aerospace Defense Command, accessed March 17, 2019, http://www.norad.mil/About-NORAD/.

homeland, modes of support to lead agencies and state and local authorities, and unity among active-duty, Guard, and reserve forces during disasters.[83]

In pure HD mission areas, where USNORTHCOM and USINDOPACOM have primacy, the implications for the Guard seem clear. In a domestic emergency, practically all active-duty forces and commands within the DoD become subordinate to these two CCMDs.[84] In the same vein, the Guard makes its forces available to assume HD missions. A graphic representation of the DoD accomplishing HD is relatively simple. Figure 3 displays the USNORTHCOM's or USINDOPACOM's combatant commanders' sourcing options when contemplating a HD mission. They source the requirement with the active component (COMPO1) or the reserve components represented by the Title 10 Reserve (COMPO3) or National Guard (COMPO2).[85]

Akin to its use as a strategic reserve for overseas contingency operations, the Guard is aligned domestically when acting as an operational reserve for matters of homeland defense. Unlike the active force, the Guard can operate under different authorities while conducting HD missions. When appropriate, the president can assume authority over Guard forces by federalizing them, which converts them to members of the (Title 10) active component with federal control and funding.[86] If it is more appropriate for the respective governors to retain authority over their Guard forces tasked with HD missions, then they can pursue HD missions under state authority but with federal funding.

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[83] U.S. Northern Command, *A Short History of United States Northern Command*, 9–10.

[84] USNORTHCOM is the primary domestic proponent for HD. USINDOPACOM's importance and jurisdiction extend from the far-reaching U.S. interests in the Pacific Ocean.

[85] "Reserve component" is a term that refers to both the Guard and the Reserves. The term creates confusion because guardsmen and reservists are similar in the part-time nature of their service. However, reservists are part-time members of the active-duty force, controlled by the president under the authority of Title 10 of the *U.S. Code* while guardsmen under Title 32 of the *U.S. Code* are under the control of their state governors (unless federalized). See Appendix A for duty statuses and Appendix B for definitions.

[86] Martin and Thomas, *Domestic Operational Law*, 57–59.

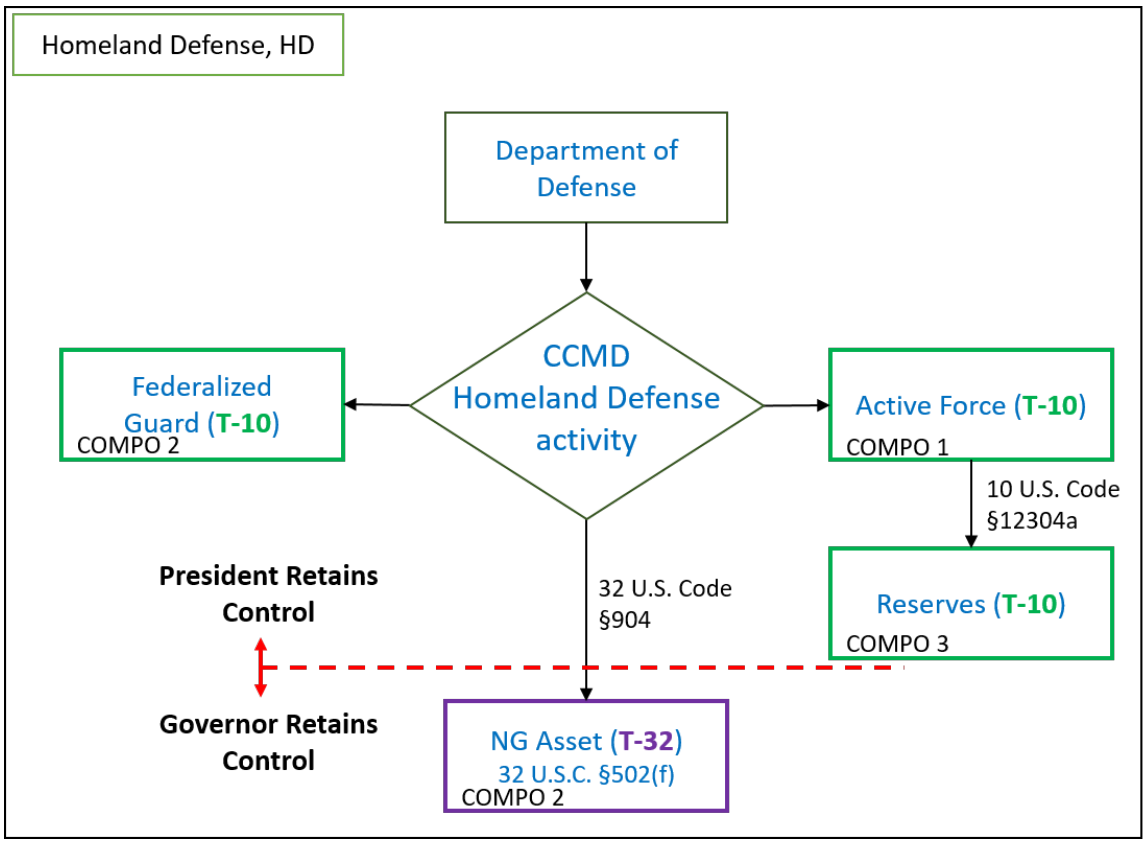

Figure 3. Sourcing Options for CCMDs Tasked with HD Missions

In either case, the Guard's HD activity is federally funded irrespective of who has control because the end result is in service to the nation.[87] This demarcation between service to the nation and service to the state is clear in matters of HD but murky in the discussion of military roles in HS.

To further reinforce the federal responsibility inherent in HD missions and to provide clarity to the National Guards, Title 32 of the *U.S. Code* was modified to include a chapter enumerating the Guard's role in this important mission. In a revision to this code, Congress recognized the need to define clear roles for the Guard in HD. This revision, enacted through the 2004 National Defense Authorization Act, added a chapter on

[87] There is little precedent for the state funding of HD. State-funded HD activity occurs in "exceptional circumstances," which is implied given that an HD activity by nature is a federal (national) concern. Joint Chiefs of Staff, *Homeland Defense*, x.

homeland defense activities.[88] Whereas JP 3-27 gives unequivocal guidance to the DoD within its primary domestic role of HD, chapter 9 of Title 32, *U.S. Code*, lends legal authority and provides operational and financial guidance for the Guard's support of the DoD in accomplishing HD.

The addition of 32 U.S.C. §§ 901–908 provides legal guidance to the DoD and unambiguous direction for the National Guard. DoD Directive 3160.01, *Homeland Defense Activities Conducted by the National Guard*, clarifies for governors and Guard commanders the authorities, funding, and mechanisms whereby Guard personnel can participate in HD activities.[89] As noted, the federal government funds Guard HD activities. Ultimately, for doctrine and directives to be effective, both the authority *and* funding must be clear, and these two considerations are important for HD and later descriptions of HS and DSCA. Notably, the HD directive does provide positive instructions for the services to provide training funds to the National Guard in support of HD readiness.[90]

Several nationally significant and enduring missions demonstrate Guard support to HD. State-controlled, federally funded Air National Guard pilots performing ongoing and necessary proficiency training can be converted to Title 10 status to accomplish air sovereignty and air defense missions over U.S. airspace.[91] In this case, the guardsmen are instantaneously federalized, fall under federal control, and become legally indistinguishable from the active force in authority and action. Air National Guard (ANG) units fulfilling these kinds of HD activities do so as an integral part of the Air Force's overall defense posture. Guard units are an essential component of integrated defense infrastructure, and the Air Force could not accomplish these missions without Guard involvement. In addition to these predominately ANG combat patrols, the Guard's

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[88] National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108–375, § 512 (2004), http://uscode.house.gov/statutes/pl/108/375.pdf.

[89] Department of Defense, *Homeland Defense Activities Conducted by the National Guard*, DoD Directive 3160.01 (Washington, DC: Department of Defense, 2017), https://www.hsdl.org/?abstract&did=.

[90] Department of Defense, 6.

[91] Robert Preiss, "The National Guard and Homeland Defense," *Joint Force Quarterly*, no. 36 (December 2004): 78, https://doi.org/10.21236/ADA430394.

Northeast Tanker Task Force provides daily refueling support to the Atlantic air bridge.[92] These examples highlight the seamlessness and routine nature of Guard support to the active force.

In addition to the ongoing or planned HD activities attributed to the Guard, other provisions ensure Guard support in emergent threats. An example of Guard personnel accomplishing unforeseen HD actions occurred after 9/11. The attacks had demonstrated a vulnerability in the nation's transportation system, so the President worked with state governors to fund the activation of 7,000 guardsmen, who provided a reassuring security presence at 422 airports across 52 states and territories.[93] Guard personnel concurrently protected critical infrastructure and high-profile public events. They were present at bridges, overpasses, nuclear power plants, and tunnels while presenting a visible deterrence at high-profile sporting events like the Super Bowl and New York marathon.[94] In these scenarios, the governors retained authority over the Guard personnel, who remained in a Title 32 status while accomplishing federally funded activities and contributing to a unified HD effort.

Guardsmen have been similarly activated to accomplish border security operations. They were federalized to accomplish this mission in 2002 and have been involved in border operations sporadically ever since including significant activations as recently as fiscal year 2019.[95] Beyond the 7,000 Guard personnel at the nation's airports, over 16,000 soldiers accomplished other security missions, such as customs and border augmentation missions, in the years following 9/11.[96] Like the ongoing missions, these unplanned HD activities were easily and quickly facilitated—with a clear understanding of authority and funding—and they aligned with propagated and understood HD guidance.

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[92] James Campbell, "The National Guard as a Strategic Hedge," *Parameters* 44, no. 1 (Spring 2014): 103.

[93] Doubler, *The Attacks of 9/11 and Homeland Security*, 66.

[94] Doubler, 68.

[95] The National Governors Association was critical of the decision to federalize the Guard for these missions, and subsequent operations on the border have been given the Title 32 status. Preiss, "The National Guard and Homeland Defense," 76.

[96] Doubler, *The Attacks of 9/11 and Homeland Security*, 69.

The aforementioned HD examples include actions to mitigate or counter direct attacks from nation-state and non-nation-state actors against U.S. interests. Although these actions may initially appear doctrinally clear, even these defensive activities are not always so easy to decipher. For example, actions aimed at preventing terrorist attacks within the United States are strictly homeland security activities under the jurisdiction of the Department of Homeland Security (DHS). Cusic's thesis affirms two guides to help doctrinarians in the terrorist discussion. First, he proposes that the national response framework demands and presupposes bottom-up mitigation, preparation, and response with local civilian authorities assuming primary responsibilities for actions in the homeland.[97] Second, he affirms that the response to terrorist actions in the homeland should be seen as law enforcement action aimed at criminals.[98] Since the DoD is largely proscribed from law enforcement actions in the homeland, these are clearly not HD matters, and the DoD should not assert primacy or relevancy.

This conversation provides insight into HD and describes a mission space that is well defined in DoD doctrinal guidance. Moreover, the DoD's HD doctrine, JP 3-37, expands its reach beyond pure HD. This doctrine addresses the ambiguity between discrete HD and HS activities by recognizing they may occur simultaneously and in the same domestic area of operation. In these cases, each agency may be charged with activities that influence or support the actions of the other. Threats to the homeland may have concurrent implications in both doctrinal spaces. To this end, the DoD added doctrine that allows for action in a supporting role to an HS activity while not explicitly referring to it as discrete HS action. In order to manage the intersections between HD and HS, DoD doctrine defines a third doctrinal space. Within DoD doctrine, support to a lead federal agency (LFA) is described as defense support to civil authorities (DSCA), which is described later in this chapter. First, HS, particularly in military operations, requires an explanation.

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[97] Cusic, "Confusion of Homeland Security with Homeland Defense," 30.

[98] Cusic, 22.

C. HOMELAND SECURITY

> With honor and integrity, we will safeguard the American people, our homeland, and our values.[99]
>
> —Department of Homeland Security

There are no widely accepted definitions of homeland security. HS is an idea that encompasses the safety, security, and resiliency of U.S. citizens, infrastructure, and ideals in the face of manmade and natural threats. HS addresses a wider threat environment than that of HD, which focuses on defeating external threats and aggression toward U.S. interests. Despite varied definitions, acts of terrorism aimed at the United States force greater attention toward the wider HS threat landscape and the management of those threats. Amid the significant governmental reorganization that followed 9/11, Congress signed the Homeland Security Act of 2002 and created the Department of Homeland Security. DHS consolidated and unified the functions and responsibilities of several federal agencies and departments with the goal of addressing both the threat of attacks on the United States and preparing for natural or manmade disasters.[100] However, amid a concerted effort to align government functions toward a unified domestic security posture, explicit HS guidance was not given to the DoD. Even the purpose of creating the United States Northern Command, described earlier in this chapter, was not explicitly to achieve an HS end state.

In 2005, the DoD propagated Joint Publication 3-26, *Homeland Security*, in an effort to provide doctrinal guidance describing this important mission space.[101] With 9/11 still a recent memory, this initial document blurred HS, HD, and civil support as it reconciled the DoD's role in countering terrorism. The publication's proposition that HS is "global in nature" and advanced through action against threats at their source improperly comingles HD and HS, not to mention improperly asserts that HD and civil support are

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[99] "Mission," Department of Homeland Security, August 29, 2016, https://www.dhs.gov/mission.

[100] Martin and Thomas, *Domestic Operational Law*, 1.

[101] Joint Chiefs of Staff, *Homeland Security*, Joint Publication 3-26 (Washington, DC: Department of Defense, 2005), https://www.hsdl.org/?view&did=456038.

subordinate HS mission areas.[102] To correct the inconsistencies, the DoD differentiated HD and civil support (DSCA) in distinct joint publications and dropped *Homeland Security* from its list of joint publications. The "3-26" designation that was used for the original 2005 *Homeland Security* joint publication was repurposed for *Counterterrorism*.[103] By separating terrorism from the existing Cold War approach to HD, the Joint Chiefs of Staff updated the approach to this mission area. Unfortunately, clarity in matters of counterterrorism coincided with a new void in stand-alone HS guidance.

Despite the instructional void in HS, the DoD does not object to Guard operations in the homeland. To the contrary, all levels of government have come to expect that military resources and capabilities organic to the Guard should be made available for local disaster response activities. The 54 National Guards of the states and territories have distributed capacities and specialized capabilities that provide utility in domestic disaster response.[104] As long as their employment does not interfere with the DoD's national security concerns, state Guards are free to engage in homeland security operations.

Within their own states, Guard units are often geographically dispersed across smaller armories and installations. The distributed nature of Guard personnel and units also make them an obvious choice for governors and an expedient resource for state-level homeland security missions. With 3,200 Guard facilities in 2,700 communities and 1,000 guardsmen in the average congressional district, their armories and personnel are a visible presence and a credible resource for homeland security operations.[105]

Governors have a great deal of latitude in how they employ their Guards in HS missions. In the early hours of August 29, 2005, when Hurricane Katrina made landfall in Buras, Louisiana, the governors of Florida, Alabama, Mississippi, and Louisiana already had 5,376 Guard personnel on state active duty (SAD), ready to provide HS support to the

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[102] Joint Chiefs of Staff, I-8.

[103] Joint Chiefs of Staff, *Counterterrorism*, Joint Publication 3-26 (Washington, DC: Department of Defense, 2009), https://www.hsdl.org/?view&did=31130.

[104] Department of Defense, *Managing the Reserve Components as an Operational Force*, DoD Directive 1200.17 (Washington, DC: Department of Defense, 2008), 5, https://www.hsdl.org/?view&did=233708.

[105] Preiss, "The National Guard and Homeland Defense," 74.

affected communities.[106] Within 24 hours, over 9,000 guardsmen were on duty, and by the end of the response, 46,500 of the 65,900 people deployed across the 90,000-square-mile operation were National Guardsmen under state-to-state support agreements.[107] These governors took advantage of the proximity and readiness of their forces and accomplished law enforcement, traffic control, sheltering, security operations, and search-and-rescue missions within hours of the storm's passing.[108] Notably, this disaster immediately precipitated a discussion between the responding governors and the federal government about whether the disaster response was to be a local matter or a national concern.

Although fiscal considerations may seem secondary to the doctrinal questions this thesis hopes to answer, adjudicating this dimension often presupposes adjudication of the HD, HS, and federalism concerns described throughout this thesis. When disasters exceed a certain threshold, governors are able to petition FEMA for federal cost-sharing resulting from HS missions associated with presidentially declared disaster response activities. President Bush made a presidential declaration for Florida on August 28, 2005, and on the following day, as the Hurricane struck, he followed suit for Alabama, Louisiana, and Mississippi, making essential federal disaster funding available.[109] At the same time, the governors of Alabama, Mississippi, and Louisiana petitioned the secretary of defense to provide Title 32 federal funding for their Guard personnel.[110] Despite the presidential declaration and the secretary of homeland security's designation of "an Incident of National Significance," it took nine days before Deputy Secretary of Defense Gordon

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[106] William B. Boehm, Renee Hylton, and Thomas Mehl, *In Katrina's Wake: The National Guard on the Gulf Coast, 2005* (Arlington, VA: National Guard Bureau, 2010), 55.

[107] James Stuhltrager, "Send in the Guard: The National Guard Response to Natural Disasters," *Natural Resources & Environment* 20, no. 4 (Spring 2006): 77; and National Emergency Management Association, *Emergency Management Assistance Compact: 2005 Hurricane Season Response After-Action Report* (Washington, DC: National Emergency Management Association, February 2006), EX-6, https://www.emacweb.org/index.php/mutualaidresources/emac-library/after-action-reports/2005-emac-response-to-hurricane-katrina/131-emac-2005-hurricane-season-aar.

[108] Boehm, Hylton, and Mehl, *In Katrina's Wake*, 55.

[109] Boehm, Hylton, and Mehl, 55.

[110] House of Representatives, *A Failure of Initiative*, 41.

England approved Title 32 federal funding.[111] Governors, the executive office, DHS, and senior Guard leaders at the National Guard Bureau and within the states were able to adjudicate the national significance of this HS event and appropriately deploy Guard forces accomplishing HS missions in a federally funded status. However, the decision to federally fund the Guard stemmed more from the governor's political clout than from the implementation of a codified mode of funding.

Examples like Katrina point to Guard action expressly accomplishing HS irrespective of the funding environment within which it operates. Although little language explicitly describes DoD activities in homeland security, the DoD nevertheless has a substantial role in this doctrinal space. However, DoD activities beyond the scope of HD are not automatically classified as HS. The guardsmen who worked the flooded intersections after Katrina were executing HS missions. However, DoD doctrine does not describe the actions of similarly deployed soldiers operating in the same neighborhoods as HS. DoD doctrine allows for action in a supporting role to an HS activity but does not define this as HS. Within DoD doctrine, support to an LFA is described as DSCA. The following section describes DoD activities in DSCA and lends some insight into the limited situations where the Guard accomplishes DSCA. This section also shows the Guard's aptitude for HS missions, as described previously, but does not infer a seamless integration into DoD DSCA missions as in HD.

D. DEFENSE SUPPORT TO CIVIL AUTHORITIES

To adjudicate the space between HD and HS, the DoD created a doctrinal space referred to as defense support to civil authorities (DSCA). As previously discussed, the DoD retains jurisdiction and primacy in matters of HD, and the recently created DHS serves as the primary agent in matters of HS. However, the HS narrative also acknowledges the significant capability and capacity of the DoD and the National Guards in HS matters. Additionally, Katrina and countless disaster responses since demonstrate the Guard's ability to accomplish discrete HS actions at the behest of governors, irrespective of the

[111] Boehm, Hylton, and Mehl, *In Katrina's Wake*, 56; and House of Representatives, *A Failure of Initiative*, 207.

funding. The DoD's reticence in describing its action as HS is understandable. DSCA terminology is deferential to local, state, and tribal civil authorities and honors the tradition of civilian leadership over military operations while asserting "support" over any implication of "command and control." Although these motivations create useful constraints on the DoD's occasional action in the homeland, they also limit some of the Guards' inherent advantages and fail to recognize the Guard's persistent presence in HS mission spaces. This section demonstrates how the DoD's effort to define a space outside HD and HS hampers proper action by the National Guards.

Although the 2018 National Defense Strategy does not provide much domestic guidance for the DoD, the White House did publish homeland security guidance in 2007. Over a decade old, the *National Strategy for Homeland Security* reaffirms the purpose of USNORTHCOM as a command dually purposed to accomplish homeland defense and civil support.[112] With respect to DoD participation in the homeland, its most imperative language pushes the DoD beyond its top priority of homeland defense. The strategy asserts all military components—active duty, reserve, and Guard—must "continue to enhance their ability to provide support to civil authorities" in response to the full spectrum of manmade and natural disasters.[113]

The terms *support to civil authorities* or *civil support* are at the center of the doctrinal opacity surrounding domestic military operations. Should their appearance in homeland-security strategy documents make them synonymous with homeland security and each other? Given that a search of the DHS website yields no definition of homeland security, the answer is probably no. In this vein, the DoD's joint doctrine designed to differentiate between homeland defense, homeland security, and defense support to civil authority leads with a clear warning that they "are not interchangeable."[114] This strict

[112] Homeland Security Council, *National Strategy for Homeland Security*, 5.

[113] Homeland Security Council, 51.

[114] Joint Chiefs of Staff, *Defense Support of Civil Authorities*, 2013, viii.

language from the 2013 DSCA doctrine is softer in the 2018 update but still draws lines of demarcation with a caution that the three doctrinal spaces "are distinct operations."[115]

While DoD doctrine makes an effort to separate these mission areas, they are not as clearly differentiated as one might suppose. The DoD has struggled to provide clear guidance since it first published joint doctrine for these mission spaces. The short chronology that follows provides some insight into the DoD's difficulty in describing these environments. The doctrinal difficulty for the DoD is compounded when these same concepts are applied to the National Guards. The Guards' ability to operate at the federal and state levels, their authorities, and their different funding modes create additional dimensions that compound the complexities within these doctrinal demarcations.

In an effort to shed light on these differentiations, the DoD authored joint doctrine not only for homeland defense—Joint Publication 3-27—but also for DSCA—Joint Publication 3-28.[116] Interestingly, when JP 3-28 was published in 2007, it was titled *Civil Support* and attempted to reconcile and define these terms as an overlapping continuum with DoD equities across homeland defense, homeland security, and civil support. The 2007 doctrine visually describes this overlap, as shown in Figure 4.

[115] Joint Chiefs of Staff, I-4.

[116] Joint Chiefs of Staff, *Homeland Defense*; and Joint Chiefs of Staff, *Defense Support of Civil Authorities*, 2013.

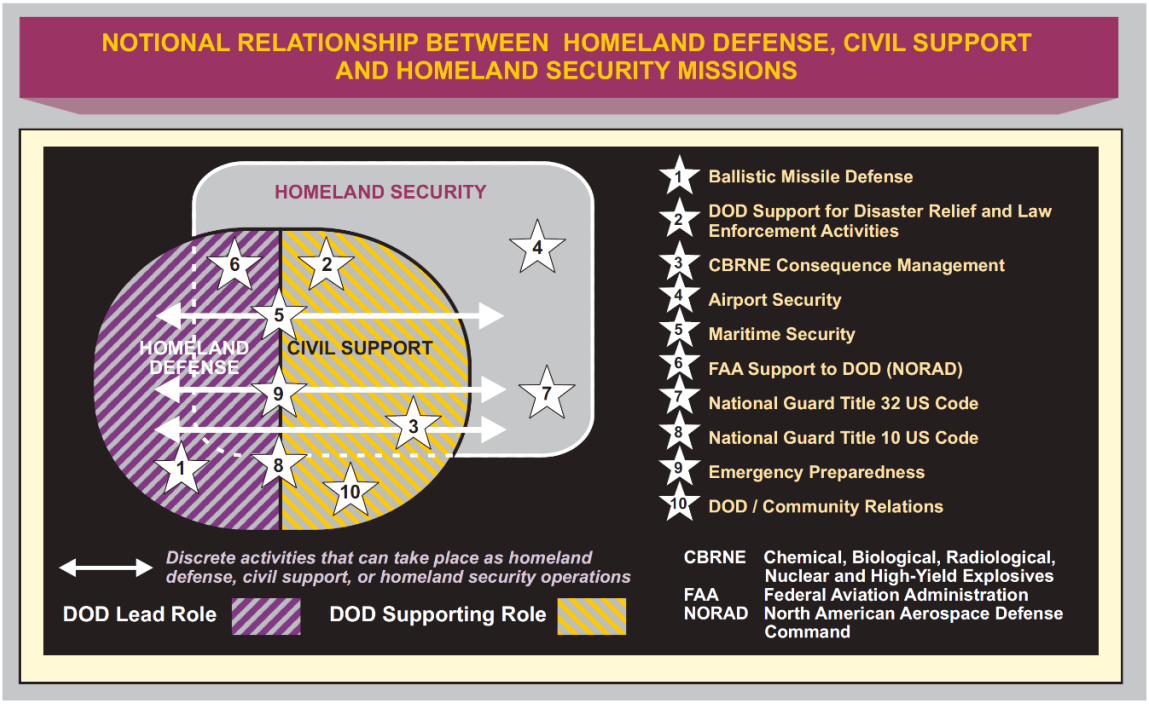

Figure 4. 2007 Graphic from JP 3-27 Displaying the Relationships between HD, Civil Support, and HS Missions[117]

By the time the 2013 revision to JP 3-28 was published, the graphic was moved from *Civil Support* to *Homeland Defense*, JP 3-27. Here, DoD regulators endeavored to reconcile and define these distinctions and overlapping ideas with a full appendix within the homeland defense guidance. Appendix A of JP 3-27 begins with the clear recognition that legal and jurisdictional considerations create significant hurdles to effective operations in the homeland.[118] This domestic legal landscape is at the forefront of the doctrinal complexity these directives attempt to reconcile and hints at the federalism discussion this thesis promotes. The 2013 graphic from JP 3-27 is displayed in Figure 5 for comparison. Interestingly, Figures 4 and 5 both allude visually to the original (and flawed) idea that HD and DSCA are predominantly subsets in an overarching HS landscape.

[117] Source: Joint Chiefs of Staff, *Civil Support*, Joint Publication 3-28 (Washington, DC: Department of Defense, 2007), I-3.

[118] Joint Chiefs of Staff, *Homeland Defense*, A-1.

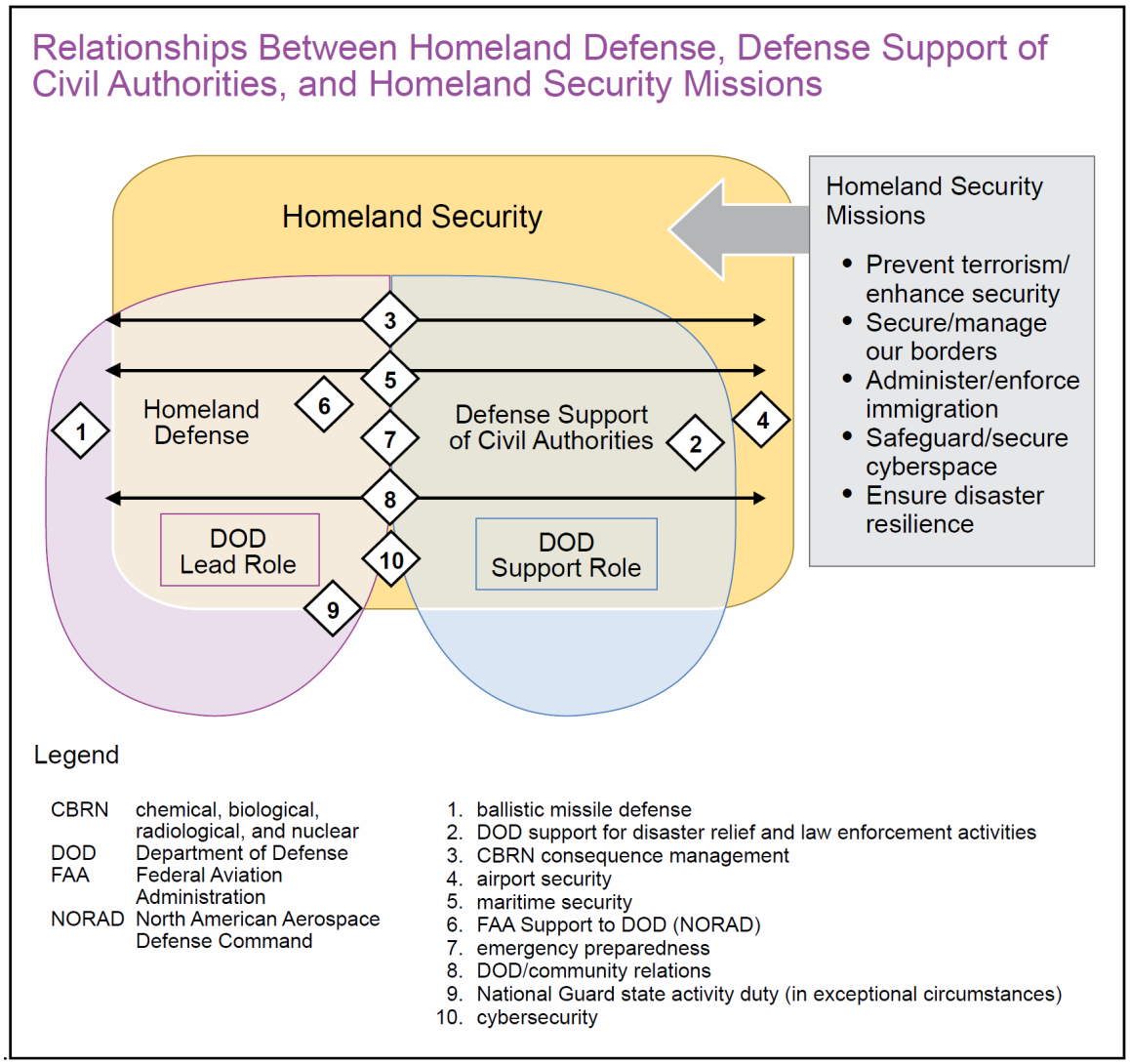

Figure 5. 2013 Graphic from JP 3-27 Displaying the Relationship between HD, HS, and DSCA Missions [119]

In 2018, the DoD published its most recent update to JP 3-28 with the third iteration of this graphic, this time proposing that the magnitude of an event is an additional factor relating to the interplay between sometimes-overlapping, sometimes-discrete DoD activities. The graphic also corrects the inaccurate implication that HD is subsumed under HS by providing greater separation between these two spaces (while not completely dividing them). Figure 6 provides useful and contemporary insight into the complexity of

[119] Source: Joint Chiefs of Staff, *Homeland Defense*, A-2.

defining these ideas and their demarcations. DoD efforts to visually interpret this doctrinal landscape have continued with each update to domestic guidance. Although these visual aids may be imperfect proofs of doctrinal shortfalls, the variance between each iteration alludes to the complexity of these mission spaces.

The legal and jurisdictional considerations referred to in JP 3-27 are at the center of this difficulty. At their polar extremes, HD and HS seem well defined: "DoD is responsible for the homeland defense (HD) mission" whereas "[DHS] is the lead federal agency for HS."[120] However, every iteration of joint doctrine admits that these functions can occur simultaneously, or in parallel, and often overlap.

In basic terms, DSCA refers to a situation in which DoD personnel, equipment, or expertise are made available to federal agencies charged with operating in the homeland. Although DHS has primacy in matters of homeland security, the DoD still has significant and consequential influence, expertise, and resources central to HS effectiveness. More emphatically, the DoD's core domestic strategy highlights the unique attributes of the Armed Forces and a consequent expectation of prominence in disaster response roles.[121] Clearly, despite the complexity of its own domestic guidance, the DoD does not want to be written out of the domestic mission.

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[120] Joint Chiefs of Staff, vii.

[121] Department of Defense, *Strategy for Homeland Defense and Defense Support of Civil Authorities* (Washington, DC: Office of the Assistant Secretary of Defense, February 2013), 6, https://fas.org/man/eprint/homedefstrat.pdf.

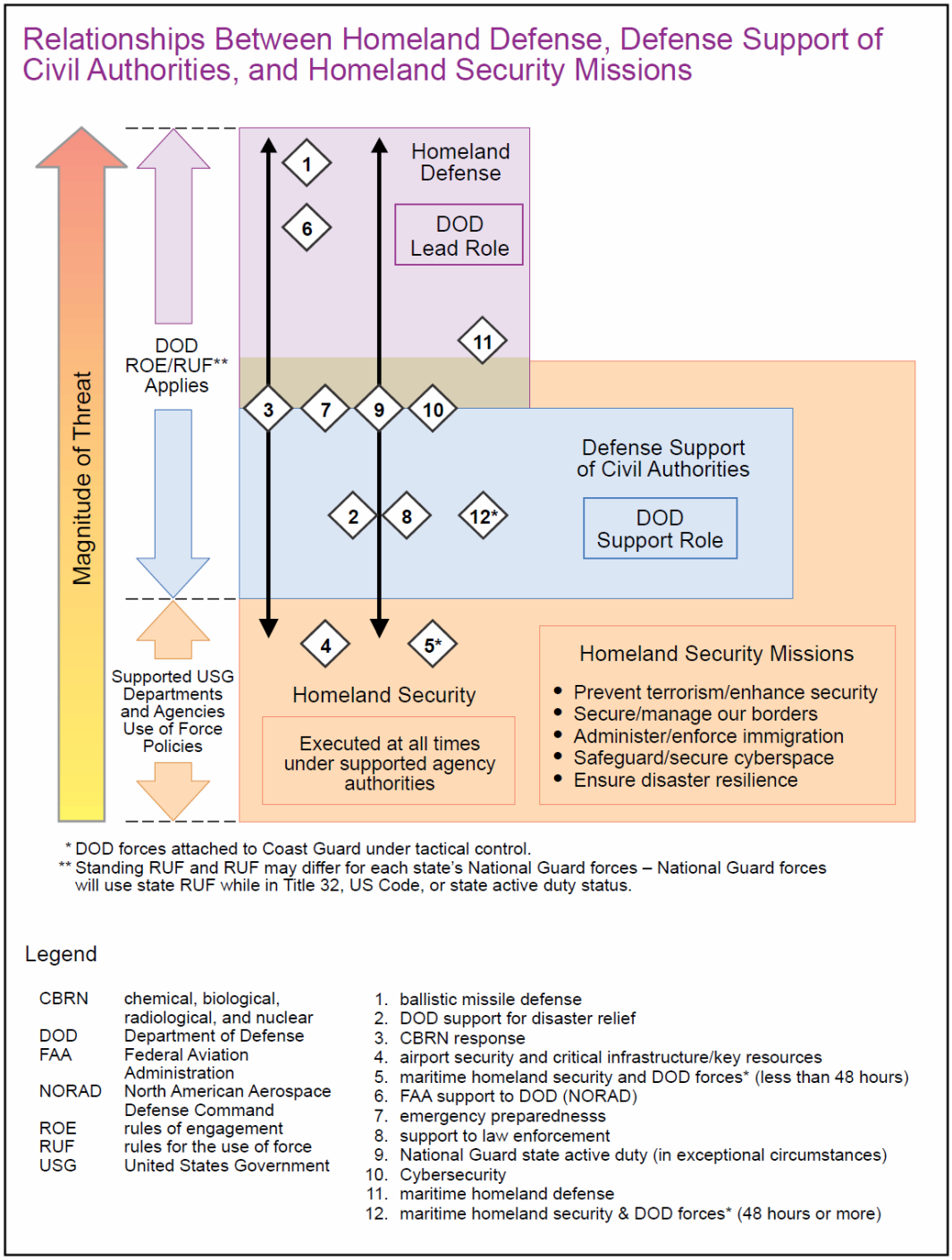

Figure 6. Contemporary Representation of HD, DSCA, and HS Relationships and Missions[122]

[122] Source: Joint Chiefs of Staff, *Defense Support of Civil Authorities*, 2018, I-5.

To be fair, the military doctrinarian's insistence in a third category beyond discrete HD or HS contains some wisdom. The DoD and USNORTHOM stand ready to provide resources should state forces be overwhelmed but do not want to supersede civil authorities.[123] Not to confuse or subordinate LFA primacy in matters of HS, the DoD's support to LFAs conducting HS activities is referred to as DSCA. The DoD stands ready to provide DSCA at all times but only when asked and for not a moment longer than needed.[124] To reiterate, even if FEMA describes an action as a homeland security activity, military leaders carrying out the activity do not.

The 2005 hurricane season was an important example of the DoD's domestic action. The DoD was present during Katrina and accomplished DSCA. While the Guard response peaked at over 50,000 members, active-duty involvement surged to an equally impressive 22,670.[125] USNORTHCOM's *Short History* describes actions in the homeland beyond Katrina and chronicles some of the DoD's ongoing domestic support. USNORTHCOM support included Navy diver support to a 2007 bridge collapse in Minneapolis, flood relief to Midwestern states, wildfire support to California, and response to Hurricanes Gustav and Ike in 2008.[126] In 2010, when the Deepwater Horizon drilling platform spilled oil across the Gulf, DoD forces moved to provide support, and in 2011, the DoD introduced "DSCA from the sea" when it deployed amphibious forces as a response to Hurricane Irene. Then in 2012, responding to Hurricane Sandy, which struck New York and New Jersey, the DoD complemented the Guard's response with half of the 8,000 supporting service personnel.[127] Irrespective of the definitions used for non-HD action in the homeland, there is no denying the capability and effectiveness of DoD forces assisting in domestic disasters.

In each application of DSCA, the DoD responded to a request for support from a lead federal agency. The DoD provides DSCA through a mission assignment process

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[123] U.S. Northern Command, *A Short History of United States Northern Command*, 5.

[124] U.S. Northern Command, 5.

[125] House of Representatives, *A Failure of Initiative*, 202.

[126] U.S. Northern Command, *A Short History of United States Northern Command*, 16.

[127] U.S. Northern Command, 19.

whereby it completes a work order originating from the affected state's leadership. The following pages describe how the DoD engages in DSCA missions, and Figure 7 is a simplified illustration of the major actions associated with DSCA.

The *National Response Framework* describes the premise that disaster response propagates from the lowest jurisdictional level capable of handling the event.[128] As community capabilities or capacities are exceeded, resources from neighboring communities, the state, neighboring states, and ultimately the federal government can be brought to bear. When state capabilities or fiscal resources are constrained, communities can submit a request for assistance to an LFA. The DSCA process begins when the LFA sources a solution for the state request but another federal agency cannot or is not suited to meet the need. FEMA is generally the LFA in a disaster and uses its tasking authority under the Stafford Act to issue a mission assignment (MA) to another federal agency.

[128] Federal Emergency Management Agency, *National Response Framework*, 3rd ed. (Washington, DC: Department of Homeland Security, 2016), 6.

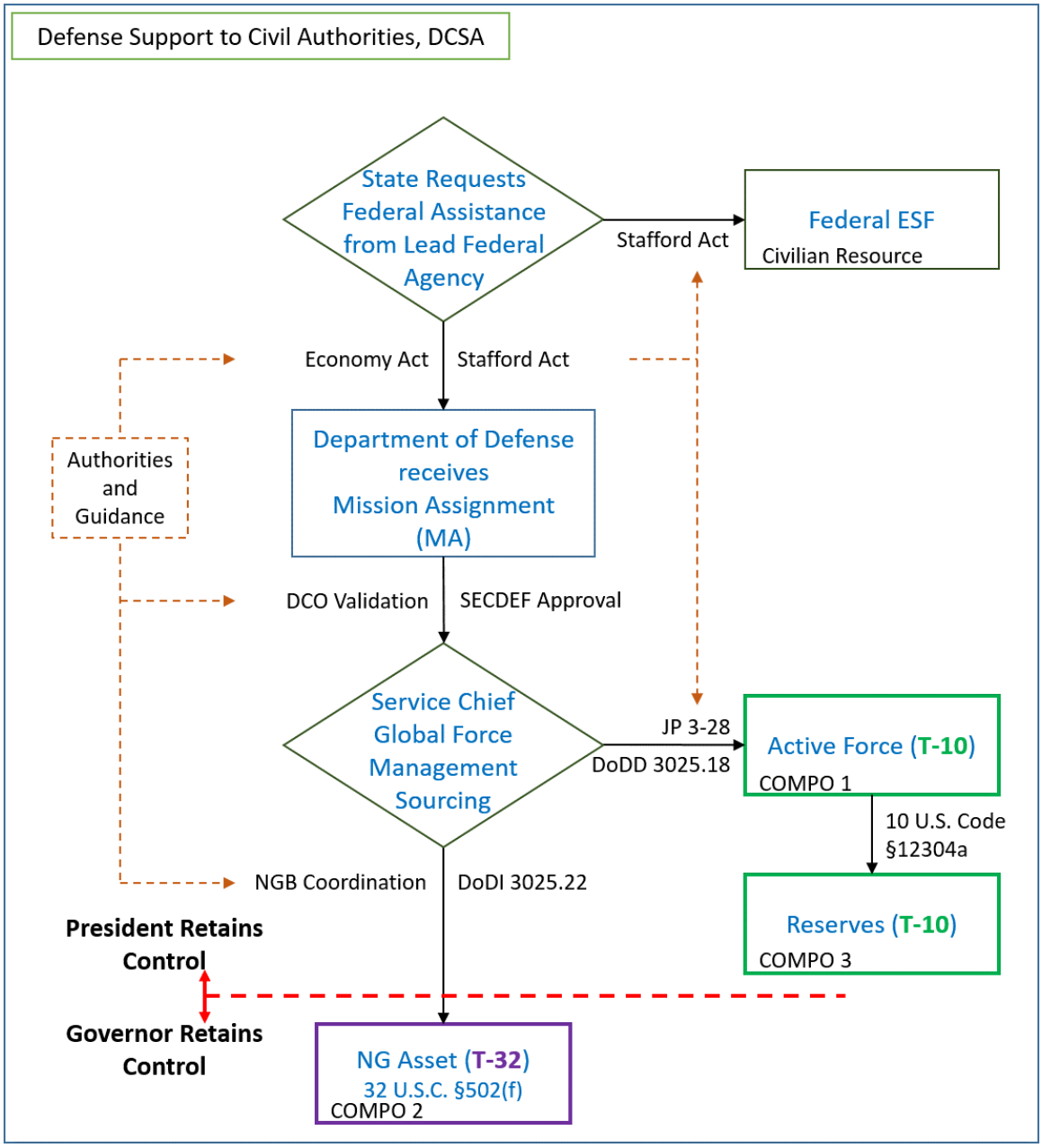

Figure 7. Process Map for Military Forces Accomplishing DSCA

An MA is a work order that describes the work to be performed, the funding authority, and managerial controls for the tasked federal agency.[129] The president "can

[129] Elizabeth Zimmerman, *FEMA Mission Assignment Policy* (Washington, DC: Department of Homeland Security, November 6, 2015), 4, https://www.fema.gov/media-library-data/1450099364660-fd855ba68f3189d974966ea259a2641a/Mission_Assignment_Policy.pdf.

direct any Federal agency, with or without reimbursement" to make its resources available within its legal authorities; however, reimbursement is the norm.[130] In this manner, the DoD is like any other federal agency, and its DSCA directive reinforces the expectation that its supporting activities will be reimbursed.[131]

In Figure 7, the sub-process associated with acceptance of the MA has been greatly simplified, and a few internal processes within this step are important to note.[132] The DoD's DSCA directive describes evaluation criteria to determine whether the MA is appropriate. These evaluation criteria include capability, cost, appropriateness, risk, readiness, legality, lethality, and time (CCARRLL-T).[133] Defense coordinating officers (DCOs) and other decision makers in the DoD's decision tree ensure that the MA complies with the law, does not unduly expose DoD members to situations where lethal force may need to be used, and does not expose its members to unnecessary safety hazards. Additionally, they screen the MA for its impact on the DoD's budget—whether it is "in the interest of the Department"—and ensure that it does not detract from primary national security missions.[134] The readiness consideration, and its potential to detract from the DoD's primary missions, has become a key concern for the DoD and the services. Units sourced from the active or reserve components must be unencumbered by commitments associated with global security missions. Consequently, MA acceptance and sourcing become almost concurrent activities to ensure the DoD has the flexibility and depth in its force pool.

Unfortunately, these necessary constraints for the DoD's occasional action in the homeland are overly restrictive when applied to the Guard. The Guards have capabilities, authorities, and legal freedoms that may not limit the appropriateness of their action, and their proximity to most disasters often makes them the timeliest solution. DCOs who reject MAs by applying CCARRLL-T under strict active-duty guidelines prematurely disqualify

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[130] 42 U.S.C. § 5192(a)(1) (2018).

[131] Department of Defense, *Defense Support of Civil Authorities*, DoD Directive 3025.18 (Washington, DC: Department of Defense, 2018), 3. The Economy Act is another reimbursement authority. See 10 U.S.C. §§ 272–274, 277 (2018); and 31 U.S.C. §§ 1535–1536 (2018).

[132] For a description of the United States Army Northern Command's MA process, see Appendix E.

[133] Department of Defense, *Defense Support of Civil Authorities*, 4.

[134] Department of Defense, 4.

a DSCA mission well suited to the Guard. Additionally, while the graphic illustrates a mechanism for the DoD to create depth from the reserves and the Guard, there is little precedent for this, not to mention a historical misunderstanding of how to engage the reserve components. Burke and McNeil reiterated the recommendations of the 2012 Reserve Forces Policy Board that challenge the DoD to clarify its instructions and procedures, which continue to be barriers to rapid sourcing of the National Guard.[135] They repeated the challenge that the secretary of defense should work with the National Guard Bureau to provide guidance for the Guard in providing DSCA support while conducting operations under (federally funded) 32 U.S.C. § 502(f). Six years after the RFPB recommendations, there is still a great deal to do in these areas.

The Guard's dual nature is the key difficulty in this sourcing discussion. The service secretaries have the authority to activate the reserve components, but there are caveats. Section 12031(d) of Title 10, *U.S. Code*, gives the secretary of defense the authority to order members of the reserve component to active duty unless they are in the Guard, where the consent of the governor is required.[136] The deference to the governor's authority makes unilateral DoD tasking impossible. However, this paper tiger could be easily mitigated through quick collaboration between the secretary of defense's staff, National Guard Bureau joint staff, and the supporting governor. In a disaster scenario, the governors are motivated to make their Guard available for DSCA and especially interested in the possibility of federal funding under 32 U.S.C. § 502(f).

Returning to the DSCA evaluation criteria, cost becomes a significant factor in the DoD's willingness to accept an MA and is a significant barrier to Guard employment. The DoD is focused primarily on matters of national defense, which means there are no funds requested for or applied to domestic operations. DoD doctrine reminds its domestic practitioners that no funds are available to train, equip, or exercise for DSCA operations and that these activities must be reimbursed.[137] The Stafford Act provides a mechanism for

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[135] Burke and McNeil, *Toward a Unified Military Response*, 102.

[136] 10 U.S.C. § 2840 (2018).

[137] Joint Chiefs of Staff, *Defense Support of Civil Authorities*, 2018, F-1.

FEMA to reimburse the DoD for DSCA work performed as a part of an MA.[138] However, such reimbursement does not automatically open the door for Guard action. Although the DoD may accept an MA from FEMA, some of the costs associated with Guard employment are not reimbursed. Specifically, regular pay and allowances cannot be reimbursed through the Stafford Act.[139] Because Guard personnel are part-time employees and have to be hired for each occasion of domestic support, their pay and allowances (beyond the minimum requirement for annual training) are not planned for in the DoD budget and deemed non-reimbursable through the Stafford Act. This reimbursement limitation may explain why the Guard has only been sourced *twice* since 2001 for DSCA action resulting from FEMA mission assignments.[140]

The introductions to HD, HS, and DSCA provide insight into how these doctrinal spaces fit into the national security landscape and how they are perceived by the DoD. However, the practical landscape of military action in HD, HS, and DSCA is dramatically different when described from the Guard's perspective. Hurricane Katrina provides an example of Guard personnel operating as local resources, activated at the lowest practical levels of government and executing HS missions. From a DoD vantage point, those pure HS missions instantly became DSCA when the assistant secretary of defense agreed to federally fund their action. However, this position is inaccurate since DoD doctrine describes Guard-doing-DSCA as a scenario where the Guard augments the DoD in providing support to overwhelmed states. The Katrina example—where National Guard soldiers and airmen were present from the beginning—is more indicative of Guard action in the homeland. For the Guard, DSCA is an imperfect abstraction that does little more than describe federal (DoD) funding of HS action.

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[138] Zimmerman, *FEMA Mission Assignment Policy*, 9. The Stafford Act and the Economy Act are both mechanisms to reimburse federal agencies for work accomplished during disasters.

[139] Joint Chiefs of Staff, *Defense Support of Civil Authorities*, 2018, F-2.

[140] Since 2001, the Guard has been sourced only 13 times for DSCA. Two supported the U.S. Coast Guard, and nine supported the National Interagency Fire Center. These 11 were reimbursed under provisions in the Economy Act, 31 U.S.C. § 1535 (2018), which allows for federal-to-federal reimbursement.

In the months after 9/11, the threat of terrorism led the DoD to broaden its definition of HD. The DoD and Guard accomplished HD activities as they guarded airports and patrolled the skies. More recently, DoD and Guard security missions along the border and at ports of entry have been defined as DSCA, not as HD. National special security events, where military forces support high-profile events like presidential inaugurations, are important examples of missions that started off as HD (after 9/11) and are now relatively commonplace as DSCA. While the HD, HS, and DSCA definitions attempt to draw doctrinal lines, adjudicating their demarcations can be complex and has evolved. Some of these tensions have been described in this chapter, but in the following chapters, they are explored in greater detail. This conversation reaffirms the role the Guard has in augmenting the DoD in HD and DSCA. Ultimately, the discussion concludes that HS is a fundamental Guard mission but that changes to policy and legislative action are necessary to facilitate action in this space.

IV. THE NATIONAL GUARD AS A NATIONAL ASSET

From the DoD and the Guard's history and into the present day, guardsmen stand ready to augment the active force across the globe and every domain.[141] To this end, the Army and Air Force service secretaries ensure the reserve components are full and relevant participants in national security missions at home and abroad.[142] At its core, the DoD's mission is to deter aggression and provide security to the United States.[143] The Guard's primary role as a national asset rests in its ability to integrate into the services and to augment the Title 10 force in accomplishing these missions. When McNeil and Burke studied the practicality of realigning the Guard under DHS, one of their chief concerns was the loss of the DoD's operational reserve.[144] These researchers recognized the increasingly important role the Guard has assumed as it has transitioned from a strategic reserve—to be activated under only the direst of situations—to an operational reserve providing ongoing service augmentation.[145] The DoD and the services provide equipment for the Guard and request training funds to ensure this operational reserve is as capable as the Title 10 forces they support.

Since the DoD acts to support the National Defense Strategy, it follows that Guard integration into these strategic objectives is similarly couched in terms of integration into and support of projecting lethality. In times of war or while supporting overseas contingency operations, National Guard personnel convert from Title 32 status to Title 10 status and integrate seamlessly into the overseas mission.[146] Doubler's history of the Guard

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[141] Joint Doctrine refers to operations within the "domains of land, maritime, air, and space; and the information environment." Joint Chiefs of Staff, *Joint Operations*, Joint Publication 3-0 (Washington, DC: Department of Defense, 2018), I-3, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_0ch1.pdf?ver=2018-11-27-160457-910.

[142] Department of Defense, *Managing the Reserve Components*, 5.

[143] Joint Chiefs of Staff, *Homeland Defense*, I-1.

[144] McNeil and Burke, *Investigating the Benefits and Drawbacks*, 22.

[145] McNeil and Burke, 22.

[146] See Appendix A for a description of duty statuses.

is an exhaustive affidavit of the Guard's involvement in these operations.[147] He recounts Guard involvement that predates its significant World War II contributions in Europe and the Pacific, and he provides examples through the Cold War up to the conflicts in the Balkans and on to the post-9/11 war on terror. His history makes a definitive case for the Guard as a national resource with a retrospective salute to its 400 years of continuous service and center-stage role in national emergencies.[148]

Beyond the Guard's role in augmenting the services in their global security operations, it also has nationally significant roles domestically. As described in the previous chapter, the Guard has a clear role in supporting the DoD in HD. Chapter 9 of Title 32, *U.S. Code*, provides a legal basis for this nationally significant role. Lowenberg, writing as chairman of the Homeland Security Committee of the Adjutants General Association, punctuates this position and applauds this modification to Title 32 to clarify the use of the Guard in the homeland.[149]

HD, described for the Guard in Title 32, *U.S. Code*, clearly transcends parochial concerns and exemplifies activities with significance to the nation as a whole. Moreover, the DoD's HD doctrine does provide for the eventuality that state governors may have local insight into emergencies with national homeland defense implications. This guidance provides governors a mechanism for identifying local HD emergencies and requesting federal funding to accomplish these missions. In exceptional circumstances, the directive *Homeland Defense Activities Conducted by the National Guard* lets a governor "submit requests for homeland defense activity funding" for planned events.[150] The directive even includes a letter template, a "sample request for funding," as one of its enclosures.

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[147] Doubler, *Civilian in Peace, Soldier in War*.

[148] Doubler, 341.

[149] "Title 32 USC, Section 502 (f), adopted in 1964 by Pub.L.No. 88–621, authorizes use of the National Guard at federal expense but under continuing state control 'to perform training or other duty.' This section of the Code was often interpreted as authorizing training only, and not domestic operations. Major General Lowenberg states that the enactment of 32 U.S.C. 902 resolved 'any such ambiguity,' and that there is now statutory authority for 'use of the Guard under continuing state control but at federal expense, when approved by the Secretary of Defense, for a wide variety of operations.'" Alice R. Buchalter, "Military Support to Civil Authorities: The Role of the Department of Defense in Support of Homeland Defense" (Washington, DC: Library of Congress, February 2007), 6–7.

[150] Department of Defense, *Homeland Defense Activities*, 10.

Both planned and emergency missions have roles for the Guard. Beyond the combat air patrol missions discussed earlier, DoD instructions provide a mechanism for integrating Guard forces into HD missions and for providing federal funding for these activities. Legislators also established specialized Guard units to fill important homeland security roles in addition to national defense missions. Modifications to Title 32 and Title 10 of the *U.S. Code* formally codified two nationally significant missions.[151] These 1989 and 1998 modifications provide for both counter-drug units and WMD-CSTs, respectively.[152] Both provide federal funding for state-controlled Guard personnel accomplishing important operational missions within the states while supporting national security objectives.

Although counter-drug units and CSTs accomplish national security objectives and perform activities that span the HD and HS landscape, they are the exception that proves the rule in providing clarity to other Guard operations in the homeland. These mission areas offer an example of a fiscal and legislative authority that consequentially provides doctrinal clarity for the Guard commanders assigned them. Conceived within the U.S. Code, these units and their missions have precise guidance that informs the DoD and specifically serves the needs of these units but has little applicability to the wider Guard infrastructure.

The DoD's instruction to the Guard for HD missions includes specific modes of activation and instructions to governors pursuing federal funding. However, these examples of clarity are absent in the *Defense Support of Civil Authorities* directive and in *The Use of the National Guard for Defense Support of Civil Authorities*.[153] Presumably, a directive titled *The Use of the National Guard for Homeland Security* would be similarly opaque if it existed. Alas, this directive has never been written. Again, the Guard enjoys this clarity in HD because it is subordinate to the guiding instructions in Title 32, *U.S. Code*, chapter 9.

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[151] 32 U.S.C. § 112 (2018) contains guidance for National Guard counter-drug operations. 10 U.S.C. § 12310(c)(1)(A) (2018) contains guidance for reserve component WMD-CSTs.

[152] 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 Lawyer*, May 2008, 30.

[153] Department of Defense, *Defense Support of Civil Authorities*; and Department of Defense, *The Use of the National Guard for Defense Support of Civil Authorities*, DoD Instruction 3025.22 (Washington, DC: Department of Defense, 2017).

National special security events (NSSEs) are domestic events with growing DoD and National Guard involvement and are equally illustrative in this discussion. NSSEs are United States Secret Service–led events for which "national significance" is adjudicated in advance, where multiple agencies cooperate in security operations, and where the DoD makes "specialized units" available.[154] NSSEs were initially designed to provide for protective measures during presidential inaugurations or summits, State-of-the-Union addresses, or high-profile events like the Olympic Games.[155] These events are planned events in which local resources may be inadequate for the magnitude of the security environment and coordination across multiple federal agencies is critical. NSSEs are useful examples of emergency management cooperation and shed some light on the effective use of National Guard resources. Some emergency planners even refer to NSSEs as "planned disasters" because the response, mitigation, and recovery methodologies of NSSEs are similar to those of natural (unplanned) disasters. Some specific contemporary examples that illustrate the complexity and magnitude of these events include the 2015 Papal visit to Philadelphia, the Republican and Democratic National Conventions in 2016, and the 2017 Boy Scout Jamboree.[156]

Despite their national significance, requests for NSSE designation are still bottom-up requests from the governor to the DHS secretary.[157] This process involves a completed questionnaire by the host state's governor and a review by the NSSE working group, which makes a recommendation to the DHS secretary for final adjudication. The reviewers look at federal participation; dignitary attendance; significance, size, location, and duration of the event; media coverage, the threat environment, and the availability of state or local resources. NSSEs are planned events and, therefore, imperfect corollaries for natural

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[154] Executive Office of the President, Presidential Decision Directive 62/NSC-62 (Washington, DC: National Security Council, May 22, 1998), 11, https://ia801304.us.archive.org/29/items/ PresidentialDecisionDirective62PDD-62/Presidential%20Decision%20Directive%2062%20(PDD-62).pdf.

[155] Executive Office of the President, 10.

[156] The Boy Scout Jamboree alone entailed the following force structure: Title 10, 352; Title 32, 737; Title 14, 31; and Civilian, 200. James Hennigan, "Dual-Status Commander Brief" (National Scout Jamboree, Summit Bechtel Reserve, WV, August 24, 2017).

[157] Thomas Landry, "Embracing the Devil: An Analysis of the Formal Adoption of Red Teaming in the Security Planning for Major Events" (master's thesis, Naval Postgraduate School, 2017), 28, https://www. hsdl.org/?view&did=800934.

disaster response. They are, nevertheless, illustrative of a state-to-federal dialogue that encompasses federalism and funding adjudication.

Although this thesis assumes doctrinal opacity surrounding Guard operations in the homeland, the modifications to Title 32 of the *U.S. Code* that allow for well-defined HD operations and for HS missions like counter-drug and CSTs illustrate a way forward. Additionally, NSSEs demonstrate a systematized process of communication between state and federal constituents and provide a model for adjudicating state and federal equity in disasters. These mission areas are blueprints for clarity, worthy of emulation across broader homeland security activities.

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V. THE NATIONAL GUARD AS A STATE ASSET

News coverage after most contemporary natural disasters includes images of National Guard personnel providing support to the affected communities. During the Hurricane Katrina response, a "National Guard vehicle making its way along a flooded street was the first sign of institutional authority for stranded citizens."[158] One can imagine flood victims taking comfort in the government understanding their plight and sending the full might of the most effective and capable military force in the world. The casual observer is certain that the government's camouflaged emissaries will remain on duty for as long as it takes normalcy to return.

Guard historians like Doubler have written extensively about the Guard's heroism fighting America's wars overseas but constantly reference its hometown role as the governor's homeland security practitioners. Reaffirming the dual nature of the National Guard, Title 32 of the *U.S. Code* prescribes some authorities for the state and outlines how governors can independently employ their National Guards. Section 109 of Title 32, *U.S. Code*, which describes the maintenance of other troops, explains situations where a state can independently employ its Guard within its own borders.[159] This provision allows a state governor, designated as the chief executive, the authority to order his Guard to perform security, safety, or defense functions within the state. This service is normally referred to as state active duty (with the disquieting acronym SAD), whereupon the governor can use state funds to activate the Guard in accordance with the constitution of the respective state.[160] The governor normally delegates the command and control of these forces to the adjutant general, the ranking guardsman in each state. Guardsmen are employed in this mode, or status, for most small-scale in-state missions. Although governors can access the Guard's federally assigned aircraft, vehicles, and other equipment while their guardsmen

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[158] National Emergency Management Association, *Emergency Management Assistance Compact*, 2-6.

[159] 32 U.S.C. §§ 101–908 (2018).

[160] The following is an example from the author's home state: "'Active state duty' means duty in the active military service of the state under an order of the governor issued pursuant to authority vested in him or her by law and while going to and returning from such duty." Ark. Code Ann. § 12-60-102 (2014). See Appendix A for a more in-depth discussion of Guard duty statuses.

respond in SAD, they must reimburse the federal government for the use of fungible equipment and supplies such as flight hours, fuel, and food stocks.[161] When a governor is employing Guard personnel and equipment in SAD, he is invariably engaging in local homeland security action.

Governors have used their authority over the Guard for a wide range of activities. When natural disasters strike a community, Guard personnel can be ordered to accomplish multiple missions including clearing debris from obstructed roadways, providing a security presence, transporting potable water, or assisting state agencies in commodity distribution. Governors' authority and discretion in these SAD missions are wide-ranging. These missions almost always accomplish local homeland security needs but are not strictly confined to this area. For example, in 2015, after a particularly severe snowstorm, the governor of Massachusetts used his National Guard to clear away snow.[162]

The Guards' versatility, capability, and capacity make them critical tools in their governors' disaster response portfolios. Most states assign their Guards the responsibility of primary support agency for each of their emergency support functions (ESFs), and some states have the Guard as an ESF in its own right.[163] Additionally, nine state adjutants general have supplemental duties as their states' homeland security advisors, serving as chief executives for matters of emergency management and homeland security.[164]

When the governors of their states independently employ the Guard in SAD, they are engaging in discrete homeland security activities. The *National Strategy for Homeland Security* reaffirms the ideas of federalism and local government authority while recognizing that local governments are more attuned to the needs of their affected communities and citizenry.[165] A governor's application of guard forces in SAD reinforces

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[161] Lowenberg, *Role of the National Guard*, 2.

[162] "Massachusetts Deploys about 500 Guard Members to Clear Snow," National Guard, February 10, 2015, http://www.nationalguard.mil/News/Article/577257/massachusetts-deploys-about-500-guard-members-to-clear-snow/.

[163] See Appendix B for a list of ESFs.

[164] Joint Chiefs of Staff, *Defense Support of Civil Authorities*, 2013, II-4.

[165] Homeland Security Council, *National Strategy for Homeland Security*, 4.

the local-first, bottom-up principle described in the *National Response Framework* that is central to the U.S. homeland security strategy.

DoD guidance references legitimate civil authority as the root of all domestic action and, therefore, subordinates its homeland security action to requests arbitrated through an LFA. This has important implications for the Guard because a state normally requests federal assistance only after its Guard, responding in SAD, has already been operational in the disaster. Unlike homeland security activities at the federal level, SAD missions are not organized under the lead federal agency direction of DHS but rather through coordination with the state's internal department of homeland security or office of emergency management. This independent action, supporting state aims and accomplishing state matters, alludes to the complication in providing doctrinally significant guidance to the National Guard. In Figures 3 and 7, which depict graphic representations of HD and DSCA sourcing, the federal government sits atop the sourcing flow. The DoD's authority in HD allows it to act independently for these missions, so this preeminent role places it atop the HD flow chart. From the DoD's perspective, action in DSCA is subordinate to a work order from a lead federal agency and is similarly enacted near the top of the DSCA flow chart. While the DSCA flow chart shown in Figure 7 is useful for the services, it fails to acknowledge state and Guard HS activities that occur well in advance of federal intervention. The discussion in the following chapter illustrates how DSCA guidance for the Guard is disconnected from potentially concurrent and prerequisite HS activities supporting the state.

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VI. DEPLOYING THE NATIONAL GUARD IN NATIONAL EMERGENCIES

The *National Response Framework* presupposes a conversation describing the capability and capacity of a local jurisdiction's response to an emergency. These factors are heavily influenced by the magnitude of the threat and a federalism debate adjudicating national or local primacy. When disasters are the result of an attack on the homeland, the DoD adds another HD factor for consideration. Emergency managers constantly ask themselves, "Who is in charge, and who is paying?"—so the fiscal dimension becomes another recurrent and practical consideration. In this chapter, large-scale, complex disasters serve as scenarios to navigate these factors. A catastrophic scenario helps draw clearer boundaries, peer through the opacity of doctrinal definitions, and provide a litmus test for the HD, HS, and federalism conversation.

A. THE SPACE BETWEEN: NATIONAL GUARD EMPLOYMENT IN A LARGE-SCALE, COMPLEX EVENT

HD, HS, and DSCA actions should be evaluated by applying them to national emergency scenarios. Homeland defense seems intuitive in the context of an existential threat to the United States such as a ballistic missile threat. Similarly, homeland security is easy to identify when it looks like a civilian in a FEMA windbreaker assessing flood damage or a state fish-and-wildlife officer conducting search and recovery operations after a tornado. Homeland security also seems intuitive during a governor-directed SAD mission for the Guard, where a small state matter can be remedied by the appropriate application of Guard resources. Local sheriffs and county judges who ask the governor to direct Guard high-water vehicles through flooded streets to deliver sandbags and evacuate trapped civilians have initiated homeland security missions. However, applying DSCA or HS descriptions to Guard action in large-scale, complex disasters is not always so straightforward.

The DoD's most recent graphic describing relationships among military missions in the homeland (from JP 3-28, illustrated in Figure 6) alludes that the magnitude of a disaster is important to HD and HS demarcations. As presented, the graphic is deeply

flawed in its implication that the largest threats presuppose HD missions. One can envision a large-scale natural disaster with no defense implication and whose response will be guided by action from DHS and other HS agents. The graphic is useful, however, as the magnitude factor hints toward distinctions that are more complicated when resources are constrained or when it is unclear whether the response is in support of a state matter or national concern.

The dividing lines between state matters and national (or federal) matters are constitutional and legal dialogues that have been at the core of America's political debate since the beginning. This debate has profound implications for homeland security policy. A federalism debate related to a ballistic missile threat to a single city on the West Coast would be short. An attack of this nature, on even the smallest municipality, is an attack on the nation, and HD policy along with DoD primacy captures the narrative.

HD and HS represent opposite perspectives on federalism. While an HD threat manifests as top-down federal jurisdiction and response, the national incident management system and response framework both press the idea that HS preparedness and response are a bottom-up effort. This contrasts with HD demands that response begins with the local incident commander and escalates or expands as resources are exhausted or are unavailable. As emergency managers engaged in HS identify the need for greater levels of support, they find themselves assessing disasters in terms of increasing national support and, consequentially, in terms of increasing national significance. At a certain point in this assessment, a governor may petition the federal government for assistance, entreating the president to invoke his authority to declare a natural disaster. Such conversations are at the very center of state-matter versus federal-matter distinctions.

Once again, fiscal concerns weigh heavily in the HS conversation. The DoD's DCSA guidance describes Guard participation in the homeland in support of DoD action that is concurrently supporting an LFA (normally FEMA). DSCA guidance provides a framework through which DoD leaders can make military capabilities available to civilian leaders. Although DoD personnel and equipment are primarily resourced and trained to accomplish war-fighting functions, there is significant dual-use applicability to these assets. A helicopter that is used to transport Navy Seals behind enemy lines can just as

easily move meals into a disaster area, pluck stranded civilians from raging rivers, or evacuate wounded or displaced civilians. Military trucks designed to ford streambeds across the Fulda Gap are equally adept at navigating flooded streets in South Carolina. Although it makes sense to make these resources nationally available, the DoD is not resourced to accomplish any of these activities. DHS is similarly limited in disaster response resources at its disposal but contributes significantly in disasters through the power of the purse. DHS has the responsibility of managing the Disaster Relief Fund, through which FEMA enables "Federal response to Presidentially-declared major disasters and emergencies."[166] This fund demonstrates a federal commitment to emergency response in matters of national significance. In 2019, the White House validated this commitment by budgeting $6.652 billion for major disasters declared under the Stafford Act.[167] Although this is evidence of a federal commitment to disaster response, this fiscal reality also means the DoD relies on reimbursement from these funds when providing DSCA.

The DoD's DSCA proposition of a top-down hierarchy of support is theoretically useful and accurate from its perspective but is practically incomplete if it is to include the Guard. Figure 8 illustrates that federal action is secondary to and at the request of a regional civilian authority. Federal action also occurs at the tail end of *a priori* local- and state-level homeland security conversations. From a Guard perspective, the LFA's position at the top of the DSCA hierarchy (see Figure 7) fails to recognize the preexisting HS environment, where the Guard is subordinate to and normally operating at the request of a lead state agency.[168] Figure 8 is a simple illustration of the National Response Framework, describing missions that are initially sourced to local resources and then to other state agencies before the state Guard is called into action.[169] When their own Guards are insufficient for the task,

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[166] Office of Management and Budget, "Budget of the U.S. Government: Appendix" (Washington, DC: Government Printing Office, 2018), 531, https://www.gpo.gov/fdsys/pkg/BUDGET-2019-APP/pdf/BUDGET-2019-APP.pdf.

[167] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121 et seq. (Supp. IV 2006), https://www.govinfo.gov/app/details/USCODE-2010-title42/USCODE-2010-title42-chap68-subchapI-sec5121; and Office of Management and Budget, "Appendix," 530.

[168] In most states, an office of emergency management acts as the channel of communication between the governor (or other authorized individuals) and the LFAs.

[169] The National Guard is a state agency but often one of the most expensive to employ. Governors usually activate other agencies first due to this cost factor.

state offices of emergency management can use the Emergency Management Assistance Compact to bring guardsmen from neighboring states. FEMA resources and the request for assistance that results in a mission assignment to the DoD occur after all of this HS activity. The National Guard Bureau, recognizing this antecedent space, coined a phrase to describe the Guard's pre-DSCA action in advance of DoD involvement. The National Guard Bureau (NGB) has proposed the more inclusive doctrinal domain of National Guard Civil Support (NGCS) in an effort to recognize Guard preeminence in the homeland, allude to Guard support in HS activities, and retain lines of demarcation between LFA primacy in DSCA and DoD primacy in HD.[170]

[170] National Guard Bureau, *National Guard Domestic Operations*, National Guard Regulation 500-1/ANGI 10-8101 (Arlington, VA: National Guard Bureau, 2008), 5, http://www.ngbpdc.ngb.army.mil/pubs/500/ngr500_1_ANGI10_8101.pdf.

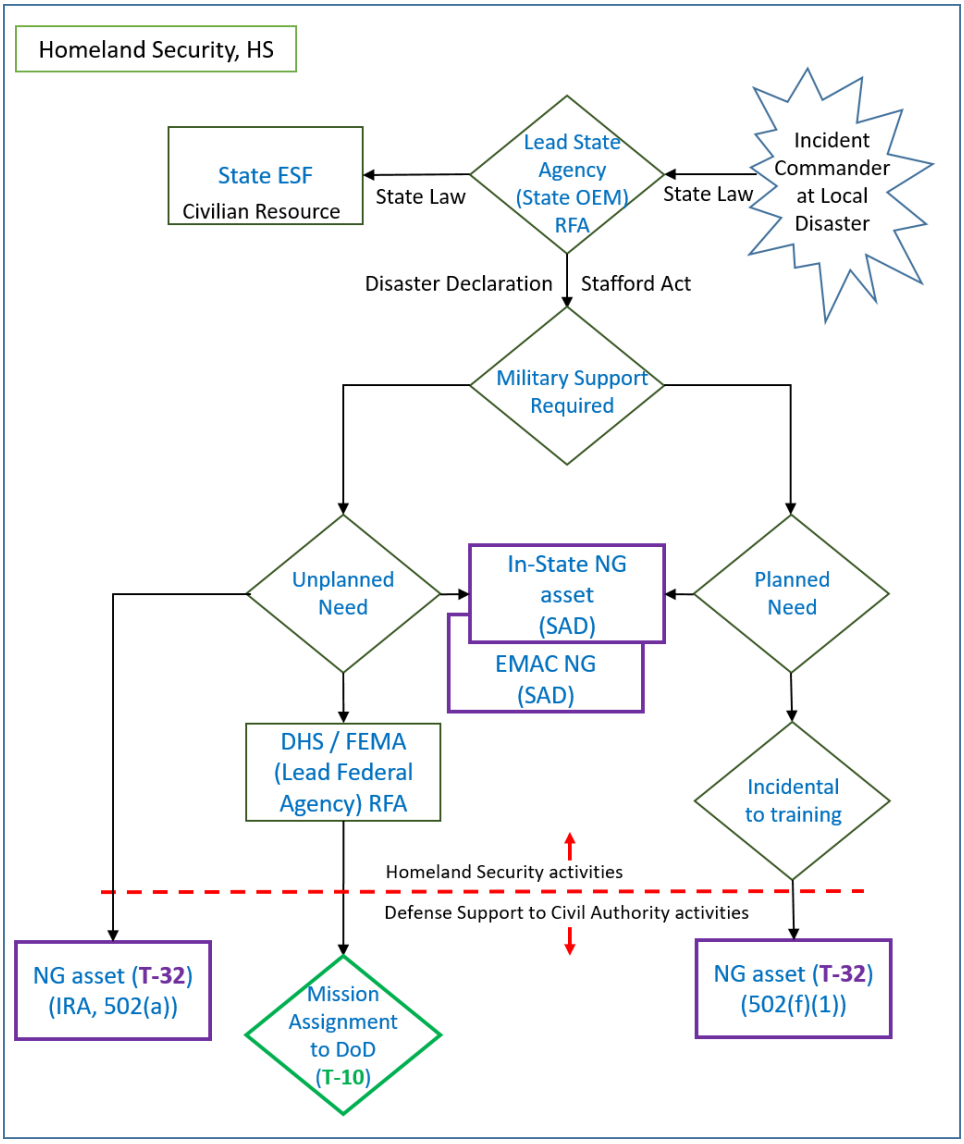

Figure 8. Sourcing the National Guard and the DoD in Homeland Security

The NGB's attempt to differentiate Guard action in advance of DSCA does not go far enough. NGCS is linguistically useful for Guard practitioners to clarify action that has the doctrinal appearance of DSCA but is not directed and funded by the DoD in support of a work order from an LFA—a mission assignment. However, the phrase has no basis in the *U.S. Code* nor is it recognized in DoD doctrine—nor does it answer the authority and funding challenges associated with the response to nationally significant homeland security

events. It is apparent that some key factors should influence doctrinarians as they contemplate the DSCA or NGCS middle ground beyond HD and the intersection with HS.

The capability and capacity of a state's response to an emergency influence the doctrinal landscape. These factors depend on the magnitude of the threat, the jurisdictional conversation between matters of (homeland) defense and (homeland) security, and the federalism debate adjudicating national or local primacy. Additionally, the fiscal dimension is a recurring practical consideration. The following section presents a practical example that differentiates starkly between these factors while bringing clarity to previously opaque doctrinal spaces.

B. A NEW MADRID SEISMIC ZONE EARTHQUAKE

While doctrinarians attempt to determine lines of demarcation between HD, DSCA, and HS, emergency management practitioners do not debate that military resources from the DoD and the National Guards endure as key enablers in the homeland. This is especially true at the extreme end of domestic repose. DHS, the DoD, and all levels in the whole-of-government planning community look to certain planning scenarios as benchmarks with which to measure their domestic readiness. The *National Strategy for Homeland Defense and Defense Support to Civil Authorities* makes a planning assumption that the DoD will be a significant force provider "during a catastrophic event in the homeland."[171] The strategy goes on to describe potential events of a catastrophic nature as follows:

> Any natural or man-made incident, including cyberspace attack, power grid failure, and terrorism, which results in cascading failures of multiple, interdependent, critical, life-sustaining infrastructure sectors and causes extraordinary levels of mass casualties, damage, or disruption severely affecting the population, environment, economy, public health, national morale, response efforts, and/or government functions.[172]

Contemporary domestic planning practitioners have wrestled with this catastrophic definition as being too specific. Recently, more inclusive language has described "large-

[171] Department of Defense, *Strategy for Homeland Defense*, 8.

[172] Joint Chiefs of Staff, *Defense Support of Civil Authorities*, 2013, II-1; and Joint Chiefs of Staff, *Defense Support of Civil Authorities*, 2018, GL-6.

scale, complex disasters" as deserving the same consideration as the events described in the definition. Whatever phraseology is used, the deputy secretary of defense through the strategy is trying to articulate threats to the nation that transcend more localized disasters.

The threat of an earthquake in the New Madrid Seismic Zone (NMSZ) is perhaps the most complicated disaster envisioned by state offices of emergency management, DHS, the Guard, and DoD planners. In 2009, FEMA and the United States Corp of Engineers provided a grant to the Mid-America Earthquake Center to study the effects of a modern-day earthquake in the New Madrid Seismic Zone.[173] Now a decade old, this report still serves as a core planning document for state emergency managers charged with preparing for a future earthquake event. The center's report describes an eight-state region that has been seismically active for over two millennia involving large earthquakes at intervals of 400–1,200 years.[174] As illustrated in Figure 9, three principle shocks with moment magnitudes of 7.5–8.0 occurred on December 16, 1811; January 23, 1812; and February 7, 1812.[175] Years of aftershocks punctuated the spaces between, and some earthquake effects rang church bells as far as Washington, DC, and Boston. The Central United States Earthquake Consortium (CUSEC), a partnership of agencies concerned with earthquake effects in the NMSZ region, proposes the 1811–1812 shocks should not be dismissed as historical curiosities. The United States Geological Survey estimates a 25–40 percent chance of a 6.0 magnitude or greater earthquake event within the next 50 years and a 7–10 percent chance of a repeat quake—as in 1812.[176] This threat is, therefore, a credible risk, worthy of detailed analysis by domestic planners.

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[173] Amr Elnashai et al., *Impact of New Madrid Seismic Zone Earthquakes on the Central USA*, (Urbana, IL: University of Illinois, October 2009), http://cusec.org/documents/scenarios/2009_Scenario_MAE_Center_Vol_I.pdf.

[174] Amr Elnashai et al., 3.

[175] Susan Hough, "Cataloging the 1811–1812 New Madrid, Central U.S., Earthquake Sequence," *Seismological Research Letters* 80, no. 6 (November 1, 2009): 1045, https://doi.org/10.1785/gssrl.80.6.1045.

[176] Whitt-Obrien's, *Central United States Earthquake Consortium CAPSTONE-14: After Action Report* (Memphis, TN: Central United States Earthquake Consortium, September 11, 2014), 15, http://www.cusec.org/capstone14/documents/CAPSTONE-14_AAR.pdf.

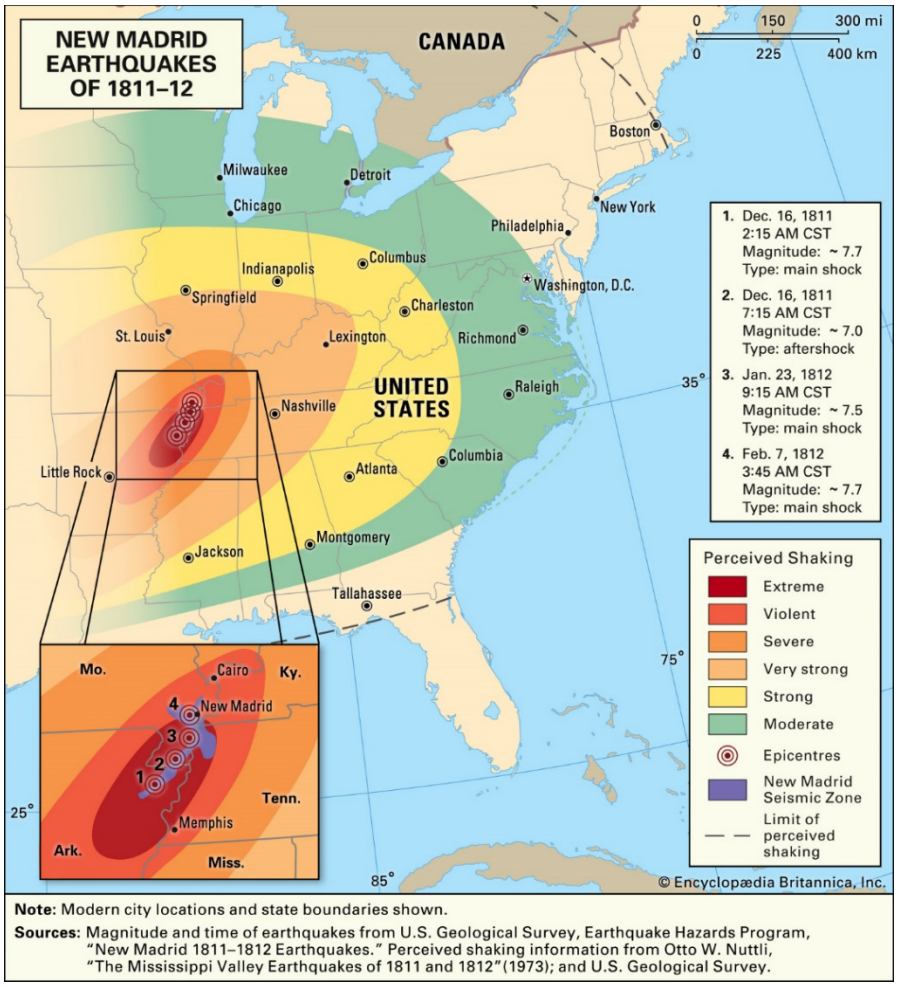

Figure 9. New Madrid Earthquakes of 1811–1812[177]

An NMSZ earthquake is a useful disaster to consider magnitude, federalism, and the interplay between HD and HS. This scenario implies additional fiscal considerations related to each of these factors. For DoD and Guard doctrinarians, it is an important lens through which to view the ideas of HD, HS, and DSCA. The earthquake would span multiple states, directly affect four FEMA regions, and have the potential to disrupt commerce, power, and communications on a national scale. The scenario blurs normal demarcations prescribed by HD and HS and may even challenge core principles from the National Incident Management System.

[177] Source: *Encyclopedia Britannica*, s.v. "New Madrid Seismic Zone," accessed March 13, 2019, https://www.britannica.com/place/New-Madrid-Seismic-Zone.

Returning to Figure 6 from the DoD's 2018 DSCA doctrine, a disaster's magnitude is portrayed as a differentiating factor in how DoD is to provide support. The graphic proposes that the very largest disasters transcend matters of HS and move to HD. The NMSZ earthquake scenario is the ultimate-of-ultimate domestic disasters. However, it is a stretch to automatically categorize an 1811-like earthquake as an HD mission. The graphic correctly implies that events of this magnitude are national matters with a top-down jurisdiction. Nevertheless, even from the DoD's first-person perspective, it is inappropriate to propose that the DoD be the lead agency responding to this event. The nation is not under attack, and there is no enemy to defeat. Even at this scale, the response is, for the most part, an HS matter.[178]

The NMSZ scenario also challenges some of the bottom-up principles central to the National Response Framework. While a bottom-up approach to disaster management nods toward the proper application of federalism and engages higher levels of government support only when needed, it falters in the face of a large-scale, complex disaster like an NMSZ earthquake. Local agencies will be immediately overwhelmed, and affected communities will compete for scarce national resources. An immediate presidential disaster declaration can be assumed, and DHS will have critically important roles in coordinating operations across state and regional boundaries. Resource triage, where federal actors prioritize support to affected states, is a matter of ongoing debate among NMSZ logistics planners and is just one example of top-down disaster management that turns the normal National Response Framework rules on their head.

A modern-day NMSZ earthquake would be a catastrophic event on the scale of the secretary of defense's definition. CUSEC states would be immediately overwhelmed and would reach out for assistance through interstate mutual aid agreements like the Emergency Management Assistance Compact and requests for assistance to the federal government.

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[178] DoD planners are quick to articulate HD planning scenarios that could result from large-scale events. Without straying into topics inappropriate for a discussion at this classification level, the DoD must consider the national security implications of a domestically crippling event of this magnitude. An NMSZ earthquake has obvious implications for logistics lines, economic stability, and overall military readiness that profoundly affect the DoD's ability to accomplish national security objectives. These are not inconsequential HD concerns but are peripheral to the main domestic effort of civilian emergency managers at the state and federal level.

Planners calculating the state-to-state movement of Guard resources estimate that 132,000 Guard personnel would need to be activated.[179] In 2019, USNORTHCOM, FEMA, the CUSEC states, the National Guard Bureau, and several state National Guards will participate in a large-scale exercise to validate these numbers. Additionally, the hope of this exercise is to describe how large the DoD response would likely be. Significant DoD involvement is expected, thus adding to the 132,000 identified Guard personnel.

The NMSZ earthquake, unlike other disaster scenarios, firmly places the conversation within a national context whose complexity applies to this thesis. A core conversation associated with the NMSZ relates to funding. As described previously, an HD threat is automatically considered a national threat and enables the DoD's federal funding of guardsmen. Most planners involved in the detailed response planning for an NMSZ earthquake would agree that the scenario is catastrophic on a national scale. However, unlike Guard action supporting HD, the DoD has no mechanism to fund the Guard supporting a national HS threat like an NMSZ earthquake. Even if legislators worked with the secretary of defense to directly fund the DoD for NMSZ operations, Guard actions subordinate to the DoD are an awkward and impractical doctrinal rigidity divorced from the reality of the Guard's persistent HS presence.

While DSCA is an inappropriate doctrinal space for the Guard response to an NMSZ earthquake, FEMA and DoD planners point to Guard action in SAD as a solution. The Guards in SAD are definitively engaged in HS, and governors can petition FEMA for access to Stafford Act disaster funding to offset costs incurred (including SAD pay and allowances). In this example, federal fiscal resources from the Disaster Relief Fund are made available through the Stafford Act, the line between HD and HS is clearly adjudicated, and the state and federal executives have a mechanism for engaging in dialogue about and adjudicating matters of federalism. Guard action in SAD seems to resolve the doctrinal difficulties described throughout this thesis.

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[179] Louisiana National Guard, "All Hazard Coordination" (workshop, Jackson Barracks, New Orleans, LA, March 2019).

Although Guard action in SAD is doctrinally differentiated and reconciles federalism, the magnitude, and HD–HS demarcations, it has practical challenges that make it an imperfect solution for the NMSZ earthquake scenario.[180] SAD activations at this scale involve separate independent payroll actions from each state involved. The administrative burden involved in seeking reimbursement is beyond the capacity of most individual states and will be a crushing burden for FEMA. In the 2017 hurricane season, 40 state National Guards deployed over 9,000 guardsmen to Texas, Puerto Rico, and the Virgin Islands.[181] Although most of these 40 states managed the fiscal and administrative burden of these deployments, it took more than a year for some of these accounting processes to finally reconcile. This disaster season was the most destructive to date, eclipsing Katrina, but was still a minor operation compared to the scale of a major NMSZ earthquake.[182] From a purely fiscal perspective, an NMSZ earthquake will create a $19.8 million daily expenditure for Guard payroll actions alone.[183] Guard planners from the CUSEC states estimate reimbursement operations will not be able to keep pace with expenditures related to an NMSZ earthquake, causing state-level fiscal insolvency within days of a significant shock.

This thesis proposes that an NMSZ earthquake provides a doctrinal lens to clarify Guard action in the homeland. For a massive, multi-state NMSZ earthquake the Guard will be the largest government entity involved. Whether it operates in SAD or in Title 32, federally funded, governor-controlled status, its actions are a national matter. With an

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[180] There are other disadvantages of SAD at this scale. This thesis has focused on matters of doctrine, but the SAD discussion often derails a clean doctrinal discussion as the DoD-to-Guard parity crowds out other discourse. These matters are of consequence, so they are discussed in Appendix A for readers who are interested in these important considerations.

[181] National Emergency Management Association, *EMAC Response to the 2017 Hurricane Season After Action Report* (Washington, DC: National Emergency Management Association, November 1, 2018), 27, https://www.emacweb.org/index.php/mutualaidresources/emac-library/after-action-reports/2017-emac-hurricane-response-after-action-report/265-emac-response-to-the-2017-hurricane-season-aar.

[182] Federal Emergency Management Agency, *2017 Hurricane Season FEMA After-Action Report* (Washington, DC: Department of Homeland Security, July 12, 2018), https://www.fema.gov/media-library-data/1533643262195-6d1398339449ca85942538a1249d2ae9/2017FEMAHurricaneAARv20180730.pdf. This source contains multiple references to measures of comparison between the 2017 season and Hurricane Katrina.

[183] Guard planners use a $150 daily rate as an approximation for SAD payroll.

assumed presidential declaration, either status will ultimately be federally funded—as SAD payroll will be reimbursed through the Disaster Relief Fund. Despite the assertion that these two courses of action are federally funded federal actions in the same HS mission space, DoD doctrine forces arbitrary separation. While in SAD, the Guard will be engaged in HS; however, the DoD has no mechanism to describe its own action in HS, and DSCA inadequately describes the Guard's catastrophic disaster response in Title 32 status. For disasters of this scale, Title 32 status resolves administration challenges—the guard activates, deploys, pays, and deactivates guardsmen once a month, every month—and ensures state fiscal solvency. However, this status concurrently places the DoD in a position of funding an operation it did not anticipate fiscally and may limit what expenses can be reimbursed through the Stafford Act. The Guard needs a doctrinal space where it accomplishes national matters in a Title 32 status, is not subordinate to a DoD mission assignment (DSCA), and does not become a fiscal drain on the DoD's HD or overseas obligations. Inconsistencies like these point to the need for an updated doctrine that is adept at serving the nation during large-scale, complex disasters in the homeland. The NMSZ scenario highlights the need for a doctrinal space that describes the National Guard in a federally funded, state-controlled, Title 32 status accomplishing HS activities. The next chapter examines short-term and ultimately more enduring strategies to correct these identified doctrinal inconsistencies and resolve competing fiscal tensions.

VII. CLARIFYING THE NATIONAL GUARD'S ROLE IN HOMELAND SECURITY AND DEFENSE SUPPORT TO CIVIL AUTHORITIES

Earlier chapters described the HD, HS, and DSCA landscape for the DoD and illustrated the current modes of National Guard integration into and alongside the DoD in these mission areas. These mission spaces were considered in the context of national or local implications and their influence on DoD and Guard response in large-scale, complex disasters. From this conversation, it is apparent that clear language within the *U.S. Code* has enabled clear action within HD and within some select mission areas attributed to the Guard. It is also clear that fiscal considerations lie beneath the surface of every doctrinal consideration and result from federalism debates. This chapter provides solutions aimed at clarifying National Guard roles in HS and DSCA. It explores the limitations within Title 32, "National Guard," and Title 42, "The Public Health and Welfare." The limitations to Guard action under Title 32 authorities and reimbursement restrictions in the Stafford Act under Title 42 need to be resolved for enduring solutions to Guard action in the homeland.

A. ENABLING GUARD ACTION: SHORT-TERM SOLUTIONS

To better facilitate Guard action in the homeland, doctrine needs to be amended or added. Ultimately, these doctrinal improvements should originate in legislation, but some short-term solutions should be pursued in the interim. The DoD abandoned efforts to create a stand-alone doctrine for HS in 2009, and although there is significant HS discussion in *Homeland Security* and *Defense Support to Civil Authorities*, these rightfully focus on DoD action in the homeland, not National Guard action. The previous DSCA discussion showed that there is little precedence for the Guard accomplishing DSCA; it is almost fiscally impossible and ignores the bottom-up premise of the National Response Framework. Moreover, the DoD asserts that neither it nor Congress has the legal authority to appropriate funding for the governors' use of their Guards. These barriers and inconsistencies lead to the conclusion that DSCA doctrine is an inadequate guide for guardsmen operating in the homeland. In advance of clear, legislative guidance for Guard action in large-scale,

complex disasters, DoD and DHS leaders must look for modes to augment DoD funding in disasters and ways to adjudicate between federal and state equities.

Reiterating the DoD's lack of funding for HS and DSCA missions, doctrinal improvements will still be at the mercy of fiscal constraints within the DoD's budget. An emergency afflicting the nation transcends treatment as purely a state matter, and the DoD must have a mechanism to fund the Guard. In the same way that *Homeland Defense Activities Conducted by the National Guard* instructs governors and senior military leaders in matters of HD, new guidance should be instructive for nationally significant matters of HS and DSCA while providing fiscal solutions. There is clearly room for a new complementary directive called *Homeland Security Activities Conducted by the National Guard.*

Lowenberg wrote of the important modifications to Title 32 and the implications of the "other duty" allowed in 32 U.S.C. § 502(f). Nevertheless, National Guard leaders continue to experience difficulty in accessing federal funding, which is implicit in Title 32, chapter 5, to accomplish disaster response activities. After the 2017 hurricane season, senior leaders in the National Guard Bureau looked for creative solutions for employing Guard personnel in current authorities that were not shackled by ambiguous DoD guidance. Without running afoul of the training mandates in the *U.S. Code*, NGB leaders looked for avenues to federally fund Guard response. The chief of the National Guard Bureau (CNGB) sought to clarify existing guidance that gives the adjutants general discretion in using training funds. He reminded them that training activities could have a secondary benefit including actions in response to domestic disasters.[184] Here, the CNGB provided guidance to Guard commanders by reminding them that activities accomplished to achieve service "warfighting" objectives could have incidental operational benefits for their state when the training coincided with a disaster or other planned event. Nevertheless, adjutants general have to be cautious and deliberate in how they exercise this authority, as these training

[184] Joseph Lengyel and Michael Taheri, *Guidance Regarding Authority to Conduct Training during National Guard Civil Support (NGCS) Operations for Domestic Disaster Response* (Arlington, VA: National Guard Bureau, September 14, 2018).

funds are distributed primarily by the services to accomplish their national security—not disaster response—objectives.

A discussion of the legal authorities behind the funds for Guard actions in the homeland helps to explain the services' distribution of training funds. Title 32, *U.S. Code*, is the source document for most of these authorities. Chapter 5 specifically describes training activities for the Guard. The 1964 revisions to the code have had important implications for domestic Guard employment. Differentiating between the authorities in the modern *U.S. Code* is still a matter of debate, but a good working example is summarized briefly in Table 1 and explained more fully in Appendix A. This table shows how the CNGB's guidance clarifies the application of training authorities and funding in the *U.S. Code*, specifically the ability to provide "an incidental operational benefit."[185] This guidance better defines the "other duty" Lowenberg references. It proposes that events—such as natural disasters—could provide meaningful, necessary training for wartime readiness while benefitting state governors and providing adjutants general with clearer guidance on their authority to repurpose local funds under *U.S. Code* authority.

[185] Lengyel and Taheri, *Authority to Conduct Training*. The NGB is currently in the process of writing the 2019 *Guidance and Authority for the use of Title 32 Training with Incidental Operational Support*, but this guidance was still in draft form at the time of this paper's publication.

Table 1. Explanation of 32 U.S.C. § 502: Required Drills and Field Exercises[186]

Section	Description	Intent	Approval
502(a)(1)	"Inactive duty training" one weekend a month	Training	State Adjutant General (TAG)
502(a)(2)	15 Days of "Annual Training"	Training	State Adjutant General (TAG)
502(f)(1)	Perform training or other duty in addition to that prescribed under 502(a)	1. Training with Incidental Mission Support 2. Response to a Formal Request for Assistance	Service Secretary and Chief, National Guard Bureau (CNGB)
502(f)(2)(A)	Duty may include support of operations or missions	1. Federal Missions (DSCA) 2. Homeland Defense (§ 901–§ 908)	President or Secretary of Defense (SecDef)

The justification presupposes (warfighting) training value commensurate with the goals of 32 U.S.C. § 502(a). While this clarifying language is valuable, DoD and Guard participation in disaster response is still an unanticipated requirement beyond the services' normal budget.[187] Subsection (f) does not create new disaster funding but provides latitude within existing training guidance and broader authorities within the existing budgetary allocation. Clearly the CNGB's guidance needs to be taken further to ensure this fiscal impasse does not restrain military support in disasters.

The CNGB's guidance is, nevertheless, valuable. DoD and Guard comptrollers are well versed in submitting out-of-cycle requests to cover unfunded or unanticipated events. For example, the DoD submitted a multi-billion-dollar supplemental budget request in 2017 that included a wide range of requirements, from additions to overseas campaigns to

[186] DoDI 1215.06 and DoDI 3025.22 are silent on the distinction between 32 U.S.C. § 502(f)(1) and § 502(f)(2) despite these distinctions in the *U.S. Code*. According to a 2019 primer produced by the National Guard Bureau, the "President and the SecDef have authority to authorize operational missions under 32 U.S.C. §502(f)(2)." This legal primer also describes DSCA by proposing that the "DOD 3025 series of publications govern providing DSCA to a qualifying entity and primarily apply to response under Title 10 and 32 U.S.C. §502(f)(2)." Rofrano, *2019 Domestic Operations Law and Policy*, 219. Although the previous reference implies the CNGB has authority to approve § 502(f)(1), considerable debate that refutes this position has not been resolved at the time of this writing.

[187] Department of Defense, *Defense Support of Civil Authorities*, 2013, E-4.

unanticipated activities including repairs to storm-damaged military infrastructure.[188] It follows that Guard personnel pressed into duty to accomplish nationally significant homeland security activities—beyond the services' initial budgetary estimates—could use supplemental funding measures in years where natural disasters strain the DoD's budget.

In advance of modifications to the Stafford Act or Title 32, *U.S. Code*, homeland security administrators must be able to supplement the DoD's budget in times of disaster. After 9/11, with a focus on prosecuting the war on terror, Congress proposed the Defense Emergency Response Fund (DERF) as a means to supplement homeland security funding for the DoD.[189] Appendix D of this thesis chronicles some significant events associated with this fund. DERF was an effective tool for providing the DoD with fiscal elasticity. Unfortunately, DERF's purpose was tied too closely to counterterrorism activities, and it was rarely used to defray the costs of disasters. The fund has been discontinued and DERF references removed from DoD guidance. Nevertheless, as defense comptrollers consider budgetary targets for future defense appropriations, an allocation to a DERF-like line of accounting would provide a mechanism to federally fund National Guard actions in the homeland. As legislators consider future national defense authorization acts, there is an opportunity to resurrect DERF or define a substitute better able to reimburse DoD and Guard domestic actions.

In addition to the short-term funding solutions proposed, NSSEs provide a model for engaging in adjudication conversations critical to DoD and Guard action in the homeland. The United States Secret Service developed questionnaires and checklists that allow state executives an opportunity to engage in structured deliberation on matters of federal and state equity. These conversations clarify the level of federal participation anticipated and draw distinctions based on the event size, location, duration, threat

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[188] Office of the Under Secretary of Defense (Comptroller), *Request for Additional FY 2017 Appropriations: United States Department of Defense Fiscal Year 2017 Budget Request* (Washington, DC: Department of Defense, March 16, 2017), 3, https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2017/marchAmendment/FY17_March_Amendment.pdf.

[189] Government Accountability Office, *Defense Budget: Tracking of Emergency Response Funds for the War on Terrorism*, GAO-03-346 (Washington, DC: Government Accountability Office, April 30, 2003), https://www.gao.gov/products/GAO-03-346.

environment, and the availability of state or local resources. Intuitively, similar differentiating criteria could adjudicate the line between state and federal matters in natural disasters. These new criteria would become prerequisites for state executives, the DoD, and DHS to access National Guard capabilities under appropriate funding and authorities.

Despite the DoD's fiscal constraints in matters of HS and in the absence of a mode of dialogue adjudicating federal or state matters, there is some precedent for resolving both of these challenges. DoD, DHS and National Guard leaders must work to develop clarifying guidance aimed at piercing these obstacles to domestic action. The CNGB is working to create interim guidance relating to "incidental support." There are existing models to augment DoD appropriations, and the Secret Service has one to adjudicate whether an event has a federal nexus. All of these examples point toward short-term collaboration that could significantly improve and facilitate Guard action during large-scale, complex disasters.

B. ENABLING GUARD ACTION: ENDURING SOLUTIONS

Beyond matters of federalism and doctrinal HS and HD demarcations, fiscal considerations permeate all disaster conversations. A major obstacle to employing the Guard in large-scale disasters stems from the inability to federally fund its activation. Guard personnel serve the military as part-time employees, so any activation beyond their core warfighting training needs external funding. The pay and allowances of activated Guard personnel accomplishing HS are unplanned appropriations outside the DoD's normal budget. Additionally, the DoD cannot seek reimbursement for pay and allowances through appeals to the Stafford Act. Guard activation in SAD is doctrinally clean but produces crushing administrative challenges, creates disparity in responder benefits, and might bankrupt states responding to nationally significant, catastrophic disasters. Clearly, more enduring fiscal solutions are needed.

Recent modifications to Title 32 of the *U.S. Code* to clarify the Guard's action in HD serve as a model worth emulating and a means to solving the funding challenges with Guard action. Sections 901–908 of Title 32, *U.S. Code*, provide legal and financial guidelines for Guard action in matters of HD. Revisions to 32 U.S.C. §112 have similarly

informed National Guard counter-drug operations while revisions to 10 U.S.C. § 12310(c) have enabled National Guard WMD-CSTs. Specialized teams like these, distributed throughout the states, have similarly instructive legal and financial authority guiding their actions in a broad range of HD and HS missions.

Title 10 of the *U.S. Code* requires that the DoD develop a plan for funding capabilities.[190] The secretary of defense must provide the funds and resources necessary to employ the active components and the reserve components in HD, domestic emergency response, and "military support to civil authorities."[191] However, because Congress does not appropriate funds for the DoD to accomplish disaster response operations, the secretary of defense must fund operations with an empty purse. This imperative should be pressed further, and the language in Title 10 and Title 32 of the *U.S. Code* needs to be further refined to provide greater clarity for the Guard. The CNGB should not have to interpret *U.S. Code* to enable Guard action. Title 32 must be modified to explicitly reference the Guard acting under the authority prescribed in § 502(f) and supporting nationally significant HS actions. This new language should serve as the basis for revisions to DoD doctrine, open the door to stand-alone HS doctrine relating to Guard action, and drive improvements to DoD instructions and directives. Furthermore, from a practical perspective, this improvement would empower the DoD to include an annual appropriation for the federally funded burden of Guard personnel acting within these mission areas.

[190] 10 U.S.C. § 1815(a)–(d) (Supp. V 2006).

[191] 10 U.S.C. § 113 (2018).

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VIII. CONCLUSION

> Working with the Nation's Governors and State Adjutants General, the Department of Defense must develop operational plans based upon the national planning scenarios that will integrate and synchronize military forces to achieve unity of effort in support of homeland security missions across the Nation. These plans will determine specific military requirements and capabilities for accomplishing homeland security missions that will most effectively be met by the combined effort of active, reserve, and National Guard forces.
>
> —Homeland Security Council[192]

On October 27, 2018, the director of operations for United States Indo-Pacific Command set in motion a conversation that would lead to employment of National Guard personnel in DSCA to support response and recovery efforts in the Commonwealth of the Northern Mariana Islands after it was struck by Super Typhoon Yutu.[193] One hundred and thirty Guam National Guard personnel were sourced and received secretary of defense approval to respond in federal pay status under 32 U.S.C. § 502(f)(2). They were approved to support USINDOPACOM and FEMA for a period of 30 days. This activation resulted from a conversation between FEMA, the DoD, and Guam's Governor, Eddie Baza Calvo, in which Calvo consented for Guam National Guard personnel to provide support in a Title 32, federally funded, state-controlled duty status. This response to a natural disaster in the Northern Marianas was a small but illustrative step toward practically defining Guard action in the homeland.

The important role the DoD and the National Guard have in the homeland remains indisputable. Both institutions are inextricably linked, and the sum of their combined parts is significantly more capable than any one part alone. Military doctrine must be explicit in

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[192] Homeland Security Council, *National Strategy for Homeland Security*, 51.

[193] Robert Brown, "Request for Activation of 9th Mission Support Command U.S. Army Reserve and Guam U.S. Army National Guard Soldiers under 12304a Mobilization Authority in Accordance with DoDI 1235.12, June 7, 2016" (official memorandum, Ft. Shafter, HI: U.S. Army Pacific Command, October 27, 2018).

the modes of cooperative and unified planning and serve as an effective guide in accomplishing homeland security missions. To this end, the DoD has taken pains to produce and refine doctrine that guides the actions of the active services and the Guard. However, the doctrine suffers where it has to serve the federal and state natures of the National Guard, and continued refinement is necessary.

Large-scale, complex natural disaster planning should press military doctrinarians to consider how federalism plays into response. These scenarios should challenge DHS, DoD, and Guard planners to consider which threats to the United States are parochial concerns and which ones are national matters. The DoD's primacy in homeland defense is uncontested, and clear doctrinal roadmaps point to fiscal, legal, and jurisdictional authorities supporting quick and seamless integration of Guard personnel. The governors' authority in accomplishing HS actions in their states is comparably efficient. The Stafford Act, adjudicated through DHS and FEMA, provides a mechanism for these state governors and federal decision-makers to debate demarcations between state and federal (fiscal) matters. Governors and their emergency managers can use the disaster declaration process to initiate a state-to-federal dialogue that results in cost-sharing between the state and the federal government. When applicable, governors can even apply these fiscal equities to the cost of placing their Guard soldiers and airmen on state active duty. Current doctrine and state laws are useful at these extremes—a federally funded Guard supporting the DoD in matters of HD or a state-funded Guard supporting HS—but fail in some of the grey areas in between.

DSCA is an action in which the DoD provides support to an LFA supporting HS. The LFA's jurisdiction in this doctrinal space implies support of a nationally significant nature. However, despite several arguments supporting Guard preeminence in matters of HS, guardsmen cannot be accessed because the DoD is not funded to source the Guard in this mission space. The DoD is also unable to access disaster funding from the Stafford Act to reimburse it for unplanned DSCA assistance from the Guard. Moreover, the doctrine is understandably loath to encroach on the governors' authority over the state Guards while silent on modes of dialogue and coordination that could result in cooperation between state and DoD planners accomplishing HS or DSCA actions. If the Guard is to be a practical

partner of the DoD in DSCA or empowered to conduct federally funded HS independent of DoD action, then refinement to the Stafford Act or disaster lines of accounting within the DoD budget must be considered. If practical, there is a solid argument for mission assignments from an LFA directly to the National Guard. Legal accounting mechanisms like DERF could serve as effective disaster response tools and provide the DoD with fiscal elasticity. Additionally, DSCA—Guard action subordinate to DoD mission assignments—is too narrow to accommodate operations like the Katrina response, where the Guard accomplished governor-directed, governor-controlled HS in a federally funded, Title 32 status. The DoD's lack of authority over the non-federalized Guard should serve as a doorway to federal and state dialogue and not be seen as an insurmountable legal barrier. NSSE missions presuppose an adjudicating conversation between lead federal agencies, the DoD, and the National Guard and provide a model for similar conversations aimed at adjudicating HS, HD, and DSCA. Ultimately, new legislation will facilitate new doctrine that must provide clear guidance to state adjutants general, the NGB, and the services for how to enter into these conversations and aid in better sourcing Guard resources for large-scale, complex disasters.

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APPENDIX A. NATIONAL GUARD DUTY STATUSES

National Guard duty statuses are important considerations for action in the homeland. Table 2 and the pages that follow provide insight into Guard duty statuses and their legal differences. Although status is central to understanding the National Guard, this discussion is included here not to distract from the central debate relating to HD, HS, and DSCA doctrine. Readers familiar with these legal statuses can dismiss this section, but it is included for readers who are unfamiliar with these demarcations or terms. Although secondary to the doctrinal focus of this paper, there are several characteristics of state active duty that make this status problematic in large-scale, complex disasters. These matters often distract from the doctrinal concerns this paper proposes but cannot be discounted as inconsequential to the practical application of Guard forces. These complications are also addressed in this appendix.

Table 2. Comparison of State Active Duty, Title 32, and Title 10 Statuses[194]

	State Active Duty (SAD)	Title 32 (T32)	Title 10 (T10)
Command and Control	Governor	Governor	President
Location of Duty	In accordance with State Law	US	Worldwide
Funding	State Funds	Federal	Federal
Mission Types	In accordance with State Law (e.g. riot control, emergencies)	Training and/or other federally authorized missions	Overseas Training and other missions as assigned
Military Discipline	State Military Code	State Military Code	Uniform Code of Military Justice (UCMJ)
Support to Law Enforcement	Yes, within authority extended by state law	Yes, within authority extended by state law	As limited by Federal law . . . Posse Comitatus Act
Indemnity for Accidents	State	Federal	Federal

[194] Adapted from John Maier, "A Legal Foundational Understanding on the Dual Status Commander & Domestic JTFs" (presentation, Dual-Status Commander Course, Arlington, VA, October 14, 2016).

A. TITLE 10 STATUS

Title 10, "Armed Forces," of the *U.S. Code* governs the management of military forces in general. Title 10 status, in the context of the Guard, refers to the Guard's ability to be federalized to accomplish national security objectives. Title 10 contains provisions that allow the president to assume control of members of the Guard and legally integrate them into the active-duty standing military force. When Guard members are deployed overseas to serve in contingency operations, they become members of the Title 10 force and are legally and practically indistinguishable from the standing military force.

B. TITLE 32 STATUS

Title 32 of the *U.S. Code* governs the management of the National Guard. The code lays out the Guard's organization, administration, training, and procedures for aligning with the services. Although these aspects are relatively small portions of *U.S. Code*, these few sentences provide the framework within which guardsmen must operate and determine how they are funded, whether conducting normal training activities or responding to natural disasters.

National Guardsmen are for the most part "citizen soldiers" who hold regular civilian roles in the community and who maintain a level of training and readiness through periodic training mobilizations.[195] Section 502 of Title 32, *U.S. Code*, describes this periodic training as well as determines how guardsmen are to be used in support of civil disturbance or natural disasters. Section 502 begins with direction on what kind of training to accomplish and how often it should occur. Under § 502(a) guardsmen "assemble for drill and instruction . . . at least 48 times each year" and "participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year."[196]

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[195] There are full-time guardsmen for the purpose of "organizing, administering, recruiting, instructing, or training the reserve components." 10 U.S.C. § 101(d)(6)(a) (2018). These AGRs, so named because they serve "Active Guard and Reserve duty," perform full-time National Guard duty under 32 U.S.C. § 502(f) (2018). Although they are important to the administration of the National Guard, this force is normally small compared to the total Guard rolls. See definitions in Annex A.

[196] 32 U.S.C § 502(a)(1)–(2) (2018).

Section 502(a) legally authorizes the funding of planned National Guard training. Two sentences describe reserve duty, which guardsmen accomplish "one weekend a month, and two weeks every summer." In accordance with "regulations to be prescribed by the [Service] Secretary," National Guardsmen maintain a level of readiness necessary to fight alongside the regular, Title 10 force in operations across the globe.[197] When the Services allocate a budget for the National Guard, the majority of the appropriation is set aside under "502(a)." It is worth stressing that the services appropriate these training funds primarily to meet *their* (federal) readiness objectives, not to accommodate state requirements *nor to prepare for civil support*.[198]

Section 502 of Title 32, *U.S. Code*, outlines two overarching authorities that prescribe activities to which guardsmen lend support. First, two sentences in § 502(a), as previously described, relate to normal training necessary for continuous readiness. The direction to employ these funds in the name of training has the force of law. National Guard commanders and their legal counselors strenuously avoided deviations from the training intent of this section.[199] Second, § 502(f) "authorizes funds originally programmed for training to be utilized for emergency situations," which is where a great deal of misunderstanding occurs regarding the use of the National Guard.[200]

As they relate to disaster response, two subcomponents of section 502(f) require careful examination. First, 502(f)(1) reads, "Under regulations to be prescribed by the

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[197] 32 U.S.C. § 502 (2018).

[198] There are two noteworthy exceptions when providing support to disasters. The first are operations that are "incidental to training." If a guardsmen were to conduct an operation directly connected to their required federal training, this training could support operational (disaster response) needs. For example, a flight crew might need to log a certain number of flight training hours and, while completing this training, find themselves "incidentally" transporting needed humanitarian aid. Second, exceptions are allowed for Immediate Response Authority (IRA), which is a National Guard version of the "Good Samaritan Law," ensuring that guardsmen do not stand idly by under the restrictions of 502(a) when *immediate* and requested support could save life or property. See Appendix A for the definition of IRA.

[199] Commanders must be careful not to take action contrary to the intent of an appropriation and cause an anti-deficiency act. Specifically, "An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A) (2018).

[200] Greg Wingard and Eric McElwain, "Title 32 U.S.C § 502 Funding Authorizations," National Guard Bureau, September 26, 2017.

[Secretaries] a member of the National Guard may . . . be ordered to perform training or other duty in addition to that prescribed under subsection [502(a)]."[201] Second, § 502(f)(2) clarifies, "The training or duty ordered to be performed under paragraph (1) may include support of operations or missions . . . at the request of the President or Secretary of Defense."[202]

An understanding of Title 32 duty status depends on these four core authorities (see Table 3, a repeat of Table 1). Section 502(f)(1) provides a mechanism whereby *training funds* can be used for activities outside the training strictures of § 502(a). If authorized, a state can use § 502(f)(1) authority to support an event, but the activity must *primarily accomplish a training objective*, and National Guard involvement must be only incidentally beneficial to the event. This provision essentially acknowledges that events (such as responding to a natural disaster) could occur that provide meaningful training necessary to wartime readiness while also benefitting the state. Governors and the adjutant generals can petition the service secretaries and the chief of the National Guard Bureau, who are the clearinghouse for these state requests and who have the authority to approve a state's requests to repurpose funds to § 502(f)(1) authority. There are numerous examples of approval for repurposing funds and the performance of activities under § 502(f)(1). Some of the most customary provisions are for national special security events.[203] However, this approval is normally merely to repurpose existing funds and does not necessarily imply that *extra* funding is available to the state. The justification, by its very nature, presupposes training value commensurate with the goals of § 502(a). As "disaster relief participation is an unprogrammed requirement for the Services for which funds have not been budgeted," neither the services nor the Guard is resourced to fund unexpected disasters.[204] For these

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[201] 32 U.S.C § 502(f)(1) (2018). More explicitly, 502(f)(1)(A) orders the member without his consent but with pay while 502(f)(1)(B) requires his consent either with or without pay.

[202] 32 U.S.C § 502(f)(2)(A) (2018).

[203] A national special security event is "an event of national significance as determined by the Secretary of Homeland Security. These national or international events, occurrences, contests, activities, or meetings, which, by virtue of their profile or status, represent a significant target, and therefore warrant additional preparation, planning, and mitigation efforts. The USSS, FBI, and FEMA are the federal agencies with lead responsibilities for NSSEs; other federal agencies, including DoD, may provide support to the NSSE if authorized by law." 32 C.F.R. § 183.3 (2013).

[204] Department of Defense, *Defense Support of Civil Authorities*, 2013, E-4.

reasons, approval normally results in moving training funds to § 502(f) in what amounts to a zero-sum accounting exercise.

Table 3. Explanation of 32 U.S.C. § 502: Required Drills and Field Exercises[205]

Section	Description	Intent	Approval
502(a)(1)	"Inactive duty training" one weekend a month	Training	State Adjutant General (TAG)
502(a)(2)	15 Days of "Annual Training"	Training	State Adjutant General (TAG)
502(f)(1)	Perform training or other duty in addition to that prescribed under 502(a)	1. Training with Incidental Mission Support 2. Response to a Formal Request for Assistance	Service Secretary and Chief, National Guard Bureau (CNGB)
502(f)(2)(A)	Duty may include support of operations or missions	1. Federal Missions (DSCA) 2. Homeland Defense (§ 901–§ 908)	President or Secretary of Defense (SecDef)

Whereas § 502(f)(1) specifically prescribes training aimed at supporting service objectives, § 502(f)(2) does not. With a governor's consent, the president of the United States and secretary of defense can order guardsmen to perform duty for a federal mission, per § 502(f)(2). Although defense support of civil authorities (DSCA) is often used to describe a multitude of National Guard activities, the use of the National Guard in DSCA expressly means the use of the National Guard under § 502(f)(2).[206]

These situations normally arise when the DoD has an interest of its own and needs National Guard assistance. In 2015, for example, the Department of the Army sought assistance to secure the crash site of the Army's Joint Land Attack Cruise Missile Defense

[205] Although the graphic implies the CNGB has authority to approve § 502(f)(1), considerable debate refuting this position has not been resolved at the time of this writing.

[206] "Except as specified otherwise, reference to DoD use of the National Guard for DSCA refers to use of the National Guard pursuant to section 502(f)" but does *not* apply to "National Guard training activities that are conducted in a duty status pursuant to section 502(a) or 502(f)." This rules out § 502(a) and § 502(f)(1) from the definition of DSCA. Department of Defense, *Use of the National Guard for Defense Support*, 1–2.

Elevated System. The secretary of defense directed the Pennsylvania National Guard to provide support under § 502(f)(2) and the Department of the Army to reimburse the National Guard for this work.[207]

This discussion describes some key points in 32 U.S.C. § 502 and helps to explain the funding and status of the National Guard. When operating domestically, funding for the National Guard is specifically intended for training aimed at improving wartime readiness. There are some mechanisms to support other operational requirements (such as disaster response), but these mechanisms may not result in reimbursement to the National Guard for costs incurred.

C. STATE ACTIVE DUTY

Reaffirming the dual nature of the National Guard, Title 32 also prescribes some authorities to the state and outlines how the state can independently employ its National Guard. Section 109, "Maintenance of Other Troops," describes situations in which a state can "use its National Guard or its defense forces . . . within its borders in time of peace." Additionally, the states "may, as provided by its laws, organize and maintain defense forces. A defense force established under this section may be used within the jurisdiction concerned, as its chief executive (or commanding general in the case of the District of Columbia) considers necessary."[208]

This provision allows state governors, designated as chiefs executive, the authority to order their National Guards to perform functions within the states outside the strictures referenced in § 502. This service is normally referred to as state active duty, whereupon the governor can use *state funds*, in accordance with the constitutions of their respective states, to activate the Guard.[209] The governor normally delegates the command and control of these forces to the adjutant general, who is the ranking guardsman of each state. National

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[207] Lowenberg, *Role of the National Guard*.

[208] 32 U.S.C. §109 (2018).

[209] The following is an example from the author's home state: "'Active state duty' means duty in the active military service of the state under an order of the governor issued pursuant to authority vested in him or her by law and while going to and returning from such duty." Ark. Code Ann. § 12-60-102 (2014).

Guardsmen are employed in this mode, or status, for most small-scale, in-state missions. Although governors can access the Guard's federally assigned aircraft, vehicles, and other equipment while their guardsmen respond in SAD, they must reimburse the federal government for the use of fungible equipment and supplies such as flight hours, fuel, and food stocks.[210]

Nonetheless, a governor's decision to activate his own National Guard needs to be weighed carefully. Although National Guardsmen bring a great deal of capability to bear, they can also be some of the governor's most expensive resources. Although soldier pay rates vary, adjutants general often use $150 to $200 as a good daily payroll figure when estimating SAD expenses for a single guardsman.[211] The per-hour "blade time" on military helicopters is even more onerous.

Additionally, emergency managers and governors must consider some limitations to SAD in situations where they have the freedom to choose how to deploy National Guardsmen. There are differences between federal status and state active duty that make SAD status less appealing than regular duty under 32 U.S.C. §502. These differences are included in this appendix because they are useful in explaining the underlying tension and doctrinal uncertainty surrounding the use of the Guard for nationally significant disaster response. This thesis proposes that doctrine should help the DoD understand how and when to engage the Guard in DSCA operations supporting HS activities or in pure HD. The disparities between Title 32 and SAD become emotional arguments during Guard employment and are often comingled or subsume doctrinal concerns. Although important, these disparities can become strawmen arguments that detract from the doctrinal clarity this thesis seeks.

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[210] Lowenberg, *Role of the National Guard*, 2.

[211] An E5 with six years of service earns $6,368.89, which is approximately $212 per day. "Military Pay Calculator," Federal Pay, accessed March 17, 2019, https://www.federalpay.org/military/calculator.

D. FACTORS DIFFERENTIATING SAD FROM FEDERALLY FUNDED TITLE 32 STATUS

1. Healthcare

Guardsmen without healthcare are not necessarily provided healthcare by virtue of activation on state active duty. In fact, their very activation may cause them to lose the coverage their regular employers may provide. The only protection afforded them is coverage under the state's workers compensation insurance. Conversely, a guardsman in Title 32 status (even while performing normal weekend training duties) can expect a line-of-duty determination that provides full medical care for any injury incurred as a result of performing military duty.[212] In addition, full medical benefits are provided for any Title 32 activation over 30 days.[213]

2. Uniformed Services Employment and Reemployment Rights Act (USERRA)

USERRA protects a guardsman from arbitrary retribution from an employer by virtue of activation to service. This law provides considerable federal protection to a guardsman if activated for service under any provision of § 502 and especially for federal, Title 10 service responding to overseas deployments. Although some states have enacted comparable USERRA-like protections under state law, others have no USERRA protections for SAD activations, exposing guardsmen to potential employer retribution for National Guard–induced absenteeism.[214]

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[212] The DoD points to this position as a strong argument *against* employing guardsmen in a 502(f) status because of the potential for unlimited medical liability whose cost is passed on to the Veteran's Administration for injuries incurred while accomplishing civil support missions.

[213] "When activated (Called or ordered to active duty service for more than 30 days in a row), [guardsmen] are eligible for the same health and dental benefits as active duty service members." "Plans," Tricare, accessed September 29, 2017, https://tricare.mil/Plans/Eligibility/NGRMandFamilies/Activated.

[214] According to this author, in the 2017 response to Hurricane Maria, state directors of military support were told on conference calls that their guardsmen could not deploy because their employers would not release them for SAD.

3. Compensation

Each state is free to enact a SAD compensation schedule in line with, or completely divorced from, the active-duty military pay scale. Most states have or are enacting legislation to ensure SAD compensation mirrors active-duty federal pay tables. Even the states whose plans most closely mirror active-duty pay still fall short. Active-duty pay has some important federal tax benefits that a state cannot duplicate.[215] For a large-scale, multi-state disaster, there is the real potential that a sergeant working 18-hour days in one state could receive greater compensation than an identical sergeant doing the same work just one state away. When one considers a disaster in which Title 10 military forces are operating side-by-side with state guardsmen in SAD, this disparity and inequity seem all the more egregious.

4. Payroll Administration

A critically important consideration associated with pay is the administration of payroll. The routine federal payroll process of every state National Guard is a well-understood process, duplicated every month across the country. Thousands of guardsmen across the entire country are activated for two days every month, returned to their employer, and paid without a hitch. The process is well tried and almost seamless. There are even mechanisms in place to track federal payroll costs incurred during disaster response that allow rapid and accurate cost accounting at the completion of the mission.[216] Conversely, the state's entire SAD pay process has to be replicated and, in some cases, completely invented from scratch.[217] These sometimes-cumbersome payroll processes mean that SAD

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[215] Active-duty and 502(f) in this context mean the same thing. Pay tables and the tax treatment of T-10 or T-32 active duty are the same. Active-duty pay in this context is base pay, the basic allowance for housing (BAH), and the basic allowance for subsistence (BAS). BAH and BAS are non-taxable and, therefore, represent a tax-advantaged component of overall military compensation. See https://www.federalpay.org/military.

[216] "[Disaster relief] costs should be recorded using unique accounting codes in accordance with Service regulations and guidance." Department of Defense, *Defense Support of Civil Authorities*, 2013, E-4.

[217] In Arkansas, every SAD Guardsman must be hired as a brand-new state employee, issued a state employee identification number, assigned a unique pay rate (because National Guard pay scales do not exist in the normal state payroll system), and then entered into the state payroll system. They then have to be terminated at the conclusion of duty.

employees are often off-cycle with normal state pay cycles and have to wait weeks for their first SAD paycheck. The payroll administration associated with a catastrophic event would greatly exceed the capacity of most state human-resource agencies.

5. Retirement

Every day of a guardsman's service contributes toward a federally defined benefit pension. After 20 years of satisfactory service, a guardsman's points are tabulated and applied toward a retirement annuity that endows at age 60. The more points, the better the endowment. Although guardsmen in SAD can serve for extended periods, none of this state-time contributes points toward their federal retirement annuity.[218]

6. Advantages

Conversely, there are some advantages to SAD. When supporting in-state events without national implication, and where no federal disaster declaration exists, states typically use SAD authority and state funding. Since the governor is providing the authority and funding, these missions can be approved quickly, and there is greater diversity in the kind of mission that can be accomplished. Support for law enforcement is one area in which this flexibility and speed are especially important. In many states, the National Guard has constitutionally provided law enforcement authority while in SAD, states may choose to place guardsmen in SAD status when they are supporting state-level law enforcement agencies. The Posse Comitatus Act aims to limit direct military involvement in civilian law enforcement, absent congressional or constitutional authorization; however, the act (and therefore the restriction from support in a law enforcement capacity) does not apply to the National Guard in a SAD or Title 32 status.[219]

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[218] Again, this is an argument from the DoD for *not* placing guardsmen in 502(f). The permanent entitlement created by 502(f) creates a generational cost that significantly outlives the disaster.

[219] Posse Comitatus Act, 18 U.S.C. § 1385 (2015); and Rofrano, *2019 Domestic Operations Law and Policy*, 58–60.

APPENDIX B. DEFINITIONS

Active Guard and Reserve (AGR): Full-time reserve-component personnel who are an exception to the part-time nature of most members of the reserve component. Their primary purpose is to provide training and administration for the "drill-status" or part-time members. "The term 'Active Guard and Reserve' means a member of a reserve component who is on active duty pursuant to section 12301(d) of this title or, if a member of the Army National Guard or Air National Guard, is on fulltime National Guard duty pursuant to section 502(f) of title 32, and who is performing Active Guard and Reserve duty."[220]

Active duty: "Full-time duty in the active military service of the United States, including active duty or full-time training duty in the Reserve Component."[221]

Armed Forces of the United States: "A term used to denote collectively all components of the Army, Marine Corps, Navy, Air Force, and Coast Guard (when mobilized under Title 10, *United States Code*, to augment the Navy)."[222]

Command and control: "The exercise of authority and direction by a properly designated commander over assigned and attached forces in the accomplishment of the mission. Also called C2."[223]

Continental United States: "United States territory, including the adjacent territorial waters, located within North America between Canada and Mexico. Also called CONUS."[224]

Contingency: "A situation requiring military operations in response to natural disasters, terrorists, subversives, or as otherwise directed by appropriate authority to protect United States interests."[225]

Declaration: "Presidential declaration of a major disaster or emergency under the Stafford Act."[226]

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[220] 10 U.S.C. § 101(b)(16) (2018).

[221] Joint Chiefs of Staff, *DOD Dictionary of Military and Associated Terms* (Washington, DC: Department of Defense, 2019), 7, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf.

[222] Joint Chiefs of Staff, 21.

[223] Joint Chiefs of Staff, 43.

[224] Joint Chiefs of Staff, 51.

[225] Joint Chiefs of Staff, 51.

[226] Zimmerman, *FEMA Mission Assignment Policy*, 1.

Disaster Relief Fund (DRF): "The congressional appropriation and source of funding for Stafford Act response and recovery programs." [227]

Dual-status commander (DSC): "A DSC is a commissioned officer of the regular USA or USAF or a federally recognized Army National Guard (ARNG) or Air National Guard (ANG) officer authorized, pursuant to Title 32, USC, Section 315 or 325, by SecDef, with the consent of the applicable governor of a state, to exercise command on behalf of, and receive separate orders from, a federal chain of command and exercise command on behalf of, and receive separate orders from, a state chain of command."[228]

"A DSC is a military commander who may, in accordance with the law, serve in two statuses, Federal and State, simultaneously while performing the duties of those statuses separately and distinctly. A commander can be a DSC of only the state he or she is affiliated with. In other words, there cannot exist multi-state DSCs as an officer holds commission in only one State's National Guard."[229]

Counterterrorism: "Activities and operations taken to neutralize terrorists and their organizations and networks in order to render them incapable of using violence to instill fear and coerce governments or societies to achieve their goals. Also called CT."[230]

Defense coordinating element (DCE): "Staff and military liaison officers who assist the defense coordinating officer in facilitating coordination and support to activated emergency support functions."[231]

Defense coordinating officer (DCO): "Department of Defense single point of contact for domestic emergencies who is assigned to a joint field office to process requirements for military support; forward mission assignments through proper channels to the appropriate military organizations; and assign military liaisons, as appropriate, to activated emergency support functions."[232]

Department of the Air Force (DAF): "The executive part of the Department of the Air Force at the seat of government and all field headquarters, forces, Reserve Component, installations, activities, and functions under the control or supervision of the Secretary of the Air Force."[233]

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[227] Zimmerman, 1.

[228] Joint Chiefs of Staff, *Defense Support of Civil Authorities*, 2018, D-1.

[229] Rofrano, *2019 Domestic Operations Law and Policy*, 56.

[230] Joint Chiefs of Staff, *DOD Dictionary*, 56.

[231] Joint Chiefs of Staff, 63.

[232] Joint Chiefs of Staff, 63.

[233] Joint Chiefs of Staff, 67.

Department of the Army (DA): "The executive part of the Department of the Army at the seat of government and all field headquarters, forces, Reserve Component, installations, activities, and functions under the control or supervision of the Secretary of the Army."[234]

Department of the Navy (DON): "The executive part of the Department of the Navy at the seat of government; the headquarters, United States Marine Corps; the entire operating forces of the United States Navy and of the United States Marine Corps, including the Reserve Component of such forces; all field activities, headquarters, forces, bases, installations, activities, and functions under the control or supervision of the Secretary of the Navy; and the United States Coast Guard when operating as a part of the Navy pursuant to law."[235]

Domestic emergencies: "Civil defense emergencies, civil disturbances, major disasters, or natural disasters affecting the public welfare and occurring within the United States and its territories."[236]

Emergency support function (ESF): ESFs "provide the structure for coordinating Federal interagency support for a Federal response to an incident. They are mechanisms for grouping functions most frequently used to provide Federal support to States and Federal-to-Federal support, both for declared disasters and emergencies under the Stafford Act and for non-Stafford Act incidents."[237]

This functional grouping is also present at the state level. State agencies are assigned as primary or supporting agencies for a particular state ESF.

ESF #1	Transportation
ESF #2	Communications
ESF #3	Public Works and Engineering
ESF #4	Firefighting
ESF #5	Information and Planning
ESF #6	Mass Care, Emergency Assistance, Temporary Housing and Human Services
ESF #7	Logistics
ESF #8	Public Health and Medical Services
ESF #9	Search and Rescue
ESF #10	Oil and Hazardous Materials
ESF #11	Agriculture and Natural Resources
ESF #12	Energy
ESF #13	Public Safety and Security

[234] Joint Chiefs of Staff, 67.

[235] Joint Chiefs of Staff, 67.

[236] Joint Chiefs of Staff, 72.

[237] Zimmerman, *FEMA Mission Assignment Policy*, 2.

ESF #14	[Designation superseded by the National Disaster Recovery Framework]
ESF #15	External Affairs/Standard Operating Procedures

Federal military forces: "Army, Navy, Marine Corps, and Air Force personnel (including Reserve Component personnel) on federal active duty."[238]

Federal service: "A term applied to National Guard members and units when called to active duty to serve the United States Government under Article I, Section 8 and Article II, Section 2 of the Constitution and Title 10, *United States Code*, Sections 12401 to 12408."[239] See federalize.

Federalize: "The terms 'Federal service' and 'Federalized' are applied to National Guard members and units when ordered to active duty (serving on active duty under Title 10). . . . See 10 U.S.C. chs. 13 and 1211 (2012 & Supp. IV 2017)."[240] To "federalize" should not be confused with "to federally fund." Federal service means service to the president and implies Title 10 status. Federal funding is implicit when federalized but can also occur while still subordinate to a governor's authority in Title 32 status.

Immediate response authority (IRA): "In response to a Request For Assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DOD officials, (most typically installation commanders) may provide an Immediate Response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States. Immediate Response Authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory."[241]

Homeland: "In accordance with Department of Defense Manual 5200.01, Volume 3, Department of Defense Information Security Program: Protection of Classified Information, the homeland is 'the physical region that includes the continental United States, Alaska, Hawaii, United States possessions and territories, and surrounding territorial waters and airspace.' Furthermore, Department of Defense Directive (DODD), 3025.18, Defense Support of Civil Authorities (DSCA), specifies defense support of civil authorities is executed 'within the United States, including the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States or any political subdivision thereof.' Additionally, the National Cyber

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[238] Joint Chiefs of Staff, *DOD Dictionary*, 87.

[239] Joint Chiefs of Staff, 87.

[240] Martin and Thomas, *Domestic Operational Law*, 47–48.

[241] Christian Rofrano et al., *Domestic Disaster Response 2017, Hurricanes Harvey, Irma, and Maria: Lessons Learned for Judge Advocates* (Charlottesville, VA: Center for Law and Military Operations, 2018), 20.

Incident Response Plan; Presidential Policy Directive-41, U.S. Cyber Incident Coordination Policy; and Directive Type Memorandum 17-007, Interim Policy and Guidance for Defense Support to Cyber Incident Response, includes cyberspace."[242]

Homeland defense (HD): "The protection of United States sovereignty, territory, domestic population, and critical infrastructure against external threats and aggression or other threats as directed by the President."[243]

Homeland security (HS): "A concerted national effort to prevent terrorist attacks within the United States; reduce America's vulnerability to terrorism, major disasters, and other emergencies; and minimize the damage and recover from attacks, major disasters, and other emergencies that occur."[244]

Inactive duty training: "Authorized training performed by a member of a Reserve Component not on active duty or active duty for training and consisting of regularly scheduled unit training assemblies, additional training assemblies, periods of appropriate duty or equivalent training, and any special additional duties authorized for Reserve Component personnel by the Secretary concerned, and performed by them in connection with the prescribed activities of the organization in which they are assigned with or without pay."[245]

Joint doctrine: "Fundamental principles that guide the employment of United States military forces in coordinated action toward a common objective and may include terms, tactics, techniques, and procedures."[246]

Lead federal agency (LFA): "The federal agency that leads and coordinates the overall federal response to an emergency."[247]

Major disaster: "Any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby (42 U.S.C. § 5122 (2))."[248]

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[242] Joint Chiefs of Staff, *Defense Support of Civil* Authorities, 2018, I-2.

[243] Joint Chiefs of Staff, *DOD Dictionary*, 106.

[244] Joint Chiefs of Staff, 106.

[245] Joint Chiefs of Staff, 110.

[246] Joint Chiefs of Staff, 125.

[247] Joint Chiefs of Staff, 140.

[248] Zimmerman, *FEMA Mission Assignment Policy*, 2.

Military department: "One of the departments within the Department of Defense created by the National Security Act of 1947, which are the Department of the Army, the Department of the Navy, and the Department of the Air Force."[249]

Mission assignment (MA): "The vehicle used by the Department of Homeland Security/Emergency Preparedness and Response/Federal Emergency Management Agency to support federal operations in a declared Stafford Act major disaster or emergency declaration that orders immediate, short-term emergency response assistance when an applicable state or local government is overwhelmed by the event and lacks the capability to perform, or contract for, the necessary work."[250] Also, "A work order issued by FEMA, with or without reimbursement, that directs another Federal agency to utilize its authorities and the resources granted to it under Federal law in support of State, local, tribal, and territorial government assistance (42 USC §§ 5170a, 5192; 44 C.F.R. § 206.2(a)(18))."[251]

National Guard civil support (NGCS): A mission in which the "National Guard normally serves in a supporting role to other primary state or federal agencies by providing assistance to U.S. civil authorities at the federal, state, tribal, and local levels." Also, "'support provided by the National Guard of the several states while in State Active Duty status or Title 32 duty status to civil authorities for domestic emergencies, and for designated law enforcement and other activities.' National Guard Soldiers and Airmen conduct National Guard Civil Support missions in their state role."[252]

National Incident Management System (NIMS): "NIMS guides all levels of government, nongovernmental organizations (NGO), and the private sector to work together to prevent, protect against, mitigate, respond to, and recover from incidents. NIMS provides stakeholders across the whole community with the shared vocabulary, systems, and processes to successfully deliver the capabilities described in the National Preparedness System. NIMS defines operational systems, including the Incident Command System (ICS), Emergency Operations Center (EOC) structures, and Multiagency Coordination Groups (MAC Groups) that guide how personnel work together during incidents. NIMS applies to all incidents, from traffic accidents to major disasters."[253]

National Response Coordination Center (NRCC): "FEMA's primary operations management center, and focal point for national resource coordination. The NRCC

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[249] Joint Chiefs of Staff, *DOD Dictionary*, 152.

[250] Joint Chiefs of Staff, 155.

[251] Zimmerman, *FEMA Mission Assignment Policy*, 2.

[252] National Guard Bureau, *National Guard Domestic Operations*, 5.

[253] Federal Emergency Management Agency, *National Incident Management System* (Washington, DC: Department of Homeland Security, 2017), 1, https://www.fema.gov/media-library-data/1508151197225-ced8c60378c3936adb92c1a3ee6f6564/FINAL_NIMS_2017.pdf.

monitors potential or developing incidents, and supports the efforts of regional and field components." [254]

National Response Framework (NRF): The NRF describes how the U.S. responds to disasters. At its core, the NRF proposes that response must be scalable, flexible, and adaptable. The NRF entreats all levels of government to engage in a partnership predicated on a bottom-up, tiered response wherein the unity of effort and readiness to act are assured by handled response "at the lowest jurisdictional level capable of handling the mission."[255]

National security: "A collective term encompassing both national defense and foreign relations of the United States with the purpose of gaining: a. A military or defense advantage over any foreign nation or group of nations; b. A favorable foreign relations position; or c. A defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert."[256]

National special security event (NSSE): 32 C.F.R. § 183.3 defines an NSSE as "An event of national significance as determined by the Secretary of Homeland Security. These national or international events, occurrences, contests, activities, or meetings, which, by virtue of their profile or status, represent a significant target, and therefore warrant additional preparation, planning, and mitigation efforts. The USSS, FBI, and FEMA are the federal agencies with lead responsibilities for NSSEs; other federal agencies, including DoD, may provide support to the NSSE if authorized by law."[257]

Pre-scripted mission assignment (PSMA): "A preliminary statement of work and cost estimate developed prior to an incident by FEMA and [another federal agency]."[258]

Ready Reserve: "The Selected Reserve and Individual Ready Reserve liable for active duty as prescribed by law (Title 10, *United States Code*, Sections 10142, 12301, and 12302)."[259]

Reserve Component: "The Armed Forces of the United States Reserve Component consists of the Army National Guard of the United States, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard of the United States, the Air Force Reserve, and the Coast Guard Reserve."[260] The Reserve Component is an overarching phrase that refers to all members of the Title 10 reserve force and the Title 32 Army and Air Force National Guards. They are grouped together under the "reserve

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[254] Zimmerman, *FEMA Mission Assignment Policy*, 2.

[255] Federal Emergency Management Agency, *National Response Framework*.

[256] Joint Chiefs of Staff, *DOD Dictionary*, 162.

[257] 32 C.F.R. § 183.3 (2013).

[258] Zimmerman, *FEMA Mission Assignment Policy*, 3.

[259] Joint Chiefs of Staff, *DOD Dictionary*, 196.

[260] Joint Chiefs of Staff, 201.

component" umbrella to differentiate their part-time status as opposed to the full-time, standing military force. Despite their part-time nature, the Title 10 reserves and the National Guard are distinct and operate under completely separate jurisdictional and legal authorities. The National Guard and the reserves are respectively referred to as COMPO-2 and COMPO-3 (the active duty is COMOP-1).

Service: "A branch of the Armed Forces of the United States, established by act of Congress, which are: the Army, Marine Corps, Navy, Air Force, and Coast Guard."[261]

United States Armed Forces: "Used to denote collectively the Army, Marine Corps, Navy, Air Force, and Coast Guard. See also **Armed Forces of the United States**."[262]

Unity of effort: "Coordination and cooperation toward common objectives, even if the participants are not necessarily part of the same command or organization, which is the product of successful unified action."[263]

[261] Joint Chiefs of Staff, 213.

[262] Joint Chiefs of Staff, 244.

[263] Joint Chiefs of Staff, 246.

APPENDIX C. DOD AND NATIONAL GUARD DOCTRINE, INSTRUCTIONS, AND DIRECTIVES

Department of Defense. *Defense Support of Civil Authorities*. DoD Directive 3025.18. Washington, DC: Department of Defense, 2018.

———. *Homeland Defense Activities Conducted by the National Guard*. DoD Directive 3160.01. Washington, DC: Department of Defense, 2017.

———. *Managing the Reserve Components as an Operational Force*. DoD Directive 1200.17. Washington, DC: Department of Defense, 2008. https://www.hsdl.org/?view&did=233708

———. *Strategy for Homeland Defense and Defense Support of Civil Authorities*. Washington, DC: Office of the Assistant Secretary of Defense, February 2013.

———. *The Use of the National Guard for Defense Support of Civil Authorities*. DoD Instruction 3025.22. Washington, DC: Department of Defense, 2017.

Joint Chiefs of Staff. *Civil Support*. Joint Publication 3-28. Washington, DC: Department of Defense, 2007.

———. *Counterterrorism*. Joint Publication 3-26. Washington, DC: Department of Defense, 2009. https://www.hsdl.org/?view&did=31130.

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APPENDIX D. THE DEFENSE EMERGENCY RESPONSE FUND (DERF)

Funding of the National Guard in accomplishing DSCA is a recurrent challenge in this thesis. A fund like DERF could ease the fiscal challenges of Guard activation by providing a funding mechanism for the DoD in HS and DSCA missions. It could even serve as a resource for HD disaster funding when unanticipated HD expenses place pressure on the DoD budget. The timeline below provides some insight into DERF as it was initially conceived.

1990: "Public Law 101–165 establishe[s] DERF to reimburse DoD Components for the use of their resources in providing disaster assistance. According to DoD regulations, DERF [is] intended to reimburse DoD Components providing disaster and emergency relief assistance only after the Components have first used their own resources."[264] On April 20, 1992, a memorandum from the under secretary of defense, comptroller (USD[C]), establishes the Disaster Relief Funds in DoD instructions.

1996: DoD financial management regulations outline procedures for the DoD to receive reimbursement from FEMA using DERF, not only to assist the DoD with funds beyond those available within its own service budgets but also to receive reimbursements.

2003: In the wake of 9/11, Congress uses the DERF as a means to dramatically increase the funds available to the DoD for prosecuting the war on terror. From 2001 to 2003, $38 billion in emergency or supplemental appropriations are added to DERF with the intent of allowing the DoD flexibility in prosecuting the war on terror.[265] Deviating from the original intent of Congress to provide funding for disaster response, the 2001–2003 funds are allocated across 10 budget areas with ambiguously broad terms like "increased situational awareness," "initial crisis response," and "improved command and

[264] Patricia Marsh et al., *Defense Emergency Response Fund*, D-2008-105 (Arlington, VA: Department of Defense Inspector General, June 20, 2008), 9, https://www.hsdl.org/?view&did=487067.

[265] Government Accountability Office, *Defense Budget*.

control."[266] Notably, these categories do not align with the regular DoD appropriations account structure, which resulted in the inability to accurately account for fund allocation.[267]

November 2003: In an effort to make DERF less accessible to DoD comptrollers, the Emergency Wartime Supplemental Appropriations Act of 2003 is amended, so outstanding expenses chargeable to DERF "shall be charged to any current appropriations account of the Department of Defense available for the same purpose."[268]

June 2008: A DoD Inspector General (IG) audit indicates DERF has not been used correctly. The IG report affirms the account's purpose: "to provide disaster relief assistance without depleting the funds [DoD] needs to accomplish its mission."[269] The report laments that DERF budget managers had not anticipated increased DoD involvement in disaster relief efforts and had failed to fund it adequately.[270] The fund has provisions allowing for up to $50 million in foreign disaster assistance.[271] The report finds this provision problematic, insisting that the funds focus on domestic civil emergency assistance, with overseas assistance as a last resort.[272]

This thesis shares the IG's recommendation that the assistant secretary of defense for homeland defense and America's security affairs instruct its budget officers to secure annual funding to sustain DERF.[273]

July 2010: The Government Accountability Office completes a report on the DoD's general financial management. Referencing the DoD's 2008 IG report, the Government

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[266] Government Accountability Office, 8.

[267] Government Accountability Office, 10.

[268] Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108–106 § 1105 (2003), https://www.congress.gov/bill/108th-congress/house-bill/3289/text.

[269] Marsh et al., *Defense Emergency Response Fund*, 1.

[270] Marsh et al., 4.

[271] Marsh et al., 15.

[272] Marsh et al., 13.

[273] Marsh et al., 15.

Accountability Office cites Army mismanagement of $110 million in DERF funding.[274] The report also reaffirms the purpose of the fund: to "allow DOD to provide disaster and emergency relief assistance without depleting the funds it needs to accomplish its mission."[275]

October 2012: Air Force financial management guidance describes DERF as a fund that enables DSCA, but which has been "dormant since [the] 9-11-01 Terrorist Attack."[276]

January 2014: The secretary of defense's deputy comptroller cancels DERF. Instead of acknowledging the internal mismanagement of the fund for excessive overseas use (as cited in the IG's report), the comptroller uses this precedent as a reason to discontinue the fund.[277] The comptroller goes on to state that the DoD has never been in a situation where a lack of funds has hindered its ability to respond to domestic requests for assistance. Without regard of the legal barrier that explicitly forbids reimbursement of federally funded Guard action in the homeland, the comptroller inaccurately argues DERF is unnecessary because FEMA's Disaster Relief Fund already creates a mechanism to reimburse DoD response to presidentially declared actions under the Stafford Act.[278]

2015: One of the most useful guides for military lawyers operating in the homeland, the *Domestic Operational Law Handbook for Judge Advocates*, retains a reference to

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[274] Government Accountability Office, *DoD Financial Management: Actions under Way Need to Be Successfully Completed to Address Long-Standing Funds Control Weaknesses*, GAO-14-94 (Washington, DC: Government Accountability Office, April 2014), 15, http://www.dtic.mil/dtic/tr/fulltext/u2/a601257.pdf.

[275] Patricia Marsh, *Management of Emergency Supplemental Appropriations at Selected Department of the Army Commands in Response to the Terrorist Attacks*, D-2010-072 (Arlington, VA: Department of Defense Inspector General, July 12, 2010), 1, https://media.defense.gov/2010/Jul/12/2001712485/-1/-1/1/10-072.pdf.

[276] Secretary of the Air Force, *Appropriation Symbols and Budget Codes (Fiscal Year 2013)*, AF Manual 65-604 (Washington, DC: Department of Defense, 2012), 163–64, https://www.acq.osd.mil/dpap/ccap/cc/jcchb/files/formspubsregs/pubs/afman_65-604.pdf.

[277] John Roth, "Cancellation of Department of Defense (DoD) Financial Management Regulation (FMR) 7000.14R, Volume 12, Chapter 6, Defense Emergency Response Fund, Dated September 1996" (official memorandum, Washington, DC: Office of the Under Secretary of Defense, January 9, 2014), https://comptroller.defense.gov/Portals/45/documents/fmr/archive/12arch/12_06_20140109_Cancelled_Jan14.pdf.

[278] Roth.

DERF "to keep judge advocates that may have relied on this funding mechanism in the past informed of the change."[279] By 2018, there is no reference to DERF in the handbooks.[280]

2017: In the 2017 version of the DoD's *Financial Management Regulation*, chapter 6 has been archived, and references to what was formerly the Disaster Relief Fund have been moved to chapter 23 and transformed into an overseas contingency operations regulation tied to foreign disaster relief—a move that seems like an effort to justify the DoD budget mismanagement identified in the 2008 IG report. The financial management regulation specifically rescinds the under secretary of defense's (comptroller) 1992 memorandum that established the Disaster Relief Funds.[281]

2018: Despite rescinding the fund, the president's FY2019 budget still includes $11 million for "emergency response," implying that the fund is still available and could be funded to a level that would enable federally funded Guard action when appropriate.[282]

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[279] Blackmore and Fields, *Domestic Operational Law*, 221.

[280] Martin and Thomas, *Domestic Operational Law*.

[281] Under Secretary of Defense (Comptroller), *Financial Management Regulation*, vol. 1–16, DoD 7000.14-R (Washington, DC: Department of Defense, 2017), 23-1https://comptroller.defense.gov/Portals/45/documents/fmr/Combined_Volume1-16.pdf.

[282] Office of Management and Budget, "Appendix," 245.

APPENDIX E. DOD'S MISSION ASSIGNMENT PROCESS

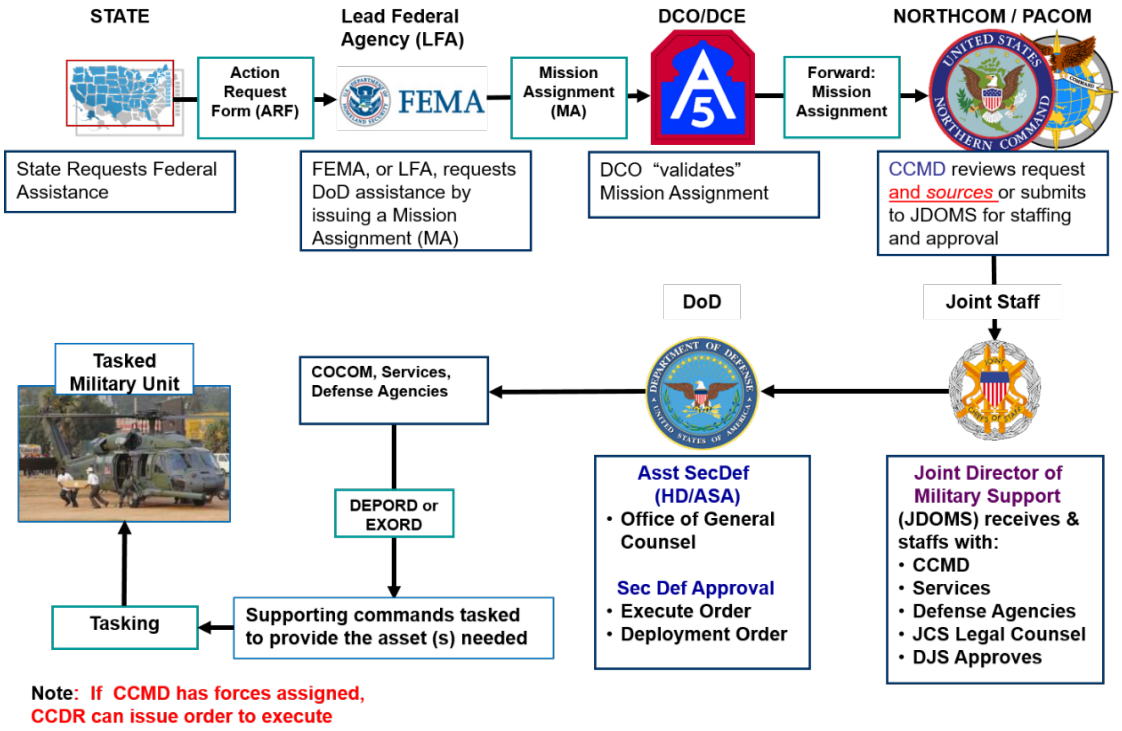

Figure 10. DoD's Mission Assignment Process

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