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The National Guard and the COVID-19 Pandemic Response

National Guard

Today's state militias trace their lineage from colonial-era militias that predate the United States. The Constitution grants the Congress and President limited authority over a state's militia (U.S. Const., Art. I, §8; Art. 2, §2). State and territorial governors serve as Commander in Chief of their militia. Federal law establishes two classes of militia: organized militia and unorganized militia (10 U.S.C. §246). The unorganized militia consists of specified individuals who are not in the organized militia. The organized militia consists of the National Guard and Naval Militia. There are 54 organized militias: one in every state, in addition to Guam, Puerto Rico, the U.S. Virgin Islands, and the District of Columbia (DC). The National Guard is subdivided into the Army National Guard (ARNG) and the Air National Guard (ANG). The ARNG and ANG are also two of the seven reserve components of the *armed forces of the United States*, denoted as ARNGUS and ANGUS.

The Organized Militia's Maritime Element

The 54 organized militias have an ARNG and ANG as land and air elements. Approximately 30 have a Naval Militia; all but 6 are dormant. The Navy included Naval Militias among its reserves as the National Naval Volunteers in 1914, but it eliminated this reserve force before World War II.

National Guard Civil Support

The National Guard is a multi-role force at the disposal of governors and, when activated under federal law, at the disposal of the President. It has primary responsibility to support state and local government responses to disasters and emergencies (DODI 3025.21). Such responses are part of the National Guard Civil Support (NGCS) mission, which is analogous to the Defense Support of Civil Authorities (DSCA) mission for active duty units (DODD 3025.18). NGCS is defined as "support provided by the National Guard while in a State Active Duty status or Title 32 status to civil authorities for domestic emergencies, designated law enforcement, and other activities" (CNGBI 3000.04). NGCS includes support to law enforcement agencies during civil disturbances (NGR 500-5).

NGCS in the District of Columbia

The DC militia is equivalent to a state militia (32 U.S.C. §101), but the President is its Commander in Chief (D.C. Code §49-409). An executive order issued in 1969 delegates command of the DC National Guard (DCNG) to the Secretary of Defense, but orders calling out the DCNG for NGCS are "subject to the direction of the President...." (E.O. 11485).

State Activation

When *called out to state service* by order of a governor, a militia *activates* to perform state active duty (SAD). Militia members on SAD receive state pay and benefits. Federal

funds are not available for SAD unless and until the President declares an emergency or a major disaster. After such declaration, and if authorized under federal law, the Federal Emergency Management Agency (FEMA) may provide federal funds to an eligible requesting state.

Emergency Management Assistance

Governors may order their National Guard to provide NGCS in another state. Such support is subject to reimbursement and governed by state and federal law (P.L. 104-321). This type of support is performed through an Emergency Management Assistance Compact (EMAC).

Federal Activation

The militia may be *federalized* to perform *federal service* as a *component* of the *U.S. armed forces* (U.S. Const., Art. I, §8, cl. 15.1). The National Guard may be *mobilized* to perform *active duty* as a *reserve component* of the *armed forces of the United States* (U.S. Const., Art. II, §2, cl. 1.1.2). With gubernatorial consent, the National Guard may be *federalized* to perform *full-time duty* (FTNGD) as an autonomous force in the *service of the United States* (U.S. Const., Art. I, §8, cl. 16.1). Governors remain in command of FTNGD forces. Command of all other federally activated state forces transfers to the President.

Full-Time National Guard Duty

Activation to perform FTNGD occurs when a governor approves a request from the President for National Guard personnel to perform a federal *operational support mission* (32 U.S.C. §502(f); H.Rept. 109-452, p. 311). Such personnel receive federal pay and benefits and may perform only the duties that are authorized by their federal orders.

Trump Administration FTNGD Policy

On March 13, 2020, then-President Donald J. Trump issued a proclamation in which he declared a national emergency concerning the COVID-19 outbreak (Proc. 9994, 85 FR 15337). Such declarations normally are the first step in the process for authorizing FEMA to fund SAD. A few days after the declaration, the Council of Governors advocated that the Secretary of Defense develop a separate FTNGD request and activation process for NGCS pandemic response missions, in lieu of SAD, and distinct from Department of Defense (DOD) DSCA policy for FTNGD.

On March 22, 2020, the President issued a memorandum that authorized 100% funding for FTNGD and directed the Secretary of Defense to request the National Guard from the 3 states listed in the memo (85 FR 16997) (45 states were later added, along with DC and 3 territories). Such funding is uncommon as the National Guard customarily supports disaster and emergency responses on SAD with its costs reimbursed from FEMA's public assistance fund. The following day, DOD indicated that the President's

memorandum did not alter existing DSCA policy for FTNGD. DOD's past practice was not to characterize a *SAD mission* for public health emergencies as a federal *operational support mission*, and, even if it did, DOD would have the option to assign federal forces instead of the National Guard. Nothing changed, a state still had to convince DOD that its *SAD mission* was also a federal mission for which its National Guard was best suited.

Four days after announcing that there was no change to the DSCA policy, DOD established a unique process for pandemic response FTNGD, similar to the one requested by the Council of Governors. According to a March 27, 2020, DOD statement, the new process featured a conditional pre-authorization for National Guard mission assignment requests. This was intended to fast-track funding for FTNGD that would "aid in whole-of-government COVID-19 response efforts."

Trump Administration FTNGD Process

The Administration initially authorized FTNGD for specific National Guard units, but only for 30 day periods. If approved for extension, the Administration would issue new orders for successive periods of the same length. However, 30 day FTNGD orders do not qualify deployed National Guard members or their families for DOD health care. On April 13, 2020, the Secretary of Defense authorized longer periods that allowed access to the military health system.

At the end of 2020, the Administration's latest guidance for the FTNGD process required states or territories to have

- an approved major disaster declaration or have submitted a declaration request for review,
- activated the lesser of 500 individuals or 2% of National Guard on SAD, and
- issued a resource request and agree to the applicable cost share.

As of December 7, 2020, the Administration reported that approximately 18,000 National Guard members were deployed on FTNGD and it had obligated over \$2.7 billion for the National Guard's COVID-19 pandemic response.

Trump Administration Federal Cost Sharing

In March 2020, FTNGD funding started at 100% federal cost share. This included salary, allowances, travel, and per diem. In August 2020, the Trump Administration reduced the federal cost share for FTNGD to 75%, leaving states to fund the remaining 25%. Some states, however, were not included in the August FTNGD cost share reduction. The Administration funded Arizona, California, Connecticut and Louisiana at 100% through September 30, 2020. It funded Florida, Iowa, and Texas at 100% through December 31, 2020. For the period from January 1, 2021, to March 31, 2021, the Trump Administration approved all FTNGD funding for the COVID-19 pandemic response at 75% federal cost share.

Biden Administration FTNGD Policy

The day after assuming office, President Joseph R. Biden, Jr. issued a Presidential Action Memorandum to the Secretaries of Defense and Homeland Security stating his Administration's policy "to combat and respond to COVID-

19 with the full capacity and capability of the Federal Government...." (86 FR 7481). The action memorandum includes a request that all state and territorial governors order their National Guard to perform FTNGD on a fully reimbursable basis to fulfill missions assigned to DOD for the purpose of supporting state, local, tribal, and territorial emergency assistance efforts related to the COVID-19 pandemic. The President also approved 100% federal cost sharing for FTNGD on January 21, 2021, which superseded the previous Administration's policy of 75%.

Perspectives on the Two Policies

The *full capacity and capability* approach of the new Administration's policy is similar to the *whole-of-government* approach eventually adopted in the previous Administration's policy. Both approaches establish a national *operational support mission* that permits funding for FTNGD. It is the implementation of the two policies that differs. The previous FTNGD policy required requestors to satisfy certain preconditions before they could receive federal funding. Approved funding was for periods of duty that necessitated regular extensions. These extensions and other matters entailed frequent administrative adjustments to the FTNGD policy; President Trump issued 20 memorandums containing these adjustments in 8 months. In the new policy however, there are no preconditions, so all 54 National Guard entities are presumptively eligible for FTNGD funding. This gives the Secretary of Defense broad discretion, "to the maximum extent feasible and consistent with mission requirements," to assign COVID-19 pandemic response missions to the National Guard.

Biden Administration Federal Cost Sharing

The new policy also removes funding variances. It states that FEMA "shall fund 100 percent of the cost of activities associated with all mission assignments for the use of the National Guard under 32 U.S.C. 502(f) to respond to COVID-19...." Legislation introduced in Congress in January 2021 would also require 100% federal cost share for FTNGD (S. 38; H.R. 324). In February 2021, President Biden issued a federal cost sharing policy for various matters that includes a 100% federal cost share authorization for all prior FTNGD that was not fully funded, retroactive to January 20, 2020 (86 FR 8281).

Biden Administration FTNGD Missions

On February 24, 2021, President Biden continued the COVID-19 pandemic national emergency declaration beyond March 13, 2021 (86 FR 11599). Based on the President's *National Strategy for the COVID-19 Response and Pandemic Preparedness*, issued in January 2021, it appears that the new FTNGD funding policy could endure through the emergency's continuance. The strategy includes NGCS roles and functions that may broaden the national *operational support mission*. Among other requirements, the strategy includes National Guard assistance for clinical care staffing, reopening of schools, and federal vaccination center operations.

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