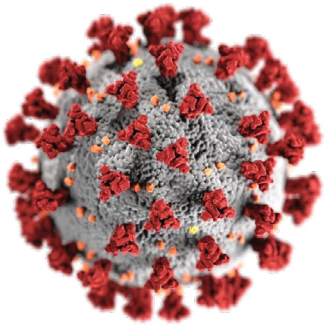

Homeland Security Affairs Journal
SPECIAL COVID-19 ISSUE

# How Should The National Guard Be Employed for The Next National Disaster?

By Paul Jara

> "I think the best use of the Guard right now is doing what they are doing. And that is working in what we call a Title 32 status for the governors of their states and then dealing with the challenges that the governor needs them to deal with at the state and local level."
>
> —Secretary of Defense Mark Esper[1]

# Abstract

Since Hurricane Katrina, military emergency managers have warned that military guidance does not adequately inform National Guard employment in large-scale, nationally significant disasters. The COVID-19 pandemic has turned this hypothetical assertion into a practical shortcoming. While there is very little debate that COVID-19 is a nationally significant natural disaster, there are still doctrinal obstacles to adjudicating the military's responsibility to provide national, state, or local disaster assistance. The United States must be prepared for the next nationally significant threat. For the next COVID-threat there must be a way to adjudicate conversation between lead federal agencies, the DoD, and the National Guard in order to better source Guard resources for large-scale, complex disasters.

# Suggested Citation

Jara, Paul. "How Should the National Guard Be Employed for The Next National Disaster?" *Homeland Security Affairs* 16, Article 16 (December, 2020) www.hsaj.org/articles16380.

In the first few days of April 2020, 17 states were authorized federal reimbursement for calling up their National Guards. Another 28 had requests pending. These states took the initiative to take advantage of a bill that professed to include $1.5 billion for National Guard response. Congress finalized this bill in late March as National Guard leaders charged the DoD to use the funds as soon as they are authorized. While legislators, the press, and vocal city executives pled for federal relief, National Guard emergency managers fretted over a doctrinal ambiguity that still appeared to be unresolved over 60 days after the first coronavirus case was confirmed in the United States. Comptrollers, fiscal and property officers, and judge advocates in National Guard headquarters across the county were abuzz with discussions relating to section 502(f) of Title 32. This critical paragraph in U.S. Code lay at the center of an emergency management discussion that still remained shrouded in uncertainty.

After each national emergency, Guard leaders find themselves navigating opaque authorities within Title 32, "National Guard," and Title 42, "The Public Health and Welfare." The after-action report for the SARS-CoV-2 virus response should question why it took over 60 days to enable federal funding of the Guard, what the criteria for federal funding are, and what the criteria are to transition back to local funding. It should also question why it took political pressure and presidential intervention for a process that should have been clearly defined in existing Title 42 (and Title 32) disaster legislation.[2]

Since Hurricane Katrina, almost every effort to federally fund the National Guard has been equally complicated. The National Guard Bureau's (NGB) senior emergency manager worked to ensure the 2020 response to COVID-19 was not a bureaucratic repetition of the last 15 years. NGB's director of operations pushed out guidance, reminding states that federal funding would be available if: 1) "POTUS declares your state a major federal disaster"; 2) "FEMA validates your request(s) in the form of Mission Assignment(s);" and 3) the FEMA request is received by "DoD for validation and sourcing which is required for the authority to execute in a reimbursable status." Although it may appear unseemly to worry about reimbursable status, emergency managers at all levels must remain mindful of this critical component to disaster response. Federal Emergency Management Administration (FEMA) administrators will still be accountable to the American taxpayer after all national emergencies. Authority and funding are central considerations to all military response in a disaster.

The Secretary of Defense delegated the final FEMA-mission-assignment approval step to the Assistant Secretary of Defense for Homeland Defense and Global Security, who pledged to provide approval promptly upon receiving the FEMA mission assignment. At the same time, much-publicized memoranda from the White House clarified the President's intention to assist state governors with "one hundred percent federal cost share" for "emergency assistance activities associated with preventing, mitigating, and responding to the threat to public health and safety posed by the virus that these States and this territory undertake using their National Guard forces." The presidential memos point to 42 U.S.C. §403 and §503, as if to imply that these paragraphs open an avenue to federal funding of the National Guard. In reality, these paragraphs merely allow FEMA to reimburse states for placing their National Guard on state active duty. 42 U.S.C. §403 does allow the President to direct the Secretary of Defense to employ the resources of the DoD, performing emergency work, but only "for a period not to exceed 10 days." As such, the President's memos go on to direct the SECDEF, "to the maximum extent feasible" and "pursuant to 32 U.S.C. 502(f)" to request that governors order their guardsmen to perform duty in support of mission assignments from FEMA to the DoD. While this top-down direction is counter to the bottom-up philosophy behind the nation's National Response Framework, it did at least appear to open up the authority the governors needed to federally fund their National Guards. It remains to be seen if the DoD will be properly reimbursed for these activities.

Discussion of Guard activation in the homeland is often obscured by repeated efforts to draw parallels between state active duty and duty in a federally funded, Title 32, status. Disparities and inequities in these two duty statuses are repeatedly debated with scant consideration to the underlying doctrinal and legal authorities. These conversations are not without merit, but they obscure a larger doctrinal confusion that is more central to military action in the homeland. Whether Guardsmen respond in state active duty or in a federally funded status depends more upon whether their action is homeland defense, or homeland security.[3] This distinction lays at the center of successful military action in the homeland.

Homeland defense has been an enduring mission for the nation's military since the earliest days of the militia. Fans of the movie *Red Dawn* can easily envision the doctrinal space this fictional threat implies. Whether the threat is an intercontinental ballistic missile, or a Bear Bomber racing towards the U.S. mainland, or Russian paratroopers landing in Colorado, the

DoD clearly has preeminence in planning, organizing, training and equipping for this mission space. Homeland defense is supported by clear language within the *U.S. Code* that enables clear action for the DoD and for select mission areas attributed to the Guard. The governors' authority in accomplishing small-scale homeland security actions in their states is comparably efficient. Conversely, Guard roles in large-scale-homeland security and Defense Support to Civil Authorities (DSCA) are not so clear cut. The limitations to National 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.

# Enabling Guard Action: Short Term Solutions

To better facilitate Guard action in the homeland, doctrine needs to be amended. 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 homeland security in 2009, and although there is significant homeland security discussion in *Joint Publication 3-28: Defense Support to Civil Authorities*, this rightfully focuses on DoD action in the homeland, not National Guard action. Practically speaking, there is very little precedence for the Guard accomplishing DSCA. DSCA is the culmination of a process that originates in a state's request for assistance, validated by a lead federal agency who then issues a mission assignment to the DoD. The lead federal agency for the coronavirus pandemic is the U.S. Department of Health and Human Services. DSCA for the Guard requires the DoD to then assign this mission to the Guard without any assurance of reimbursement during the current fiscal cycle. Outside of the lead federal agency mission assignment process, the DoD is even further constrained. The DoD's legal and fiscal constraints place it in a difficult position. In April, the Office of the Undersecretary of Defense (Comptroller) issued guidance associated with the Coronavirus Aid, Relief, and Economic Security Act, reminding service comptrollers that the DoD does not receive appropriations for, and has no authority to provide support to, other Federal departments and agencies, or to State, local, territorial, or tribal governments in preventing, preparing for, or responding to the coronavirus on a non-reimbursable basis.

As a consequence of the limitations imposed upon the DoD, it has approved DSCA missions for the Guard less than 10 times since Hurricane Katrina. The DoD consistently asserts that neither it nor Congress has the legal authority to appropriate funding for the governors' use of their Guards accomplishing DSCA. The response to COVID-19 once again illustrates how the National Guard accomplishing DSCA is almost fiscally impossible and occurs through conversations that are at odds with the bottom-up premise of the National Response Framework. The President's memo forces the SECDEF and the Secretary of Homeland Security to look for ways to align National Guard resources to requests for assistance from the States, but it may not be legally sufficient to fully reimburse DoD for referring the mission assignments to the Guard component.

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 differentiate between federal and state equities.[4]

Reiterating the DoD's lack of funding for homeland security and DSCA missions, doctrinal improvements will still be at the mercy of fiscal constraints within the DoD's budget. An emergency like a COVID-19 pandemic transcends treatment as purely a state matter, and the DoD must have a mechanism to fund the Guard. *Defense Directive 3160.01, Homeland Defense Activities Conducted by the National Guard* instructs governors and senior military leaders in matters of homeland defense. New guidance should be equally instructive for nationally significant matters of homeland security and DSCA, and should provide fiscal solutions. Clearly, room exists for a new complementary defense directive called *Homeland Security Activities Conducted by the National Guard.*

After the 2017 hurricane season, senior leaders in at NGB looked for creative solutions for employing Guard personnel within 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. In September 2018, the Chief of the National Guard Bureau (CNGB) published *Guidance Regarding Authority to Conduct Training during National Guard Civil Support (NGCS) Operations for Domestic Disaster Response*. This memo 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.[5] 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. Unfortunately, the CNGB's efforts have been undermined by contemporary legal and fiscal caveats that hamper subsequent state response. As a consequence, adjutants general have to be cautious and deliberate in how they exercise this authority, as these training 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. This table shows how the CNGB's guidance attempted to clarify the application of training authorities and funding in the *U.S. Code*, specifically the ability to provide "an incidental operational benefit."[6] 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.

**Table 1**:Explanation of 32 U.S.C. § 502: Required Drills and Field Exercises[7]

| 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<br>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)<br>2. Homeland Defense (§ 901–§ 908) | President or Secretary of Defense (SecDef) |

The proposition 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.[8] Subsection (f) does not create new disaster funding but provides latitude within existing training guidance and broader authorities within the existing budgetary allocation. 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 unanticipated activities including repairs to storm-damaged military infrastructure.[9] 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.[10] The 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 could 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. The 2020 CARES Act could have been written to provide direct supplemental funding to the DoD, or could have been used to bolster the DERF, enabling expedited 502(f)(2) funding to states' National Guards.

Beyond the funding, there must be clear authority. The President's memo cut through a great deal of red-tape, but does not create a clear roadmap for navigating future national disasters. Unfortunately, the memorandum was not born from clearly understood criteria for defining federal and state equities. As a consequence, state legislators have fought to retain the President's pledge for one hundred percent federal reimbursement. In the latter months of 2020, President Trump's efforts to reduce the cost share to a 75:25 federal-to-state share have not been well received. There needs to be a systematic mode of adjudicating whether disasters are national, federal-matters, or localized matters; during initial response and after recovery operations have normalized.

National Special Security Events provide a model for engaging in federalism 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 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, pandemics, or other significant threats to domestic security. 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 homeland security 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's staff worked to create guidance relating to "incidental support," and this should be further clarified. There are existing models to augment DoD appropriations, and the Secret Service has a model to resolve 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.

# An Enduring Solution to Guard Action

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. Beyond matters of federalism and doctrinal homeland security and homeland defense 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 homeland security 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 state active duty is doctrinally clean but produces crushing administrative challenges for

states, creates disparity in responder benefits, and might bankrupt states responding to nationally significant, catastrophic disasters. The COVID-19 pandemic is a perfect storm of a nationally significant disaster and fiscally crippled state economies that demands a more enduring fiscal solution.

Recent modifications to Title 32 of the *U.S. Code* to clarify the Guard's action in homeland defense 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 homeland defense. 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 "Weapons of Mass Destruction-Civil Support Teams." Specialized teams like these, distributed throughout the states, have similarly instructive legal and financial authority guiding their actions in a broad range of homeland defense and homeland security missions.

Title 10 of the *U.S. Code* requires that the DoD develop a plan for funding capabilities.[11] The SECDEF is directed to provide the funds and resources necessary to employ the active components and the reserve components in homeland defense, domestic emergency response, and "military support to civil authorities."[12] However, because Congress does not appropriate funds for the DoD to accomplish disaster response operations, the secretary of defense must fund these 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. As an equal member of the Joint Chiefs of Staff, the CNGB should not have to interpret *U.S. Code* to enable Guard action. Title 32 must be modified to reference explicitly the Guard acting under the authority prescribed in § 502(f) and supporting nationally significant homeland security actions. This new language should serve as the basis for revisions to DoD doctrine, open the door to stand-alone homeland security 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.

If the Guard is to be a practical partner of the DoD in DSCA or empowered to conduct federally funded homeland security independent of DoD action, then refinement of 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 a lead federal agency directly to the National Guard. Legal accounting mechanisms like DERF could serve as effective disaster response tools and provide the DoD with fiscal elasticity.

# Conclusion

DSCA is an action in which the DoD provides support to a lead federal agency supporting homeland security. The lead federal agency's jurisdiction in this doctrinal space implies support of a nationally significant nature. However, despite several arguments supporting Guard preeminence in matters of homeland security, guardsmen cannot be easily 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 homeland security or DSCA actions. 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 homeland security 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. If the United States is to prepare for nationally significant threats, like COVID-19, it must find a way to adjudicate conversation between lead federal agencies, the DoD, and the National Guard. There must be modes of dialogue that help to adjudicate between homeland security, homeland defense and defense support to civil authorities. 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.

# About the Author

Paul Jara is the Director of Staff for the Arkansas Air National Guard. In his previous assignment, he was the Deputy Director of Military Support for the Arkansas National Guard and participated in several national planning exercises to ensure Guardsmen were postured to succeed in local, state, or national disasters. He can be reached at paul.jara@us.af.mil.

Disclaimer The views and opinions of the author are his own and do not necessarily reflect the position of the United States Air Force, the Arkansas Air National Guard, nor the Department of Defense.

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# Endnotes

**1**. Judy Woodruff, "Defense Sec. Mark Esper on mobilizing the U.S. military to fight COVID-19" PBS News Hour, PBS.org, 19 Mar 2020, https://www.pbs.org/newshour/show/defense-sec-mark-esper-on-mobilizing-the-u-s-military-to-fight-covid-19 .

**2.** This paper expands upon arguments relating to National Guard action in large-scale disasters as described in work done in completion of a masters in Homeland Security from the Naval Postgraduate School. The full thesis can be accessed at https://calhoun.nps.edu/handle/10945/62258 .

**3.** Joint Chiefs of Staff, *Defense Support of Civil Authorities*, Joint Publication 3-28 (Washington, DC: Department of Defense, 2013), I-2 to I-4, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_28.pdf?ver=2018-11-29-083820-613.

**4.** DHS is the Lead Federal Agency for the majority of domestic disasters. The Department of Health and Human Services (HHS) is the lead federal agency for the COVID-19 pandemic response.

**5.** 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).

**6.** Lengyel and Taheri, *Authority to Conduct Training*.

**7.** 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.

**8.** Department of Defense, *Defense Support of Civil Authorities*, 2013, E-4.

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**11.** 10 U.S.C. § 1815(a)–(d) (Supp. V 2006).

**12.** 10 U.S.C. § 113 (2018).

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