

*The National Response Framework provides the Local-State-Federal response sequence. The legal basis for this National Response Doctrine is the Tenth Amendment to the Constitution. As a general rule, the Federal Government must wait for Local/State officials to request Federal assistance. When Federal assistance includes Department of Defense (DOD) participation, such involvement must be under proper authority and after consulting a legal advisor.*

### I. PRESIDENTIAL AUTHORITY

1. Although the President has Constitutional and inherent authority to direct DOD to perform DSCA missions, he relies primarily on his statutory authority under the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988. There are four ways he may exercise this statutory authority.

a. **Major Disaster Declaration:** issued *in response to a request from a Governor* for a natural catastrophe or any catastrophe as a result of a fire, flood, or explosion.

b. **Emergency Declaration (State):** issued *in response to a request from a Governor* for any occasion where Federal assistance is needed to save lives, protect public health or property, or lessen the threat of a catastrophe.

c. **Emergency Declaration (Federal):** issued *unilaterally by the President* for an emergency that primarily involves a Federal function, property, or personnel.

d. **DOD Emergency Work Authority:** pre-declaration assistance exercised *in response to a request from a Governor*, but only for DOD support to perform “emergency work” for a period not to exceed 10 days.

2. When the President issues a declaration, it will identify the counties covered and initiate the FEMA Request for Assistance (RFA)/Mission Assignment (MA) process for Federal agencies, including DOD, to provide assistance.

### II. SECRETARY OF DEFENSE AUTHORITY

1. The Secretary of Defense (SECDEF) is the authority to approve all DSCA RFA’s, including those from FEMA. He has delegated some authority to the ASD (HD/ASA) (DODD 3025.18 and 5111.13), Combatant Commanders (CCDR) (DSCA EXORD, 19 August 2011), and military commanders and responsible officials of DOD agencies who may provide assistance under immediate response authority or a mutual aid agreement.

a. **Immediate Response Authority (IRA)** (DODD 3025.18): In response to a request from a civil authority, under imminently serious conditions when time does not permit obtaining approval from the SECDEF or his designee, military commanders and DOD civilian

officials may take immediate action to save lives, prevent human suffering, or mitigate great property damage.

(1) Any person directing a response under IRA must “immediately” notify the National Joint Operations and Intelligence Center (NJOIC) of the details of the response at [jnoic.battlecaptain@js.pentagon.mil](mailto:jnoic.battlecaptain@js.pentagon.mil) or 703-692-4595. For Army and Navy units, this means within two hours of the decision to provide assistance.

(2) Reassessment of continued IRA must be done NLT the 72-hour point after the request was received to determine if further assistance is needed.

(3) IRA will not be delayed or denied because of inability of the requester to reimburse DOD.

(4) IRA does not authorize DOD forces to perform law enforcement functions.

b. **Mutual Aid Agreements (MAA)** (DODI 6055.06): Commanders may execute MAA’s with the local community for *emergency fire, medical, hazmat, and rescue services and personnel* (see also DODI 6055.17).

### III. DSCA VALIDATION CRITERIA

All DSCA requests will be evaluated by DOD approving/recommending officials using the following six CARRLL validation criteria (see DODD 3025.18).

1. **Cost:** How much will DOD assistance cost? Who will reimburse DOD for the assistance it provides?

2. **Appropriateness:** Is DOD the best option? Is another Federal agency or commercial enterprise better suited than DOD to provide the assistance?

3. **Risk:** What are the potential health and safety risks to DOD forces? Can they be mitigated?

4. **Readiness:** Will the assistance have an adverse impact on a unit’s readiness, training, or deployment mission?

5. **Legality:** Can the assistance be provided IAW the law? If prohibited, is there a legal exception?

6. **Lethality:** Is there any potential for the use of lethal force by or against DOD forces? Will the SECDEF authorize the carrying of weapons?

### IV. ARMING AUTHORITY

1. DOD personnel are not authorized to carry individual service weapons during a DSCA mission unless authorized by the SECDEF or DODD 5210.56.

2. When the SECDEF authorizes the carrying of weapons, the CCDR retains the authority to establish the arming level/weapons status policy.

### V. POSSE COMITATUS ACT (PCA) (Title 10 USC 1385)

1. The major limitation on the DSCA authorities described above is the PCA. The PCA (and DODD 5525.5) prohibits active duty members of the Army, Air Force, Navy, and Marine Corps from performing law

enforcement functions, unless expressly authorized by the Constitution or an Act of Congress.

2. The PCA prohibitions also apply to members of the Reserves and National Guard personnel when in an active duty (Title 10) status, and civilian and contract personnel under the command and control of a Title 10 officer.

3. The PCA prohibition does not apply to members of the National Guard when in a non-Federal status, either State Active Duty (SAD) or Title 32. It also does not apply to members of the Coast Guard at any time or to any service member when acting in his/her private capacity.

4. The types of direct/active law enforcement functions the PCA prohibits are: arrest, apprehension, search, seizure, surveillance, *security patrols, traffic control, crowd control*, riot control, evidence collection, interrogation, acting as an undercover agent, and any other activity where civilians are subjected to military authority that is regulatory, proscriptive, or compulsory.

### VI. CONSTITUTIONAL AND ACT OF CONGRESS EXCEPTIONS TO THE PCA

1. The Constitutional exception to the PCA resides with the President when he determines DOD forces are needed to perform law enforcement functions in order to fulfill his obligations under Article II of the Constitution to respond promptly in time of war, insurrection, or other serious national emergency. He could exercise this Constitutional exception by issuing a:

a. National Emergency Declaration.

b. Martial Law Proclamation (A commander’s Emergency Authority is derived from the President’s authority to respond to a civil disturbance).

2. There are at least thirty Acts of Congress that create exceptions to the PCA. The five primary ones are:

a. **Military Support for Civilian Law Enforcement Agencies** (Title 10 USC 371-382) allows the SECDEF or designated Secretary (see Enclosures 3 and 4 to DODD 5525.5) to approve indirect, passive support to civilian law enforcement authorities, such as providing information concerning a violation of State or Federal laws, loaning military equipment, providing personnel to operate and/or maintain the loaned equipment, and providing basic training or expert advice.

b. **Military Purpose Doctrine** (Title 10 USC 375) allows DOD forces who are performing a military function to provide an “incidental” benefit to law enforcement authorities as well, such as a security patrol on a DOD-controlled area located off-post to protect DOD equipment and property that also serves as a deterrent to any criminal activity in the area.

c. **Insurrection Statutes** (Title 10 USC 331-334) allows the President to use DOD forces to restore law and order in a State under three circumstances:

(1) insurrection against a State Government when requested by the State Legislature or, if not in session, the State Governor.

(2) rebellion against the US Government that makes it impracticable to enforce US laws by judicial proceedings.

(3) domestic violence that hinders the execution of Federal or State laws that protect individual Constitutional rights and the State is either unable or refuses to provide protection.

d. Chemical or Biological WMD (Title 10 USC 382) allows the SECDEF and Attorney General to jointly determine an emergency exists and then allows the SECDEF to provide DOD forces to the Attorney General to detect, disable, dispose of any type of WMD and to perform law enforcement functions when necessary for the immediate protection of human life and civilian law enforcement authorities are not capable of taking action.

e. Prohibited Transactions Involving Nuclear Materials (Title 18 USC 831) allows the SECDEF and Attorney General to jointly determine an emergency exists and then allows the SECDEF to provide DOD forces to the Attorney General to perform certain law enforcement functions to prevent the unlawful possession, transfer, use, disposal, or dispersal of nuclear material.

#### VII. USE OF INCIDENT AWARENESS AND ASSESSMENT (IAA) ASSETS

1. The SECDEF may approve a request for IAA assets to support DSCA missions for non-intelligence purposes. The SECDEF will consider requests concerning the following seven pre-approved IAA modules: (1) situational awareness, (2) damage assessment, (3) evacuation monitoring, (4) search and rescue, (5) CBRNE assessment, (6) hydrographic survey, and (7) dynamic ground coordination.

2. Any request for imagery products requires compliance with NORAD and NORTHCOM Instruction 14-3. Requests must include a Proper Use Memorandum (PUM) and be submitted thru G2 channels to NC-J24.

#### VIII. ECONOMY ACT (Title 31 USC 1535)

1. When there is no Presidential declaration under the Stafford Act, the Economy Act is the authority for one Federal agency to request assistance from another Federal agency on a reimbursable basis.

2. Reimbursement under the Economy Act is for "total" costs. Reimbursement under the Stafford Act is for "incremental" costs (see para. C.9.3.3 of DOD 3025.1M).

3. The Economy Act is also the basis for the statement "Federal agencies will not compete with commercial businesses." Actually, a Federal agency should not

compete with a business that can provide goods and services more economically or conveniently.

#### IX. DUAL STATUS COMMANDER

1. Title 32 USC 325 allows a National Guard (NG) officer to serve and command in both a Federal and non-Federal status in order to provide unity of effort and a common operating picture for both chains of command in a JTF.
2. The dual status commander serves both the President and the Governor, but not simultaneously. He holds two hats, a Federal hat and a non-Federal hat, one in each hand, but he wears only one hat at a time.
3. The JTF commander is the only person with dual status. Other members of the JTF are either in a Federal status (Title 10) or non-Federal status (SAD or Title 32).
4. The President delegated his full dual status commander approval authority to the SECDEF. The Governor of the designated NG officer must consent.
5. An active duty Title 10 officer may also be designated a dual status commander under Title 32 USC 315. The SECDEF must approve a Title 10 officer to accept a commission offered by a Governor into his/her State NG.

#### X. EMERGENCY MANAGEMENT ASSISTANCE COMPACT (EMAC)

1. EMAC is a non-binding agreement by its member States to assist one another to manage a disaster or an emergency after the Governor of the affected State has issued a State of Emergency Declaration.
2. All 50 States, the District of Columbia, Puerto Rico, Guam and the Virgin Islands are members of EMAC.
3. EMAC does not authorize the use of armed National Guard forces from one State to perform civil disturbance and law enforcement operations in another State. This type of assistance may be accomplished through a Memorandum of Understanding signed by the Governors.
4. The MOU should cover command relationship, immunity, arming level policy, law enforcement authority, and the Rules for the Use of Force (RUF).

#### XI. STANDING RULES FOR USE OF FORCE (SRUF)

1. The SECDEF-approved SRUF for DOD forces are in Enclosures L and N to CJCSI 3121.01B, 13 June 2005.
2. The SRUF applies to all Title 10 forces performing any type of DSCA and land homeland defense missions.
3. The SRUF does not apply to State National Guard forces when in a SAD or Title 32 status.
4. Commanders have a responsibility to teach and train the SRUF. Units should not deploy from home station for a DSCA mission until commanders ensure their personnel are briefed on the SRUF and receive an SRUF card or brochure.

# Legal Considerations of Defense Support of Civil Authorities (DSCA)



DSCA Course  
O'Fallon, IL  
10 July 2012

My Legal Advisor is: \_\_\_\_\_

Phone number: \_\_\_\_\_

E-mail: \_\_\_\_\_