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CHARTING A NEW ROLE FOR TITLE 10 RESERVE FORCES: A TOTAL FORCE RESPONSE TO NATURAL DISASTERS

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The American people fully expect that all military forces that are available and can help respond to a disaster will do so without unnecessary delays. In time of need, the public, who pays for the military and whom our armed services are pledged to serve, does not care whether the military personnel who come to their aid are active duty or from the National Guard or Reserves.¹

I. Introduction

Indeed, when Mother Nature unleashes her most potent forces causing catastrophic destruction and suffering, the public does not care whether needed military aid comes from the National Guard, the Active Component, or the Title 10 Reserve. To the public, receiving the right type of support, quickly and consistently, is what matters.

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¹ COMMISSION ON THE NATIONAL GUARD AND RESERVES, SECOND REPORT TO CONGRESS 60 (Mar. 1, 2007), <http://www.congr.gov/Worddocs/March%20ReportCNGR%20Second%20Report%20to%20Congress%20.pdf> [hereinafter CNGR SECOND REPORT].

But the law differs. Under the law, *who* provides relief for natural disasters does matter, especially when it comes to the Title 10 Reserve (meaning, the Reserve Components minus the National Guard, hereinafter “the Reserve”).² The law discriminates against the Reserve, making it difficult—although not impossible—for the Reserve to deploy for natural disaster response.

This is true even though much of the nation’s military assets most relevant to natural disaster response reside throughout the country in the Reserve. For every natural disaster, therefore, it is likely that the Reserve, similar to the National Guard, will have critically relevant capabilities very close to the areas in need.

In its final report to Congress and the Secretary of Defense, the Commission on the National Guard and the Reserves (CNGR) recognized this potential and made it part of its focus, stating that “preparing for and responding to man-made or natural disasters at home is a total force responsibility.”³ In other words, no military force should be excluded—especially not one as relevant as the Reserve.

² A couple of clarifying remarks are necessary up front. First, under 10 U.S.C. ch. 1003 there are subtle but very significant differences between the labels involving the following: National Guard, the Reserve, Reserve Components and Ready Reserve. This article follows the uses as found in 10 U.S.C. ch. 1003. Specifically, when this article refers to “the Reserve,” it is referring to the Reserve Components minus the National Guard. This article mentions the National Guard separately when it intends to refer to the National Guard, or uses the phrase “Reserve Component personnel,” which includes both the Reserve and the National Guard. Second, this article addresses the “Ready Reserve,” as opposed to the “Standby Reserve” or “Retired Reserve.” Title 10, § 10101 defines “Reserve Components” as a category comprising seven separate entities: (1) Army National Guard of the United States; (2) The Army Reserve; (3) The Naval Reserve; (4) The Marine Corps Reserve; (5) The Air National Guard of the United States; (6) The Air Force Reserve; and (7) The Coast Guard Reserve. Each is further defined at 10 U.S.C. § 10141, explaining that each armed force has a “Ready Reserve, a Standby Reserve, and a Retired Reserve.” The Ready Reserve is defined by 10 U.S.C. §§ 10141–10150, and it includes both the National Guard and the Reserve. Specifically, the Ready Reserve is composed of three groups: the Selected Reserve, Individual Ready Reserve, and the Inactive National Guard. The Selected Reserve consists of “units, and, as designated by the Secretary concerned, of Reserves, trained as prescribed in § 10147(a)(1), of this title” 10 U.S.C. § 10143 (2000). This article focuses on the Ready Reserve, and specifically on the Selected Reserve. Primarily, this article focuses on the Selected Reserve of “the Reserve” (meaning, the Selected Reserve of the Reserve Components, minus the National Guard).

³ COMMISSION ON THE NATIONAL GUARD AND RESERVES, TRANSFORMING THE NATIONAL GUARD AND RESERVES INTO A 21ST-CENTURY OPERATIONAL FORCE, FINAL REPORT TO

The purpose of this article is to highlight the specific law, 10 U.S.C. § 12304, that shackles the President, more than anything else, from effectively deploying the Reserve for natural disaster response. On 7 February 2008, the Department of Defense (DOD) submitted its proposed National Defense Authorization Act for Fiscal Year 2009 (FY09 NDAA) to Congress.⁴ The proposal contained, at section 1031, a recommended change to 10 U.S.C. § 12304 that would enable the President to mobilize the Reserve for natural disaster response. On 22 May 2008, the House of Representatives passed its version of the FY09 NDAA,⁵ substantively incorporating DOD's recommended change to § 12304. The governors and adjutants general, however, have now come forward and objected to the change. This article argues that for the best interest of this nation, as a whole, Congress should look past the misplaced resistance from the governors and adjutants general and enact the proposed amendment to 10 U.S.C. § 12304, with one revision.

A secondary, but equally important, purpose of this article is to outline ways to legally circumvent the needless roadblock of 10 U.S.C. § 12304, in case the amendment does not pass. The primary method is for the DOD and Service Secretaries to energize volunteerism of individual Reserve members, in the form of "hip-pocket" orders, much like the way the National Guard performs national security and national defense missions such as Operation Noble Eagle (ONE). In addition to hip-pocket orders, the Reserve may also provide natural disaster response under Immediate Response Authority (IRA), mutual aid agreements, Emergency Authority, and use of full-time personnel (i.e., Active Guard Reserve and Technicians). These alternative authorities are important, but they contain limitations that render them merely temporary solutions, necessitating Congress to provide a more permanent statutory fix.

Part II of this article will briefly describe the Title 10 Reserve's background and further expound on its potential use in disaster relief. Part III will then discuss the proposed amendment to 10 U.S.C. § 12304 that the House of Representatives recently passed in its FY09 NDAA, and the objection of the governors and adjutants general to that proposed

CONGRESS AND THE SECRETARY OF DEFENSE 59 (Jan. 31, 2008) [hereinafter CNGR FINAL REPORT], available at <http://www.cngr.gov/resource-center.CNGR-reports.asp>.

⁴ See DOD Proposed National Defense Authorization Act for Fiscal Year 2009, available at http://www.dod.mil/dodg/olc/docs/FY2009_BillText.pdf (last visited Apr. 11, 2008) [hereinafter DOD Proposed FY09 NDAA].

⁵ H.R. 5658, 110th Cong. (2008).

change. This part will emphasize that changing the statute is the right thing to do. But given the fragmented nature of Congress, the fact that Congress rejected a similar change to 10 U.S.C. § 12304 in the Fiscal Year 2007 National Defense Authorization Act (FY07 NDAA),⁶ and the current resistance by the states,⁷ waiting for a legislative change may be imprudent.

Because of those political realities, Parts IV–VI will discuss the alternate executive options that, if exploited, could provide an effective Reserve response within the current legal framework. Part VII will summarize these recommendations and alternate strategies for employing the Reserve in disaster relief missions.

II. Background & Potential of the Reserve

A. Background

After Hurricane Katrina, which involved a National Guard and Active military response that peaked at 71,284 military personnel,⁸ most state and federal disaster relief planners know how to bring the National Guard and Active military into the fray for support. They plan on the fact that the National Guard fills the role as the first military responder to natural disasters;⁹ they are familiar with the procedure for the governor to call out the Guard under the governor's control;¹⁰ and they know that if

⁶ H.R. REP. NO. 109-452, at 319 (2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr452.109.pdf.

⁷ *See infra* notes 54–71 and accompanying text.

⁸ Of those 71,284 troops, a large majority, 56,116, were National Guard and the rest—21,408—were primarily regular military forces. *See* S. REP. NO. 109-322, at 476 (2006), *available at* <http://www.gpoaccess.gov/serial/set/creports/katrinanation.html>.

⁹ This does not address the maritime domain, where the regular or reserve Coast Guard forces under the Secretary of Homeland Security would most likely serve as the first military-type force to a disaster.

¹⁰ State active duty (SAD) is specifically defined by state law. In general, it refers to the National Guard under the control of the governor, performing a state mission, paid for by state funds. Operational duty under Title 32, typically is referring to duty under 32 U.S.C. § 502(f)(2)(A). Duty under 32 U.S.C. § 502(f)(2)(A) must be authorized by the President or Secretary of Defense (SecDef). Once authorized by the President or SecDef, this duty is under the control of the Governor, performing a federal mission, paid for with federal funds. One significant aspect of this status is that *Posse Comitatus* (18 U.S.C. § 1385) does not apply to these forces because the command and control remains under the Governor, thus maintaining the state nature of the forces. Both SAD and 32 U.S.C. § 502(f)(2)(A) forces are activated by an order from the governor (of course Title 32 would

needed, the Active military may supplement support to civil authorities under either the Stafford Act¹¹ or the Economy Act.¹² But that same familiarity and ease of implementation does not exist regarding how the “other” component—that is, the Reserve—deploys to a natural disaster. How do they deploy, if at all?¹³

necessarily also require authorization for that status by the President or SecDef, as stated above).

¹¹ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 [hereinafter Stafford Act].

¹² If a response is needed to a natural disaster, typically the first and primary military responder will be the state National Guard. Positioned in approximately 3300 locations throughout the fifty-four states and territories, the National Guard provides a rapid, comprehensive, and trained force, uniquely familiar and connected with the local civil authorities. Moreover, the legal status of National Guard is *sui generis*. The Tenth Amendment of the Constitution secures the police power, including disaster response, with the states. The National Guard in its normal, default, everyday status is a state entity, directly under the control of the Governor. Each state possesses its own unique requirements under state law on exactly how, and under what circumstances, the governor may call out the National Guard. The purpose of this article is not to displace or inhibit the National Guard’s primacy as a military provider to disaster response. Rather, it is only to add to that response by bringing to bear the assets of the Reserve, when a federal military response is appropriate.

¹³ This lack of clarity is exemplified in Army Field Manual (FM) 3-07, as it attempts to describe just how the Army Reserve fits into disaster response with the following passage:

The US Army Reserve is capable of extensive domestic support operations. This assistance and support may include the use of equipment and other resources, including units and individuals. US Army Reserve personnel may be activated in a volunteer status when ordered to active duty in lieu of annual training or after the president has declared a national emergency. Use of reserve component persons and units is restricted, under law, to immediate response under provisions DODD 3025.1 and to population and resource control for CBRNE incidents. US Army Reserve units may be used to respond to a CBRNE incident if they are in the area and in annual training status. They may not be used for other types of emergencies.”

U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS para. 6-16 (20 Feb. 2003) (superseding FM 100-20). As is typical in this area, the paragraph displays incongruence. It starts off boldly describing the vast capability of the Army Reserve to contribute to disaster response only to spend the rest of its language on qualifying that capability with its limitations on activation, ultimately failing to explain all the options available.

Traditionally, the Reserve has been a force held as a strategic reserve for wartime support, focused almost exclusively on supplementing the active force in times of armed conflict against a foreign enemy. While the Reserve responded to Hurricane Katrina and the 2007 Southern California wildfires, they did so only on an exceptional basis, with few troops and sporadic forms of support.¹⁴ The Reserve's relatively small contribution to natural disaster relief in the past, however, does not reflect its vast potential to serve the nation in the future during times of natural catastrophe. In today's natural threat environment where a deadly animal virus may only be a mutation away from efficient human-to-human infection,¹⁵ where rising temperatures continue to alter weather patterns across the globe, and where an aging national infrastructure is becoming more and more precarious, it is imperative for the military to bring its plethora of military capabilities to bear on *all* contingencies in support of civil authorities.

As with the Active Component (AC), the Reserve may provide Civil Support¹⁶ during natural disasters through either the Economy Act,¹⁷

¹⁴ The total contribution from the Reserve was low enough that it was not mentioned in Congress's final report on the preparation for and response to Hurricane Katrina. See U.S. HOUSE OF REPRESENTATIVES BIPARTISAN FINAL REPORT ON THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE (Feb. 15, 2006) [hereinafter FINAL REPORT ON THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA], available at <http://www.gpoaccess.gov/katrinareport/fullreport.pdf>. But the Reserves did in fact contribute. For instance, B Company, 5th Battalion, 159th Aviation Regiment, Fort Eustis, flew 138 hours in the first seven days, carried 1400 Soldiers and rescue workers, 115,000 pounds of food and water, and 1.7 million pounds of sandbags. The 206th Transportation Company, Opelika, Alabama provided 124 Soldiers, water and ice delivery; the 647th Transportation Company, Laurel, Mississippi sent 120 Soldiers and did debris removal in drainage lanes; and the Army Reserve Contact Teams dispatched to evacuee shelters. E-mail from Office of the Chief, Army Reserve, to author (30 Aug. 2007) (on file with author); Lieutenant General Jack Stultz, Call to Duty: Army Reserve Soldiers Serving with Pride (9 July 2007) (unpublished PowerPoint presentation, on file with author). In addition, the Reserve responded with Emergency Preparedness Liaison Officers (EPLOs). See *infra* note 29.

¹⁵ For example, the avian influenza, associated with the H5N1 virus, currently only contracted from birds, poses a grave potential human-to-human threat if the proper mutation occurs. See Key Facts About Avian Influenza (Bird Flu) and Avian Influenza A (H5N1) Virus, <http://www.cdc.gov/flu/avian/gen-info/facts.htm> (last visited June 26, 2008).

¹⁶ Civil Support is defined as "Department of Defense support to US civil authorities for domestic emergencies, and for designated law enforcement and other activities." JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, CIVIL SUPPORT glossary, at 6 (14 Sept. 2007) [hereinafter JOINT PUB. 3-28].

¹⁷ 31 U.S.C. § 1535 (2000).

when another federal agency possesses authority to provide civil support and when that federal agency requests DOD support, or through the Stafford Act, when the President declares a major disaster or emergency. But there is a difference between the AC and the Reserve under these laws: the Reserve members, by default, reside in a non-active duty status, and neither the Economy Act nor the Stafford Act provides inherent authority to activate the Reserve.¹⁸

To activate the Reserve, statutory authorities provide few practical options. Historically, the available authorities have been used only for warfighting or for training to conduct warfighting missions; they have not been used for natural disasters. When the Reserve has managed to respond, it has done so by groping for whatever authority lies within its reach, with members of the same unit often deploying under disparate personnel statuses.¹⁹ The result has been an inchoate system of

¹⁸ When referring specifically to *involuntarily* bringing the Reserve into an active duty status, this article will use the terms “mobilize” or “mobilization.” But when referring to the concept of bringing the Reserve into an active duty status either as a general matter (involuntarily and voluntarily) or specifically referring to voluntarily coming onto active duty, this article intentionally uses the narrower term “activate” or activation. One may quibble over the terms in any given case, but for the purposes of this paper, the intent, regardless of the term being used, is to convey the process of placing portions of the Reserve into an active duty status. Department of Defense Instruction (DODI) 1235.12 defines both terms: “Activation: The ordering of units and individual members of the Reserve components to active duty, with or without their consent, under legislative authority granted to the President, Congress or the Secretaries of the Military Departments.” U.S. DEP’T OF DEFENSE, INSTR. 1235.12, ACCESSING THE READY RESERVES para. E2.1.1 (19 Jan. 1996) [hereinafter DODI 1235.12]. “Mobilization. The process by which all or a portion of the Armed Forces are brought to a state of readiness for war or a national emergency. It includes the order to active duty [i.e., activation] of units and members of the Reserve components under a declaration of national emergency by either the President or the Congress or when the Congress declares war. It includes the order to active duty of all or part of the Reserve components, as well as assembling and organizing personnel, supplies, and material.” *Id.* para. E2.1.8. As explained in the *Domestic Operational Law Handbook*, activation is a more proper term when referring to the act of ordering individuals or units to active duty under presidential or congressional authority. CTR. FOR LAW & MILITARY OPERATIONS, TJAGLCS, U.S. ARMY, DOMESTIC OPERATIONAL LAW HANDBOOK vol. I, ch. 10, at 208–09 (2006) [hereinafter DOPLAW HANDBOOK]. Mobilization, on the other hand, as found in DODI 1235.12, is a broader term encompassing the entire scope of assembling and organizing personnel, supplies and material.” See also JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEP’T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 4, 344 (12 Apr. 2001).

¹⁹ For example, during the 2007 Southern California Wildfires, some members of the 302d Airlift Wing, Peterson A.F.B. deployed in their everyday Title 5 technician status, while others in the same unit deployed under Active Duty Operational Support under 10 U.S.C. 12301d and DODI 1215.06. See U.S. DEP’T OF DEFENSE, INSTR. 1215.06,

integrating the Reserve assets into the federal disaster response. Thus, the bottom line continues to be that while a vast potential for the Reserve exists, that potential currently remains embryonic.

B. Potential of the Reserve

As the saying goes in real estate, the key to success is “location, location, location.” The same holds true for natural disaster response. The local response, or at least the most local entity able to respond, likely will provide the most effective and urgently needed assistance. That is what makes the National Guard so effective—they are, by nature, in every state and territory, ready to respond.²⁰ But so too is the Reserve. The Reserve members and their units are dispersed throughout the United States in large and small communities.

Specifically, the Army Reserve alone sits in over 1100 communities across the United States, with over 6400 buildings, of which 975 are Army Reserve Centers.²¹ Similarly, the Air Force, Marine, Coast Guard and Navy Reserve units have a pervasive presence throughout the nation. And like the National Guard, their ranks are filled by community members and leaders with deep roots in the areas they serve. The Reserve could be, if allowed, a federal forward-deployed force fortuitously positioned to respond to the indiscriminate wrath of nature.

Unlike the National Guard, the Reserve brings a unified, cohesive chain of command to its entire spectrum. That is, the Reserve, in its entirety, ultimately falls under the same Title 10 chain of command: under the Secretary of Defense and the President. This unified national chain of command can be essential to an effective disaster response,

UNIFORM RESERVE, TRAINING, AND RETIREMENT CATEGORIES para. 6.1.4.2.1 (Feb. 7, 2007) [hereinafter DODI 1215.06]. Who went under what status really depended on the individual’s preference. Technician pilots often choose to fly in their technician status during the week to preserve their leave days. The unit wisely permits this flexibility to encourage technician pilots to volunteer for the duty. Another example is the emergency preparedness liaison officers (EPLOs) who are forced to perform their mission in a training status. See DODI 1215.06, *supra*, para. E7.2.1; see also *infra* note 29 and accompanying text.

²⁰ The National Guard’s ability to quickly deploy is another reason they are typically the first military responder to any calamity. The lack of authority is what hinders the Reserve.

²¹ E-mail from Eric Loughner, Army Reserve Division, Office of the Assistant Chief of Staff for Installation Management (17 Sept. 2007) (on file with author).

enabling the Reserve to respond not only from a local or state venue, but also from a regional basis, ensuring availability of assets outside the disaster area that are still close enough to respond quickly. Moreover, because the Reserve falls under a federal chain of command, its assets are easily transferred to out-of-state areas during times of widespread natural disaster. National Guard assets, on the other hand, are perpetually tethered to local concerns.

The local concern of the Guard is best demonstrated by envisioning an unpredictable, sweeping situation such as a pandemic influenza. If a pandemic influenza developed, states could reasonably hesitate or refuse to send assets out-of-state today in fear of what tomorrow may bring, i.e., a situation requiring those same assets in-state.²² This ever-present primacy of local concern that the National Guard faces as the elected governor's military force creates the potential for inefficient distribution of National Guard assets on a national scale during a widespread disaster.²³ The Reserve's geographical dispersion, ease of conducting operations across state borders, and federal chain of command enables it to contribute as part of an integrated federal response that has the command and control structure to objectively make tough decisions on how to balance federal assets against competing state needs, bringing regional and national complementary forces to state National Guard efforts.

While these aspects may make one wonder why this nation continues to fail in training, exercising, and employing the Reserve for natural disaster response, the situation becomes even more confounding when

²² All fifty states, the District of Columbia, Puerto Rico, U.S. Virgin Islands, and Guam are members of the Emergency Management Assistance Compact (EMAC). Emergency Management Assistance Compact, *available at* <http://www.emacweb.org> (last visited Apr. 8, 2008). The EMAC requires member states to provide mutual assistance and cooperation, which may include the National Guard. The EMAC has proven to be a very effective method of support among the states over the years. The EMAC does, however, contain an escape clause for a state to withhold assistance/cooperation if the state deems it necessary for its own welfare. Specifically, Article IV states: "Any party state requested to render mutual aid or conduct exercises and training for mutual aid shall take such action as is necessary to provide and make available the resources covered by this compact in accordance with the terms hereof; provided that it is understood that the state rendering aid may withhold resources to the extent necessary to provide reasonable protection for such state." *Id.*

²³ For instance, if a pandemic influenza breaks out in a particular region of the country, governors may in fact be very resistant to sending National Guard forces such as medical personnel, civil support teams, etc., to other states.

considering the *composition* of the Reserve. The Army Reserve consists primarily of combat support and combat service support units.²⁴ This composition means it possesses a majority of the Army's critical specialties relevant to disaster response. The Army Reserve assets include over half of the Army's medical assets, over half of the Army's chemical units, and half of the Army's transportation assets and mortuary affairs.²⁵ Likewise, the Navy Reserve has aviation units and Seabee units—units specifically outfitted with equipment and personnel designed to conduct missions such as debris removal and building infrastructure.²⁶ The Air Force Reserve has medical units, air transportation units, firefighting equipped aircraft, and civil engineering units.²⁷ The Marine Reserve has medical units (including surgical units), bulk fuel, transportation, maritime transportation, supply, engineering, aviation, communication and motor maintenance units.²⁸ The Coast Guard has aviation and maritime assets uniquely positioned to respond to areas in close proximity to the water. The Reserve also maintains emergency preparedness liaison officers (EPLOs).²⁹ The EPLOs are primarily military officers, in the grade of O-5 and O-6, who specialize in consequence management. There are currently approximately 422 EPLOs nationwide, with teams in every state and each of the ten Federal Emergency Management Agency (FEMA) regions,³⁰ ready to contribute to any federal response under the Defense Coordinating officer (DCO) in

²⁴ The National Guard, on the other hand, primarily consists of Combat and Combat Support Units. From a disaster-response perspective, this is nothing short of nonsensical. The Army is organized in a manner that places its most relevant disaster response units into a component that is rarely used in natural disasters, and places its combat units in a component that is under the control of a state governor for most of its existence.

²⁵ See Army Reserve homepage, <http://www.armyreserve.army.mil/ARWEB/MISSION/Role.htm> (last visited Oct. 24, 2007).

²⁶ See Navy Reserve homepage, www.navyreserve.com (last visited Nov. 1, 2007); see also the Navy Reserve Seabees website, <http://www.navyreserve.com/opportunities/enlisted/construction.jsp> (last visited Oct. 30, 2007).

²⁷ See Air Force Reserve homepage, <http://afreserve.com> (last visited Aug. 6, 2008); see also Air Force Reserve Civil Engineer website, <http://afreserve.com/mission.aspx?id=13> (last visited Aug. 6, 2008).

²⁸ See Marine Reserve homepage, <http://www.marines.mil/units/Pages/categoryresults.aspx?Column=DivisionMulti&ColumnDisplayName=Unit%20Type&Value=Reserves> (last visited Aug. 6, 2008).

²⁹ See JOINT PUB. 3-28, *supra* note 16, at II-19; see also U.S. DEP'T OF DEFENSE, DIR. 3025.16, MILITARY EMERGENCY PREPAREDNESS LIAISON OFFICER (EPLO) PROGRAM (18 Dec. 2000) [hereinafter DOD DIR. 3025.16].

³⁰ Information compiled by U.S. Northern Command (USNORTHCOM) (charts on file with author). Don Reed, U.S. Northern Command, J35, Working Seminar Addressing the Structure of EPLOs (17 Jan. 2008) (unpublished PowerPoint presentation, on file with author).

aid of local and state authorities.³¹ The assets in the Reserve are, therefore, uniquely designed to provide precisely the type of services needed in times of disaster—whether natural or man-made.

IV. Legislative Change

A. 10 U.S.C. § 12304—Not Available for Natural Disasters

The statutory authority for a presidential Reserve call-up is found at 10 U.S.C. § 12304. It allows the President “to augment the active forces for any operational mission”³² For instance, the President invoked 10 U.S.C. § 12304 to mobilize Reserve Component personnel for the following operational missions: Persian Gulf War (1990–1991), intervention in Haiti (1994–1996), Bosnian peacekeeping mission (1995–2004), Iraq (1998–2003), and Kosovo (1999–present).³³

Title 10, § 12304 is also a handy, responsive tool for the President to use when troops are needed for terrorist-related incidents as well as disasters related to weapons of mass destruction (WMD). Under this authority, the President can immediately, involuntarily call up to 200,000 Reserve Component (RC) personnel for up to 365 days. No declaration of a national emergency or major disaster is needed,³⁴ and the language of the statute explicitly allows the President to order an involuntary mobilization when there is a “threatened” terrorist attack or when there is a “threatened” use of weapons of mass destruction. It is precisely the

³¹ The EPLOs fall under the Service Secretaries, not assigned to any particular combat command, including USNORTHCOM and Pacific Command (PACOM). This arrangement began prior to USNORTHCOM’s establishment, when the Services were responsible for the federal military civil support missions with Army as the primary executive agent. The Office of the Assistant Secretary of Defense (OASD (HD & ASA)), the Services, USNORTHCOM, and PACOM are currently clarifying the precise roles of EPLOs and how they fit into the National Response Framework. The most effective structure appears to be one that keeps the EPLOs assigned to the Services, enabling them to receive administrative support that has evolved and proven effective over time. Upon the occurrence of a disaster, the EPLOs should then fall under the Tactical Control (TACON) of the DCO. Because of the current restrictions of 10 U.S.C. § 12304, EPLOs primarily deploy to disasters using Annual Training (AT) and Individual Duty Training (IDT). *See infra* note 145.

³² 10 U.S.C. § 12304(a) (2000).

³³ Lawrence Kapp, *Reserve Component Personnel Issues: Questions and Answers*, CONG. RESEARCH SERV. REP. RL30802 (Jan. 18, 2006).

³⁴ 10 U.S.C. § 12304. Part of its title establishes Congress’s intent that this statute does not require a declaration from the President. *See infra* note 75 and accompanying text.

type of forward-leaning authority that is needed in modern society—it mitigates suffering through proactive measures.

Title 10, § 12304 is also a quick, effective and practical method for mobilization because it does not create a personnel quandary for the total force. The Reserve members ordered to active duty under this authority are not accounted for in the active duty end strength.³⁵ Moreover, this authority provides a mechanism for congressional oversight by requiring the President to notify Congress within twenty-four hours, specifically setting forth in writing, “the circumstances necessitating the action taken . . . and describing the anticipated use of these units or members.”³⁶

But as good as 10 U.S.C. § 12304 is as a mechanism to mobilize the Reserve for operational missions and to respond to WMD and terrorist attacks, it may not be used as an authority to mobilize the Reserve for natural disasters such as hurricane relief, wildfires, flooding, or pandemic influenza. The explicit language of 10 U.S.C. § 12304(c)(1) prohibits its use for natural disasters. It states: “[N]o unit or member of a reserve component may be ordered to active duty under this section . . . to provide assistance to either the federal government or a state in time of a serious natural or manmade disaster, accident, or catastrophe.”³⁷

This is true even when the natural disaster is grave, pervasive, and extraordinary in scope; it is true even if the Reserve forces that would be allowed to respond under a WMD or terrorist event are also the exact type of resources needed for the natural disaster response, as undoubtedly would be the case. Because of this disparity between potential and authority, one may expect that Congress would move quickly to amend this law to provide involuntary call-up authority based

³⁵ See *id.* § 12304(d); see also *id.* § 115(i)(4).

³⁶ *Id.* § 12304(f).

³⁷ *Id.* § 12304(c)(1). This paragraph was changed as part of the FY08 NDAA repeal of Public Law Number 109-364 (Enforcement of the Laws to Restore Public Order). With the FY08 NDAA, 10 U.S.C. § 12304(c) now reads, in full:

No unit or member of a reserve component may be ordered to active duty under this section to perform any of the functions authorized by chapter 15 or section 12406 of this title or, except as provided in subsection (b), to provide assistance to either the Federal Government or a State in time of a serious natural or manmade disaster, accident, or catastrophe.

on the gravity of the national threat. This expectation, unfortunately, has not fully come to fruition.

B. FY07 Changes

Congress's best opportunity to effectively address the lack of authority to mobilize the Reserve for natural disasters came while considering the FY07 NDAA.³⁸ One particular version of the FY07 NDAA from the House of Representatives included language that would have permitted the President to mobilize Reserve Components under 10 U.S.C. § 12304 for *any* natural disaster response. Specifically, the language would have added a new paragraph, 10 U.S.C. § 12304(b)(3), authorizing mobilization of Reserve Components for *any* situation involving "serious natural or manmade disasters, accidents, or catastrophes that occur in the United States, its territories and possessions, the District of Columbia and the Commonwealth of Puerto Rico."³⁹ This language was actually in the bill that passed the House, but was eventually dropped in the Senate, never making its way into the final version that became law.⁴⁰

When Congress rejected the proposed change to 10 U.S.C. § 12304(b) in FY07, it was allegedly not the aspect of making the Reserve available for natural and manmade disasters that sealed its fate, but rather the scope of its applicability. Specifically, the proposed FY07 NDAA change to 10 U.S.C. § 12304(b) unwisely included the National Guard, exposing the National Guard to federalization during periods

³⁸ During the FY07 NDAA legislative process, Congress considered and made numerous changes concerning 10 U.S.C. § 12304. For instance, Congress changed the duration limit of mobilization from 270 days to 365 days. In addition, Congress altered the statute to allow the President to mobilize the Reserve Components under 10 U.S.C. § 12304 for the Enforcement of the Laws to Restore Public Order (ELRPO). Under the FY07 NDAA, Congress replaced the Insurrection Act with the ELRPO. This was a short-lived change, as one year later Congress repealed the ELRPO and reverted the statute back to the former Insurrection Act. In FY08, Congress also repealed the corresponding change to 10 U.S.C. § 12304 that addressed mobilization for the ELRPO. *See* Pub. L. No. 110-181, § 1068 (Jan. 28, 2008).

³⁹ H.R. REP. NO. 109-452, at 319 (2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr452.109.pdf.

⁴⁰ There were six versions of the NDAA for 2007; the final version that became law was the John Warner National Defense Authorization Act for Fiscal Year 2007. *See* National Defense Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

when it inevitably would be needed by the states. It was that aspect of the FY07 NDAA that caused its failure in the Senate.

After the House passed its version of FY07 NDAA, including the provision that would have revised 10 U.S.C. § 12304 to be used for natural and manmade disasters, Governors Mike Huckabee (Arkansas) and Janet Napolitano (Arizona) wrote a letter to the Chairman and Ranking Member of the Committee on Armed Services, U.S. House of Representatives.⁴¹ The letter objected to “the House-passed DoD Act [that] would allow the President to federalize the National Guard of the states without the consent of the governor.”⁴² The letter went on to assert that the “possibility of the federal government pre-empting the authority of the state or governor in natural and manmade disasters is opposed by the nation’s governors.”⁴³ The letter was endorsed by all fifty governors.⁴⁴ The message from the governors was clear: any attempt to expand the President’s authority to federalize the National Guard will meet heavy resistance from the states.

C. Another Attempt at Change Needed

The rejection by Congress in FY07 to amend § 12304(b), coupled with the statute’s explicit language currently found at 10 U.S.C. § 12304(c), leaves no doubt as to Congress’ intent concerning the breadth of 10 U.S.C. § 12304—it is not to be used for natural disasters.⁴⁵

⁴¹ See William Banks, *Who’s in Charge: The Role of the Military in Disaster Response*, 26 MISS. C. L. REV. 75 n.189 (2006/2007).

⁴² Letter from Governors Mike Huckabee & Janet Napolitano to Duncan Hunter, Chairman, Committee on Armed Services, and Ike Skelton, Ranking Member, Committee on Armed Services, U.S. House of Representatives (Aug. 1, 2006), available at <http://www.nga.org/portal/site/nga/menuitem.cb6e7818b34088d18a278110501010a0/?vgnextoid=7a62d3164d5cc010VgnVCM1000001a01010aRCRD>.

⁴³ *Id.*

⁴⁴ See Banks, *supra* note 41, at 75 n.189.

⁴⁵ See 10 U.S.C. § 12304(c)(1) (2000). Congress’s decision to reject the involuntary activation of the Reserve for natural disasters in 10 U.S.C. § 12304 does not translate into an implied will of Congress to prohibit, writ large, involuntary activation of the Reserve for natural disaster response, not even as a prohibition limited to times when national emergency/disaster has not been declared. *Id.* Section 12304(c)(1) explicitly limits the scope of the prohibition to activation under 10 U.S.C. § 12304. Specifically, it states: “no unit or member of a reserve component may be ordered to active duty *under this section*” *Id.* § 12304(c)(1) (emphasis added). Implicitly, 10 U.S.C. § 12304(c)(1) does not intend to limit other sections. And indeed, other sections such as 10 U.S.C. § 12301(a), 10 U.S.C. § 12301(b) and 10 U.S.C. § 12302 contain unqualified language, in

But while it is understandable for the states to resist changes in the law that expand the President's authority to federalize the National Guard, it does not make sense to hobble the President's ability to effectively and efficiently use the Reserve. This is especially true when the statutory framework intentionally padlocks the same assets that are available during incidents involving terrorism or weapons of mass destruction. The quantity and quality of the Reserve assets that are potentially available, coupled with their dispersion across the country, makes it imperative for Congress to reconsider this statute.⁴⁶

In its final report to Congress, the Commission on the National Guard and the Reserves reiterated the need for change with the following words: "The Commission believes that current mobilization authorities for federal reserve forces to respond to emergencies are insufficient and should be expanded."⁴⁷ The single best point to begin this expansion is to address the limiting language of 10 U.S.C. § 12304.

relation to natural disasters, that authorizes activation. *See infra* pt. IV. When possible, statutes are to be read in concert with each other. *John Doe v. Rumsfeld*, 435 F.3d 980, 987 (9th Cir. 2006) (citing *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 370 (1986)). Congressional rejection of natural disasters in 10 U.S.C. § 12304, therefore, should not be seen as the expression of congressional will that goes beyond the four corners of 10 U.S.C. § 12304.

⁴⁶ The fact that the Reserve members may volunteer for natural disasters, as will be discussed later in Section V, pardons Congress only to the extent that Congress can guarantee that no natural disaster will occur where volunteerism becomes a questionable concept, e.g., a pandemic influenza.

⁴⁷ CNGR FINAL REPORT, *supra* note 3, at 112. In this report, the Commission on the National Guard and Reserves recommends using the Coast Guard model as a potential solution. Specifically, the Commission states the following in its final report:

We further believe that the mobilization authorities for the Coast Guard Reserve present a good model. Rear Admiral Kenneth T. Venuto of the Coast Guard testified that this authority increases the availability and accessibility of reservists to respond to domestic crises, especially when disaster is imminent. Similar authorities should be adopted to provide service Secretaries the authority to involuntarily mobilize federal reserve components for up to 60 days in a four-month period and up to 120 days in a two-year period during or in response to imminent natural or man-made disasters.

Id. An alternative to this approach, of course, is a change to 10 U.S.C. § 12304.

D. FY09 NDAA: A New Attempt to Access the Reserve

On 22 May 2008, the House of Representatives passed its proposed version of FY09 National Defense Appropriations Act—House Bill 5658.⁴⁸ Section 594 of House Bill 5658 would amend 10 U.S.C. § 12304 by adding a paragraph that gives the President the authority to access the Reserve for natural disaster relief. Specifically, it would give the President the authority to order

any unit of the Selected Reserve of the Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve to active duty to provide assistance in responding to a major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)).⁴⁹

Notice that the National Guard is *not* listed. The language adequately expands the scope of 10 U.S.C. § 12304(b) to allow for the mobilization of the Reserve for natural disaster response, but does so in a manner that does not implicate the National Guard.

Politically, as FY07 and FY08 have so vividly demonstrated, it makes sense to exclude the National Guard. The past demonstrates that states successfully fight attempts in Congress to expand the President's ability to mobilize the states' military force—the National Guard.⁵⁰ This is particularly true in times of natural disaster when governors need to establish their authority, competence, and leadership.

Strategically, excluding the National Guard also makes sense. In times of major disaster and national emergency, one of the most important aspects of the National Guard is the fact that the Posse Comitatus Act⁵¹ does not apply to the Guard in state status, enabling

⁴⁸ See H.R. 5658, 110th Cong. (2008).

⁴⁹ *Id.* sec. 594. The substantive portion of this provision was initially proposed by DOD in its Proposed FY09 NDAA, at § 1031. See DOD Proposed FY09 NDAA, *supra* note 4.

⁵⁰ The resistance in this area is exemplified by the reaction of the adjutants general of the states and the governors when Public Law Number 109-364 (Enforcement of the Laws to Restore Public Order) was passed in the FY07 NDAA. Their reaction was so negative and vehement that the law was recently repealed in the FY08 NDAA. See Pub. L. No. 110-181, § 1068 (Jan. 28, 2008).

⁵¹ 18 U.S.C. § 1385 (2000).

governors to use the Guard for law enforcement missions.⁵² Section 594 of House Bill 5658 would give the President needed access to the Reserve, and at the same time would ensure that the Guard remains in its most effective status—a state status under the control of the governors, not subject to the Posse Comitatus Act.

Section 594 represents an amendment to 10 U.S.C. § 12304, therefore, that would authorize the President to employ the Reserve while still honoring the political and strategic advantages of not implicating the National Guard. In other words, it was drafted thoughtfully, and the care in its drafting, presumably, contributed to an overwhelmingly positive vote, 384 to 23, in the House of Representatives on the entire bill.⁵³ This is encouraging news for the proponents of change to § 12304.

But while it is encouraging news, it is not final news. Even with the House sidestepping the landmine of implicating the Guard, the proposed amendment now finds itself in the Senate, facing a minefield of state resistance.

E. State Resistance: The Minefield

On behalf of the National Governors Association, Governor Michael F. Easley of North Carolina and Governor Mark Sanford of South Carolina sent a letter, dated 10 July 2008, to the Chairmen and Ranking Members of the Committee on Armed Services.⁵⁴ The first paragraph of the letter states, in part:

⁵² While it is true that in some disaster situations posse comitatus would not apply, even to the federal forces, those situations are infrequent. Specifically, if the President invokes authority under conditions of insurrection, the Posse Comitatus Act would not apply to any of the military forces. But those times are few and far between. The best solution, therefore, is to amend 10 U.S.C. § 12304(b) in a manner that assumes that the Posse Comitatus Act will remain in force, prohibiting the use of federal military forces for law enforcement functions. House Bill 5658, section 594 does just that.

⁵³ H.R. 5658, 110th Cong. (2008).

⁵⁴ Letter from Governors Michael F. Easley & Mark Sanford to Ike Skelton, Chairman, Committee on the Armed Services, House of Representative; Carl Levin, Chairman, Committee on Armed Services, U.S. Senate; Duncan Hunter, Ranking Member, Committee on Armed Services, House of Representatives; John McCain, Ranking Member, Committee on Armed Services, U.S. Senate (July 10, 2008) (on file with author).

[W]e write to express our opposition to Section 591 and Section 594 of the National Defense Authorization Act (NDAA) for fiscal year (FY09), as passed by the House of Representatives. These sections would modify the Insurrection Act by expanding the power of the President to order Reserve component forces other than the National Guard to active duty for domestic emergencies.⁵⁵

One week after the governors sent their letter, the Adjutants General Association of the United States (AGAUS) sent a letter to Senator John McCain, stating that the AGAUS “strongly opposes” sections 591 and 594.

Notice that both the governors and AGAUS address not only section 594, but section 591 as well. Section 591 of House Bill 5658 would amend the Insurrection Act by authorizing the President to activate the Reserve to enforce the laws in times of insurrection.⁵⁶ Currently, the President can “use” the armed forces to enforce the law during times of insurrection. This includes using any National Guard forces that the President calls into federal service under the Insurrection Act, as well as any of the Reserve forces that are already serving in an activated status. The current Insurrection Act does not, however, act as an independent authority to *activate* the Reserve. To activate the Reserve for an insurrection, at least now, some other authority must be used.⁵⁷ Section 591 attempts to change that requirement by changing the Insurrection Act so that it, alone, provides activation authority for the Reserve.

True to form, the governors and adjutants general have launched an aggressive campaign against section 591. Their aggression towards the amendment is not a surprise. After all, the Insurrection Act is an exception to *Posse Comitatus*⁵⁸ and would thus allow federal military

⁵⁵ *Id.*

⁵⁶ H.R. 5658, sec. 591.

⁵⁷ 10 U.S.C. § 12304(c)(1) explicitly states that it may not be used as an activation authority for insurrection. House Bill 5658, section 594 does not change this aspect of 10 U.S.C. § 12304, which is one very significant reason why House Bill 5658 sections 591 and 594 do not act in tandem as an increase in the President’s insurrection authority. Potential activation authorities include 10 U.S.C. §§ 12301(b), 12301(d), and 12302. *See infra* pts. IV–V.

⁵⁸ The text of the statute explicitly states that it does not apply in cases expressly authorized by Congress. *See* 18 U.S.C. § 1385.

forces to enforce the law against the citizens of their states. Furthermore, two sections of the Insurrection Act authorize the President to invoke its authorities without a request from a state's governor.⁵⁹ Plus, the Insurrection Act does not contain a limit on the amount of time forces may be activated under its authority.⁶⁰ Given these features of the Insurrection Act, it is understandable that the governors and adjutants general would resist direct expansion of the President's authority in this area. In fact, the governors and adjutants general are just coming off a resounding victory in this area with the repeal of the Enforcement of the Laws to Restore Public Order (ELRPO).⁶¹

Why the House decided to amend the Insurrection Act, one year after Congress did away with ELRPO, in a bill in which they were attempting to open access to the Reserve for disaster relief, is bewildering: it simply was not well thought out. The lack of care that went into section 591 is captured in the fact that its language attempts to amend not the current language found in the Insurrection Act, but rather language that existed in the ELRPO that has since been repealed.⁶²

But section 594 is not section 591. Throughout their letters, the governors and adjutants general meld the two sections as if no significant differences exist; they insinuate that the sections operate in tandem to increase the President's powers under the Insurrection Act. But, the sections are separate and distinct.

Granted, if the governors and adjutants general are bent on defeating section 594, then fusing their opposition to section 591 with section 594 is adept advocacy. But regardless of how savvy the move may be, their decision to do so is unfortunate. Melding these two sections muddies the issues. In the end, with a busy Congress, the strategy may cause section 594 to be defeated for misleading reasons.

Section 594 does not touch the language of 10 U.S.C. § 12304(c)(1), which explicitly prohibits § 12304 from being used to activate the Reserve to perform duties authorized under the Insurrection Act, i.e., enforcing the laws. Similarly, section 594 does not, in any way, amend the Insurrection Act.

⁵⁹ See 10 U.S.C. §§ 332, 333.

⁶⁰ See *id.* §§ 331–335.

⁶¹ Pub. L. No. 110-181, § 1068 (Jan. 28, 2008).

⁶² See H.R. 5658, 110th Cong. sec. 591(c) (2008).

Therefore, to say, as the governors and adjutants general did, that section 594 expands the President's powers under the Insurrection Act, one must accept that simply having more military forces in an active status during natural disasters equals expansion of the President's insurrection authorities. For that reason, the governors and adjutants general "strongly oppose" making the assets in the Reserve available to the public during natural disasters—even, presumably, during the most horrific disasters imaginable. All because the President could possibly in the future (but not at the time of activation, given the prohibition under § 12304(c)(1)) use those same forces under the Insurrection Act.

F. Command and Control

As attenuated as the argument above against section 594 appears once stripped away from section 591, it is still missing one piece. The full argument put forward by the states actually throws in another issue, invariably moving the discussion further and further away from the actual issue of whether making the Reserve accessible for natural disaster relief serves the public good.

Specifically, both the governors and the adjutants general hitch their objections against section 594 to the need for Congress to resolve the issue of command and control, when federal forces operate in states during disaster relief operations.

The command and control issue was addressed by the Commission on the National Guard and Reserves (CNGR) in both its second report and its final report. In its second report, the CNGR made a recommendation for DOD to develop protocols that would allow governors to "direct the efforts of federal military assets responding to an emergency such as a natural disaster."⁶³ The DOD rejected this recommendation, and as an alternative began developing protocols for federal forces to provide direct assistance to states.⁶⁴ The direct

⁶³ CNGR SECOND REPORT TO CONGRESS, *supra* note 1, Recommendation 8.

⁶⁴ CNGR FINAL REPORT, *supra* note 3, at 109; *see* Memorandum from Honorable Robert Gates, Secretary of Defense, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Commanders of the Combatant Commands, Assistant Secretaries of Defense, General Counsel of the Department of Defense, Assistants to the Secretary of Defense, Director, Administration and Management, Chief, National Guard Bureau, Chairman, Reserve forces Policy Board,

assistance protocols would allow federal forces to coordinate and respond directly to the states, including the National Guard, while maintaining a federal chain of command over federal troops. In its final report, the CNGR stated that while direct assistance protocols were a “step-forward,” they did not “solve the problem of having two separate chains of command operating within a state.”⁶⁵

This issue of whether federal military forces should be placed under the command and control of governors for disaster relief is not an easy one. It implicates the President’s Article II authorities; it implicates concerns over the proper balance of power between the federal and state governments; and it implicates concerns over possibly violating *Posse Comitatus*.

Moreover, placing federal troops under the command and control of governors modifies the National Response Framework.⁶⁶ Federal military forces are part of an integrated federal response. The Administrator of the Federal Emergency Management Agency (FEMA) has the statutory responsibility to “lead the Nation’s efforts to prepare for, protect against, respond to, recover from, and mitigate against the risk of natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents.”⁶⁷ Placing federal military forces under the control of governors would circumvent this authority and could eviscerate measures the Administrator of FEMA has set forth in ensuring a coordinated federal response.

Mandating that federal forces fall under the command and control of governors also implicates a host of practical concerns. Currently, for Defense Support of Civil Authorities (DSCA),⁶⁸ federal forces primarily fall under the command and control of either United States Northern Command (NORTHCOM) or United States Pacific Command (PACOM).⁶⁹ These commands continuously execute their command and

subject: Implementation of the Recommendations from the Commission on the National Guard and Reserve (10 May 2007) (on file with author).

⁶⁵ CNGR FINAL REPORT, *supra* note 3, at 111.

⁶⁶ See U.S. Dep’t of Homeland Security, National Response Framework (2008), available at <http://www.fema.gov/emergency/nrf/>.

⁶⁷ 6 U.S.C. § 313(b)(2)(A).

⁶⁸ Defense Support of Civil Authorities (DSCA) is a particular form of Civil Support, defined as: “Civil support provided under the auspices of the National Response Plan.” JOINT PUB. 3-28, *supra* note 16, glossary, at 7.

⁶⁹ See *infra* notes 109–110.

control structures during military operations, and also push the structures to their limits during national level exercises in order to achieve higher levels of effectiveness. In that vein, NORTHCOM is currently undergoing a realignment of its command and control structure, and organizing under functional commanders in an effort to leverage expertise as well as consolidate efforts. Stripping federal forces away from these commands the moment catastrophe hits, to potentially any one of fifty-four different jurisdictions,⁷⁰ all with varying degrees of expertise in commanding federal assets, will inevitably create unintended and negative second and third order effects, unnecessarily challenging military operations in ways that would likely outweigh any marginal benefit hoped to be gained from placing all military forces under a state's control.

A shift in command and control of federal forces away from NORTHCOM would also lose the advantage of training synergy that NORTHCOM achieves between its DSCA and Homeland Defense (HD) missions. Currently, NORTHCOM exercises command and control over federal military forces for both missions. This creates a confluence of the DSCA and HD missions, allowing federal forces to quickly transition from one mission to the other, taking full advantage of their training. That is to say, when NORTHCOM exercises its command and control under one mission structure, it naturally trains the same command and control structure needed to execute the other mission. At a time when the threat of terrorism blurs the lines between DSCA and HD, it makes sense to keep a tight nexus between these missions.

For all these reasons, it is unfortunate that the governors and adjutants general have chosen to inextricably link their objection to section 594 to the command and control issue. The governors explicitly admit that the availability of the Reserve during natural disasters would be a "welcomed" change. Given that, where is the necessity to put off that welcomed change for another day? There is no need to delay making relevant assets available to the public during natural disasters, simply because some other structural issue would remain unresolved.

This is especially true given the fact that the command and control issue may be resolved independent of any decision concerning 10 U.S.C. § 12304. For instance, tanking the proposed change to § 12304 will not

⁷⁰ The fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

resolve the command and control issue, either for or against the states. Similarly, even if Congress were to enact the change to § 12304, it would in no way inhibit the options available in resolving the command and control debate.

The issues of amending 10 U.S.C. § 12304 and the command and control issue are also separate and distinct in their measure of import. Barricading relevant Reserve assets from the public during a natural disaster must, in good faith, be considered more egregious than not achieving the perfect model of command and control. This is exemplified by the fact that the AC currently operates within the states side-by-side with National Guard forces during disaster relief, as well as during national security special events, such as the upcoming Democratic and Republican Conventions. There is no reason to believe that these relationships cannot continue to be successful, and even incrementally improve, perhaps even to the point of striking an optimal relationship that serves both federal and state interests. Fixing specific issues as they arise, as opposed to creating a new, theoretical command structure, could possibly be the best approach.

In FY07, the states objected to changing 10 U.S.C. § 12304 for the explicit reason that the National Guard was implicated. In FY09, the proposed change intentionally leaves out the National Guard to appease the states. The states are, however, apparently still unsatisfied; the states have come up with a new reason to object: control.⁷¹

In the end, it will be the public that suffers if Congress continues to wall-off the Reserve from natural disaster relief. Therefore, Congress needs to step forward and rise above the apparent willingness of the states to sacrifice the public good for the sake of winning what essentially boils down to a turf battle. If the Senate wants to *wisely* spend its time on the proposed change to § 12304, then it should spend time on tweaking, not tubing, House Bill 5658, section 594.

⁷¹ It is an ironic hook for the states to hang their objection on, given that the National Guard regularly operates in a Title 32 status under the command and control of the governors, even when conducting missions that have significant federal, security concerns, such as Operation Noble Eagle.

G. Tweaking House Bill 5658, Section 594

While the current proposed change to § 12304 is a good one, it nonetheless has some room for improvement. As passed by the House of Representatives, the bill authorizes the President to invoke the statute for major disasters and emergencies “as those terms are defined . . . [by the Stafford Act].”⁷² The Senate should modify this language slightly.

Instead of specifically referring to the Stafford Act, potentially tying in a host of unintended Stafford Act requirements, or at least risking confusion over the extent to which the Stafford Act must be incorporated, the statute should, instead, explicitly state that the President may invoke the statute’s authorities under “actual, or threat of, serious natural or manmade disasters, accidents, or catastrophe in the United States, its territories and possessions, or Puerto Rico.” While this language may leave room for discretion, it is similar to what the House proposed in the FY07 NDAA, and would nest nicely in the current structure of the statute that already provides the President wide discretion in deciding when to invoke the statute’s authorities.

The breadth of when the President may invoke § 12304 begins with its title and remains consistently broad throughout. In particular, the title states that it was intended for “other than . . . national emergency.”⁷³ The text then immediately buttresses this theme by starting off: “Notwithstanding the provisions of section 12302(a) or any other provision of law, when the President determines”⁷⁴ Given that § 12302 does indeed require the President to first declare a national emergency, there is no question that part of Congress’s intent for § 12304 was to create an authority for the President distinguished by the very fact that it does *not* require any type of declaration, either under the National Emergencies Act or the Stafford Act, as a precondition for the statute to apply.⁷⁵

⁷² See *supra* note 49 and accompanying text. The Stafford Act defines these terms at 42 U.S.C. § 5122(1)–(2).

⁷³ 10 U.S.C. § 12304.

⁷⁴ *Id.*

⁷⁵ This is one aspect that separates 10 U.S.C. § 12304 from 10 U.S.C. § 12302. The latter has never been, and probably never will be, used for natural disaster relief because it implicates the National Guard and it cannot be invoked until after the President actually declares a national emergency—making a timely response by the Reserve a fairly futile concept. See *infra* note 84 and accompanying text.

In current form, § 12304 applies to certain categories of events, such as operations of armed conflict, threats of weapons of mass destruction, or terrorism, “when the President determines that it is necessary to augment the active forces” Any change to § 12304 that expands those categories to include natural disasters and manmade accidents, needs to do so with congruent language that provides the President a nimble, anticipatory tool to employ the Reserve. This is critical given the lead time often required to make the Reserve truly relevant in an unpredictable environment.

H. Summary

Title 10, § 12304 is not currently available for natural disaster response. The House of Representatives has recently passed its version of the FY09 NDAA—House Bill 5658. Section 594 of House Bill 5658 would amend 10 U.S.C. § 12304 in a way that would allow the President to activate the Reserve for natural disasters and emergencies, without involving the potential federalization of the National Guard and without amending the Insurrection Act. The proposal would improve 10 U.S.C. § 12304 as a vital tool for the nation in times of great need. The state governors and adjutants general have come forward in an attempt to stop this change. But, the Senate needs to look past the states’ attempt to use section 594 as leverage to defeat a separate proposed amendment to the Insurrection Act (section 591) and to resolve the separate issue of command and control. That is, the Senate needs to act in the best interest of the nation by voting for section 594, but only after slightly modifying its language.

The Senate should modify section 594 by eliminating the reference to the Stafford Act and replacing it with explicit language that states that the statute applies to natural disasters/emergencies, manmade accidents, and when the President deems there is a threat of these situations. This slight change would avoid unnecessarily raising questions concerning the extent to which external statutes, such as the Stafford Act, apply. The entire Congress should then enact the proposal with this change.

But, because the Senate might buckle once again under the pressure exerted by the states, the remainder of this article will focus on alternative executive options to activate the Reserve for natural disaster response.

IV. Executive Limited Authorities for Involuntary Mobilization

A. Introduction

Currently, there are only two statutes that provide authority to involuntarily mobilize the Reserve for natural disaster response. The first is 10 U.S.C. § 12301. It essentially has two potential provisions for involuntary mobilization. Title 10, § 12301(a) provides authority for a full mobilization; 10 U.S.C. § 12301(b) is limited to fifteen days, typically used for annual training but also available for operations. The second statute is 10 U.S.C. § 12302, Partial Mobilization. Each statute will be separately addressed.

B. Full Mobilization

Full mobilization of all Reserve Component (RC) forces is authorized under 10 U.S.C. § 12301(a). Before the President can invoke full mobilization, Congress must first declare war or a national emergency. There is no limit on the number of personnel that may be mobilized under this authority, and the duration of mobilization may last up to the duration of the war/national emergency, plus six months.⁷⁶ World War II was the last time this authority was invoked, and it has *never* been used for a purely natural disaster response. Nonetheless, nothing explicit in the statute prohibits full mobilization to respond to natural disasters. By the plain language of the statute, full mobilization is available for national emergencies when so declared by Congress; there is no qualifying language limiting the mobilization to any particular type of emergency.

C. Fifteen Day Authority

In addition to full-mobilization authority, 10 U.S.C. § 12301(b) authorizes the Service Secretaries to involuntarily call RC personnel to duty for up to fifteen days a year. This authority may be used to call RC personnel to annual training.⁷⁷ The legislative history of this paragraph

⁷⁶ 10 U.S.C. § 12301(a).

⁷⁷ See U.S. DEP'T OF ARMY, REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS para. 1-11(a)(6) (30 June 1999). A

indicates it was intended only to be used for training and not for operational missions.⁷⁸ “As a practical matter, however, the two-week . . . requirements are interpreted broadly and used for both training and operational mission requirements.”⁷⁹

Accordingly, while legislative intent may have initially indicated that the authority was meant for training, the statute’s language does not explicitly limit its use to training. Current DOD policy agrees. The new DOD Instruction 1215.06, paragraph 6.1.4.1.2 begins by stating that “[t]he primary purpose of [Annual Training (AT)] is to provide individual and/or unit readiness training.”⁸⁰ But immediately after announcing AT’s main purpose as training, the instruction further states that “AT *may* provide support to AC missions and requirements.”⁸¹ And nothing excludes natural disaster response from the realm of permissible operational missions under this authority. The Reserve may, therefore, be ordered to active duty for the fifteen-day AT period to perform natural disaster response, so long as the unit has not already expended this time on other active duty training.⁸² There is also no requirement for a national emergency declaration prior to using 10 U.S.C. § 12301(b). In fact, 10 U.S.C. § 12301(b) starts off: “[a]t any time”⁸³ to refer to its applicability.

The fifteen-day limit of 10 U.S.C. § 12301(b) is, however, an explicit and unambiguous boundary. After fifteen days, time runs out, hereby significantly circumscribing its utility for natural disasters. For floods or hurricanes, fifteen days may be enough. If, on the other hand, a pandemic influenza or similar long-lasting calamity exists, fifteen days would only serve as an initial authority to mobilize the Reserve, necessitating follow-on authority for longer periods, such as 10 U.S.C. §

potential separate authority for Annual Training (AT) is 10 U.S.C. § 12301(d). *See* DODI 1215.06, *supra* note 19, paras. 6.1.4, 6.1.4.1.2.

⁷⁸ Captain L. Dow Davis, *Reserve Callup Authorities: Time for Recall?*, ARMY LAW., Apr. 1990, at 4, 8.

⁷⁹ *Id.*

⁸⁰ DODI 1215.06, *supra* note 19, para. 6.1.4.1.2.

⁸¹ *Id.* (emphasis added).

⁸² The Army Reserve AT period is actually fourteen days (exclusive of travel time). *See* DODI 1215.06, *supra* note 19, para. 6.1.4.1.2. For the National Guard, the AT period is fifteen days, including travel. *See id.* para. 6.1.4.1.2. While 10 U.S.C. § 10147(a)(1) requires the Reserve to conduct Active Duty Training (ADT) for at least fourteen days, § 10147(a)(2) allows up to thirty days of ADT per year. *Id.*

⁸³ 10 U.S.C. § 12301(b) (2000).

12302, discussed immediately below, or 10 U.S.C. § 12301(d), discussed in Part V, below.

D. Partial Mobilization

Partial Mobilization is the President's authority "in times of national emergency declared by the President,"⁸⁴ that enables the President to mobilize up to one million RC personnel, not to exceed twenty-four months. More likely to be invoked than full mobilization, it provides authority for support longer than the fifteen days under 10 U.S.C. § 12301(b). But with history as a guide, this statute is more of a safety net than a workhorse for natural disasters.

It is a safety net because it has *never* been used to mobilize RC personnel for a natural disaster response and it likely will never be used for natural disasters. Three reasons account for its lack of relevancy: (1) partial mobilization signals grave circumstances, so much so, Presidents invoke it only when absolutely necessary; (2) it implicates the National Guard; and (3) it requires the President to actually declare a national emergency under the National Emergencies Act⁸⁵ before mobilization may occur, reducing its ability to provide a timely response from the Reserve.

Prior to Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), political considerations have inhibited Presidents from readily activating RC personnel under 10 U.S.C. § 12302 for international matters. Presidents have been wary of unnecessarily escalating tensions in the international arena, which partial mobilization tends to signal.⁸⁶

These same concerns apply domestically. If the President declares an emergency, followed by a partial mobilization, states may become wary. States could interpret the action as federal overreacting or

⁸⁴ *Id.* § 12302.

⁸⁵ 50 U.S.C. § 1601–1651 (2000).

⁸⁶ See Davis, *supra* note 78, at 10 (suggesting that the limited historical use of § 12302 up to 1990 was due to the fact that Presidents were reluctant to invoke it because the act could be interpreted internationally as escalating tensions). The concept of partial mobilization being politically sensitive in the international realm is expanded in this article to highlight its similar potential to create tensions between the states and the federal government.

muscling-in. State governments may also be concerned about a potential public perception of state ineptitude. This is especially true given that Partial Mobilization would enable the President to federalize the National Guard, taking the National Guard away from the governors and placing them under the President's command and control, precisely when the governors would need to demonstrate leadership, effective command, and ultimately, success.

Lastly, 10 U.S.C. § 12302 begins: "In time of national emergency declared by the President" ⁸⁷ Lacking is any anticipatory authorization, explicitly or by reference, for the President to mobilize the Reserve prior to declaration. This renders the statute ineffective for natural disaster response. The Reserve requires time to respond; it is the nature of the Reserve as an entity that resides primarily in a non-active duty status. Delaying mobilization until after declaration of a national emergency hamstring the President from employing the Reserve effectively.

In addition, because 10 U.S.C. § 12302 requires an emergency declaration, it is contingency specific. Typically, it is used for contingency operations such as OEF and OIF.⁸⁸ While members who

⁸⁷ See 10 U.S.C. § 12302(a).

⁸⁸ On 14 September 2001, President Bush issued Executive Order (EO) 13,223 declaring a national emergency by reason of the terrorist attack on 11 September 2001, and delegated authority to the Secretary of Defense and the Secretary of Transportation (later changed from the Secretary of Transportation to the Secretary of Homeland Security) to order "any unit, and any member of the Ready Reserve . . . to active duty for not more than 24 consecutive months." While EO 13,223 does not explicitly reference 10 U.S.C. § 12302, the language was taken directly out of 10 U.S.C. § 12302. Moreover, the Secretary of Defense re-delegated this authority to the Service Secretaries, specifically citing 10 U.S.C. § 12302. See Memorandum from the Honorable Donald Rumsfeld, Secretary of Defense, to Secretaries of the Military Departments and Chairman of the Joint Chiefs of Staff, subject: Partial Mobilization (World Trade Center and Pentagon Attacks) and Redlegation of Authority Under Title 10, United States Code, Sections 123, 123a 527, 12006, 12302, and 12305 (Sept. 14, 2001 & Oct. 13, 2001) (on file with author). The total number of Ready Reserve personnel authorized to be mobilized under 10 U.S.C. § 12302 is one million. Executive Order 13,223 is still in effect. The President issued it under the authority of the National Emergencies Act (50 U.S.C. § 1601-1651). Title 50, § 1622(d) requires presidential declarations of national emergencies to terminate after one year from proclamation, unless extended by the President via publication in the *Federal Register*. The President has done so, most recently with a statement signed by the President on 12 September 2007. See 72 Fed. Reg. No. 177, FR Doc. 07-4593 (Sept. 12, 2007). This authority, therefore, is still available to mobilize RC personnel when the purpose of mobilization concerns terrorism

were initially mobilized for OEF and OIF under 10 U.S.C. § 12302 may subsequently be used for natural disaster response once on active duty,⁸⁹ the President cannot further mobilize RC personnel under the OEF or OIF Executive Order (EO) for natural disaster response.⁹⁰ To activate additional RC personnel specifically for natural disaster response, the President would need to declare a national emergency specific to the natural disaster and issue a new executive order activating the RC personnel.⁹¹

V. Volunteering—Fertile Ground for Cultivation

A. In General

One way to make the Reserve available for natural disaster response is to ask its members to volunteer. Although this sounds unconventional, it actually works. Volunteers from the RC deployed during Just Cause in Panama, Operation Uphold Democracy in Haiti and Desert Shield and Desert Storm in the Persian Gulf and continue to volunteer today for the Global War on Terror.⁹²

The Air Force and Army Secretaries have taken this volunteer activation system to a unique level concerning National Guard forces. Specifically, the Secretaries use voluntary activation as a method to activate National Guard Airmen/Soldiers with very little advance notice to conduct some of this nation's most important homeland defense missions. The Air Guard uses "hip pocket orders" to conduct the Mobile Command and Control mission for NORTHCOM,⁹³ and to fly air sovereignty missions to secure North America (Operation Noble Eagle)

by groups related to the terrorist attacks on the World Trade Center, i.e., groups related to the Al Qaeda Network.

⁸⁹ See 10 U.S.C. § 12314.

⁹⁰ See 50 U.S.C. § 1621.

⁹¹ If this is done, the Reserve officers activated for disaster would not affect strength ceilings in senior grades. 10 U.S.C. § 527 authorizes the President, in times of war and national emergency, to suspend the provisions of 10 U.S.C. §§ 523, 525 and 526. 10 U.S.C. § 527.

⁹² See JOINT CHIEFS OF STAFF, JOINT PUB. 4-05, JOINT DOCTRINE FOR MOBILIZATION PLANNING (22 June 1995) [hereinafter JOINT PUB. 4-05].

⁹³ The Wyoming Air National Guard 153rd Command and Control Squadron (CACS) performs the Mobile Command and Control mission for NORTHCOM. See *infra* notes 109–110 and accompanying text (providing more information on NORTHCOM).

for the North American Aerospace Defense Command (NORAD).⁹⁴ Just prior to these missions, Air National Guard members perform their duties in a Title 32 status. They then voluntarily transition into a Title 10 status upon the occurrence of some pre-designated event or type of mission or situation.

The mechanics of transitioning National Guard personnel from Title 32 to Title 10 status occurs under 10 U.S.C. § 12301(d) and starts with the Service Secretaries. For instance, with the ONE mission, the Secretary of the Air Force has delegated authority to activate “those members of the Air National Guard who have volunteered to perform federal active service in furtherance of the federal mission” to the Chief of Staff of the Air Force.⁹⁵ The Chief of Staff of the Air Force has in turn delegated this authority to the Commander, Air Combat Command,⁹⁶ and the Commander of Air Combat Command has further delegated the authority to the Commander, First Air Force.⁹⁷

Similarly, the Army Guard uses the same method to conduct the U.S. Ballistic Missile Defense System (BMDS) mission by voluntarily transferring its members from Title 32 to Title 10 upon entering a BMDS facility.⁹⁸ And, like the delegation explained above for ONE missions,

⁹⁴ NORAD is a bi-national command established in 1958 between the United States and Canada. It is located at Peterson Air Force Base, Colorado Springs, Co. The commander is a four-star U.S. general and the deputy commander is a three-star Canadian general. The mission of NORAD has evolved slightly since its inception. The original mission was “to provide a common defense from an air and strategic missile attack from the former Soviet Union.” See Colonel Mark P. Fitzgerald, *NORAD, Bi-National Relations, and the Future* (Aug. 2007) (unpublished manuscript) (on file with author). Today, its mission has expanded to include the following three areas: Aerospace Warning, Aerospace Control, and Maritime Warning. See *id.*

⁹⁵ Memorandum from James G. Roche, Secretary of the Air Force, Order, subject: Delegation of Air National Guard Re-Call Authority (June 11, 2003) (on file with author).

⁹⁶ See Memorandum from General John P. Jumper, Chief of Staff, Department of the Air Force, to Major Commands, subject: Re-delegation of Authority to Order Air National Guard Members to Federal Active Service Pursuant to Secretary of the Air Force Order (SAFO) 306.1 (June 5, 2003) (on file with author).

⁹⁷ See Memorandum from General Hal M. Hornburg, Commander, Air Combat Command, subject: Redelegation of Authority to Order Air National Guard Members to Federal Active Service Pursuant to Chief of Staff Redelegation, 5 June 2003 (7 Jan. 2004) (on file with author).

⁹⁸ See K. SCOTT McMAHON, WITH LIEUTENANT COLONEL STEPHEN DALZELL (U.S. ARMY), RAY CONLEY, & ROLAND YARDLEY, U.S. STRATEGIC BALLISTIC MISSILE DEFENSE: OPTIONS FOR RESERVE COMPONENT SUPPORT 7 (Rand Corp. Technical Report, Sept. 2004), http://www.rand.org/pubs/technical_reports/2005/RAND_TR140.pdf; see also

the Secretary of the Army has delegated the authority to activate Army National Guard members to the Commander, United States Strategic Command (STRATCOM) for BMDS missions.

Under 10 U.S.C. § 12301(d), the governor of the applicable state must agree to activate a Guard member. Obtaining the governor's consent, like obtaining the proper delegation authorities from the Service Secretaries, is best done in advance. Typically, as with ONE, Mobile Command and Control and the BMDS missions, governors express their consent in a Memorandum of Agreement.

The intent behind the memorandum of agreement is to standardize procedures and lay common ground for expectations, creating a degree of comfort and trust that the procedures will work when national security is at stake. Memorandums of Agreement (MOAs) in the past have typically included an agreement by the governors that the primary mission for the designated unit is the federal mission. And for the ONE mission, the agreements have also included a specific provision designating the Commander, First Air Force, as the individual who orders the members into active duty for the purpose of conducting homeland defense missions.

The individual members must also agree to activation under 10 U.S.C. § 12301(d). Consent of military members, of course, is an inherently retractable concept. To ensure stability in the units that depend on the voluntary activation of its members to perform important federal missions, units have generally required the individual members to sign a written agreement.⁹⁹ The agreement should set forth the trigger

Memorandum of Agreement Between National Guard Bureau and U.S. Army Space and Missile Defense Command/U.S. Army Forces Strategic Command and the State of Colorado and the State of Alaska, subject: Concerning the Implementation of the Ground-Based Midcourse Defense Manning Model (Dec. 21, 2007) (on file with author). There are a couple of potential caveats with the volunteer system. One, the response time of the Soldiers will depend on their physical proximity to their unit. Some Army Reservists come from afar to drill with their units. And two, so far, the missions mentioned are ones typically understood in the military community as being enjoyable—"hooah" if you will. If the situation were pandemic influenza, or a CBRNE situation, the experience could differ. In other words, there is a danger that the members would be less willing to go forward with their volunteer duty in a situation with a communicable disease or CBRNE threat. These missions, generally speaking, could create anxiety different from more conventional missions (and understandably so).

⁹⁹ See Memorandum of Agreement between the Governor of Colorado, Commander First Air Force, and Commander, Continental United States NORAD Region, subject:

that initiates active duty, and should also require the member to give at least forty-eight hours advance notice of intent to withdraw consent. Units conducting the Mobile Command and Control mission, ONE, and BMDS all use MOAs that contain this forty-eight hour advance notice requirement. It has proved to be an adequate measure to ensure availability.

As seen from above, the concept of hip-pocket orders has worked, and continues to work, with the National Guard. It works because the National Guard has taken the time to plan for, and work thorough, the necessary steps for success. With some effort, the Reserve can do the same.

In fact, the hip-pocket orders process can be much easier for the Reserve. For instance, the Reserve process requires one less step than the National Guard in that no gubernatorial consent is required. In addition, there are other considerations inherent to hip-pocket-orders that have not yet been mentioned. Primarily, these considerations stem from the fact that 10 U.S.C. § 12301(d) activates *individuals*, not units. This subtle aspect of the statute implicates funding, equipment, and command and control issues. But these issues are primarily associated with the National Guard transitioning from a state status to a federal status.¹⁰⁰

For the purposes of this article and the use of hip-pocket orders for the Reserve, the issues of funding, equipment, and command and control are always under Title 10. Service Secretaries, therefore, possess the authority to shift funds, authorize the use of equipment, and designate appropriate command and control relationships as needed for the hip-pocket authority to fulfill its desired intent.¹⁰¹

Providing Governor's Consent to Voluntary Federal Military Active Duty (draft) app. A (Dec. 21, 2005) (on file with author).

¹⁰⁰ How the National Guard negotiates its way through these issues is beyond the scope of this article. Suffice to say, the National Guard is able to shift funds, keep control of equipment, and achieve unit integrity using the hip-pocket order scheme when it wants to. Cases in point: Mobile Command and Control mission, ONE, and the BMDS. As for the equipment, the National Guard equipment is primarily federally owned and accountable under the United States Property and Fiscal Officer (USPFO)—a Title 10 officer. Using the equipment upon transitioning into Title 10, therefore, is simply a matter of proper planning and maintaining proper accountability.

¹⁰¹ See U.S. DEP'T OF DEFENSE, DIR. 1225.6, EQUIPPING THE RESERVE FORCES (7 Apr. 2005). At paragraphs 4.3.1 and 4.3.2, the Service Secretaries have an obligation to ensure that units *and* Reserves are equipped properly to accomplish operational objectives when mobilized under 10 U.S.C. § 12301(d). *Id.* paras. 4.3.1, 4.3.2. In

The Reserve already uses 10 U.S.C. § 12301(d) to conduct a multitude of tasks under what used to be called Active Duty Special Work (ADSW), now called Active Duty for Operational Support (ADOS).¹⁰² It would be a small step for the Reserve to go from its current practice of using § 12301(d) in performing miscellaneous projects and missions under ADSW/ADOS, to using the same authorities in combination with hip-pocket orders to pre-designate relevant members and equipment that would be ready for rapid activation and response to natural disasters.

B. Greensburg, Kansas

At approximately 9:45 p.m., 4 May 2007, an F5 tornado, the rating reserved for tornadoes that pack devastating winds in excess of 200 miles per hour,¹⁰³ slammed into the small town of Greensburg, Kansas (population 1500). The tornado killed nine people and destroyed 95% of the town's infrastructure.¹⁰⁴ Kansas Governor Kathleen Sebelius requested, and President Bush granted, a federal major disaster

addition, DODI 1235.12 recognizes a "Volunteer Unit" utilizing 10 U.S.C. § 12301(d). "Volunteer Unit. One or more individual volunteers, organized to perform a particular function whether or not such a unit is part of a larger group, who has consented to perform an active duty mission." DODI 1235.12, *supra* note 18, para. E2.1.18.

¹⁰² See Memorandum from David S. C. Chu, Under Sec'y of Def., to Secretaries of Military Departments, et al., subject: Operational Support Duty—Update (Jan. 29, 2007) [hereinafter Operational Support Memorandum] (including attachment). "Operational Support" is defined as "active duty, other than Active Guard and Reserve duty, under § 12301(d) of Title 10, U.S.C.; full-time National Guard duty, other than Active Guard and Reserve duty, under § 502(f)(2) of Title 32, U.S.C.; and active duty, including active duty for training or full-time National Guard duty performed at the request of an organizational or operational commander, or as a result of reimbursable funding." *Id.* at attachment; see also DODI 1215.06, *supra* note 19, para. 6.1.4.2.1. The authority to use Operational Support under 10 U.S.C. § 12301(d) comes from DODI 1215.06. *Id.* para. 6.1.4.2. It permits the use of 10 U.S.C. § 12301(d) for Active Duty Other than for Training (ADOT). *Id.* para. 6.1.4.2 states that ADOT is a "category of AD [Active Duty] used to provide RC [Reserve Component] support to either AC [Active Component] or RC missions. *Id.* It includes the categories of ADOS (formerly active duty for special work (ADSW)) . . ." *Id.* The Operational Support Memorandum, replaces ADSW with Operational Support.

¹⁰³ See Richard A. Lovett, *How Kansas Tornado Became a Monster*, NAT'L GEOGRAPHIC NEWS, May 8, 2007, <http://news.nationalgeographic.com/news/2007/05/0705-08-tornado-kansas.html>.

¹⁰⁴ See CNN.com, <http://www.cnn.com/2007/WEATHER/05/07/severe.weather/index.html> (last visited Aug. 6, 2008).

declaration for Kiowa County, triggering the Stafford Act and enabling the federal government to provide disaster assistance.¹⁰⁵

Almost immediately, Governor Sebelius began to claim that the Iraq war, and in particular the deployment of Kansas National Guardsmen were negatively affecting the state's ability to adequately respond. Specifically, Governor Sebelius stated: "I don't think there is any question if you are missing trucks, Humvees and helicopters that the response is going to be slower. The real victims here will be the residents of Greensburg because the recovery will be at a slower pace."¹⁰⁶

When the tornado hit, the Kansas Army National Guard had only about 60% of its equipment on hand, with its UH-60 helicopter unit deployed to Iraq.¹⁰⁷ But although the Kansas Army Guard helicopters were deployed overseas, an Army Reserve Aviation unit, B Company, 7-158th Aviation, with CH-47 Chinook heavy-lift helicopters, was located in Olathe, Kansas. Olathe is only about 282 miles away—less than a three-hour flight for those helicopters.¹⁰⁸

Shortly after Governor Sebelius's allegations that the lack of Guard equipment would negatively affect the recovery, the federal government pushed back, refuting the claim and offering assistance. Governor

¹⁰⁵ Press Release 07-061, Kansas Adjutant General, Kansas Receives Presidential Disaster Declaration (May 6, 2007), *available at* <http://www.kansas.gov/ksadjutantgeneral/News%20Releases/2007/07-061.htm>.

¹⁰⁶ Jennifer Loven, *Administration, Sebelius Back Off Argument Over National Guard*, LAWRENCE JOURNAL-WORLD, May 9, 2007, *available at* http://www2.ljworld.com/news/2007/may/09/administration_sebelius_back_argument_over_national/. Later, Governor Sebelius backed away from her claims that the National Guard deployments were slowing the state response. Specifically, Governor Sebelius's spokeswoman, "Nicole Corcoran, said the governor didn't mean to imply that the state was ill-equipped to deal with this storm. Sebelius' comments about National Guard equipment were instead meant as a warning, she said." *Id.*

¹⁰⁷ See Sergeant Sara Wood, *National Guard Responds to Kansas Tornado*, AM. FORCES PRESS SERV., May 7, 2007, *available at* <http://www.defenselink.mil/news/newsarticle.aspx?id=33080>. The Kansas National Guard Aviation unit deployed was the 1st Battalion, 108th Aviation Regiment, a unit with fifteen UH-60 Blackhawk helicopters, which deployed to Iraq in September 2006 and did not return from Iraq until September 2007. See Press Release 07-152, Kansas Adjutant General's Department, Kansas National Guard 1st Battalion, 108th Aviation Regiment Returning Home Sept. 14 (Sept. 12, 2007), *available at* <http://www.kansas.gov/ksadjutantgeneral/News%20Releases/2007/07-152.htm>.

¹⁰⁸ See 7-158th Aviation Battalion, <http://www.globalsecurity.org/military/agency/army/7-158avn.htm> (last visited Aug. 6, 2008).

Sebelius cooled her anti-war focus and ended up never requesting federal military aviation. But if she had, a salient question would have been: was B Company, 7-158th ready? Almost certainly the unit was mission ready. But was it positioned to activate, and if so, how, under what authority? Although the Stafford Act does provide for substantial federal assistance to local authorities, it does *not* activate the Reserve.

As previously discussed, with minimal planning the unit could have been prepared to use hip-pocket orders. The process does not involve a complicated formula and may be the only realistic way to nest the Reserve assets, like B Company, 7-158th, in current Civil Support operational planning to provide DSCA.

C. DSCA EXORD

United States Northern Command¹⁰⁹ is the primary federal military command for DSCA to the Continental United States, Alaska, the Virgin Islands, and Puerto Rico.¹¹⁰ Within those areas, NORTHCOM holds primacy over all other combatant commands (COCOMs) when it comes to performing DSCA, and other COCOMs may support NORTHCOM to help NORTHCOM accomplish its mission. In turn, NORTHCOM's

¹⁰⁹ United States Northern Command (NORTHCOM) was authorized by President George W. Bush on 17 April 2002. It is the first Combatant Command established by the Department of Defense (DOD) that includes the continental United States in its area of responsibility (AOR). Specifically, NORTHCOM's AOR includes air, land, and sea approaches of the continental United States, Alaska, Canada, Mexico, and the surrounding water out to approximately 500 nautical miles. It also includes the Gulf of Mexico and the Straits of Florida. The defense of Hawaii and our territories and possessions in the Pacific is the responsibility of PACOM. The defense of Puerto Rico and the U.S. Virgin Islands is the responsibility of U.S. Southern Command (SOUTHCOM). The commander of NORTHCOM is responsible for theater security cooperation with Canada and Mexico. NORTHCOM is responsible for the DOD missions of homeland defense and civil support within its AOR. Although it has few permanently assigned forces, NORTHCOM receives operational control over units designated by the Secretary of Defense, primarily through Joint Forces Command, whenever necessary to execute missions. See About U.S. Northern Command, <http://www.northcom.mil/About/index.html> (last visited Aug. 6, 2008).

¹¹⁰ PACOM is the supported COCOM for DSCA in Hawaii. SOUTHCOM is the supported COCOM for DSCA within its area of responsibility, with the exception of natural disasters (and only natural disasters, unless the Secretary of Defense makes a formal change) occurs in the U.S. Virgin Islands and Puerto Rico, which belongs to NORTHCOM.

primary mission in DSCA is to support the lead federal agency—the Department of Homeland Security (DHS), acting through FEMA—to provide an integrated and coordinated federal response in support of local, state, and tribal responders, including the National Guard.¹¹¹ The overall goal for NORTHCOM, and the entire integrated federal response, is to help the state, local, and tribal authorities achieve success.

NORTHCOM executes its DSCA missions under orders from the Secretary of Defense through the Chairman of the Joint Chiefs of Staff. These orders are known as execute orders (EXORDs). For DSCA, there is a standing Joint Staff EXORD¹¹² that the Joint Staff may update each year, typically just before the summer hurricane season. Under this Joint Staff standing DSCA EXORD, NORTHCOM deploys and employs units to disasters for DSCA using a four-category system. Category One involves forces assigned to NORTHCOM and allows the NORTHCOM Commander to *deploy* those forces to the Joint Operation Area (JOA) upon notification to the Chairman, Joint Chiefs of Staff (CJCS) and the Secretary of Defense (SecDef).¹¹³ Category Two involves a package of assets, pre-identified by type (e.g., up to eight Utility Aviation Light/Medium and up to four Medium/Heavy Lift helicopters), that U.S. Joint Forces Command (JFCOM) is required to source once

¹¹¹ Under federal statutory authority, the Administrator of FEMA has responsibilities to “lead the Nation’s efforts to prepare for, protect against, respond to, recover from, and mitigate against the risk of natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents.” 6 U.S.C. § 313(b)(2)(A) (2000). The Administrator of FEMA also has the duties to: “provide funding, training, exercises, technical assistance, planning, and other assistance to build tribal, local, State, regional, and national capabilities (including communications capabilities), necessary to respond to a natural disaster, act of terrorism, or other man-made disaster.” *Id.* § 313(b)(2)(G). Under policy, specifically, the Homeland Security Presidential Directive (HSPD-5), the President designated the Secretary of Homeland Security as the “principal Federal official for domestic incident management.” U.S. DEP’T OF HOMELAND SECURITY, PRESIDENTIAL DIR. HSPD-5, MANAGEMENT OF DOMESTIC INCIDENTS (Feb. 28, 2003). In addition, HSPD-5 establishes that the Secretary of Homeland Security will establish and conduct consequence management under a National Response Plan (NRP), now known as the National Response Framework (NRF), through a National Incident Management System (NIMS). *Id.* paras. 16 and 15, respectively. HSPD-5 states that the “Secretary of Defense shall provide military support to civil authorities for domestic incidents as directed by the President or when consistent with military readiness and appropriate under the circumstances and the law.” *Id.* para. 9.

¹¹² JOINT CHIEFS OF STAFF EXECUTE ORDER, DOD SUPPORT OF CIVIL AUTHORITIES 2008 (28 May 2008) [hereinafter DSCA EXORD] (on file with author).

¹¹³ *Id.* para. 4(a). The NORTHCOM Commander can employ Tier 1 forces upon receipt of a Request for Assistance, validation, and notification to Chairman, Joint Chiefs of Staff (CJCS) and Secretary of Defense.

NORTHCOM sends a request to place those assets in a status referred to as “Prepare To Deploy Orders” (PTDO).¹¹⁴

The third category involves “Resources For Internal Use.”¹¹⁵ A mobile public affairs detachment is an example of a Category Three asset. The unique aspect of this category is that its assets may be deployed and employed without a Request for Assistance (RFA).¹¹⁶

Category Four forces are “Large-Scale Response Resources”¹¹⁷ for disasters, such as Hurricane Katrina and the 2004 Asian Tsunami, that would inevitably overwhelm state resources, including the National Guard and the EMAC process. Under Category Four, the Secretary of Defense must approve prepare-to-deploy orders, deployment, and employment of forces. For any support that does not fall within Categories One through Four, a standard RFA process occurs. The defense coordinating officer (DCO) receives an RFA from the Primary Agency (PA), validates it and sends it to NORTHCOM with a recommendation. NORTHCOM reviews the RFA and forwards it, with a recommendation, to the Joint Staff and the Joint Director of Military Support (JDOMS). The JDOMS reviews the request and then sends it to the Secretary of Defense Executive Secretariat and the Office of the Assistant Secretary of Defense for Homeland Defense and America’s Security Affairs (OASD (HD/ASA)) for review and Secretary of Defense decision. Once the Secretary of Defense approves the request, JFCOM sources the requirement with an appropriate unit.¹¹⁸

A hip-pocket approach is the most viable option for the Reserve to fit into this DSCA EXORD scheme, as the Greensburg, Kansas example demonstrates. An EXORD, as with the Stafford Act, does not activate the Reserve, not even those units that possess the types of assets identified in the EXORD. So, unless the President invokes a partial mobilization, the individual members must voluntarily activate before assets such as B Company, 7-158th can be activated for a natural disaster. This takes time—time normally not available in disaster situations. But alleviating the time burden only requires some planning.

¹¹⁴ *Id.* para. 4(b).

¹¹⁵ *Id.* para. 4(c).

¹¹⁶ *Id.*

¹¹⁷ *Id.* para. 4(d).

¹¹⁸ *Id.* para. 10(b).

For the future, NORTHCOM, JFCOM, and the Joint Staff could, and should, ensure in advance that all Reserve units possessing assets designated for Tier 2, e.g., helicopters, possess hip-pocket orders. In addition, *all* Reserve units possessing unique capabilities that are likely to be needed in times of natural disasters should ready themselves for quick activation via hip-pocket orders.

D. Strength Limits

When using the Reserve in a volunteer active duty status, there are few concerns about strength limits. Although the Reserve forces activated in this fashion would count against the applicable Reserve Component operational support strength limits, they would not be counted toward the active duty end strength so long as the active duty orders do not specify a period greater than three years, and so long as the actual active duty period does not exceed three years (1095 days) out of the previous four years (1460 days).¹¹⁹

E. Volunteering Wrap-Up

As this article explains, combining the § 12301(d) authority with the practice of hip-pocket orders provides the Reserve with a potential activation mechanism that is calculated, measured, responsive, and flexible. It further provides the requisite longevity to ensure mission accomplishment without negatively impacting end strength. Moreover, hip-pocket orders fit within the DSCA EXORD framework. But for the system to work, prior planning is a must. As the saying goes, there is no time like the present. Even assuming that military leaders implement planning for hip-pocket orders, it is still important to understand several other options that provide authority for Reserve support in time of natural disaster.

¹¹⁹ Before being rescinded, 10 U.S.C. § 115(h)(6) required that reserve components performing ADSW/Operational Support for more than 180 days must be counted as part of end strength for the total force. Congress saw this as an undue limitation on the Reserves and therefore in the National Defense Authorization Act of 2005 changed the 180 day limitation to a limit of 1095 days out of 1460 days (three out of four years). *See* National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, §§ 415, 416, 118 Stat. 1811 (2004); *see also* Operational Support Memorandum, *supra* note 102; DODI 1215.06, *supra* note 19, para. 6.1.4.2.1.7.

VI. Miscellaneous Authorities & Piggy-Backing

A. General

The immediate response authority (IRA) and mutual aid agreements for firefighting support are two other sources that provide a limited authority for the Reserve to provide support for natural disasters. These authorities may be coupled with, or placed on top of, other authorities to initially justify as well as extend the time permitted for support.¹²⁰

B. Immediate Response Authority

Immediate response authority permits a commander to take “immediate actions in response to requests from domestic civil authorities in order to save lives, prevent human suffering, or mitigate great property damage.”¹²¹ It is a limited authority that originates from two sources: the common law concept of necessity,¹²² and historical precedent.¹²³ Department of Defense policy now explicitly authorizes IRA, specifically Department of Defense Directives 3025.1 and 3025.15.¹²⁴ Under both directives, the essence of IRA is that the situation must be imminent, where delay would result in harm or damage, and local civil authorities are unable to adequately respond. A request for IRA from civil authorities, therefore, generally should come within the first twenty-four hours of the emergency.¹²⁵

The specific standards for invoking IRA are as follows: (1) civil authorities request assistance; (2) civil authorities are unable to adequately respond; (3) the situation is imminent with life or property in

¹²⁰ This concept is referred to as “piggy-backing” and “tacking” in this article. *See infra* text accompanying note 144.

¹²¹ Memorandum from Paul Wolfowitz, Deputy Sec’y of Defense, to Secretaries of the Military Departments et al., subject: Reporting “Immediate Response” Requests from Civil Authorities (Apr. 25, 2005) [hereinafter Wolfowitz Memorandum, Immediate Response] (on file with author); *see also* DOD DIR. 3025.16, *supra* note 29, paras. 4.5, 4.7.1.

¹²² *See* Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at 3, 5 (citing *Mitchell v. Harmony*, 59 U.S. 115 (1851)).

¹²³ *Id.*

¹²⁴ U.S. DEP’T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (18 Feb. 1997) hereinafter DOD DIR. 3025.15].

¹²⁵ *Id.* at 7.

peril; (4) there is no time to obtain prior approval from higher headquarters;¹²⁶ and (5) assistance is provided on a cost-reimbursable basis (but should not be delayed or withheld due to funding).¹²⁷ Department of Defense Directive 3025.1 explicitly refers to the “local military commanders and responsible officials of other DOD Components” as being authorized to take action under IRA. At least one commentator has interpreted “local” not so much as limiting support from only a commander/official in the immediate area of the disaster, but rather to the closest commander/official that possesses the requested assets.¹²⁸ For instance, immediately after the Oklahoma City bombing, commanders from Fort Sill and Tinker Air Force Base responded with assets.¹²⁹

In addition to the above requirements, commanders executing an IRA mission must notify the National Military Command Center (NMCC) through their chain of command within two hours of responding.¹³⁰ When conducting an IRA mission, commanders must remain cognizant that the Posse Comitatus Act continues to apply to Title 10 forces. In addition, prior to deciding to support a request for immediate assistance, commanders must assess the following six criteria: legality, lethality, risk, cost, appropriateness, and readiness.¹³¹ Lastly, the support is not indefinite and should end as soon as local, state, tribal or other federal entities under proper authority are able to take over the mission. The general rule is that IRA should last no more than seventy-two hours,¹³² and arguably, in no case should it last more than ten days¹³³

¹²⁶ With today’s rapid communications, available in all but the worst disasters, one must honestly ask just how many situations where Immediate Response Authority is invoked actually meet the requirement that it is used only when there is no time for higher headquarter approval. If the 2007 Southern California wildfires are a barometer for the future, the military may be taking a fairly aggressive approach to invoking IRA, resulting in its increased use.

¹²⁷ DOD DIR. 3025.16, *supra* note 29, paras. 4.5; 4.7.1; *see also* Lieutenant Colonel Mary J. Bradley & Major Kathleen V.E. Reder, *They Asked, But Can We Help? A Judge Advocate’s Guide to Immediate Response Authority (IRA)*, ARMY LAW., Feb. 2007, at 30.

¹²⁸ *See* Winthrop, *supra* note 122, at 3.

¹²⁹ *Id.*

¹³⁰ *See* Wolfowitz Memorandum, Immediate Response, *supra* note 121.

¹³¹ *See* DOD DIR. 3025.15, *supra* note 124, para. 4.2.

¹³² *See* DOPLAW HANDBOOK, *supra* note 18, at 288 (stating “[t]he JDOMs has indicated that this assistance should not exceed 72 hours”); *see also* U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS para. 6-42 (Feb. 2003) (stating “immediate response authority is generally limited to 72 hours or less”). DSCA EXORD, *supra* note 112112 (limiting IRA to seventy-two hours unless the military departments coordinate with the combatant commander).

or after the President declares a major disaster or emergency under the Stafford Act.¹³⁴ After seventy-two hours, the response begins to crack any straight-face argument that the response is “immediate,” and also begins to undermine the National Response Framework, with its accompanying fiscal restrictions.

The 2007 Southern California wildfires tested the general rules of IRA perhaps like no other recent emergency. During the fires, military commanders provided support to civil authorities under IRA. Commanders conducted many of those IRA missions well after the President had made an emergency declaration and major disaster declaration.¹³⁵ But the California fires were unique in that while the President had declared an emergency and major disaster for the entire situation, each new fire potentially created a new emergency that justified commanders to take independent action under the IRA. As with every general rule, new situations, e.g., the California wildfires, reveal unique twists, expose nuances, and stretch and modify previous understandings. As time separates analysis from the fires, the proper reach of IRA should become more apparent. What is certain, however, is

¹³³ The term “arguably” is used because while there is no explicit outer limit to IRA prior to a presidential declaration; it is derived from the President’s executive powers. Prior to the President declaring a “major disaster” or “national emergency,” the President is limited by the Stafford Act to providing “emergency work” for a maximum of ten days. See 42 U.S.C. § 5170b (2000). Given that the President is explicitly limited to a ten-day period prior to a declaration, it would seem that any derivative authority of his power would also be limited to ten days.

¹³⁴ Immediate Response Authority is limited by the language of 32 C.F.R. § 185.3. Specifically, it defines immediate response as: Any form of immediate action taken by a DOD component or military commander, under the authority of this part and any supplemental guidance prescribed by the head of a DOD component, to assist civil authorities or the public to save lives, prevent human suffering, or mitigate great property damage under imminently serious conditions occurring where there has not been any declaration of major disaster or emergency by the President or attack.” *Id.*; see also DOD DIR. 3025.15, *supra* note 124, para. E2.1.7 (defining “Immediate Response” as “[a]ny form of immediate action taken by a DOD Component or military commander, under the authorities outlined in DoD Directive 3025.12, (reference (e)), to assist civil authorities or the public to save lives, prevent human suffering, or mitigate great property damage under imminently serious conditions occurring where there has not been any declaration of major disaster or emergency by the President or attack.”) (emphasis added).

¹³⁵ President Bush initially made an emergency declaration on 23 October 2007. See Federal Emergency Management Agency, California Wildfires Emergency Declaration (Oct. 23, 2007), available at <http://www.fema.gov/news/event.fema?id=9029>. The President made a major disaster declaration on 24 October 2007. See Press Release, The White House, President Bush Meets with Cabinet, Discusses Fires in California (Oct. 24, 2007), available at <http://www.whitehouse.gov/news/releases/2007/10/20071024-2.html>.

that this is an extremely limited source of authority, insufficient to provide a meaningful remedy to the current lack of authority to effectively use the Reserve in response to such emergencies.

C. Mutual Aid Agreements

A separate form of authority from IRA is the statutory authority for installation commanders to enter into mutual aid agreements with local fire protection agencies for firefighting and emergency services.¹³⁶ The types of situations that the installation may respond to under these mutual aid agreements, both on and off the installation, are fairly broad, including “emergencies involving facilities, structures, aircraft, transportation equipment, hazardous materials, and both natural and man-made disasters (including acts of terrorism).”¹³⁷ When conducted within the parameters of DODI 6055.6, the mutual aid agreements do not require prior approval from the Secretary of Defense.

Moreover, DODI 6055.6, *The Department of Defense Fire and Emergency Services Program*, states: “In absence of any agreement, installation commanders are authorized to render assistance to preserve life and property in the vicinity of the DOD installation, when, in their opinion, such assistance is in the best interest of the United States.”¹³⁸ When aid is provided under this paragraph, outside the four corners of any agreement, it is, in essence, IRA. As a matter of DOD policy, it should follow the IRA notice procedures and parameters.

D. Emergency Authority

The next category under this miscellaneous section of authorities is the “emergency authority” under DOD Directive 3015.12.¹³⁹ Emergency authority permits military commanders to employ Title 10 forces in response to civil disturbances “to prevent loss of life or wanton destruction of property, or to restore governmental functions and public

¹³⁶ See 42 U.S.C. § 1856 (2000); see also U.S. DEP’T OF DEFENSE, INSTR. 6055.6, DOD FIRE AND EMERGENCY SERVICES PROGRAM para. E2.5.21 (10 Oct. 2000) [hereinafter DODI 6055.6]; see also Bradley & Reder, *supra* note 127, at 30–31.

¹³⁷ DODI 6055.6, *supra* note 136, para. E2.5.2.

¹³⁸ *Id.* encl. 2, para. E2.5.21.3.

¹³⁹ See U.S. DEP’T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES para. 4.2.2.1 (Feb. 4, 1994).

order.”¹⁴⁰ It is even more limited than the IRA. Emergency authority applies only to civil disturbance situations when “local authorities are unable to control the situation and circumstances preclude obtaining prior authorization by the President.” Contrary to the IRA that requires a request from civil authorities for assistance, emergency authority only comes into play when local authorities are unable or unwilling to respond.¹⁴¹

E. AGRs and Technicians

The last area to discuss is not a separate authority but rather a separate personnel status. In particular, there are two types of personnel status that provide a limited means for the Reserve to respond to natural disasters—Active Guard Reserve (AGR) personnel and Civilian Technicians. Both are full-time employees in the Reserve with their primary duties to train, administer and maintain the Reserve force.¹⁴² But so long as their primary duty is not sacrificed, they may also take part in operations and missions.¹⁴³ The number of personnel who fall under these categories is relatively small, naturally limiting the degree that these individuals can be counted on for disaster response.

Nonetheless, as full-time employees, they are present for duty, requiring no activation to operate and employ their equipment. This is

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² The primary duties of AGRs involve “organizing, administering, recruiting, instructing, or training the reserve components.” 10 U.S.C. § 12310(a)(1) (2000). For military technicians, their primary duty is the “administration and training of the Selected Reserve or . . . the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.” *Id.* § 10216(a)(1)(C).

¹⁴³ The AGRs may conduct “operations or missions assigned in whole or in part to the reserve components,” so long as the operations/missions do not interfere with their primary duties. 10 U.S.C. § 12310(a)(1). Moreover, 10 U.S.C. § 12314 states that

[n]otwithstanding any other provision of law, a member of a reserve component who is on active duty other than for training may, under regulations prescribed by the Secretary concerned, be detailed or assigned to any duty authorized by law for members of the regular component of the armed force concerned.

Id.; see John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, subtit. B, § 525, 120 Stat. 2083 (2007) (allowing technicians to perform certain missions/operations).

how some of the technicians of the 302d Airlift Wing, Peterson Air Force Base, deployed to the California fires in a fairly seamless manner. Using AGRs and technicians rarely will be a complete answer to any response situation, but they certainly may provide an initial response or act as a gap-filler, supplementing and supporting the primary Reserve force.

F. Piggy-Backing

The Reserve may use the authorities above to provide initial support to civil authorities and then follow that support with any other applicable authority, such as 10 U.S.C. § 12301(d). This of course is legitimate only to the extent that the subsequent authority is appropriate. In other words, one way to fully engage the Reserve may be by piggy-backing, or tacking, one authority onto another.¹⁴⁴ For instance, a Reserve unit may be justified in initially responding to a natural disaster, pre-declaration, with AGRs under the IRA. The unit may then continue its support under 10 U.S.C. § 12301(b), involuntarily activating members for fifteen days followed by a drill status,¹⁴⁵ or hip-pocket orders under 10 U.S.C. § 12301(d).

VII. Conclusion

Current statutes provide limited access to the Reserve for disaster response. While one rationale behind the current statutory structure is ostensibly to ensure that the Reserve remains just that—a reserve force—the operational tempo of the twenty-first century provides little basis for this justification. Granted, members of the Reserve are deployed overseas regularly. But it makes little sense to exclude the Reserve from natural disaster response duties because of the operational tempo, when the National Guard and AC forces are required to deploy overseas as well as provide DSCA for domestic disasters.

¹⁴⁴ See *supra* note 120.

¹⁴⁵ Selected Reserve units are required to conduct training (drill) forty-eight periods a year. Four hours is considered one period. Units typically conduct this training on weekends, in blocks of four units. See 10 U.S.C. § 10147 (2000); see also DODI 1215.06, *supra* note 19, para. 6.1.4.1.2. The EPLOs, in the past, have typically deployed to disasters under drill or annual training status.

If, instead of operational tempo, it turns out to be that parochial and political concerns are the primary impetus for keeping the Reserve assets inaccessible during a natural disaster, it is worth considering the words from the Commission on the National Guard and Reserves in its Second Report to Congress that appear at the beginning of this article: “the public . . . does not care whether the military personnel who come to their aid are active duty or from the National Guard or Reserves.”¹⁴⁶

Indeed, to most of the public a uniform is a uniform. The only thing that matters to the general public, and deservedly so, is that when called upon the military provides adequate support at the right time, in the right place. The assets found in the Reserve are just too tailored for natural disaster response to categorically exclude. Any hurdle that stands in the way of tapping into those assets quickly and seamlessly, when federal military aid is legally permissible, must be challenged and ultimately dismantled.

Currently, the only involuntary methods for activating the Reserve are to use a fifteen-day activation under 10 U.S.C. § 12301(b), or resort to a partial or even full mobilization. These options are either not available until after an emergency/disaster declaration is made, or limited to a mere fifteen days—a period too short for many disasters. Furthermore, the options of partial and full mobilizations appear unrealistic for anything short of a colossal disaster heretofore unseen by mankind.

One option to cure this lack of effective activation authority is for Congress to amend 10 U.S.C. § 12304, providing the President with a practical method to involuntarily order the Reserve to active duty for natural disaster response. Section 594 of the FY09 NDAA passed by the House contains a well thought-out change to 10 U.S.C. § 12304 that would provide this authority. The Senate should pass the proposed change, eliminating the reference to the Stafford Act and replacing it with explicit and general language, setting forth that the statute applies when there is a threat or occurrence of natural disasters/emergencies and manmade accidents. But until statutory change to 10 U.S.C. § 12304 becomes a reality, if ever, cultivating the ability to effectively use 10 U.S.C. § 12301(d) via hip-pocket orders provides a viable method to identify, prepare and ultimately employ timely, strategically located, and relevant Reserve assets to areas in need during natural disasters.

¹⁴⁶ CNGR SECOND REPORT, *supra* note 1.