PANDEMIC RESPONSE CASE STUDY AND AAR FROM THE COVID-19 HEALTH EMERGENCY

ADDENDUM TO THE DOMESTIC OPERATIONAL LAW HANDBOOK

2024 Handbook For Legal Personnel

Center for Law and Military Operations (CLAMO)
The Judge Advocate General's Legal Center and School
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Charlottesville, Virginia 22903-1781

DOMESTIC OPERATIONAL LAW HANDBOOK

2024 ADDENDUM: PANDEMIC RESPONSE CASE STUDY AND AAR FROM THE COVID-19 HEALTH EMERGENCY

LESSONS LEARNED AND BEST PRACTICES FOR JUDGE ADVOCATES

CENTER FOR LAW AND MILITARY OPERATIONS

March 2024

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2024 PANDEMIC LAW HANDBOOK

A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES

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This publication is a tribute to every judge advocate, warrant officer, non-commissioned officer, legal specialist, civilian employee, and their families who selflessly served in or in support of the response to the COVID-19 pandemic. CLAMO—while assuming full responsibility for any errors contained in this publication—gratefully acknowledges the assistance of the following individuals:

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FOREWORD

This Handbook represents the work of the Center for Law and Military Operations (CLAMO) and many others across the U.S. Army Judge Advocate General's Corps. While the pandemic response mission continues to evolve, this publication is meant to capture key lessons learned by judge advocates during the historic COVID-19 pandemic. The intent of this publication is that it be used in conjunction with the Domestic Operational Law Handbook (2021), a resource that focuses on the legal matters pertaining to providing assistance to domestic civil authorities, also known as DSCA. This Handbook should be used as a supplement to the Domestic Operational Law Handbook when the declared disaster or emergency is the result of a pandemic.

COVID-19 was not the first pandemic and it will likely not be the last. However, this is the first public health crisis in which the military was significantly leveraged to facilitate a public-facing response. The military was not immune to the crisis. This publication addresses challenges associated with the DSCA mission, as well as the force protection and continuity of operational challenges associated with keeping the workforce mission-ready. **(Note, the "54 States and territories" or simply "States," as frequently used throughout this Handbook, collectively refers to the 50 States, Guam, Puerto Rico, U.S. Virgin Islands, and the District of Columbia.)**

Perspectives and experiences across military services and across a multi-year response are diverse. This publication is meant to consolidate those diverse experiences to better inform training, policy, and operations of future legal practitioners across the military services.

This Handbook is designed to serve as a working reference and training tool for judge advocates. It is not a substitute for independent research. With the exception of footnoted doctrinal material, the information contained in this Handbook is not doctrine. Judge advocates advising in this area of the law should monitor developments in domestic operations closely as the landscape continues to evolve.

Further, the information and examples provided in this publication are advisory only. The materials contained in this book represent the contributions of federal attorneys from a variety of Department of Defense (DoD) legal offices. If you recognize your work within these pages, CLAMO thanks you for your contribution and offers 17 U.S.C. § 105(a) as appreciation for your assistance. The contents of this publication are not to be construed as official positions, policies, or decisions of the United States Government or any department or agency thereof.

Much of the information contained in this Handbook has been synthesized from more detailed resources and information papers covering these topics. Where applicable, access to these broader and more thorough resources has been footnoted within this publication. These materials can be accessed online by searching in the "2020 COVID-19 Key Leader Guide" folder on the CLAMO website at: https://intelshare.intelink.gov/sites/clamo/ (CAC required) or https://tjaglcs.army.mil/publications.

CHAPTER 1

INTRODUCTION AND TIMELINE OF COVID-19 RESPONSE

The coronavirus pandemic is an occurrence unprecedented in modern history. Most domestic disasters or emergencies affect either a single State or several States in a region. In contrast, the coronavirus affected not only the entire United States, but the entire world. It was also the first time in U.S. history the President has declared a nationwide emergency under Section 501b of the Stafford Act and authorized Major Disaster Declarations for all states and territories for the same incident.[1] Typical incident responses last between one and three weeks and then transition to recovery.[2] Contrarily, the coronavirus Public Health Emergency lasted more than three years, ending May 11, 2023. Additionally, the COVID-19 response was the first time FEMA had implemented a federal interagency Unified Coordination Group.[3] Most incidents occur at a fixed point in time, such as a hurricane, wildfire, or earthquake. Responders are subsequently able to focus on saving and protecting lives and transition to recovery. Conversely, the coronavirus is a persistent incident that ebbs and flows in the intensity of its impacts. In scale and scope, the coronavirus is unlike even the most significant events of the last 100 years, going back to the 1918 flu pandemic.[4]

The first significant DoD response to the coronavirus occurred on January 29, 2020 when the Secretary of Defense (SecDef) granted a Health and Human Services (HHS) Request for Assistance (RFA) for the Department of Defense (DoD) to provide housing to American evacuees from China, who needed to be observed because of potential exposure to coronavirus. The initial RFA was for housing at one installation, March Air Force Reserve Base, for approximately 200 persons.[5] However, as the number of U.S. citizens returning from the Hubei Province increased and coronavirus outbreaks occurred aboard cruise ships, HHS requested DoD to provide additional lodging sites: Travis AFB, Miramar MCAS, Joint Base San Antonio-Lackland, Joint Base Pearl harbor Hickam, and Camp Ashland. By the end of this effort in early April 2020, U.S. Transportation Command (USTRANSCOM), in support of the State Department, facilitated the safe return of more than 4,500 Americans, and U.S. Northern Command (USNORTHCOM) and the Military Departments provided housing at 13 military installations for the quarantine of more than 3,000 individuals from China and two cruise ships in

[1] Pandemic Response to Coronavirus Disease 2019 (COVID-19): Initial Assessment Report, FEMA Operations January through September 2020, FEMA JAN 2021, page 22.

[2] the term "incident" includes any occurrence, natural or manmade, that necessitates a response to protect life or property and includes planned events, as well as emergencies or disasters of all kinds and sizes. NRF page 4 Within the NRF, the term "response" includes actions to save lives, protect property and the environment, stabilize the incident, and meet basic human needs following an incident. NRF pg 2. Recovery includes those capabilities necessary to assist communities affected by an incident to recover effectively. Support for recovery ensures a continuum of care for individuals to maintain and restore health, safety, independence and livelihoods, especially those who experience financial, emotional, and physical hardships. NPG page 17

[3] The Unified Coordination Group (UCG) is composed of senior leaders representing state, tribal, territorial, insular area and federal interests and, in certain circumstances, local jurisdictions, the private sector, and NGOs. UCG members must have significant jurisdictional responsibility and authority. The composition of the UCG varies from incident to incident, depending on the scope and nature of the disaster. NRF pg 20.

[4] See Strategic Review, The Department of Defense Response to the COVID-19 Pandemic

[5] https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/Timeline/

response to multiple HHS requests.[6][7]

On 31 January 2020, Secretary Alex Azar of the Department of Health and Human Services (DHHS) declared the coronavirus (COVID-19) a public health emergency (PHE), under Section 319 of the Public Health Service Act (PHSA) (Title 42 USC 247d), and ordered the quarantine of any U.S. citizen returning from the region of China.[8] The significance of this declaration is that any U.S. citizen returning to the United States who had been in Hubei Province in the previous 14 days, was then subject to a mandatory quarantine up to 14 days, to ensure the provision of proper medical care and health screening. Additionally, any U.S. citizen returning to the United States who had been in the rest of mainland China within the previous 14 days underwent proactive entry health screening (not quarantine) at a select number of ports of entry, to ensure they had not contracted the virus and did not pose a public health risk.

COVID-19 was classified as a Risk Group 3 (RG3) agent. RG3 agents are those associated with serious or lethal human disease for which preventive or therapeutic interventions may be available.[9] In late January 2020, the CDC declared a Presidential Public Health Emergency, and DHHS requested supplemental appropriations to support the initial study, response, and containment efforts to contain the virus. By 2 February 2020, the number of confirmed cases totaled over 14,000, with more than 300 deaths reported worldwide, and eight (8) cases in the United States. USNORTHCOM activated its Crises Action Team (CAT), and the Federal Emergency Management Agency (FEMA) activated its National Response Coordination Center (NRCC).

On 13 March 2020, President Donald J. Trump determined that the pandemic was of sufficient severity and magnitude to warrant two Emergency Declarations. The first declaration was pursuant to Sec. 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207 (the "Stafford Act"). The second declaration was under the National Emergencies Act (NEA).

The Stafford Act declaration increased federal support to the HHS in its role as the lead federal agency for the COVID-19 pandemic response. Also, as a result of the declaration, FEMA could now reimburse state, territorial, tribal, and local governmental entities and some private non-profit organizations for taking certain emergency protective measures at the direction or guidance of public health officials. Subsequently, President Trump approved major disaster declaration requests under the Stafford Act for all 50 states, five territories, the District of

[6] U.S. Transportation Command, U.S. Transportation Command Assisted Americans Stranded Abroad Due to Heightened COVID-19 Restrictions, https://www.amc.af.mil/News/Article-Display/Article/2201503/us-transportation-command-assisted-americans-stranded-abroad-due-to-heightened/ (last visited July 8, 2024).

[7] Isolation means the separation of an individual or group reasonably believed to be infected with a quarantinable communicable disease from those who are healthy to prevent the spread of the quarantinable communicable disease. Quarantine means the separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease. 42 C.F.R. §70.1.

[8] Presidential Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020).

[9] National Institutes of Health, Interim Laboratory Biosafety Guidance for Research with SARS-CoV-2 and IBC Requirements under the NIH Guidelines, https://osp.od.nih.gov/policies/biosafety-and-biosecurity-policy/interim-laboratory-biosafety-guidance-for-research-with-sars-cov-2-and-ibc-requirements-under-the-nih-guidelines/ (last visited July 8, 2024).

Columbia, and the Seminole Tribe of Florida.[10] In February 2021, President Joseph R. Biden Jr. later approved major disaster declaration requests from the Navajo Nation, and the Poarch Band of Creek Indians for the COVID-19 pandemic.[11]

Pursuant to the Stafford Act Declaration, FEMA provided reimbursements for Emergency Protective measures under Category B of its Public Assistance Program, which included activities necessary to protect public health and safety. [12] Typically, this includes costs related, but not limited, to:

1. Activation of State Emergency Operations Centers
2. Use of the State National Guard
3. Law enforcement;
4. Emergency medical care;
5. Mass care, shelter, food, and water; and
6. Temporary facilities for essential community services.

FEMA reimbursement required the execution of a FEMA-State/Tribal/Territory Agreement, as appropriate, and execution of an applicable emergency plan. No funds could be released until the agreement was signed. States, tribal and territorial governments did not need to request separate emergency declarations to receive FEMA assistance under a nationwide declaration. Under a Stafford Act declaration, the Federal share for assistance provided would be greater or equal to, but not less than 75% of the eligible costs.

Under the Stafford Act emergency declaration, FEMA has the authority to request another Federal Agency, such as the DoD, with or without reimbursement, to utilize its existing authorities and resources in support of state or territory emergency assistance efforts. Any request for DoD assistance is made through a Request for Assistance (RFA), which may result in a Mission Assignment (MA) if accepted by DoD. In that case, normal Defense Support of Civil Authorities principles and regulations applies.

The second Presidential Emergency Declaration was a "National Emergency" declaration under the National Emergencies Act (50 U.S.C. §§ 1601 et seq). The National Emergency declaration provided additional authorities to the Secretary of HHS to waive or modify requirements of the Medicare, Medicaid, and State Children's Health Insurance programs (CHIP) and the Health Insurance Portability and Accountability Act.[13] Additionally, the Secretary of HHS, through the Director, CDC, was able to "detain, medically examine, or conditionally release" persons suspected of carrying certain communicable diseases. Federal Quarantine powers include

[10] Specific presidential declarations of major disaster for novel coronavirus 2019 (COVID-19) are listed on the FEMA, "COVID-19 Disaster Declarations" webpage, available at https://www.fema.gov/coronavirus/disaster-declarations, and the FEMA "Disasters" webpage, available at https://www.fema.gov/disasters.

[11] https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/03/president-joseph-r-biden-approves-the-navajo-nation-disaster-declaration/

[12] https://www.fema.gov/news-release/2020/03/13/covid-19-emergency-declaration

[13] The President of the United States of America, "Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," Proclamation 9994 of March 13, 2020, 85 *Federal Register* 15337, March 18, 2020, https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05794.pdf.

Interstate / International movement of persons:

1. Entering into the United States or possessions from foreign countries,
2. Moving from one state or possession into any other state or possession, and
3. Moving within a state, if individual is reasonably believed to be infected

If the Director, CDC determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.

In early March, DoD announced USNORTHCOM activated United States Army North (USARNORTH)—the Army Service Component Command as the Joint Force Land Component Command (JFLCC), its Defense Coordination Officers, Emergency Preparedness Liaison Officers and Joint Regional Medical and Operation officers to assist FEMA. By the end of March 2020 COVID-19 had begun materializing in key hotspots around the nation, first in Washington, New York, and California, but then quickly spread across the country. Hospitalization from COVID-19 began to rapidly increase, creating concerns about insufficient medical capacity to treat the rise in the number of patients, and a subsequent demand from States and localities for both medical facilities and medical providers. HHS and FEMA, through the NRF, turned to DoD to help meet this demand and in response, DoD deployed two Navy hospital ships (USNS COMFORT and USNS MERCY), several Navy Expeditionary Medical Facilities, Army Combat Hospital Centers, Army Reserve Urban Augmentation Medical Task Forces, and Air Force Expeditionary Medical Support units to provide surge medical support on ships, at alternate care facilities (ACFs), and in civilian hospitals and nursing homes. Additionally, thirty-eight ACFs were designed and constructed by the U.S. Army Corps of Engineers (USACE) to provide additional capacity. At its peak, USNORTHCOM deployed almost 15,000 DoD personnel, including almost 5,000 DoD medical professionals, to ten different States and multiple locations within some States.

The USNS COMFORT and USNS MERCY were deployed to New York and California respectively to assist overwhelmed communities with acute patient care.[14] The purpose of both ships was to provide assistance with non-coronavirus patients to help alleviate some of the demand on civilian hospital staffs so they could focus on COVID patients. However, when the two Navy medical ships departed after a little more than a month, the USNS MERCY had treated only seventy-seven total patients all of whom were non-COVID-19 patients,[15] while the USNS COMFORT had treated just 182 patients in total.[16] It was later determined that medical personnel were more valuable than constructing temporary medical facilities and employing

[14] https://www.defense.gov/News/News-Stories/Article/Article/2116862/hospital-ships-other-dod-assets-prepare-for-coronavirus-response/

[15] Megan Eckstein, "USNS Mercy Leaves Los Angeles After Treating 77 Patients; Some Personnel will Remain in L.A." USNI News, May 15, 2020.

[16] J.D. Simkins, "Hospital Ship Comfort Departs NYC, Having Treated Fewer than 200 Patients," Navy Times, April 30, 2020.

medical ships.

Based on statutory authorities, federal planning directed that HHS, rather than FEMA, would take the lead in a PHE response. The 2018 Pandemic Crisis Action Plan (PanCAP) identified HHS as the lead federal agency (LFA).[17] The PanCAP Adapted (PanCAP-A), which was finalized by FEMA and HHS in March 2020, also identified HHS as the LFA for the COVID-19 response, with support from FEMA for coordination. This scenario is reinforced by the Biological Incident Annex (BIA) to the Response and Recovery Federal Interagency Operational Plans (FIOPs), which assumes that HHS will act as the LFA for biological incidents where a Stafford Act declaration has not been made. Parallel funding authorities are also in place, allowing both FEMA and HHS to dedicate funding to a response. [18]

When the President declared a nationwide emergency pursuant to Stafford Act Section 501(b) on March 13, 2020, the President also announced that HHS would continue to serve as LFA, with FEMA providing support. However, on March 18, 2020, President Trump and Vice President Pence then directed FEMA to assume leadership of the coordinated federal response. FEMA assumed this role on March 19, 2020. The divergence from established policy and doctrine and the incomplete communication of changes in LFA contributed to conflicting impressions over the roles and authorities of FEMA and HHS among staff across the response.[19]

By the end of March 2020, the United States had the highest number of COVID-19 cases in the world, as confirmed by the CDC, and the USS THEODORE ROOSEVELT was dealing with a COVID outbreak on its ship.[20] The outbreak on the USS THEODORE ROOSEVELT infected more than 1,000 and killed one sailor and prompted sailors to disembark in Guam for testing and isolation.

In addition to the almost 15,000 DoD personnel, including almost 5,000 DoD medical professionals deployed by USNORTHCOM, the DoD was called upon to authorize National Guard (NG) personnel from 51 States and territories to operate in a Title 32 duty status.[21] In typical disasters, States and territories use their NG personnel in State active duty status, and generally request support from other States to provide assistance. Due to the pervasive nature of the pandemic and its economic consequences, the President early on made the decision to provide a 100% Federal cost-share to the States under the Stafford Act, directed FEMA to fully reimburse DoD for the cost of pay and allowances for FEMA mission assignments to DoD

[17] U.S. Department of Health and Human Services (HHS), PanCAP Adapted: U.S. Government COVID-19 Response Plan, March 13, 2020, p. 1, https://int.nyt.com/data/documenthelper/6819-covid-19-response-plan/d367f758bec47cad361f/optimized/full.pdf (hereinafter HHS, PanCap-Adapted).

[18] Federal Emergency Management Agency (FEMA, *Pandemic Response to Coronavirus Disease 2019 (COVID-19): Initial Assessment Report*, at 31 Jan. 2021.

[19] *Id*, at 33.

[20] https://www.nejm.org/doi/full/10.1056/NEJMoa2019375?query=featured_home

[21] Section 502(f) of Title 32 U.S. Code, authorizes the President or the Secretary of Defense to request the Governors order to duty members of their NG for operations or missions. Operations or missions conducted in a Title 32 duty status are under the command and control of the Governors with funding provided by DoD. DoDI 3025.22, "The Use of the National Guard for DSCA" establishes policy for the use of the NG for DSCA missions, which requires another Federal Department to request DoD support. In this case, FEMA requested support on behalf of the State and fully reimbursed DoD for the pay and allowances and other costs associated with the use of NG personnel in Title 32.

related to NG support, and directed SecDef to maximize the use of Title 32 to support the States. Under this arrangement, States retain command and control of their NG personnel for their COVID-19 response, while DoD, with reimbursement from FEMA, covered the costs of such support. In order to be eligible for this assistance, States' had to first activate the lesser of 500 or 2 percent of their State National Guard in a State active duty status, request a Major Disaster Declaration under the Stafford Act, and request the use of Title 32 duty status.[22] At the peak of the COVID-19 response, more than 47,000 National Guard personnel supported community-based testing, emergency medical care, medical sheltering, communication of health and safety information to the public, transportation, logistics, and first responder support.[23]

By May 2020, the White House announced operation Warp Speed (OWS), the administration's national program to accelerate the development, manufacturing, and distribution of COVID-19 vaccines and therapeutics.[24] In late July 2020, Moderna and Pfizer began Phase 3 COVID-19 vaccine clinical trials. By December 2020, there were more than 19 million confirmed COVID-19 cases and more than 342,000 deaths in the United States – more lives than those lost in the Vietnam and Korean wars combined.[25] By the end of December, the virus had spread to 191 countries, and has been estimated to have infected more than 82 million people and caused 1.9 million deaths.[26] Then on 11 and 18 December 2020, Emergency use Authorization was awarded to Pfizer and Moderna's COVID-19 vaccine respectively, and the first COVID-19 vaccine administered to the public in mid-December 2020.[27]

In August 2021, SecDef issued a message to the force indicating that he had requested presidential approval to mandate vaccines for all military members. On 23 August 2021, and 31 January 2022, the Pfizer-BioNTech and Moderna vaccines received FDA approval respectively. The Pfizer-BioNTech vaccine, became mandatory for members of the military on 24 August 2021 and on 4 October 2021 became mandatory for DoD civilian employees.

As of the date of publication, the pandemic response is leveling off, but remains ongoing. The United States has had over 79.5 million confirmed cases of COVID-19, and over 964,800 deaths. Over 100,000 military personnel, across our active, reserve and national guard components, have been mobilized to build field hospitals, support vaccination efforts, and generally manage logistics associated with this operation

Over the course of the pandemic, military personnel augmented medical staff at hospitals, nursing homes, and assisted living facilities; delivered food to hard-hit communities; supported logistics efforts to supply medical equipment; built alternate care facilities; conducted community based medical screening; conducted laboratory testing; installations support; and

[22] CRS National Guard and COVID Response
[23] Federal Emergency Management Agency, Fact Sheet: Transition of National Guard Activations for COVID-19 Response Activities, https://www.fema.gov/fact-sheet/transition-national-guard-activations-covid-19-response-activities (last visited July 8, 2024).
[24] https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-vaccine-development/
[25] Johns Hopkins University, Coronavirus Resource Center, as of December 31, 2020: https://coronavirus.jhu.edu.
[26] These are estimates of confirmed cases. Other estimates vary. Johns Hopkins University, Coronavirus Resource Center, as of December 31, 2020: https://coronavirus.jhu.edu.
[27] https://www.defense.gov/News/News-Stories/Article/Article/2445137/operation-warp-speed-official-first-covid-19-vaccines-to-arrive-monday/

assisted with fatality management among other tasks.[28] DoD developed and implemented several measures to contain and mitigate effects on the force. These included issuing force health protection (FHP) guidance (DoD issued the first Force Health Protection guidance on January 30, 2020); strategically issuing restriction of movement (ROM) orders; requiring social distancing and mask wearing; instituting telework on an unprecedented scale; employing testing and contact tracing; implementing sentinel surveillance in coordination with its influenza sentinel surveillance program; and leveraging epidemiological models.

This publication discusses the history of military involvement in pandemics and public health emergencies. Additionally, it explains the Department of Defense's domestic operational response framework and the rules and regulations associated with a domestic response. Lastly, this publication includes a complication of pandemic best practices, information papers, and legal lessons learned from the response across all components of the Department of Defense's legal community.

[28] See National Conference of State Legislatures, "National Guard Assists Response to the COVID-19 Pandemic," NCSL homepage, April 28, 2020.

CHAPTER 2

A SHORT HISTORY OF PANDEMICS (AND EPIDEMICS) IN THE U.S. ARMY[29]

While one might think that COVID-19 is the first pandemic to have an impact on the U.S. Army, it is not—the Spanish Flu that killed millions of individuals from 1918 to 1919 also killed thousands and thousands of soldiers during World War I.[30] In any event, disease has long been a threat to the health of American soldiers and military operations, albeit arguably of epidemic rather than pandemic proportions.

Before discussing the Spanish Flu pandemic, and its impact on military operations, it is important to appreciate that epidemics were a constant problem in the Army before the twentieth century, chiefly because physicians (and commanders) did not understand how disease was transmitted and how better sanitation might reduce sickness. The absence of antibiotics (like penicillin) also meant that soldiers who were seriously ill were more likely to die.

During the war between the United States and the Republic of Mexico in the 1840s, for example, the unhealthy Mexican climate quickly resulted in sickness and disease among U.S. soldiers. Of the 15,000 troops who initially deployed with Brevet Major General Zachary Taylor, roughly fifty percent were sickened by disease during the war. Similarly, disease in Mexico was chiefly responsible for reducing Major General Winfield Scott's army of 13,000 Regulars and volunteers to fewer than 6,000 men by May 1847. Yellow fever (called vómito by the Mexicans) was especially endemic—and feared. A soldier could feel fine on Tuesday morning, have symptoms that afternoon, and be dead by Friday. For those who contracted yellow fever, about half died. It earned the moniker "yellow" because the fever turned eyes and skin yellow and color.[31]

After the Civil War, soldiers serving in southern states like Florida and Texas also frequently suffered from malaria and yellow fever. While one rarely died from the former, it was still debilitating—and rendered a soldier unfit for duty. But yellow fever continued to kill soldiers who contracted it—and since Army physicians and other medical professionals did not understand that it was spread by mosquitos until the early twentieth century, the disease wreaked havoc on soldiers serving in warmer climates.

Most historians believe that the Spanish Flu pandemic originated in rural Kansas in March 1918. From there, the disease—caused by a virus—was carried by young men to Fort Riley, and then spread throughout other Army camps, where thousands and thousands of men were undergoing military training. These infected soldiers took the influenza with them as they deployed to

[29] A pandemic is an epidemic of an infectious disease that has spread across a large geographic area—over multiple countries or continents—and has affected a large number of individuals. An epidemic is a disease that has affected a large number of people within a community or region.

[30] It earned the moniker "Spanish Flu" because Spanish newspapers ran lengthy news articles on the spread of the disease while British and French newspapers, which were censored by their governments during World War I, did not report on the illness. As a result, the public concluded that the disease must have originated in Spain.

[31] John S. D. Eisenhower, *Polk and His Generals*, in ESSAYS ON THE MEXICAN WAR 58 (1986); STEPHEN H. CARNEY, THE OCCUPATION OF MEXICO MAY 1846-1848 (U.S. ARMY CAMPAIGNS OF THE MEXICAN WAR) 11 (2015).

England and France. By the end of 1918, the Spanish Flu had reached as far as India, New Zealand and Russia. Infected men, women and children complained of headache, fever, body aches, and a cough. The flu weakened the body's immune system, which meant that many individuals developed pneumonia as a secondary infection. It was this pneumonia, rather than the influenza, that caused most of the deaths, as it filled lungs with blood and other fluids, and often led to still other complications such as meningitis and organ bleeding. Since antibiotics like penicillin did not yet exist, little could be done for those who developed any secondary infection.[32]

By September 1918, more and more soldiers began reporting fevers as high as 103 degrees, darkening of the skin, and violent coughs. At Camp Sherman, Ohio, half the men were infected. At Camp (later Fort) Devens, Massachusetts, Army physicians reported:

This epidemic started about four weeks ago, and has developed so rapidly that the camp is demoralized and all ordinary work is held up till it has passed. These men start with what appears to be an ordinary attack of LaGrippe or Influenza, and when brought to the Hosp. they very rapidly develop the most vicious type of Pneumonia that has ever been seen. Two hours after admission they have the Mahogany spots over the cheek bones, and a few hours later you can begin to see the Cyanosis [blue-colored skin resulting from oxygen deprivation] extending from their ears and spreading all over the face, until it is hard to distinguished the coloured [sic] men from the white. It is only a matter of a few hours then until death comes, and it is simply a struggle for air until they suffocate. It is horrible. One can stand it to see one, two or 20 men die, but to see these poor devils dropping like flies sort of gets on your nerves. We have been averaging 100 deaths per day, and still keeping it up. (emphasis supplied).[33]

Although the pathogen that caused the disease was yet to be identified, Army physicians and other medical personnel quickly realized that the influenza was spread by respiratory droplets made when infected individuals cough, sneeze or speak. They knew that an outright ban on all public gatherings and a lock-down on Army installations almost certainly would slow the pandemic. But the Army was fighting a war, and the Army had to keep training thousands and thousands of men and then ship them to France for combat operations. Nonetheless, Army medical professionals tried a number of ways to stop the pandemic. Surgical masks were made mandatory for anyone in contact with infected soldiers—a practical solution that still works today. As for the soldiers themselves, they too wore masks when marching in formation and in close quarters. Some men also believed that smoking cigarettes and drinking brandy would protect them from the Spanish Flu—they did not.[34]

Ultimately, the influenza pandemic would infect between one quarter and one third of the entire American Army (and more than forty percent of the U.S. Navy). Since there were about two million soldiers in the American Expeditionary Force (AEF) in France, the Spanish Flu had a significant impact on the AEF's fighting ability. According to the Center of Military History, about 55,300 soldiers, sailors and marines died of the influenza (and pneumonia) in World War I.

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[32] Kathleen M. Fargey, *The Deadliest Enemy: The U.S. Army and Influenza, 1918-1919*, ARMY HISTORY (Spring 2019), at 25.
[33] Michael S. Neiberg, *Pale Horse: The influenza epidemic and the apocalyptic climax of the Great War*, MILITARY HISTORY QUARTERLY (Autumn 2015), 47.
[34] *Id*. at 48.

When one remembers that 50,500 personnel were killed in combat or died of wounds in World War I---almost 5,000 fewer—the impact of the pandemic on the U.S. armed forces is both remarkable and horrific. Overall, it seems that the influenza mortality rate in the Army was about five percent.[35]

There were two waves of infection: March to July 1918 and August to November 1918. While the second wave was deadlier than the first wave, soldiers who had contracted the Spanish Flu in the first wave had developed a partial immunity and, if infected by the Spanish Flu during the second wave, were more likely to survive. The Americans, however, were not the only military personnel to suffer the effects of the pandemic. German soldiers facing the Allies across the trenches in Belgium and France were sickened by the flu as well, which they nicknamed the "Flanders Fever." Some German commanders believed that their 1918 campaign against the Allies failed, at least in part, because German soldiers suffering from the flu were incapable of continuing the fight.[36]

At the end of 1919, there were as many as 50 million dead worldwide. The United States, with a population of about 103 million, had lost 675,000 to the pandemic. The mortality rate was higher in individuals younger than five years, but men and women between the ages of 20 and 40 also died at higher rates.

Compare these numbers to COVID-19. While its impact on the U.S. Armed Forces generally and the Army in particular was greatly mitigated by mandatory vaccinations and the implementation of mask wearing and social distancing—so that fatalities were relatively few—there is little doubt that the Army's effectiveness as a combat force was hurt by COVID-19 during the early months of the pandemic.

The American public has fared less well. Almost one million dead in the United States out of more than 80 million cases. Since the U.S. population today is about 330 million, deaths from COVID-19 are much less as a percentage of the population than deaths from the Spanish flu a century ago, undoubtedly because of medical care available today. But one million dead from COVID-19 is a national tragedy. As for the world, there have been more than fifteen million deaths world-wide out of more than 500 million cases.[37]

[35] Fargey, *supra* note 3, at 32.
[36] *Id.* at 25.
[37] www.covid.cdc.gov/covid-data-tracker/#datatracker-home (last accessed 13 Apr. 2022); Stephanie Nolen and Karan Deep Singh, *Virus Death Toll 9 Million Higher*, N.Y. TIMES, 17 Apr. 2022, A1.

CHAPTER 3

DOMESTIC OPERATIONS FRAMEWORK[38]

The DoD's domestic operational (DOMOPs) response to the COVID-19 pandemic was a Defense Support to Civil Authorities (DSCA) mission. A DSCA mission is any mission in which the DoD provides support of federal military forces in response to a request for assistance, from civil authorities for domestic emergencies.[39] This section provides basic information on DSCA authorities and common issues encountered during DSCA missions.[40]

A. The Role of the Department of Defense in Civil Support[41]

Federal military support provided to civil authorities is neither new nor unique to a single service. DoD support has been long provided support to the States in times of major disaster or emergency.[42] During the Reconstruction after the Civil War, U.S. Marshalls called on the Federal military to assist with maintaining order in the southern States.[43] In the late Nineteenth Century, the Army played a direct role in many disaster relief operations including the great Chicago fire, the Johnstown Flood, and the Charleston, South Carolina earthquake. When called on today, and under the proper authority, the Department of Defense will continue to fulfill its role in providing support to civil authorities when necessary and authorized.

Under the control of their State Governor and The Adjutant General (TAG),[44] National Guard (NG) units are the primary military responders in all civil support operations. The use of Federal forces to support State and local governments was, and remains, the exception rather than the rule. Federal forces are generally used only after State and local resources are exhausted or overwhelmed, and Federal assistance has been requested, normally in writing, by the State's Governor or delegated official.

The Department of Defense has unique capabilities and resources to provide support to civil authorities if necessary. Like the NG, the DoD consists of trained and disciplined personnel and

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[38] This addendum will not attempt to restate or explain DSCA and its implementing DoD directives, instructions, and regulations. For a thorough discussion of DSCA and issues in Domestic Operational Law, please see the 2024 Domestic Operational Law Handbook, available at tjaglcs.army.mil.

[39] Joint Publication 3-28, Defense Support of Civil Authorities, 29 October 2018.

[40] Detailed guidance on DSCA operations is located in the 2024 Domestic Operational Law Handbook, available for download at: https://intelshare.intelink.gov/sites/clamo/ or the TJAGLCS public publications website. Additional materials on subjects mentioned in this Handbook, including references and information papers on COVID-19 response, can be found in the "2020 COVID-19 Key Leader Guide" Folder on the CLAMO website at: https://intelshare.intelink.gov/sites/clamo/ (CAC required for access).

[41] This section is reprinted from the Domestic Operational Law Handbook 2024, Chapter 1, Overview of Civil Support Operations, Subpart B. The Role of the Department of Defense in Civil Support. Pages 4-5.

[42] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY (June 2014) [hereinafter FM 3-07].

[43] *Id.*, para 1-1.

[44] In "State status" National Guard personnel are under the control of the particular Governor and The Adjutant General (TAG) of their particular State. In this context, "State status" includes "State Active Duty (SAD)" and the status maintained by members of the National Guard under Title 32 of the United States Code. *See infra* Chapter 3 for further discussion of National Guard status.

organizations capable of rapidly responding on short notice to a broad spectrum of emergencies. Although primarily organized to conduct combat operations abroad, Federal military personnel and equipment are effectual in domestic disaster relief operations.[45] In these instances, the DoD's role is always one of support – civilian authorities retain primary responsibility for domestic operations.[46]

Civil authorities may request Federal assistance, including DoD support, once it becomes clear that their capabilities will be insufficient or have been exceeded.[47]

U.S. domestic law, Presidential Decision Directives (PDDs),[48] National Security Presidential Directives (NSPD), Homeland Security Presidential Directives (HSPDs), [49] Presidential Policy Directives (PPDs),[50] Executive Orders (EOs), and DoD regulations provide the framework for, and set limits on, the use of Federal military forces to support civil authorities. While the types of domestic support operations may vary widely, two forms of statutory restrictions, as well as policy concerns limit the scope of Federal support provided. Judge advocates must carefully consider fiscal law constraints[51] and Posse Comitatus Act (PCA) limitations.[52] From a DoD policy perspective, the "3025 series" of DoD Manuals, Instructions, and Directives are applicable.

The NG, while in State Active Duty (SAD) status, has primary responsibility for providing civil support to State and local governments.[53] When Federal forces respond in a support role, they operate under the direction of a designated Lead Federal Agency (LFA). Federal laws recognize the importance of interdepartmental and interagency coordination and planning in this area. For example, the National Response Framework is designed to maximize unity of effort when Federal agencies work together to respond to domestic emergencies. [54]

In summary, in domestic operations, NG units and personnel, in non-Federal status and under the command of their respective governors, have primary responsibility for providing civil support to local governments. The Department of Defense provides Federal military assistance only when civil resources are insufficient, when requested to do so by appropriate civil authorities,

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[45] DoDD 3025.18 U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (29 Dec. 2010) (19 March 2018) [hereinafter DoDD 3025.18].

[46] *See* STRATEGY FOR HOMELAND DEFENSE AND DSCA, *supra* note 1, at 9, 14. *See also* U.S. DEP'T OF DEFENSE, INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES Encl. 4 (27 Feb. 2013) (C1, 8 February 2019) [hereinafter DoDI 3025.21] (noting "[t]he primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in State and local governments.")

[47] *See* STRATEGY FOR HOMELAND DEFENSE AND DSCA, *supra* note 1, at 15.

[48] The PDD series was the mechanism used by the Clinton administration to promulgate Presidential decisions on national security matters.

[49] In the George W. Bush administration, the directives used to promulgate Presidential decisions on national security matters are designated National Security Presidential Directives (NSPDs) and those on homeland security matters are designated Homeland Security Presidential Directives (HSPDs). Unless otherwise indicated, past directives of previous administrations remain in effect until superseded.

[50] The PPD series is a mechanism that the Obama administration used to promulgate Presidential decisions on national security matters.

[51] *See infra* Chapter 14.

[52] 18 U.S.C. § 1385 (2012). *See infra* Chapter 4.

[53] DoDI 3025.21, *supra* note 24, at 28.

[54] NRF, *supra* note 15.

and when properly ordered to do so by DoD officials. **Unless otherwise authorized by law, the Federal Government may only provide support to civil authorities in response to an official request for assistance, and after State and local government resources have been exhausted or overwhelmed.**

B. Defense Support of Civil Authorities (DSCA)

The primary reference for the provision of all DoD support to civil authorities during domestic operations is DoD Directive (DoDD) 3025.18, Defense Support of Civil Authorities.[55] The Department of Defense promulgated DoDD 3025.18, with changes, on March 19, 2018.[56] Notably, DoDD 3025.18 states that DSCA plans shall be compatible with the National Incident Management System (NIMS and will consider command and control options that emphasize "unity of effort."[57])

DoDD 3025.18 provides the criteria to evaluate all requests for support to civilian authorities. Domestic operations practitioners refer to these criteria as the "CARRLL" factors.[58] Commanders at all levels should be cognizant of these factors when forwarding a recommendation for Federal military support through the chain of command.

The CARRLL factors are:

- **C**ost – Who pays and the impact on DoD budget**;**
- **A**ppropriateness – Whether it is in the interest of DoD to provide the requested support**;**
- **R**eadiness – Impact on DoD's ability to perform its primary mission**;**
- **R**isk – Safety of DoD forces**;**
- **L**egality – Compliance with the law**;** and
- **L**ethality – Potential use of lethal force by or against DoD forces.

DoDD 3025.18 also outlines the roles and responsibilities of each DoD component and establishes request procedures and approval authorities for each type of domestic support operation. The Secretary of Defense has reserved approval authority of DoD support for civil disturbances and for responses to acts of terrorism. Various DoD Directives and Instructions cover specific types of domestic support authorities and are set out in the respective chapters of

[55] DoDD 3025.18, *supra* note 23.
[56] DoDD 3025.18 incorporated and canceled DoDD 3025.1 (Military Support to Civil Authorities) and DoDD 3025.15 (Military Assistance to Civil Authorities).
[57] *Id.* at 4.
[58] *Id*.

the Domestic Operational Law Handbook.

C. Status of Components Responding to Domestic Incidents

The Reserve Component (RC), which is comprised of the reserve of the various Services and the National Guard (NG) of States, plays a significant role in domestic support operations. The purpose of the RC is to provide trained and qualified persons available for active duty in time of war, national emergency, or for other national security requirements.[59] The RC has unique personnel/duty categories that are important to understand because they not only determine what benefits (e.g., medical and retirement) and protections (e.g., Federal Tort Claims Act or similar liability rules) RC members have, but they also determine the different types of duties that Service member may perform. The Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD (M&RA)) is responsible for the supervision of RC affairs in the Department of Defense and establishes the directives that provide guidance on RC activation, mobilization, and training.[60]

1. Reserve Component

The RC consists of the Army NG of the United States (ARNGUS), the Army Reserve, the Naval Reserve, the Marine Corps Reserve, the Air NG of the United States (ANGUS), the Air Force Reserve, and the Coast Guard Reserve.[61] Members of the RC are a true reflection and extension of civilian society. The defense of the United States is dependent upon the contributions of these citizens who prepare for active service during peacetime and enter active duty during times of national emergency.

a. U.S. Army Reserve (USAR)[62]

The USAR's mission is to meet Department of the Army contingency operations and mobilization requirements.[63] The Army Reserve makes up 20 percent of the Army's organized units, but provides half of the Army's combat support, and 25 percent of the Army's mobilization base expansion capability.[64]

[59] 10 U.S.C. § 10102 (2018).
[60] U.S. DEP'T OF DEFENSE, DIR 5124.10, ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND RESERVE AFFAIRS (14 Mar. 2018).
[61] 10 U.S.C. § 10101 (2018).
[62] U.S. DEPT' OF ARMY, REG. 140-1, MISSION, ORGANIZATION, AND TRAINING (20 Jan. 2004) [hereinafter AR 140-1]; U.S. DEP'T OF ARMY, REG. 140-10, ASSIGNMENTS, ATTACHMENTS, DETAILS, AND TRANSFERS (25 Apr. 2018); U.S. DEP'T OF ARMY, REG. 135-18, THE ACTIVE GUARD RESERVE PROGRAM (11 Oct. 2019); U.S. DEP'T OF ARMY, REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS, 17 Feb. 2024). 1994).
[63] AR 140-1, *supra* note 6, para. 1-8.
[64] *America's Army Reserve*, ARMY RESERVE, http://www.usar.army.mil/About-Us/ (last visited 29 May 2024).

b. U.S. Air Force Reserve (USAFR)[65]

The USAFR is composed of 35 wings that report to one of 3 Numbered Air Forces (NAFs).[66] With just over 10 percent of the Air Force's manpower, the USAFR performs more than 30 percent of all Air Force missions.[67] Like all of the other RCs, the role of the USAFR is to provide trained and ready forces to support its parent service. Yet the USAFR also has several unique missions. For example, the 731st Airlift Squadron, assigned to the 302nd Airlift Wing, Peterson Air Force Base, Colorado, is trained in the use of modular airborne firefighting systems that support local, State, and Federal agencies during wildland fire response.[68] Additionally, the 53rd Weather Reconnaissance Squadron at Keesler Air Force Base, Mississippi, performs hurricane reconnaissance exercises over the Atlantic, Pacific, Caribbean, and Gulf of Mexico and is the only DoD unit tasked to perform weather reconnaissance in support of the Department of Commerce.[69]

c. U.S. Naval Reserve (USNR)[70]

The Naval Reserve is composed of both commissioned units (self-contained, deployable assets with both personnel and mission equipment) and augmentation units (non-hardware units that provide trained manpower to active Navy units). Typically, members of the U.S. Naval Reserve (USNR) serve one weekend a month and an additional two weeks per year. However, members may also serve fulltime as Navy Full-Time Support or Navy Individual Augmentees. USNR unique missions include operation of a Mine Countermeasure Ships, Mobile Inshore Undersea Warfare Units, Helicopter Warfare Support Squadrons, and Navy Expeditionary forces such as Seabees and Cargo Handlers.

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[65] U.S. DEP'T OF AIR FORCE, INSTR. 36-2110, TOTAL FORCE ASSIGNMENTS (5 Oct. 2018); U.S. DEP'T OF AIR FORCE, INSTR. 36-2619, ACTIVE DUTY OPERATIONAL SUPPORT (ADOS)—ACTIVE COMPONENT (AC) MAN-DAY PROGRAM (25 Nov. 2019); U.S. DEP'T OF AIR FORCE, MAN., 36-2136, RESERVE PERSONNEL PARTICIPATION (15 Dec. 2023).

[66] *Command Structure,* U.S. AIR FORCE RESERVE, https://www.afrc.af.mil/Units/ (last visited 29 May 2024).

[67] The unit program of the USAFR is called the "Category A" program. Personnel perform a minimum of one weekend of inactive duty training every month, referred to as a unit training assembly (UTA), and two weeks of active duty (annual training) for pay and points each fiscal year. The "Category B" program is the individual mobilization augmentee (IMA) program consisting of individual reservists assigned to major commands, field operating agencies, joint organizations, direct reporting units and outside agencies. Although some commands allow training with other units in the member's local area, this decision is made on a case-by-case basis by the individual command. Inactive duty training periods for pay and points are usually performed during the week in increments of four IDTs per quarter. A day is worth two IDT points. Members also perform a 12–14 day paid active-duty training tour annually with one point awarded for each day. In the "Category E" program, personnel do not earn pay for their service, but they do earn retirement points. Examples of this are service with the Civil Air Patrol Assistance Program and the Chaplain reinforcement designees.

[68] *Modular Airborne Fire Fighting System (MAFFS)*, 302ND AIRLIFT WING, http://www.302aw.afrc.af.mil/About-Us/Fact-Sheets/Display/Article/627167/modular-airborne-fire-fighting-system-maffs/ (last visited 29 May 2024).

[69] *53rd Weather Reconnaissance Squadron Hurricane Hunters*, 403RD WING), https://www.403wg.afrc.af.mil/About/Fact-Sheets/Display/Article/192529/53rd-weather-reconnaissance-squadron-hurricane-hunters/ (last visited 29 May 2024).

[70] U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPS, INSTR. 1001.20D, STANDARDIZED POLICY AND PROCEDURE FOR THE ACTIVE DUTY FOR OPERATIONAL SUPPORT PROGRAMS (20 Feb. 2020).

d. U.S. Marine Corps Reserve (USMCR)[71]

The Marine Corps Reserve is composed of one Marine division, one Marine air wing, one service support group, and a Marine Corps Reserve support command. Marine Forces Reserve is the headquarters command for roughly 100,000 members of the USMCR.[72] Unique units in this reserve branch include Civil Affairs Groups and Air-Naval Gunfire Liaison Companies.

e. U.S. Coast Guard Reserve (USCGR)[73]

The USCGR, like its active duty counterpart, is an agency within the Department of Homeland Security. Under Title 14 and Title 10 of the United States Code, the Coast Guard is at all times an armed force, as well as a law enforcement agency. As an armed force, the Coast Guard is required to maintain a state of readiness to function as a specialized service in the Navy in time of war or upon Presidential declaration. The Coast Guard, discussed more below, is a unique member of the Joint Forces involved in civil support missions because of its mix of military, civil law enforcement, and regulatory authorities that allow it to respond to a wide variety of threats at home and abroad.

Coast Guard reservists may be called in response to serious natural or man-made disasters, accidents, or catastrophes such as hurricanes, earthquakes, tornadoes, or floods. The Secretary of Homeland Security has the authority to order members of the Coast Guard Ready Reserve to active duty without their consent in a domestic emergency.[74] They may be used for not more than 120 days in any two-year period to augment the Regular Coast Guard. Coast Guard reservists perform unique missions as well. Among the most important is the staffing of Guard Port Security Units (PSUs)—specialized deployable security units that have served both domestically and abroad during times of war.[75] Additionally, under 10 U.S.C. § 12302, the USCGR provided key support to Operation Iraqi Freedom and Operation Enduring Freedom.[76]

f. NG of the United States (NGUS)

The terms Army NG of the United States (ARNGUS) and Air NG of the United States (ANGUS)

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[71] U.S. MARINE CORPS, ORDER 1001.52K, MANAGEMENT OF THE ACTIVE RESERVE (AR) SUPPORT TO THE UNITED STATES MARINE CORPS RESERVE (15 Feb. 2019); U.S. MARINE CORPS, ORDER 1001.59A, ACTIVE DUTY FOR OPERATIONAL SUPPORT (ADOS) IN SUPPORT OF THE TOTAL FORCE (19 Jan. 2011).

[72] *MARFORRES Media Information*, U.S. MARINE CORPS FORCES RESERVE, https://www.marforres.marines.mil/About/Media-Info/ (last visited 29 May 2024).

[73] U.S. COAST GUARD, COMMANDANT INST. M1001.28C, RESERVE POLICY MANUAL, (Dec. 2016).

[74] *See* 14 U.S.C. § 3713 (2018).

[75] U.S. COAST GUARD PORT SECURITY UNIT HISTORY, https://media.defense.gov/2017/Jun/25/2001768454/-1/-1/0/USCG-PORT-SECURITY-UNIT-HISTORY.PDF (last visited 29 May 2024).

[76] The Center for Naval Analyses (CNA), upon request of the U.S. Coast Guard Historian, compiled a summary of Coast Guard operations in Operation Iraqi Freedom. *See* BASIL TRIPSAS, ET AL., COAST GUARD OPERATIONS DURING OPERATION IRAQI FREEDOM (2004), https://media.defense.gov/2017/Jul/01/2001772261/-1/-1/0/OIF_D0010862.PDF (last visited 29 May 2024).

refer to the NG as a RC of their respective service.[77] The terms "Federal service" and "Federalized" are applied to NG members and units when ordered to active duty in their RC status or called into Federal service in their militia status under various sections of Title 10 of the U.S. Code.[78]

The terms "Army NG"(ARNG) and "Air NG" (ANG) refer to the Federally-recognized (and usually Federally trained and funded under Title 32, U.S. Code) organized militia of the various States—in other words, members of the NG in a "State status" pursuant to Article I, Section 8, Clause 16 of the Constitution.[79] The ARNG and ANG train for their Federal military missions according to congressionally-established disciplines under Title 32 of the U.S. Code, and they are under State control. ARNG/ANG members also take oaths to obey their respective governors and abide by State law.[80] Upon enlistment/commissioning in the Army and Air NG, members simultaneously become members of the ARNGUS or ANGUS respectively, and thus may be called into Federal service.

Determining whether a NG member is in a State or Federal status can be critical to defining their roles and responsibilities. Status is also the primary factor for determining the applicability of law for such issues as benefits, protections, and liabilities. For instance, members of the NG only become subject to the Uniform Code of Military Justice (UCMJ) when Federalized (serving on active duty under Title 10); while in a State status they are subject to their respective State codes of military justice. Additionally, some laws, such as the Posse Comitatus Act (PCA) only apply to the NG when they are in a Title 10 status. NG members are usually relieved from duty in the NG when on Federal active duty as a member of the NGUS under 32 U.S.C. § 325. However, per the National Defense Appropriations Act for Fiscal Year 2004, 32 U.S.C. § 325 was amended to allow Federalized NG officers to retain command authority over State forces with the approval of POTUS and the consent of the Governor.[81]

Guard personnel in Title 10 and Title 32 status receive Federal pay and are covered under the Federal Torts Claims Act.[82] Title 10 personnel always receive Federal military retirement credit for the performance of duty. It is helpful to keep in mind that the determination of whether the NG is in Federal or State service does not rest on the entity that funds the activity, but rather which entity has command and control.

(1) Title 32 Status

When performing duty pursuant to Title 32, U.S. Code, a NG member is under the command and control of the State but paid with Federal funds. The majority of NG members perform weekend

[77] 10 U.S.C. §§ 101(c), 10101 (2018). Per 10 U.S.C. §§ 10105 and 10111 (2018), the Army National Guard of the United States (ARNGUS) and Air National Guard of the United States (ANGUS) specifically consist of (1) Federally recognized units and organizations of the ARNG/ANG, and (2) members of the ARNG/ANG who are also members of the Army/Air Force Reserves.
[78] *See* 10 U.S.C. chs. 13, 1211 (2018).
[79] *See* 10 U.S.C. § 101 (2018); 32 U.S.C. §§ 301, 307 (2018).
[80] *See* 32 U.S.C. §§ 304, 312 (2018).
[81] Section (G)(6)(a) of this chapter and section (A)(6) of chapter 2 discuss Dual Status Commanders in more detail.
[82] *See* 32 C.F.R. § 536.97 (2012).

drills of inactive duty for training (IDT) once per month and annual training (AT) two weeks per year. These traditional members of the NG are commonly referred to as "M-Day" (Mobilization Day). Each year, M-Day Service members are required to perform 48 IDT drills and 15 days of AT.[83] The operations of NG units in Title 32 status are controlled by the individual States and supplemented by funding from Federal sources pursuant to Federal regulations.[84] Federal recognition of NG units and associated funding is conditional upon the unit continuing to meet applicable Federal standards.[85] ARNG and ANG Service members performing duty in Title 32 status have Federal Tort Claims Act (FTCA) coverage as long as they are acting within the scope of their Federal employment.

There are many instances of the NG performing operations (as opposed to training) in a Title 32 status (e.g., post 9-11 airport security duty, Hurricane Katrina, Southwest Border operations, counter-drug operations, and WMD-CST teams). The use of Title 32 duty for operational missions must be based on statutory authority (for example, counter-drug authority at 32 U.S.C. § 112) or upon the request of the President or the Secretary of Defense (see 32 U.S.C. § 502(f)(2)(A)). Ultimately, performing Homeland Security missions in a Title 32 status, instead of a Title 10 status, may be preferable because the Posse Comitatus Act (PCA) does not apply, NG troops can respond more rapidly because they are in the local area, and NG troops typically have more situational awareness in local, domestic areas than their active-duty counterparts. Furthermore, Homeland Security missions can enhance NG training through "training by doing." The benefits of performing operations under Title 32, instead of Title 10, has continually been raised. Thus, various legislative proposals exist to modify Title 32 to improve this capability.[86]

Ordinarily, NG personnel in a Title 32 status should not provide civil support to a State, such as disaster assistance, unless such missions have legal authorization and receive funding. Accordingly, NG members are often in a State Active Duty (SAD) status (funded by the State) when providing civil support. If TAGs use NG members in a Title 32 status to perform civil support without appropriate authority, the State may be required to reimburse the Federal Government for the Federal funds expended during the operation.

(2) State Active Duty (SAD)

Of the Armed Forces of the United States, only the NG has a status entitled State Active Duty; performance of such duty is pursuant to State constitutions and statutes.[87] SAD status has no relationship to USAR/USAFR or Active Duty (AD). In a SAD status, States control their own NG personnel, subject to the command and control of the respective Governor and Adjutant

[83] 32 U.S.C. § 502(a) (2018).
[84] *See* Illinois Nat'l Guard v. Fed. Labor Relations Auth,, 854 F.2d 1396, 1398 (D.C. Cir. 1988).
[85] 32 U.S.C. §§ 107–109 (2018).
[86] For example, H.R. 2073/S. 215, called "Guaranteeing a United and Resolute Defense Act of 2003," set forth a mechanism that allows centralized Federal funding and decentralized execution of National Guard homeland security missions.
[87] For example, ARIZ. CONSTITUTION, art. 5, § 3; ARIZ. REV. STAT. § 26-101 (2020) (Governor as commander-in-chief of State military forces when not in Federal service); ARIZ. REV. STAT. § 26-121 (2020) (composition of militia); ARIZ. REV. STAT. § 26-172 (2020) (mobilization of militia for emergencies and when necessary to protect life and property).

General. NG units perform duties authorized by State law, such as responding to emergencies or natural disasters (floods, hurricanes, fires), and are paid with State funds. Because NG units are subject to State control unless Federalized under Title 10 of the United States Code, they are the primary military force that will respond to local disasters and emergencies. For these types of operations, the Governor may declare an emergency and call any State NG unit into SAD status. Governors can directly access and utilize the Guard's Federally-assigned aircraft, vehicles, and other equipment as long as the Federal government is reimbursed for the use of fungible equipment and supplies such as fuel, food stocks, etc. Federal funds are not obligated for any personnel or units performing SAD. However, if the President declares a major disaster or an emergency after a Governor's request for assistance under the Stafford Act, then the State military department may be reimbursed through FEMA for the SAD pay and allowances it has expended.[88]

For more information on authorities for mobilizing the Reserve Component, the categories of the Reserve Component, and the National Guard Bureau's role and responsibilities, please review Chapter 3 of the Domestic Operational Law Handbook.[89]

D. Dual Status Commander (DSC)

The National Defense Authorization Act for 201290 stated when Federal forces and the NG simultaneously provide support to civil authorities, appointment of a DSC should be the usual and customary command and control arrangement.91 This arrangement helps Federal and NG personnel unify efforts in response to a major disaster or emergency. This includes Stafford Act major disaster and emergency response missions. A DSC maintains a commission in both a Title 10 and Title 32 capacity, and is subject to orders from both the State and Federal chains of command. This unique status serves as a vital link between the two. The use of DSCs have become common for incident response and special events since 2004. DSCs receive their appointment in one of two ways. First, under 32 U.S.C. § 315, an active-duty Army or Air Force officer may be detailed to the Army or Air NG of a State. Second, under 32 U.S.C. § 325, a member of a State's Army or Air NG may be ordered to active duty. Regardless of method of

[88] 42 U.S.C. § 5121 (2018).
[89] Domestic Operational Law Handbook (2024) 47-80.
[90] National Defense Authorization Act of 2012, Pub. L. No. 112-81, § 515, 125 Stat. 1298 (2011). *See also* 32 U.S.C. §§ 315, 325 (2012 & Supp. IV 2017).
[91] National Defense Authorization Act of 2012, Pub. L. No. 112-81, § 515(c), 125 Stat. 1395 (2011), 32 U.S.C. § 317, note. Despite a DSC being the usual and customary arrangement, this language "does not limit, in any way, the authorities of the President, the Secretary of Defense, or the Governor of any State to direct, control, and prescribe command and control arrangements for forces under their command." *Id.*

appointment, the Secretary of Defense must authorize the dual status, and the Governor of the effected State must consent.[92]

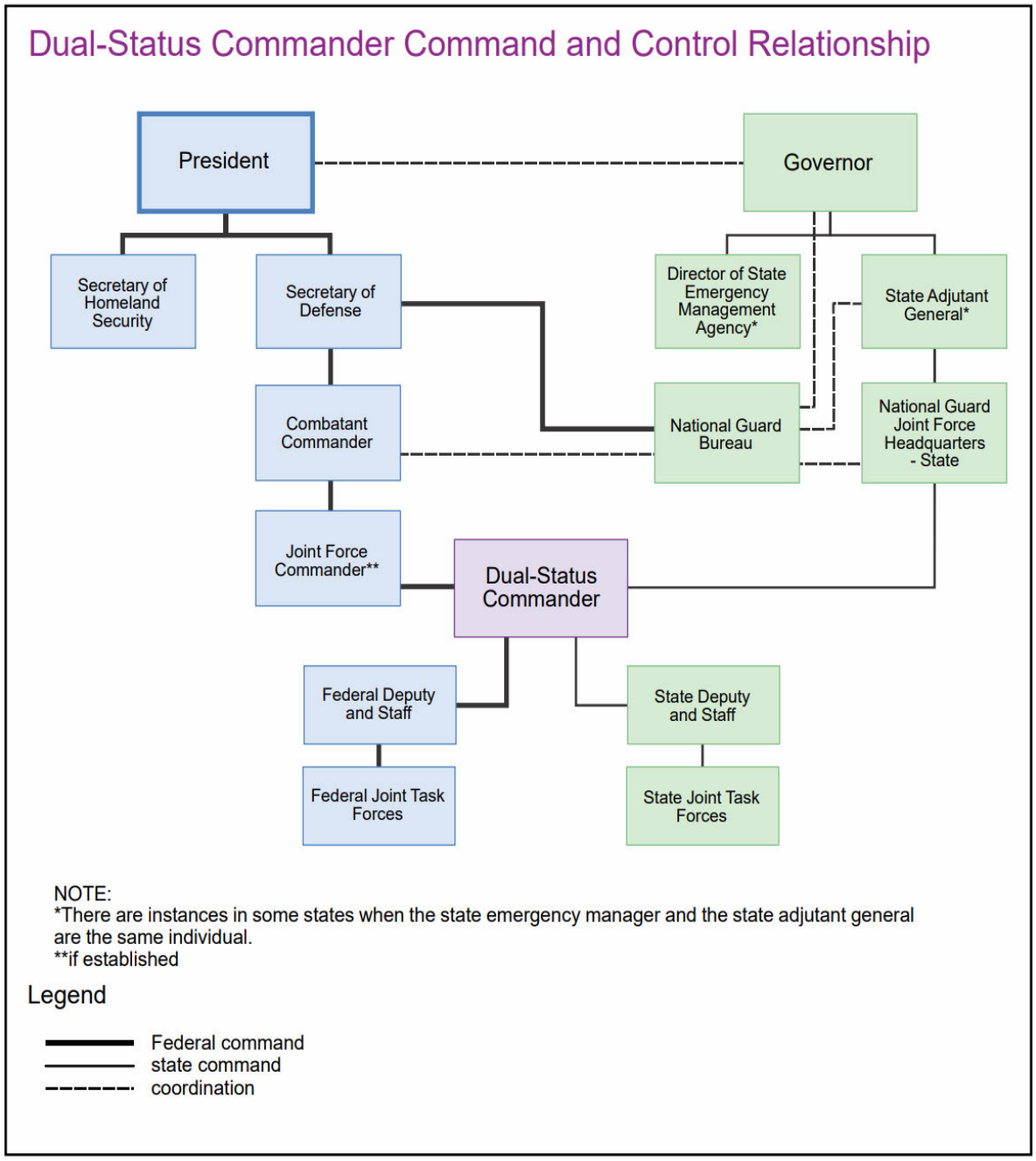

Figure 2-2[93]

[92] See 32 U.S.C. §§ 315, 325 (2012 & Supp. IV 2017); and U.S. Gov't Accountability Office, DoD Needs to Address Gaps in Homeland Defense and Civil Support Guidance, GAO-13-128 (Oct. 2012).

[93] See JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES, Appendix D (29 Oct. 2018).

E. The Robert T. Stafford Disaster Relief and Emergency Assistance Act

The Stafford Act provides for assistance from the Federal government to States in the event of emergencies or natural and other disasters.[94] The Stafford Act is the primary legal authority for Federal emergency and disaster assistance to State and local governments. Congress' intent in passing the Stafford Act was to provide for an "orderly and continuing means of assistance by the Federal government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters."[95] The Stafford Act sought, among other things, to: 1) broaden the scope of disaster relief programs; 2) encourage the development of comprehensive disaster preparedness and assistance plans, programs, and capabilities of State and local governments; and 3) provide Federal assistance programs for both public and private losses sustained in disasters.[96]

Through the Stafford Act, Congress delegated to the President emergency powers that may be exercised in the event of a *declared major disaster* or *emergency*. Generally, Federal Stafford Act assistance is given upon request from a State Governor[97] provided certain conditions are met; primarily that the Governor certifies that the State lacks the resources and capabilities to manage the consequences of an event without Federal assistance. The Stafford Act lists the roles and responsibilities of Federal agencies and departments when providing both major disaster and emergency assistance, and it outlines the types of assistance that affected State(s) may receive from the Federal Government. (See Table 2-3 below).

FEMA operates under the Stafford Act and is the lead Federal agency for Stafford Act responses, focusing its efforts on managing the consequences of disasters and emergencies. FEMA's actions under the Stafford Act are generally driven by requests from State and local governments.

To coordinate the relief efforts of all Federal agencies in both major disasters and emergencies, the Stafford Act authorizes the President to appoint a Federal Coordinating Officer (FCO) immediately after declaring a major disaster or emergency. The Stafford Act also requires the President to request that a Governor seeking Federal assistance designate a State Coordinating Officer (SCO) to coordinate State and local disaster assistance efforts with those of the Federal

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[94] The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.,* as amended by the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295 (2007), the Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2 (2013), and the Disaster Recovery Reform Act of 2018, Pub. L. No. 115-254 (2018) [hereinafter The Stafford Act].

[95] 42 U.S.C. § 5121 (2012 & Supp. IV 2017).

[96] *Id.*

[97] An example where a request is not required is in the case of an *emergency* in an area where the Federal Government is determined to have primary responsibility, as discussed below. *See* 42 U.S.C. § 5191(a) (2012 & Supp. IV 2017). Additionally, 42 U.S.C. § 5170a(5) states that in a major disaster, the President may provide accelerated Federal assistance in the absence of a request where necessary to save lives, prevent human suffering, or mitigate severe damage as long as prompt coordination with the State occurs. Use of this authority may impede the ability of the Federal Government to implement the cost-share process.

government.[98]

The Stafford Act applies in the event of a major disaster or emergency. It details the emergency functions of the President, which are delegated per Executive Order 12656 and other directives.	
DEPARTMENTS & AGENCIES	**ROLES AND RESPONSIBILITIES**
Executive Office of the President (President or as delegated)	Major Disaster Assistance—upon request of a State Governor. Provide specified essential services; coordinate disaster relief activities; direct Federal agency assistance to States and localities; take other action as consistent with the Act and within delegated authority.
	Emergency Assistance, upon request of a State Governor or *sua sponte*: Direct Federal agencies to provide resources and technical and advisory assistance; provide essential services; coordinate all disaster relief assistance.
Federal Coordinating Officer	Major Disaster and Emergency Assistance: Establish field offices; coordinate relief efforts; take other necessary actions within authority.
Emergency Support Teams	Assist the Federal Coordinating Officer in carrying out his or her responsibilities in a major disaster or emergency.
State Governor(s)	Request declaration by the President that a major disaster or emergency exists.
Federal Agencies	Provide, consistent with appropriate authorities and upon request from the President: Personnel for the Emergency Support Teams; and, assistance in meeting immediate threats to life and property resulting from a major disaster or emergency.
FEMA	Prepare, sponsor, and direct Federal response plans and programs for emergency preparedness**;** provide hazard mitigation assistance in the form of property acquisition & relocation assistance.
Department of Defense	Upon President's direction, provide "emergency work" to protect life and property prior to declaration of major disaster or emergency.
American National Red Cross and other relief organizations	Major Disaster: As a condition of receiving assistance, comply with regulations relating to non-discrimination and other regulations as deemed necessary by the President for effective coordination of relief efforts.

Table 2-3. Stafford Act Roles and Responsibilities

The FCO may utilize relief organizations, such as State relief organizations and the American National Red Cross (ANRC). The use may be for the distribution of emergency supplies, such as

[98] 42 U.S.C. § 5143 (2012 & Supp. IV 2017).

food and medicine, and in reconstruction or restoration of essential services, such as housing. The FCO may coordinate all relief efforts. However, States, localities, and relief organizations must agree with the courses of action. The President must form Emergency Support Teams (EST) of Federal personnel to be deployed to the area of the disaster or emergency.[99] By delegation, the FCO may activate ESTs, composed of Federal program and support personnel, which deploy into an area affected by a major disaster or emergency.[100] The EST is the principal interagency group that supports the FCO in coordinating the overall Federal disaster assistance.

1. Requests for Emergency or Major Disaster Declarations

Under the Stafford Act, the Governor of an affected State may request the declaration of a major disaster or emergency.[101] The Governor must demonstrate, as a prerequisite for receiving assistance, both that the State's response plans have been activated and that State and local capabilities are inadequate for an effective response.[102] The Stafford Act's definitions of "emergency" and "major disaster" are referenced in many of the legal documents related to incident management and are used consistently throughout this chapter.

a. Major Disasters

A "major disaster" is defined as follows:

> [A]ny natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.[103]

b. Emergencies

The Stafford Act defines "emergency" as follows:

> [A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public

[99] 42 U.S.C. § 5144 (2012 & Supp. IV 2017).
[100] 44 C.F.R. § 206.43 (2017). These teams may also be called emergency response teams.
[101] 44 C.F.R. § 206.35 (2017).
[102] 44 C.F.R. § 206.36 (2017).
[103] 42 U.S.C. § 5122(2) (2018).

> health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.[104]

An emergency is, more broadly, any situation in which Federal assistance is required to save lives, protect health and property, or mitigate or avert a catastrophe. Generally, the existence or threat of a chemical, biological, radiological, nuclear, and high-yield explosive WMD would be deemed an "emergency," if it overwhelms State and local authorities and warrants the assistance of the Federal Government.

Emergency authority granted to the President is similar to that authorized for handling major disasters, but not as extensive. Emergency assistance is more limited in scope and in time. Additionally, total assistance may not exceed $5 million for a single emergency, unless the President determines there is a continuing and immediate risk to lives, property, public health or safety, and necessary assistance will not otherwise be provided on a timely basis.[105] In contrast to its provisions for major disasters, The Stafford Act authorizes the President to declare an emergency *sua sponte,* when the emergency "involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority."[106]

In any emergency, the President may direct any Federal agency, with or without reimbursement, to use the authorities and resources granted to it under Federal law in support of State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe.[107] The President may coordinate all emergency relief assistance and provide technical and advisory assistance to affected State and local governments for the: performance of essential community services; issuance of hazard and risk warnings; broadcast of public health and safety information; and management, control and reduction of immediate threats to public safety.[108] The President may also direct Federal agencies to provide emergency assistance; remove debris pursuant to 42 U.S.C. § 5173; provide temporary housing assistance in accordance with 42 U.S.C. § 5174; and assist State and local governments in the distribution of food, medicine, and other consumable supplies.[109] The Stafford Act also authorizes the President, upon request from the Governor of an affected State, to provide "emergency work" essential for the preservation of life and property, by the Department of Defense for a maximum of ten days before the declaration of either an emergency or a major disaster.[110]

Emergency	**Major Disaster**
Does not need to be requested by State or Territorial Governor (as long as emergency involves area of primary federal responsibility).	Requires Governor request and disaster assessment.

[104] 42 U.S.C. § 5122(1) (2018).
[105] *See id.* § 5193.
[106] *See id.* § 5191(a).
[107] *See id.* § 5192.
[108] *Id.*
[109] *Id*.
[110] *See id.* § 5170b(c).

Assistance is narrower, in this case limited Public Assistance program, Category B. The assistance is normally provided in the form of grants to state and local governments for emergency work.	Wider range of federal assistance programs, including for individuals and public infrastructure, as well as "permanent work" and hazard mitigation to prevent or reduce long term risk to life and property from natural hazards.
Emergency assistance is intended for immediate and short-term help in order to save lives, and protect public health, safety, and property.	Assistance usually continues for a longer period of time.
Usually limited to no more than $5M per event but in this case, President has apparently authorized up to $50B.[111]	No pre-determined cap.

FEMA Mission Assignments. For DoD to provide assistance, FEMA must submit RFAs or mission assignments (MA) to the DoD. The use of the term "mission assignment" is specific to a request for assistance from FEMA in support of a Stafford Act declaration. The MA request process is as follows:

States identify needed resources and capabilities and coordinate requests for assistance at the Joint Field Office (JFO) with the appointed Federal Coordinating Officers (FCO).

FCOs identify appropriate Federal capability and resources to meet the State's request and, if the DoD is the appropriate agency to assist, submit the State request to the DoD through the assigned Defense Coordinating Officer (DCO).

The DCO validates the request and submits to the appropriate CCDR where the Global Force Management process is utilized to source requests approved by SecDef.[112] The SecDef approved, standing DSCA EXORD delegates limited approval authority to the supported combatant commanders (USNORTHCOM & USINDOPACOM) for the use of forces allocated in this EXORD – without further approval from SecDef.[113] ASD M&RA is involved in the approval of all requests for DoD support involving the NG in a T-32 status.

Judge advocates, at each level within the DoD enterprise, review MAs to ensure the requests can be performed legally (utilizing the CARRLL factors noted above)

The Department of Defense Automated Support System (DDASS) is a web-enabled Government

[111] President can exceed normal 5M cap if he determines there is a continuing and immediate risk to lives, property, public health or safety, and necessary assistance will not otherwise be provided on a timely basis. We understand that the Disaster Relief Fund which can be tapped during declared emergencies and major disasters has around $40BN currently.

[112] The Unified Command Plan assigns DSCA responsibilities to the Commander, USNORTHCOM within the 48 contiguous states, the District of Columbia, Alaska, Puerto Rico, and the U.S. Virgin Islands; and to the Commander, USINDOPACOM within Hawaii, U.S. territories or insular areas, and possessions in the USINDOPACOM area of responsibility.

[113] CJCS Defense Support of Civil Authorities EXORD (30 Jul. 2019).

software application developed by the Army Geospatial Center (AGC) to manage (i.e., track, collaborate, coordinate and prioritize), FEMA Mission Assignments (MAs) assigned to the Department of Defense in real time. DDASS provides the automated means for a Defense Coordinating Element (DCE, one assigned to each FEMA region), to validate MAs and allow for all Orders, Requests For Forces (RFFs) and FEMA MA forms to be associated with specific missions and provides multiple commands Situational Awareness, to view and respond to mission critical actions. DDASS serves as the backbone to support the DoD's Defense Support to Civil Authorities (DSCA) responsibilities assigned primarily to U.S. Northern Command (NORAD/NORTHCOM) and the U.S. Pacific Command (US INDOPACOM) as required.[114]

Mission Assignment Task Orders (MATO). MATOs are specific tasks that direct activities within the scope of an approved MA, utilizing forces already sourced for a particular MA. MATOs may include personnel, resource movement, and locations for delivery and duty stations, etc. MATOs are the tactical equivalent of the FRAGO where follow on orders and instructions are issued from an original base order and are validated and approved by the cognizant DCO with CCDR acknowledgment.

MAs are generally issued and obligated in order to make resources available to address estimated immediate mission-critical needs and are frequently updated. As the need for a particular mission assigned activity is assessed, MA funding may be supplemented or de-obligated as required.

2. Liability under the Stafford Act

The Stafford Act specifically provides for immunity from liability for certain actions taken by Federal agencies or employees of the Federal government pursuant to the Act. 42 U.S.C. § 5148 of the Stafford Act provides:

> The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter.[115]

3. Categories of Agency Support Under the Stafford Act[116]

Once an emergency or major disaster is declared, it means a State has requested assistance from the Federal Government (except in the case of the limited exception discussed above). The assistance given will typically take one of two forms: Direct Federal Assistance or Federal

[114] DDASS, Department of Defense, Defense Support to civil authorities, automated support system (DDA Army Geospatial Center (2023), https://www.agc.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/480905/department-of-defense-defense-support-to-civil-authorities-automated-support-sy/ (last visited Jul 2, 2024).

[115] *See id.* § 5148.

[116] U.S. COAST GUARD, COMDTINST 3006.1 (series), FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) MISSION ASSIGNMENTS: OPERATIONAL ACCEPTANCE AND EXECUTION (Aug. 13, 2012).

Operations Support.

a. **Direct Federal Assistance** is assistance where one or more Federal departments or agencies provide goods and services to State and/or local governments. Direct Federal Assistance is authorized and reimbursed by FEMA and is subject to Federal-State cost sharing.

b. **Federal Operations Support** is assistance where one or more Federal departments or agencies provide goods or services to FEMA and/or other Federal agencies to enable them to provide direct Federal assistance or other supplemental Federal assistance. Federal operations support is requested by FEMA or another Federal department or agency. Federal operations support is authorized and reimbursed by FEMA and is not subject to Federal-State cost sharing.

F. Economy Act

The Economy Act authorizes interagency orders when the ordering agency reimburses the performing agency for the costs of supplying the goods or services. [117] 31 U.S.C. § 1536 specifically indicates that the servicing agency should credit monies received from the ordering agency to the "appropriation or fund against which charges were made to fill the order."[118] The Economy Act applies only in the absence of a more specific acquisition authority, such as the Stafford Act.[119] Additionally, the Economy Act may not be used by an agency to circumvent conditions and limitations imposed on the use of funds, including extending the period of availability of cited funds. Furthermore, the Economy Act may not be used for services which the servicing agency is required by law to provide the requesting agency and for which it receives appropriations.[120]

G. Immediate Response Authority (IRA)

1. Federal Military Commanders

Federal military commanders, heads of DoD Components, and/or responsible DoD civilian officials have IRA under DoDD 3025.18. In response to a request for assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DoD officials may provide an immediate response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States.[121] "The civil authority's request for immediate response should be directed to

[117] 31 U.S.C. § 1535
[118] See also 41 U.S.C. § 6307 (providing similar intra-DOD project order authority, and DoD FMR, Vol. 11A, Ch. 3 (providing policies and procedures for Economy Act orders).
[119] FAR 17.502-2(b).3
[120] DoD FMR vol. 11A, ch. 3, para. 030303.
[121] U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 4.i. (29 Dec. 2010) (C2, 19 Mar. 2018) [hereinafter DoDD 3025.18].

the installation commander or other appropriate DoD official responsible for the installation . . . ."[122] The DoD official must exercise judgement in determining the maximum allowable distance from the installation that the immediate response may take place and should also, unless otherwise directed by a higher authority, prioritize DoD resources and requirements before addressing the civil authority's request.[123] IRA does not allow for actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory (for a detailed discussion, see the Chapters within on Military Support to Civilian Law Enforcement and Civil Disturbance Operations).

Separately, per DoDD 3025.18., paragraph 4.i.4, any decision by an IRA to temporarily deploy resources requires notification to the National Joint Operations and Intelligence Center (NJOIC). Commanders may not normally continue support under IRA beyond 72 hours. When using this authority, DoD commanders shall reassess whether there remains a continued need for a DoD response as soon as practicable, *but no later than 72 hours* after the request for assistance was received.[124]

As noted in subsection B. of this Chapter, Commanders acting pursuant to IRA must still evaluate requests from civil authorities for assistance using the "CARRLL" factors.[125]

2. State Governors

As the principle authority during State emergencies, Governors may direct an immediate response using NG personnel under State command and control (including personnel in a Title 32 status).[126]However, NG personnel will not be placed in or extended in Title 32 status to conduct State immediate response activities.[127] Additionally, State leadership must coordinate with the Chief of the NG Bureau to approve the continued use of personnel in a Title 32 status responding in accordance with IRA in excess of seventy-two hours.

DSCA Fiscal Considerations. All DoD support is provided on a reimbursable basis, unless otherwise directed by the President or reimbursement is waived by SecDef.[128] The reimbursement process requires the DoD components to capture and report total and incremental costs IAW applicable DoD financial management regulations. Types of DSCA Reimbursement:

[122] *Id.* at 5.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 4e.
[126] CHIEF NATIONAL GUARD BUREAU, INST. 3000.04, NATIONAL GUARD BUREAU DOMESTIC OPERATIONS (Jan. 24, 2018) para. 4.a. [hereinafter CNGBI 3000.04].
[127] DoDD 3025.18, *supra* note 150, at para. 4.j.
[128] DoDD 3025.18, para 4; DoD 7000.14R, DEP'T OF DEFENSE FINANCIAL MANAGEMENT REGULATION, Vol. 11A, Ch. 19.

H. COVID-19 Specific Legislation, Appropriations, and Policy

1. Coronavirus Aid, Relief, and Economic Security (CARES) Act (memo from Under SecDef)

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was enacted on March 27, 2020, in response to the Coronavirus Disease 2019 (COVID-19) national emergency. Section 3610 of the CARES Act allows agencies to reimburse, at the minimum applicable contract billing rates (not to exceed an average of 40 hours per week), any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, during the PHE declared for COVID-19

Then, in April 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) which provides supplemental funding for expenses incurred by the National Guard in preventing, preparing for and responding to COVID-19.[129]

See Appendix A for additional implementation guidance from the Office of The Under Secretary of Defense for Acquisition and Sustainment (OUSD A&S) and an excerpt of the CARES Act.

2. Public Readiness and Emergency Preparedness (PREP) ACT

The PREP Act allows the Secretary HHS to issue a PREP Act Declaration "that provides immunity from liability for any loss caused, arising out of, relating to, or resulting from administration or use of countermeasures to diseases, threats and conditions determined in the Declaration to constitute a present or credible risk of a future PHE."[130]

In a March 2020 PREP Act Declaration covering COVID-19 tests, drugs, and vaccines the HHS Secretary defined who qualifies for immunity: "manufacturers, distributors, states, localities, licensed healthcare professionals, and others identified by the Secretary (qualified persons) who administer COVID-19 countermeasures. The Declaration has been amended several times to expand liability protections, including prior amendments to cover licensed healthcare professionals who cross state borders and federal response teams."[131]

[129] Further information regarding the funding and authorities for National Guard during the COVID-19 PHE is discussed in Chapter 6, Part C of this publication.
[130] U.S. Department of Health and Human Services, "PREP Act Q&As", available at: https://aspr.hhs.gov/legal/PREPact/Pages/PREP-Act-Question-and-Answers.aspx; *See*, 42 U.S.C. 247(a)(1).
[131] Fact Sheet: HHS Announces Intent to Amend the Declaration Under the PREP Act for Medical Countermeasures Against COVID-19, available at: https://www.hhs.gov/about/news/2023/04/14/factsheet-hhs-announces-amend-declaration-prep-act-medical-countermeasures-against-covid19.html

CHAPTER 4

PUBLIC HEALTH EMERGENCIES

Other than the usual information campaigns, isolation and quarantine are two common public health strategies which aim to protect the public by preventing exposure to infected or potentially infected individuals.

Isolation means the separation of an individual or group reasonably believed to be infected with a quarantinable communicable disease from those who are healthy to prevent the spread of the quarantinable communicable disease.[132]

Quarantine means the separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease.[133] The term "cordon sanitaire", is borrowed from French, literally, "sanitary cordon," originally in reference to a line of military posts or other barriers enclosing a community stricken by an infectious disease.[134] [135]

Both isolation and quarantine may be conducted on a voluntary basis or compelled on a mandatory basis through legal authority.

State Responsibility: A State's public health authority to enact statutes and issue regulations to compel isolation and quarantine within its borders (intra-state) is derived from the 10th Amendment to the U.S. Constitution and its inherent "police power."[136] During a Public Health Emergency (PHE), State and local authorities have primary responsibility for establishing and enforcing intrastate quarantine and isolation restrictions. State law enforcement agencies and the State National Guard are the State's enforcement authorities. As a result of these authorities, States have primary responsibility to enact laws and regulations to promote health, safety, and welfare of its citizens. Consistent with this authority, States may provide for isolation and quarantine restrictions within their borders and conduct these activities in accordance with their respective statutes and regulations. Most State statutes follow the Model State Emergency Health

[132] 42 CFR 70.1 "Isolation"
[133] 42 CFR 70.1 "Quarantine"
[134] "Cordon sanitaire." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/cordon%20sanitaire. Accessed 16 Jun. 2023.
[135] Rothstein, Mark A. (2015). "From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine" (PDF). 12 (1) Ind. Health L. Rev. 227.
[136] See Gibbons v. Ogden, 22 U.S. 1 (1824).

Powers Act.[137] [138] [139]

Title 10 forces may indirectly support a State quarantine or isolation pursuant to DSCA authorities. However, absent the President invoking authorities pursuant to the Insurrection Act or the Emergency Situations Involving Chemical or Biological Weapons of Mass Destruction statutes, Title 10 forces cannot enforce a quarantine or isolation without violating the Posse Comitatus Act.[140]

Federal Enclaves: Federal authorities have primary responsibility for quarantine and isolation restrictions on Federal property and foreign and interstate situations. The lead Federal agency responsible for a Federal quarantine and isolation is the U.S. Department of Health and Human Services (HHS). On August 16, 2000, the Secretary of HHS delegated quarantine and isolation authority to Director of the Centers for Disease Control for any "communicable diseases," as defined in Executive Orders 13295 and 13375.[141] Quarantine and isolation orders issued by the Secretary of HHS or delegee may be enforced by the "Federal law enforcement community," which does not include the DoD.[142]

Interstate: Congress granted the Federal Government a variety of legal statutory authorities designed to restrict modes of transportation, control immigration, close borders, and manage plant and animal infections in response to threats to public health.[143] In response to the COVID-

[137] Larry O. Gostin, Georgetown University, The Centers for Law and the Public's Health, Centers for Disease Control and Prevention (U.S.), National Governors' Association, National Conference of State Legislatures, Association of State and Territorial Health Officials (U.S.), National Association of County & City Health Officials (U.S.), National Association of Attorneys General; The Model State Emergency Health Powers Act: as of December 21, 2001; **(**2001); https://stacks.cdc.gov/view/cdc/6562

[138] As of July 15, 2006, 44 states and the District of Columbia have introduced a total of 171 bills or resolutions that include provisions from or closely related to MSEHPA. Of these bills, 66 have passed within 38 states and the District of Columbia. The Centers for Law & the Public's Health, The Model State Emergency Health Powers Act (MSEHPA) State Legislative Activity, (Jul. 15, 2021), https://www.publichealthlaw.net/files/msehpa/msehpalegactivity.pdf

[139] For a list of each state's isolation and quarantine statutes, see *State Quarantine and Isolation Statutes*, National Conference of State Legislatures, https://www.ncsl.org/health/state-quarantine-and-isolation-statutes

[140] 10 USC 275: Restriction on direct participation by military personnel.

[141] Communicable diseases over which SHHS and the CDC Director have authority are listed in Presidential Executive Order (E.O.) 13295, dated 4 April 2003: Cholera, Diphtheria, Infectious Tuberculosis, Plague, Smallpox, Yellow Fever, Viral Hemorrhagic Fevers, and Severe Acute Respiratory Syndrome (SARS). On 1 April 2005, E.O. 13375 added Influenza caused by novel or re-emergent influenza viruses that are causing, or have the potential to cause, a pandemic. COVID-19 is a "severe acute respiratory syndrome (SARS). Thus, it qualifies as a "communicable disease."

[142] In accordance with 34 U.S.C. § 50102, the community of Federal law enforcement agencies is composed of 110,000 agents and officers in the following organizations: U.S. Coast Guard; Federal Bureau of Investigation; Drug Enforcement Administration; Criminal Division of the Department of Justice; Internal Revenue Service; U. S. Custom Service; Immigration and Naturalization Service; U.S. Marshals Service; National Park Service; U.S. Postal Service; U.S. Secret Service; National Security Division of the Department of Justice Bureau of Alcohol, Tobacco, Firearms, and Explosives; and other Federal agencies with specific statutory authority to investigate violations of Federal criminal laws.

[143] *See e.g.*, Federal Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42 U.S.C. § 300hh-ll (authorizing the implementation of the National Disaster Medical System (NDMS); Project BioShield Act of 2004, 42 U.S.C. § 247d-6b (establishing the Strategic National Stockpile of countermeasure drugs and vaccines); Public Health Threats and Emergency Act of 2000, 42 U.S.C. § 247 (specifying responsibilities of national security-

19 outbreak of 2020, HHS Secretary Alex M. Azar II relied on one such statute, specifically Section 319 of the Public Health Service Act (PHSA) [144] to declare a PHE for the entire United States to aid the nation's healthcare community in responding to COVID-19.[145]

Section 319 of the PHSA grants the DHHS Secretary the ability to determine whether: (a) a disease or disorder presents a PHE; or (b) that a PHE, including significant outbreaks of infectious disease or bioterrorist attacks, otherwise exists.[146] This declaration lasts for the duration of the emergency or 90 days, whichever occurs first, but may be extended by the Secretary. Congress must be notified of the declaration within 48 hours, and relevant agencies, including the Department of Homeland Security, Department of Justice, and Federal Bureau of Investigation, must be kept informed.[147]

The emergency declaration gives State, tribal, and local health departments more flexibility and HHS can authorize those health departments to temporarily reassign state, local, and tribal personnel to respond to a PHE if their salaries normally are funded in whole or in part by PHSA programs. These personnel can assist with public health information campaigns and other response activities.[148]

DoD Support to Enforce quarantine and isolation during PHE. Just like State and Federal enclave quarantines and isolations, during a HHS declared PHE DoD forces may provide indirect support for a quarantine and isolation, but the PCA prevents DoD forces from enforcing such quarantine and isolation.[149] Congress has resisted several attempts to enact legislation creating an exception to the PCA that would authorize either the President or the SecDef to employ DoD forces to enforce a quarantine. Nevertheless, in the absence of specific quarantine enforcement authority from Congress, if circumstances justify it, the President may rely on the following authorities to

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based agencies); Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3 (authorizing emergency use of regulated drug products still undergoing testing); Social Security Act, 42 U.S.C. § 1320b-5 (allowing emergency waiver of the Emergency Medical Treatment and Labor Act); Public Health Service Act, 42 U.S.C. § 247d-6 (granting Secretary of Health and Human Services authority to issue a public health emergency declaration to provide assistance to the States); Pandemic and All-Hazards Preparedness Act, 42 U.S.C. § 300hh-1 (improving the effectiveness of Federal response efforts); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (authorizing EPA to take action to protect public health); Animal Health Protection Act, Title 7 U.S.C. § 8301 (authorizes USDA to work with States to respond to and begin recovery from animal disease or pest incident).

[144] 42 U.S.C. §247d.

[145] U.S. Dept. of Health and Human Services, Office of the Assistant Secretary for Preparedness and Response, Determination that a Public Health Emergency Exists (January 31, 2020), https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.

[146] 42 U.S.C §247(a)

[147] *Id*.

[148] 42 U.S.C §247(e)

[149] 18 U.S.C. § 1385; Department of Defense Instruction (DoDI) 3025.21, Defense Support of Civilian Law Enforcement Agencies (27 Feb. 2013, inc. Ch. 1, 8 Feb. 2019). When a request is submitted to DoD to "assist" Federal or State authorities with its isolation or quarantine of groups of people in order to minimize the spread of a disease, great care should be taken to understand what is meant by "assist." The PCA prohibits DoD personnel from enforcing a quarantine/isolation order, but it does not prohibit providing logistical and administrative support. As long as DoD "assistance" is limited to logistical and administrative support, there would be no violation of the PCA. DoD support for a Q&I may include medical screening and monitoring the health of civilians; providing medical treatment, ground and air transportation of medical supplies and personnel, and technical and advisory assistance; distributing food and consumable supplies; building temporary shelters and roadways; and disseminating public information.

order DoD forces to enforce a quarantine and isolation: (a) inherent authority; or (b) statutory authority under (1) the Insurrection Act, (2) the Weapons of Mass Destruction Act, or (3) the Emergency Federal Law Enforcement Assistance Act.[150]

A. Declaration of a Department of Defense Public Health Emergency

Department of Defense Instruction (DoDI) 6200.03, Public Health Emergency Management within the Department of Defense, governs how military commanders address a PHE on Federal military installations under their control.[151] It is DoD policy that all persons and property on a military installation be protected against communicable diseases associated with biological warfare, terrorism, and a PHE.

DoDI 6200.03 Establishes policy, assigns responsibilities, and provides direction to ensure mission assurance and readiness for public health emergencies caused by all-hazards incidents pursuant to DoD Directive (DoDD) 5124.02. DoD installation commanders are authorized to declare a DoD PHE, and subsequently exercise certain emergency health powers, to protect lives, property, and infrastructure and enable DoD installations and military commands to sustain mission-critical operations and essential services.[152] Notification procedures following a PHE Declaration are set forth in Section 3.3 of the instruction. Situations that may constitute a PHE include the occurrence or imminent threat of an illness or health condition with a high probability of significant deaths or serious, long-term disabilities; widespread exposure to an infectious agent that poses a significant risk of future harm; health care needs that exceed available resources; and/or severe degradation of mission capabilities or normal operations.[153]

DoDI 6200.03 requires DoD installation commanders to designate, in writing, a Public Health Emergency Officer (PHEO). That person must be a uniformed or DoD civilian clinician with specific qualifications and training.[154] The PHEO is responsible for developing the health protection condition framework HPCON[155] for a specific health threat and updating

[150] *See* 10 U.S.C. §§ 251-255; 10 U.S.C. § 282. Before relying on the Emergency Federal Law Enforcement Assistance Act (EFLEAA) (34 U.S.C. § 50101 *et seq*.) to employ DoD forces to enforce a State quarantine order, a Governor must first request the Attorney General provide Federal law enforcement assistance to his State. Under the EFLEAA, the Attorney General would request the SECDEF "detail" DoD personnel to a Federal law enforcement agency, which would have the effect of not only removing them from the restrictions of the PCA, but also from the command and control of the DoD. Upon detail, such DoD personnel would be deputized as a State law enforcement official with specific instructions to assist State law enforcement authorities to enforce a State Q&I order. State laws and regulations governing the use of force would apply. *See* U.S. Department of Justice, U.S. Attorney General Memorandum for the President, Subject: "Summary of Legal Authorities for Use in Response to an Outbreak of Pandemic Influenza," 25 April 2009.

[151] Department of Defense Instruction (DoDI) 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT WITHIN THE DOD, March 28, 2019.

[152] DoDI 6200.03, para. 1.2.b. Notification procedures following a PHE Declaration are set forth in Section 3.3.

[153] *Id*. at para. 3.1.c

[154] In joint basing and tenant organization situations, the installation commander will designate the PHEO. On installations where a joint medical center is a tenant, the commander of the joint medical center will make a qualified individual available to serve as PHEO for the host installation.

[155] DoDI 6200.03 establishes the framework for setting DoD HPCON Levels. HPCON Levels provide a framework to inform decisions by installation commanders charged with implementing appropriate force health protection

recommended HPCON measures as the situation evolves based on guidance from DoD and appropriate civilian public health sources. Although the PHEO develops the HPCON framework, the determination to change the HPCON level is made by the installation commander, in consultation with the PHEO and military treatment facility (MTF) commander.

The PHEO, in coordination with the installation Staff Judge Advocate (SJA), advises the installation commander on the declaration of a PHE and the implementation of emergency health powers in accordance with relevant public health laws, regulations, and policies.[156] When the commander and PHEO determine that a PHE emergency declaration is necessary, the commander will complete a written declaration, with the support and guidance of the SJA and in consultation with the Public Affairs Office (PAO), that outlines the existing situation and specific actions to be taken.[157]

The installation commander's emergency health powers, described in Section 3.2 of DoDI 6200.03, apply to Servicemembers and other persons on a DoD installation, including DoD civilian personnel, contractors, beneficiaries, and any other person within the scope of the installation commander's authority.[158]

Pursuant to Section 3.2, Military commander emergency health powers include:

> (1) Directing Servicemembers to submit to medical examinations or testing as necessary for diagnosis or treatment. Persons other than Servicemembers may be required as a condition of exemption or release from restrictions of movement to submit to a physical examination or testing.
>
> (2) Collecting specimens and performing tests on any property or on any animal or disease vector.
>
> (3) Using facilities, materials, and services necessary for emergency response.
>
> (4) Taking measures to obtain and control the use and distribution of health care supplies.
>
> (5) Closing, directing the evacuation of, or decontaminating any asset or facility that endangers public health; decontaminating or destroying any material that endangers public health; or asserting control over any animal or disease vector that endangers public health, including quarantine and isolation of animals on the installation.

(FHP) measures for the installation population in response to specific health threats. The HPCON framework includes categories (0,A,B,C,D), category descriptions, and specific FHP measures associated with each HPCON level, based on the scope and severity of the threat in question. HPCON levels should be synchronized with the installation FPCON level, and can include installation access, appropriate FHP measures, and limitation of non-critical activities. DoDI 6200.03, Figure 8 provides a conceptual framework for HPCON levels, and examples of FHP measures associated with each level. To supplement this general guidance, OUSD(P&R) issued a memorandum ("FHP Supplement 2") on 25 February 2020, which provides COVID-19 specific guidance for HPCON levels and associated FHP measures. This document may also be found on the CLAMO at: https://intelshare.intelink.gov/sites/clamo/.

[156] *Id*. at para. 4.2.c(3).

[157] *Id*. at para. 3.1.f.

[158] *Id*. at para. 3.2.a(2).

(6) Controlling evacuation routes on, and ingress and egress to and from, the installation.

(7) Taking measures to safely contain and dispose of infectious or contaminated waste.

(8) Restricting movement to prevent the introduction, transmission, and spread of communicable diseases or any other hazardous substances that pose a threat to public health.[159]

B. Restriction of Movement

Quarantine, isolation, and conditional release are types of restriction of movement that can be imposed in certain circumstances by a military commander for individuals within the scope of the commander's authority. Within the United States, restriction of movement should be coordinated with the local CDC quarantine officer and state and local State, local, tribal, and territorial (SLTT) public health authorities. These agencies have public health authorities that may be applicable when the military commander's authority is limited. Conditional release is less restrictive authorized for persons who may have been exposed to a communicable disease or hazardous substances and require continued health monitoring and supervision but have been assessed and determined to be asymptomatic and present a low risk to public health. Conditional release is not appropriate under all circumstances and the PHEO should consult with DoD and civilian public health and medical officials when advising the military commander on the appropriateness of conditional release. Persons under conditional release orders may return to their living quarters but must comply with the terms of the orders, including regular monitoring visits, travel restrictions, and limited contact with other persons as directed.[160]

In areas outside the United States, PHE declarations may be limited to U.S. personnel and subject to the requirements of applicable treaties, agreements, and other arrangements with foreign governments and allied forces, particularly in the case of non-U.S. installations and field activities.[161]

C. DoD HPCON Levels and Public Health Emergency Declarations

DoD HPCON levels provide a framework to inform decisions by installation commanders charged with implementing appropriate force health protection (FHP) measures for the installation population in response to specific health threats. The HPCON framework includes categories (0, A, B, C, D), category descriptions, and specific FHP measures associated with each HPCON level, based on the scope and severity of the threat in question.[162] HPCON levels should be synchronized with the installation FHP measures, and can include installation access,

[159] *Id*. at para. 3.2.b. This is a summarized description of each authority. Please review para. 3.2.b for detailed descriptions and any restraints on the authorities.

[160] *Id*. at para. 3.2.c(3) and (4). Violators of procedures, protocols, provisions, or orders issued in conjunction with a PHE may be charged under the UCMJ or under 42 U.S.C. § 271.

[161] DoDI 6200.03, Section 3.5.

[162] Department of Defense Instruction (DoDI) 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT WITHIN THE DOD, March 28, 2019, paras. 4.1.a(9), 4.2.d(4), and Glossary.

appropriate FHP measures, and limitation of non-critical activities.

DoDI 6200.03, Figure 8 provides a conceptual framework for HPCON levels, and examples of FHP measures associated with each level. To supplement this general guidance, OUSD(P&R) issued a memorandum ("FHP Supplement 2") on 25 Feb 20 which provides COVID-19 specific guidance for HPCON levels and associated FHP measures.[163]

D. PHE Best Practices

1. Navy HPCON and PHE Declaration Recommendation

Issue: Navy's involvement with natural & man-made disasters reiterates need for clear command authorities afloat and ashore.

Observation: Commanders ashore need authorities commensurate with responsibilities, including Force Protection and Emergency Management (FP & EM). HPCON levels inform decisions by installation commanders to implement appropriate force health protection (FHP) measures for installation population in response to specific health threats.

Discussion: DODI 6200.03 allows DoD military installation commanders to declare DoD PHE & implement relevant emergency health powers to protect lives, property, and infrastructure and enable DoD installations and military commands to sustain mission-critical operations and essential services for military, civilian, and contractors. A PHE may include occurrence or imminent threat of illness or health condition with high probability of significant deaths or serious / long-term disabilities; widespread exposure to infectious agent that poses a significant risk of future harm; health care needs > available resources; and/or severe degradation of mission capabilities or normal ops. HPCON levels should be synchronized with installation FPCON level, and can include installation access, appropriate FHP measures, and limit non-critical activities.

Recommendation: Clarify HPCON levels of visiting and tenant commands and Sailors on TAD/TDY. All personnel deploying in support of this mission comply with Service Component specific FHP requirements and associated country-specific guidance. Maintain ongoing situational awareness to limit the spread of PHE, refine emergency response plans, support mitigation measures, enhanced Interagency and international partner coordination, and preposition of key capabilities to ensure mission continuity.

Implication: Success depends on sufficient education of personnel and implementation of heightened FHP to prevent PHE events.

[163] FHP Supplement 2, including Table 1, is embedded in this PDF.

CHAPTER 5

DELINEATING AND DISTINGUISHING LINES OF AUTHORITY DURING A PUBLIC HEALTH EMERGENCY: A SERVICE COMPONANT COMMAND VIEW

The COVID-19 pandemic response operations highlighted the difficulty in determining the applicability of guidance from two higher headquarters on an issue that impacts Combatant Command (CCMD) and Service responsibilities. Both United States Indo-Pacific Command (USINDOPACOM) and HQDA published orders and guidance implementing DoD policies—some of which conflicted or were unclear as to application outside the continental United States (OCONUS), to include Hawaii, Alaska, and the U.S. territories. Even when the orders from higher echelons were unambiguous, to ensure proper authorities were applied, judge advocates needed to know a broad array of authorities for the multiple, simultaneous missions related to COVID-19.

During the first few months of the pandemic response many legal issues arose while integrating joint authorities promulgated through the Office of the Secretary of Defense and CCMDs with service authorities promulgated by HQDA. This section discusses those lines of authority issues and the challenges of executing several simultaneous missions that stemmed from the COVID-19 response.[164]

A. Lines of Authority

United States Army Pacific Command (USARPAC) is the operational-level Army Service component command assigned to USINDOPACOM.[165] As such, USARPAC is under the authority, direction, and control of the CDR, USINDOPACOM on all matters assigned to USINDOPACOM.[166] The CCDR exercises CCMD authority over assigned forces—authority involving organizing and employing; assigning tasks; designating objectives; and giving authoritative direction over all aspects of military operations, joint training, and logistics necessary to accomplish assigned missions.[167] When delegated, CCMD authorities—including operational control authorities—are exercised through Service component commanders.[168] While the CCMD is responsible for operational missions, including Defense Support for Civil Authorities (DSCA), the Services remain responsible for the administration and support of Service forces, including forces assigned to a CCMD.[169] Service Secretaries execute these authorities through administrative control (ADCON)—authority over organizations with respect

[164] Portions of this section are excerpts from Lieutenant Colonel Laura A. Grace & Major Sean P. Mahoney, *COVID-19 Response in the Indo-Pacific Theater*, THE ARMY LAWYER, no. 5, 2020.

[165] U.S. DEP'T OF ARMY, REG. 10-87, ARMY COMMANDS, ARMY SERVICE COMPONENT COMMANDS, AND DIRECT REPORTING UNITS (11 Dec. 2017) [hereinafter AR 10-87], para 1-1 and Chapter 8.

[166] 10 U.S.C § 164 (d)(1) (1986).

[167] *Id*. at (c)(1); JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, V-2 (25 Mar. 2013) (C1, 12 July 2017) [hereinafter, JP 1].

[168] JP 1, *supra* note 184, at V-6.

[169] 10 U.S.C. §165(b), JP-1, *supra* note 184, at V-12.

to administration and support. Each service secretary has the authority and responsibility for "all affairs of the Department", including twelve statutorily specified functions.[170] The Service Secretaries twelve statutory functions are: 1) recruiting, 2) organizing, 3) supplying, 4) equipping, 5) training, 6) servicing, 7) mobilizing, 8) demobilizing, 9) administering, 10) maintaining, 11) construction, outfitting, and repair of military equipment, and 12) construction, maintenance, and repair of buildings, structures, and utilities and the acquisition of real property necessary to carry out the service's responsibilities.[171]

Because these are the service secretary's statutory responsibilities, ADCON does not transfer outside of the military department.[172] For the purpose of analyzing the DoD response to a PHE, this chapter will summarize the conflicts in authorities and issues addressed during the COVID-19 PHE involving the USINDOPACOM geographic combatant command and the United States Army Pacific Command, the Army service component command (ASCC) for USINDOPACOM.[173]

United States Army Pacific Command exercises ADCON authority and responsibility on behalf of SecArmy for USARPAC forces that have been assigned to USINDOPACOM.[174] Accordingly, USARPAC derives its authorities from USINDOPACOM for operational missions and from SecArmy for administrative support of Army forces.

The threat caused by COVID-19 impacted all military activities and cannot be classified as solely operational or administrative. For example, the DoD stop movement policies impacted travel for Defense Support of Civil Authorities (DSCA) missions and other operations as well as travel for training at Army schools. Consequently, USARPAC received directives from both lines of authority.

1. Combatant Command vs. Service Authorities

Almost seven months into the COVID-19 PHE response, USARPAC staff and subordinate forces continued to struggle with understanding authorities and delegations. This was problematic when the CCMD and HQDA interpret or implement DoD policies differently.

In March 2020, DoD issued three separate stop movement policies, which were ultimately replaced by a 20 April 2020 memorandum applicable to all domestic and international travel.[175]

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[170] 10 U.S.C. §§7013(2)(b), 8013(2)(b), 9013(2)(b)

[171] *Id*.

[172] 10 U.S.C. §165(b).

[173] In DSCA operations, CDRUSNORTHCOM oversees operations in CONUS, Alaska, Puerto Rico, and the U.S. Virgin Islands, while CDRUSINDOPACOM oversees operations in Hawaii, Guam, American Samoa, and the Northern Mariana Islands. JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES, at II-14 (29 Oct. 2018) [hereinafter JOINT PUB 3-28].

[174] AR 10-87, *supra* note 182, para. 8-3a. USARPAC also exercises shared administrative control (ADCON) over other United States Indo Pacific Command assigned Army forces through military operation areas (MOAs), such as the Memorandum of Agreement with United States Army Forces Command for shared ADCON of I Corps.

[175] Memorandum from Sec'y of Def. to Chief Mgmt. Officer, Dep't of Def. et al., subject: Travel Restrictions for DoD Components in Response to Coronavirus Disease 2019 (11 Mar. 2020) [hereinafter 11 March 2020 Travel

In each of the policies, there was explicit language identifying exception authorities for the stop movement policies: the CCDR could approve exceptions for individuals assigned to the CCMD and the Service Secretary could approve exceptions for individuals under his jurisdiction.[176]

Under a delegation from the USINDOPACOM Commander, the Commanding General of USARPAC initially withheld exception authority at his level.[177] The SecArmy's delegations, on the other hand, varied based on the type of travel—emergency leave, for example.[178] Despite USARPAC's withholding of the exception to policy (ETP) authority, USARPAC staff and subordinate units routinely followed the SecArmy delegations, instead of adhering to the less permissive USARPAC authorities. There are at least two reasons for the confusion. First, some of the staff who normally took direction from HQDA on ADCON issues (e.g., permanent change of station (PCS) moves) continued to do so without understanding that for the stop movement policies, SecDef delegated authority through the CCMD line of authority for units assigned to the CCMD. This confusion was eventually mitigated through better staff communication and collaboration. The second source of confusion was that, at least initially, HQDA delegations were written to apply Army-wide, including forces assigned to a CCMD.[179]

Between 14 and 22 March 2020, HQDA published seven documents regarding COVID-19 stop movement policies that appeared to evolve in their level of recognition of the different lines of authority. The first policy stated that SecArmy was the ETP authority to the stop movement policy, with no disclaimer for personnel assigned to a CCMD.[180] The Secretary of the Army's subsequent delegation to the Under Secretary of the Army (USA) and the Vice Chief of Staff of the Army (VCSA) only delegated authorities granted "to him"[181] but applied the memorandum "to all Army military and civilian personnel and their families assigned to DoD installations, facilities, and surrounding areas in the United States and its territories."[182] The authority to approve emergency leave, as well as the return of Service members and Department of the Army Civilians from temporary duty or leave, was later delegated to the first General Officer/Senior

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Restrictions Memo]; Memorandum from Deputy Sec'y of Def. to Chief Mgmt. Officer, Dept. of Def. et al., subject: Stop Movement for all Domestic Travel for DoD Components in Response to Coronavirus Disease 2019 (13 Mar. 2020); Memorandum from Joint Staff J3 to U.S. Command et. al., subject: MOD 01 TO REVISION 01 TO DOD RESPONSE TO CORONAVIRUS-2019 EXORD (24 Mar. 2020); Memorandum from Sec'y of Def. to Chief Mgmt. Officer, Dep't of Def. et al., subject: Modification and Reissuance of DoD Response to Coronavirus Disease 2019—Travel Restrictions (20 Apr. 2020).

[176] *See supra* note 193 The Department of Defense (DoD) policies also specified that, if the individual is assigned to the Joint Staff and the Chief Management Officer for the Office of the Secretary of Defense, the approval authority for exemptions to the stop movement policies belong to the Chairman of the Joint Chiefs of Staff.

[177] HEADQUARTERS, U.S. ARMY PACIFIC COMMAND, FRAGMENTARY ORDER 1 TO USARPAC ORDER 20-03-029, USARPAC COVID-19 RESPONSE AND REPORTING, para. 3.E.4.B.4.D (22 Apr. 2020).

[178] Memorandum from Sec'y Army to Principal Officials of Headquarters, Dep't of Army et al., subject: Delegation of Authority to Approve Domestic Travel (20 Mar. 2020).

[179] The bulk of the Army's forces, 750,000 Active Army, U.S. Army Reserve, and Army National Guard soldiers and equipment, are assigned to U.S. Army Forces Command (FORSCOM), an Army Command directly under the jurisdiction of U.S. Army Headquarters (HQDA). See https://www.army.mil/FORSCOM#org-about (last visited 26 June 2024), and AR 10-87, *supra* note 182, at para. 2-2.

[180] HEADQUARTERS, DEP'T OF ARMY, EXECUTE ORDER 144-20, ARMY WIDE PREPAREDNESS AND RESPONSE TO CORONAVIRUS (COVID-19) OUTBREAK, FRAGMENTARY ORDER 8 (14 Mar. 2020).

[181] *Citing* Memorandum from Sec'y Army to Principal Officials of Headquarters, Dep't of Army et al., subject: Delegation of Authority to Approve Domestic Travel (15 Mar. 2020).

[182] *Id.*

Executive Service in the chain of command.[183] This delegation was emailed to commanders, regardless of whether they were assigned to a CCMD. The USARPAC staff drafting orders initially incorporated language from both lines of authority, causing considerable confusion. Judge advocates began sitting side by side with the personnel drafting the orders to ensure the correct delegations were incorporated into the USARPAC orders.

The HQDA publications eventually included explicit language regarding applicability of the delegations. However, there continued to be confusion regarding COCOM and ADCON authorities and why CCMD-assigned forces follow the CCMD lines of authority for some ADCON issues.[184] The best way to mitigate confusion in the future is through clearer language in policies and better communication.

2. Continental United States (CONUS) vs. Domestic

In addition to confusion regarding lines of authority, initial HQDA policies appeared to conflate domestic with CONUS, causing additional uncertainty. Operational control authorities and other Units assigned to USARPAC are located in Hawaii, Alaska, Washington State, Guam, Republic of Korea, and Japan. Joint doctrine defines CONUS as the "United States territory, including the adjacent territorial waters, located within North America between Canada and Mexico."[185] This excludes Alaska and Hawaii. A pay and allowances statute defines CONUS as the forty-eight contiguous states of the United States and the District of Columbia, excluding Alaska and Hawaii.[186] The Financial Management Regulations make a distinction between OCONUS and Non-Foreign OCONUS, defining Non-Foreign OCONUS as Alaska, Hawaii, and U.S. territories and possessions—which in the Indo-Pacific includes Guam, the Commonwealth of the Northern Mariana Islands (CNMI), and American Samoa.[187] Therefore, units in Washington State are CONUS, while the remaining USARPAC units are OCONUS or Non-Foreign OCONUS.

The Secretary of Defense's first stop movement order for domestic DoD travel applied to all "DoD military and civilian personnel and their families assigned to DoD installations, facilities, and surrounding areas in the United States and its territories."[188] However, some of the Army's guidance implementing the DoD policy referred to CONUS instead of the United States and its territories, thereby excluding Alaska, Hawaii, and the U.S. territories. For example, an All Army Activities (ALARACT) message addressing PCS guidance included CONUS to CONUS PCS moves and CONUS to Foreign OCONUS locations.[189] Non-Foreign OCONUS locations were not addressed. Similarly, an HQDA execute order addressed several travel scenarios between the Center for Disease Control, Travel Health Notice Level 2 or 3 countries, and CONUS; once

[183] *Citing* Memorandum from Sec'y Army to Principal Officials of Headquarters, Dep't of Army et al., subject: Delegation of Authority to Approve Domestic Travel (20 Mar. 2020).
[184] This topic should receive greater attention during the officer basic and graduate courses to ensure JAs understand the lines of authority.
[185] JP 1, *supra* note 184, at GL-6.
[186] 37 U.S.C. § 101 (1962).
[187] U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 9, DEF-10 (Sept. 2019).
[188] 11 March 2020 Travel Restrictions Memo, *supra* note 11.
[189] All Army Activities Message, 026/2020, 172052X Mar. 20, U.S. Dep't of Army et al., subject: Personnel Policy Guidance in Support of Army Wide Preparedness and response to Coronavirus Disease (COVID) 19 Outbreak.

again, this left a gap for Hawaii, Alaska, and U.S. territories.[190]

In the global pandemic environment, it is logical that different standards apply to international and domestic locations, as well as between CONUS and OCONUS. However, many of the HQDA policies and guidance omitted the Non-Foreign OCONUS locations. These policies were likely intended to make a distinction between domestic and foreign; however, the failure to recognize that the Indo-Pacific area of responsibility (AOR) includes Non-Foreign OCONUS locations caused confusion and guesswork on HQDA's intent. Much of the confusion occurred in the beginning of pandemic operations when leaders were trying to get information to the field quickly. This confusion could be mitigated by using more precise and consistent language. In addition to interpreting orders from two higher headquarters, JAs needed to understand COVID-19 response missions—and applicable laws—to ensure the proper authorities and funding were being followed.

B. Multiple Simultaneous Missions

In January 2020, all military commands shifted efforts to responding to the COVID-19 threat. In addition to force health protection efforts, USINDOPACOM designated USARPAC as the Theater Joint Force Land Component Command (TJFLCC) and supported component command for DSCA for the COVID-19 response. USARPAC was also designated lead for foreign humanitarian assistance (FHA) in specified countries. This was the first time USARPAC forces were executing DSCA missions within the United States and its territories, planning for FHA in foreign countries, and implementing PHE force health protection measures all at the same time. The challenge was not in understanding the authorities, it was in applying the correct authorities to the specific mission.

1. DSCA – Not Just the Stafford Act

The complex nature of the COVID-19 DSCA response revealed that most practitioners focus on the Stafford Act191 as the single source for DSCA authority and that the Economy Act192 is often overlooked. The authority for DoD to provide DSCA support to other federal agencies is derived from the Economy Act, whereas the Stafford Act gives authority to support state and local authorities. While both authorities provide a valid basis for DSCA support under DoD Directive 3025.18, DSCA practitioners are most familiar with the Stafford Act's authorities to aid local governments. It was easy to forget that when another federal entity requests assistance (HHS is doctrinally the lead federal agency for a PHE)193, the authority is found in the Economy Act.194 The following are some examples of resources used for both federal and state purposes that the legal advisor should be aware of and be prepared to clarify for commanders,

[190] HEADQUARTERS, DEP'T OF ARMY, EXECUTE ORDER 144-20, ARMY WIDE PREPAREDNESS AND RESPONSE TO CORONAVIRUS (COVID-19) OUTBREAK, FRAGMENTARY ORDER 7 (14 MAR. 2020).
[191] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq*., as amended.
[192] Economy Act, 31 U.S.C. § 1535 (LexisNexis 2020).
[193] HHS, PanCap-Adapted, *supra* note 18.
[194] For an overview of the Economy Act, see Domestic Operational Law, 2021 Handbook for Judge Advocates, Ch 12, para G.1 and 31 U.S.C. §1535.

staff, other agencies, and supported local and state employees.

Quarantine Locations: During the initial stages of the COVID-19 pandemic, both local and federal authorities engaged in planning and response efforts. HHS issued the earliest requests for assistance to the DoD, asking for assistance in quarantining individuals returning to the United States from China. Joint Base Pearl Harbor-Hickam (JBPHH) was designated as a quarantine site for these travelers. At the same time, the state and local authorities began to plan for state-directed quarantine sites. TJFLCC planners initially recommended the State of Hawaii make a Stafford Act request to use the same facility that DHHS was establishing at JBPHH for travelers returning from China. The State was informed that it would be required to pay a share of the cost for establishing and running the facility. Hawaii officials were understandably confused as to why DoD would suggest the State request use of a federally established quarantine site and then require it to pay a portion for operation of the site. Judge advocates advised that the HHS requests were Economy Act requests—which basically amount to transfer of funds through the Treasury, and that the State's requests were Stafford Act requests—which could come with cost sharing. If travelers were being quarantined by the order of the Federal Government, the State would not be responsible for any of the costs; but, if the State wanted to use the facility, it would be responsible for a share of the costs.

The Stafford and Economy Acts were again confused when both civil authorities and DoD officials prepared to respond to the COVID-19 outbreak on a Navy aircraft carrier. The USS Theodore Roosevelt docked in Guam with a ship full of infected Sailors, requiring a DoD response for both DSCA and internal DoD support. At the same time, FEMA requested DoD assistance in standing up the reserve center in Guam to provide shower, bath, laundry, and other logistical support to forces providing DSCA assistance in Guam.

Direct support to the USS Theodore Roosevelt Sailors was a DoD internal effort and any assistance or resources from other federal agencies, such as HHS or FEMA, should be requested through the Economy Act. Since it was not a request from civil authorities, the support could not be tasked as part of a FEMA mission assignment or be funded by FEMA disaster relief funds. Nevertheless, support to Guam for ancillary issues stemming from the infected Sailors could be a valid FEMA mission assignment, such as requests from a local government for medical support at the local hospital overwhelmed by treating infected Sailors.

2. DSCA vs. Traditional Military Air Transportation Authorities – Strategic Air to American Samoa

When the Governor of American Samoa closed the territory's borders to incoming passengers and commercial airlines canceled routes to American Samoa, residents became stranded without regular commercial transportation to get supplies and personnel to the distant island. Civilian authorities in American Samoa requested FEMA's assistance in transporting medical personnel and lab testing supplies.[195] The military aircraft conducting the mission were not full, so there were requests to fill the seats with non-DSCA related passengers, including DoD retirees in need

[195] U.S. DEP'T OF HOMELAND SEC., FEDERAL EMERGENCY MANAGEMENT AGENCY MISSION ASSIGNMENT 3465EM-AS-DOD-01 (24 MAR. 2020).

of non-COVID-19-related medical treatment, a non-DoD affiliated bone marrow transplant donor, and—in one case—a family that had been stranded in Alaska and Hawaii several months after the borders in American Samoa were closed.

Department of Defense Instruction (DoDI) 4515.13 specifies the eligibility requirements for transporting civilians on military aircraft.[196] However, the DoDI does not address applicability to DSCA missions when another federal agency is funding the flight. Additionally, although SecDef restricted the ability of certain categories of passengers to fly Space Available during COVID-19, he exempted certain categories of individuals, such as military retirees traveling for medical treatment.[197] Both the DoDI's applicability and the SecDef's temporary instructions during the COVID-19 PHE provided the authority to transport retirees travelling from American Samoa to Hawaii for medical treatment.

The authority to transport non-DoD passengers may be more challenging during a PHE. Again, there are two types of assistance FEMA provides to State and local authorities: Direct Federal Assistance (DFA) and Federal Operational Support. Direct Federal Assistance is when a State or local authority makes a specific request for a certain type of assistance.[198] If FEMA supports the assistance, the State or local authority typically shares the costs. Federal Operational Support is when one federal agency assists another to execute its response and recovery missions.[199] Because the support is internal to the federal government for the purpose of a federal mission, there is no cost-share with the State or local authorities.

DFA provides FEMA with the authority to request the transportation of people who might not otherwise be authorized to travel on the military aircraft as part of the DSCA mission—so long as FEMA has non-DSCA authority to transport the individuals.[200] Individuals and families were stranded on U.S. territorial islands because of flight and travel restrictions imposed by public health authorities, not the natural disaster-caused traditional effects. The FEMA began categorizing these non-traditional DSCA passengers as DFA on the mission assignment tasking orders to ensure the cost sharing was applied to state/territorial and local authorities. Equally as important, the stranded family was returned home.

3. DSCA vs. FHA

United States Army Pacific Command was also designated the TJFLCC for FHA in the Compact of Free Association (COFA) States, which include Palau, Republic of the Marshall Islands (RMI), and the Federated States of Micronesia (FSM). Designating one command to coordinate

[196] U.S. DEP'T OF DEF., INSTR. 4515.13, AIR TRANSPORTATION ELIGIBILITY (22 Jan, 2016) (C4 31 Aug. 2018).
[197] Memorandum from Under Sec'y of Defense to Sec'y Military Dep't. et al., subject: Space Available Travel Program Limitations Due to Coronavirus Disease 2019 (23 Mar. 2020).
[198] U.S. DEP'T OF HOMELAND SEC., FEDERAL EMERGENCY MANAGEMENT AGENCY, MISSION ASSIGNMENT POLICY FP 104-010-2 (6 NOV. 2015).
[199] 44 C.F.R. § 206.8 (2009).
[200] In this case, the FEMA used its own "Space-A" authorities, where individuals may be transported so long as there is space on the flight and the individuals reimburse FEMA for the costs of the flight. This initially caused confusion, as FEMA requested the individuals to be transported under "Space-A" authorities and asked that the DoD be responsible for determining the reimbursement amounts and collect the money from the individuals. Once it became clear that FEMA was working under "FEMA Space-A" and not "DoD Space-A," the mission could be executed.

DSCA and FHA provides for efficiencies in training and experience; but, it can also confuse authorities for operations that look similar but are legally distinct due to the sovereign of the territory where the assistance is being provided. The United States has a unique relationship with the COFA states, but they are still sovereign nations.

After World War II, the three COFA states and Commonwealth of the Northern Mariana Islands (CNMI) were placed under the United Nation's Trusteeship System and declared the United States to be the Administering Authority.[201] Originally controlled by the U.S. Navy, in 1951, administration was transferred to the U.S. Department of Interior. The CNMI became a U.S. territory while Palau, RMI, and FSM became independent nations known as the Freely Associated States.[202]

The lead federal agency for FHA to the COFA states is the U.S. Agency for International Development (USAID).[203] However, during the COVID-19 PHE, FEMA drafted a mission assignment to move supplies from the Strategic National Stockpile for the COVID-19 response to Guam, CNMI, and the COFA states. Because FEMA lacked authority for the proposed mission assignment, it would not have the appropriations authority to reimburse DoD under the Stafford Act for the assistance. Legal advisors must therefore be competent on the authorities of supported agencies as much as DoD authorities during DSCA missions to inform command decisions to support, or not support, particular mission assignments. Ultimately, in this case HHS contracted directly with a carrier to move the supplies to the COFA states.

Many of the legal issues confronted in the USINDOPACOM AOR during the COVID-19 PHE were not new. The challenges were identifying the correct authority for the distinct missions when the various missions stem from the same threat—a global pandemic.

[201] S.C. Res. 21 (Apr. 2, 1947).

[202] The Freely Associated States was an independent nation that signed a comprehensive agreement with the United States—called a COFA—that governs diplomatic, economic, and military relations with the United States.

[203] In the absence of a Presidential Disaster Declaration, the U.S. Agency for International Development (USAID) supports the Republic of the Marshall Islands (RMI) and the Federates States of Micronesia (FSM) as they would any other country. If there is a Presidential Disaster Declaration, USAID is still the Lead Federal Agency, but FEMA is authorized to pay for the support (USAID does the work, FEMA pays the bill). This operational blueprint is contained in the Federal Programs and Services Agreements for the Compacts of Free Association. Palau does not have a Federal Programs and Services Agreement like FSM and RMI, so FEMA does not provide any Foreign Humanitarian Assistance support to Palau. USAID could request that FEMA provide support to Palau, but USAID would fund the support.

CHAPTER 6

USE OF NATIONAL GUARD FOR COVID-19 RESPONSE[204]

Generally, the National Guard has primary responsibility to support state and local government responses to disasters and emergencies. Such responses are part of the National Guard Civil Support (NGCS) mission, which is analogous to the Defense Support of Civil Authorities (DSCA) mission for active duty units.[205] NGCS is defined as "support provided by the National Guard while in a State Active Duty (SAD) status or Title 32 status to civil authorities for domestic emergencies, designated law enforcement, and other activities."[206] When the National Guard is under the control of the Governor or in "State status," i.e., Title 32 status or State Active Duty, members of the NG are subject to the military code of the respective State to which they belong.[207]

Accordingly, National Guard forces in State status provide support to State and local government agencies during a disaster under the command and control of, the Governor, in accordance with State or territorial law and in accordance with Federal law.[208]

In typical disasters, States and territories use their Nation Guard personnel in SAD status and generally request support from other states to provide assistance through Emergency Management Assistance Compact (EMAC).[209] Federal funds are not available for SAD unless and until the President declares an emergency or a major disaster.[210] After such declaration, and if authorized under federal law, the Federal Emergency Management Agency (FEMA) may provide federal funds to an eligible requesting state, including reimbursement for pay and allowances of National Guard on SAD.

A. Full Time NG Duty - Operational Support (FTNGD-OS)

Traditionally, the National Guard performs training in Title 32 status. In 2006, as a result of the increasing use of the NG for domestic missions of national importance, such as the response to Hurricane Katrina, Congress amended 32 U.S.C. § 502(f) to expressly authorize the use of the NG for "[s]upport of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense."[211] These orders are distinct from the "training" requirements of NG members.

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[204] For a more in-depth discussion regarding the National Guard, see chapter 3 in the 2024 Domestic Operational Law Handbook for Judge Advocates.
[205] DoDD 3025.18
[206] (CNGBI 3000.04)
[207] Pursuant to 32 U.S.C. § 327 (2018), the President or active duty commanders may convene State courts-martial. In 2003, Congress ordered the preparation of a model State code of military justice.
[208] DoDI 3025.18, para 4.
[209] For a more in-depth discussion regarding the National Guard, see chapter 3 in the 2024 Domestic Operational Law Handbook for Judge Advocates
[210] Congressional Research Services (March 12, 2021) *The National Guard and the COVID-19 Pandemic Response*. (C.R.S. Report No. IF11483 version 4 updated).
[211] 32 U.S.C. § 502(f)(2) (2018)

The Secretary of Defense, with the concurrence of the affected governors, is the sole authority to authorize DoD funding for the National Guard for DoD operations or missions, including DSCA. SecDef's approval of using the National Guard in a duty status pursuant to section 502(f) for DSCA requires:

1. Receipt of a reimbursable request from a federal department or agency or qualifying entity for DoD assistance in accordance with DoDD 3025.18
2. Selection of the National Guard as the sourcing solution to a Combatant Commander's request for forces
3. Concurrence from the applicable Governor(s)
4. Determination by the SecDef to approve the use of the National Guard in a Title 32 status for DSCA to respond to the approved request.[212]

Nevertheless, the COVID-19 response presented several challenges to the usual and expected process, beginning with the President's Stafford Act declaration on March 13, 2020. This declaration marked the first time any President had declared a Stafford Act emergency effective for all jurisdictions nationwide, and the first time the President issued such an expansive declaration unilaterally.[213] Generally, the President issues an emergency declaration at the request of a governor or tribal chief executive when state, tribal, territorial, and local resources are insufficient to respond to and recover from an incident.[214]

The Stafford Act does not authorize the President to unilaterally declare major disasters (natural catastrophe or any fire, flood, or explosion)[215]; the President may only make such declarations upon request from a governor or tribal chief executive. However, the President can make a unilateral emergency declaration (Federal assistance is required to save lives, protect health and property, or mitigate or avert a catastrophe)[216]. President Trump's Stafford Act emergency declaration explicitly invited governors and tribal chief executives to submit requests for major disaster declarations.[217] Subsequently, governors and tribal chief executives submitted requests for major disaster declarations for the COVID-19 pandemic, and President Trump declared major disasters for each requesting state, which eventually included all fifty states, five territories, the District of Columbia, and the Seminole Tribe of Florida.[218] President Biden later approved the major disaster declaration requests of the Navajo Nation and the Poarch Band of Creek Indians for the COVID-19 pandemic.[219]

Then, due to the pervasive nature of the pandemic and its economic consequences, the President

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[212] Id.

[213] See CRS Insight IN11229, *Stafford Act Assistance for Public Health Incidents*, by Erica A. Lee and Bruce R. Lindsay; and CRS Insight IN11251, *The Stafford Act Emergency Declaration for COVID-19*, by Erica A. Lee, Bruce R. Lindsay, and Elizabeth M. Webster.

[214] As described in Stafford Act Section 401 (42 U.S.C. §5170(a)-(b)).

[215] See Ch 3.E above, and 42 U.S.C. §5122(2)

[216] See Ch 3.E. above, and 42 U.S.C. §5122(1)

[217] President Trump, Letter on Stafford Act Emergency Declaration for COVID-19 (13 March 2020).

[218] FED. EMERGENCY MANGMNT. AGNCY., PANDEMIC RESPONSE TO CORONAVIRUS DISEASE 2019 (COVID-19): INITIAL ASSESSMENT REPORT (Jan 2021), p, 22.

[219] Authorized pursuant to Stafford Act Section 401 (42 U.S.C. §5170(a)-(b)). Specific presidential declarations of major disaster for novel coronavirus 2019 (COVID-19) are searchable on the FEMA "Disasters" webpage, available at https://www.fema.gov/disasters (last visited 26 June 2024).

issued a memorandum on March 22, 2020, that authorized 100% funding for Full-Time National Guard Duty-Operational Support (FTNGD-OS) and directed the Secretary of Defense to request the National Guard from the three states listed in the first presidential memorandum, this funding was eventually extended to forty-five states, the District of Columbia, and three territories.[220] This type of funding is uncommon since the National Guard customarily supports disaster and emergency responses on SAD with its costs reimbursed from FEMA's public assistance fund. Additionally, DoD's past practice was not to characterize a SAD mission for public health emergencies as a federal operational support mission, and, if it did, DoD would have the option to assign federal forces instead of the National Guard.

After the president issued his 100% funding memorandum, the DoD established a unique process for pandemic response FTNGD. The new process featured a conditional preauthorization for National Guard mission assignment requests. This was intended to fast-track funding for FTNGD that would "aid in whole-of-government COVID19 response efforts." The President "pre-approved" the use of National Guard forces to operate under Title 32 Section 502(f)(2), subject to three conditions: first, States must identify specific requirements for COVID-19 support in accordance with the Stafford Act; second, these requests must be submitted to FEMA; and third, FEMA must provide the Department of Defense with a fully reimbursable Mission Assignment.[221] The SECDEF announced to state governors that the Department of Defense "will immediately approve requests meeting these conditions."

From the state perspective, Title 32 status–including 32 U.S.C. 502(f)(2) operational support to DoD missions–offers two distinct advantages to SAD (which is state mobilized and funded): first, FEMA reimburses all the costs if the President agrees to 100 percent cost share,[222] and second, NG units in 502(f)(2) status remain under the command and control of the Governor, which allows local control of the response effort. From the DoD's perspective, use of 502(f)(2) status mitigated sourcing and logistics challenges by providing local, DSCA-trained NG units to execute DoD MAs in their local communities, eliminating the need to source and deploy a Title 10 unit, while enhancing public perception of DSCA operations.

Federal Supremacy Clause immunity is extended to NG personnel operating in a Title 32 status. This includes protections under the Federal Tort Claims Act (FTCA) for suits against Service members acting in their official capacity; Uniformed Services Employment and Reemployment Rights Act (USERRA) rights for employment and re-employment following qualifying service; the Service members Civil Relief Act (SCRA) for Service members with civil actions pending against them during qualifying duty;[223] federal medical care for injuries incurred in the line of duty; and eligibility for death gratuities during the covered period of service. In contrast, NG

[220] Providing Federal Support for Governors' Use of the National Guard To Respond to COVID–19 Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security 85 FR 16997 March 22, 2020

[221] U.S. DEPT. OF DEFENSE, DEPARTMENT OF DEFENSE STATEMENT ON THE USE OF NATIONAL GUARD FORCES UNDER TITLE 32 SECTION 502(f), (28 March, 2020), available at: https://www.defense.gov/News/Releases/Release/Article/2129455/department-of-defense-statement-on-the-use-of-national-guard-forces-under-title/ (last visited 26 June 2024).

[222] FEMA has internal guidance for certain Title 32 personnel costs. There is a certain amount of personnel costs that are not reimbursable. COVID-19 response is unique because the President authorized the use of 502(f)(2).

[223] Not all personnel supporting under Title 32 will be eligible for SCRA. Qualification requires that orders be more than 30 days and in support of declaration of national emergency.

personnel responding on SAD are subject to state law, which may not afford the same protections and benefits as Title 32 or Title 10 status.

Title 32 Active Guard Reserve (AGR) is governed by 32 U.S.C. Section 328. A member of the National Guard performing AGR duties may perform the additional duties specified in 502(f)(2) to the extent that the performance of those duties does not interfere with the performance of the member's primary AGR duties of organizing, administering, recruiting, instructing, and training the reserve components. However, AGRs may respond under IRA on a non-interference basis.[224]

On July 1, 2022, Federal funding for the National Guard to support the whole-of-America response to COVID-19 under 32 U.S.C. transitioned to SAD. After July 1, 2022, governors could still activate National Guard personnel to SAD as necessary for ongoing COVID-19 response and would receive reimbursement from FEMA's Public Assistance (PA) program at a 90 percent federal cost share.[225]

B. §10216. Military technicians (dual status) [226]

A military technician (dual status) is a Federal civilian employee who:

a. is employed under section 3101 of title 5 or section 709(b) of title 32;
b. is required as a condition of that employment to maintain membership in the Selected Reserve; and
c. is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

Dual status technicians are covered under the Federal Tort Claims Act. When the assigned national guard unit is participating in civil support operations while in a "State status" (Title 32 or SAD), the dual status technician's participation is limited because any participation must fall within the scope of their position. To perform out-of-scope activities, the dual status technician may be placed in a leave status and placed on SAD orders. Nevertheless, dual status technicians can still respond under Immediate Response Authority (IRA) while in State status. This limitation regarding scope does not apply to FTNGD-OS.

In the beginning of the COVID response, The Trump Administration initially authorized FTNGD-OS for specific National Guard units, limited to thirty-day periods. If approved for extension, the Administration would issue new orders for successive periods of the same length. However, thirty-day FTNGD-OS orders do not qualify deployed National Guard members or

[224] *See* 10 U.S.C. § 10508; 32 U.S.C. § 328; 32 U.S.C. 709; DoDD 3025.18, DSCA; NGR 600-5, The AGR Program Title 32 Full-Time National Guard Management; Domestic Operational Law and Policy Manual, 2nd Edition, NGB-JA; CNGBI 1400.25, National Guard Technician Personnel Program.
[225] FEDERAL EMERGENCY MANAGEMENT AGENCY, TRANSITION OF NATIONAL GUARD ACTIVATIONS FOR COVID-19 RESPONSE ACTIVITIES FACT SHEET, (updated May 10, 2023), available at: https://www.fema.gov/fact-sheet/transition-national-guard-activations-covid-19-response-activities (last visited 26 Jun 2024).
[226] *See* DOPLAW Handbook Chap 3 G.4.b., 10 U.S.C. §10216

their families for DOD health care. On April 13, 2020, the Secretary of Defense authorized longer periods that allowed access to the military health system.

Subsequently, by the end of 2020, the Administration's guidance for the FTNGD-OS process required states or territories to have an approved major disaster declaration or have submitted a declaration request for review, activated the lesser of 500 individuals or 2% of National Guard on SAD, and issued a resource request and agree to the applicable cost share.

Funding and mobilization issues were just a few of the challenges the National Guard faced during its COVID response. At the peak of the COVID-19 response, more than 47,000 National Guard personnel supported community-based testing, emergency medical care, medical sheltering, communication of health and safety information to the public, transportation, logistics, and first responder support.[227] Those issues and best practices are addressed in this section.

C. Title 32 Personnel access to Title 10 Medical Care

While on active duty or full-time National Guard duty orders for more than 30 days, Reserve Component personnel, and dependents, are authorized healthcare on the same basis as the active component. Additionally, while on inactive duty for training (IDT), active duty, or full-time National Guard duty for 30 days or less, Reserve Component personnel are authorized medical and dental care as a result of injury, illness, or disease incurred or aggravated incident to IDT or active duty.[228]

Although the authority was not used during the COVID-19 PHE, be aware that secretaries of the Military Departments, and the Under Secretary of Defense (Personnel & Readiness), may establish eligibility not specifically provided by statute for critical mission-related health care services for designated members of the Armed Forces, such as Reserve Component members not in a present duty status. This authority includes payment for health care services in private facilities to the extent authorized by 10 U.S.C. Chapter 55. Care under this paragraph is non-reimbursable.[229]

D. Intelligence and Information Acquisition during COVID-19 Response[230]

Multiple governors expanded the role of their National Guard (NG) units in combating the spread of COVID-19 within their states and territories. These actions raised questions and concerns about the appropriate and effective use of NG intelligence capabilities to support this domestic activity. Domestic missions are no different from overseas missions in that a key

[227] See Chap. 1, pg. 6 above.
[228] AR 40-400 Patient Administration, 8 JUL 2014, para 3-2
[229] 32 CFR § 108.4 Policy, also DODI 6025.23 Health Care Eligibility Under the Secretarial Designee (SECDES) Program and Related Special Authorities
[230] The intent of this publication is not to replicate the information found in Chapter 9 of the Domestic Operational Law Handbook. Please review that comprehensive chapter for the underlying authorities and concept of intelligence and information acquisition activities. The purpose of this section is to identify and outline legal concepts and issues particular to the COVID-19 Pandemic Response.

requirement for mission success is situational awareness. Leaders and commanders at all levels must be aware of the situation on the ground and have a deep understanding of the operational environment in which their forces are operating and the inherent threats faced in that environment. Overseas, where the threat is, by definition, foreign, the intelligence component provides the preponderance of threat data. Domestically, defining threat information may involve information concerning U.S. persons.[231] By law, the military and civilian intelligence components face legal constraints on how they acquire/collect, use, disseminate, and retain such information.

1. Background

Before discussing the rules concerning the acquisition/collection, use, retention and dissemination of information within the homeland, it is important to understand that there are two distinct groups of National Guardsmen who collect information. Each group must operate according to its own authorities and rules. The first group is generally composed of Intelligence personnel and equipment assigned to the NGB J2, A2, and G2/S2; the second group, the National Guard at large (non-intelligence component) to include Domestic Operations (NGB J3/G3/A3); Command, Control, Communications and Computers (NGB J6/G6/A6); Health and Medical personnel; and Military Police and Security Forces personnel. Because each has its own authorities and rules, it is imperative that commanders and leaders direct their requests for information to the appropriate group.

NG intelligence personnel operating in a State active duty (SAD) status are not members of the DoD intelligence component and are prohibited from engaging in DoD intelligence and counterintelligence activities. NG personnel in SAD status are also prohibited from using DoD intelligence and intelligence, surveillance, and reconnaissance (ISR) equipment, or resources intended for counterintelligence and human intelligence (HUMINT) activities, unless the SecDef or his or her designee authorizes that use. NG personnel in SAD status are subject to the provisions of State and Federal law, including privacy laws. [232]

2. Domestic Information Collection – Intelligence Personnel (J2, G2/S2 and A2) and Equipment

Intelligence personnel in Title 10 or Title 32 status and the Federal intelligence equipment they employ are subject to the Intelligence Oversight (IO) rules contained in DoDM 5240.01, DoD 5240.1-R and Chief National Guard Bureau Instruction (CNGBI) 2000.01D, National Guard Intelligence Activities, and its accompanying manual (CNGBM 2000.01A)[233]. Information concerning U.S. persons may only be collected by Intelligence Personnel and equipment if it is necessary to carry out an authorized intelligence mission and falls within an approved category

[231] U.S. DEP'T OF DEF., MANUAL 5240.01, PROCEDURES GOVERNING THE CONDUCT OF DOD INTELLIGENCE ACTIVITIES 54 (8 Aug. 2016) [hereinafter DoDM 5240.01].
[232] The Conduct and Oversight of National Guard Intelligence Activities, CNGBI 2000.01D, Jan 18, 2022, (incorporating change 1, effective June 15, 2023), para. 4.d., National Guard Intelligence Activities, CNGBM 2000.01B, August 24,. 2022, Encl E, para. 3.
[233] CNGBM 2000.01B *supra* note 258.

of information as listed in DoDM 5240.01. By law, the only authorized missions for Title 10 intelligence personnel and equipment and Title 32 intelligence personnel training for their Title 10 mission are foreign intelligence and counterintelligence. SecDef approval is required to use Title 10 intelligence personnel and Federal intelligence equipment for any use other than their Title 10 (Foreign Intelligence or Counterintelligence) mission.

During domestic response, Title 32 NG intelligence personnel may leverage their Title 32 training Mission Essential Task List (METL) tasks and **non-intelligence equipment** to provide situational awareness of the operational environment so long as it is not for the purpose of targeting, or collecting on, any specific U.S. Persons and does not constitute foreign intelligence or counterintelligence collection.[234] Using their training and experience but not using intelligence and ISR equipment, NG personnel may monitor foreign threats to the NG/DoD and all-hazards threats (natural and manmade disasters and incidents). This includes lines of communication analysis; key and critical infrastructure status and vulnerabilities; movements of large crowds (not specific U.S. Persons); the erection of street barriers; the location of citizens or incident responders in distress (consent of the U.S. Person is implied in these circumstances); locations of shelters or COVID-19 testing; locations of hospitals; geographical location of the large-scale destruction of property (e.g., arson and looting); attempts by foreign terrorist organizations to exploit vulnerabilities during domestic response, even when foreign actors have played no role in the incident; and the effects of weather and terrain on planning and operations. Any domestic criminal or terrorist information concerning specific U.S. persons incidentally collected by NG intelligence personnel in the routine performance of their duties must be handed over to the NGB J34 or law enforcement officials.

Governors may also leverage the military intelligence (MI) skills of NG intelligence personnel under State Active Duty (SAD) with Federal non-Intelligence equipment (on a reimbursable basis) or State equipment. While they are not subject to the DoD IO or DoDD 5200.27 rules in a SAD status, all NG personnel are subject to the provisions of State law, to include Privacy Laws, when it comes to acquiring/collecting, using, retaining and disseminating U.S. Person Information (USPI). Consultation with the State Staff Judge Advocate is highly recommended. Federal intelligence equipment and facilities may only be used in a SAD status with SecDef approval. However, NG on SAD status are prohibited from engaging in any DoD intelligence and counter intelligence activities.[235] Additionally, access to U.S. Government security clearances in SAD status is not automatic; the lead federal agency must sponsor SAD Guardsmen and other state employees.

3. National Guard "At Large" (Non-Intelligence Personnel)

Non-intelligence personnel are subject to the rules contained in DoDD 5200.27 and CNGBI 3000.07.[236] Non-intelligence NG personnel are prohibited from acquiring, reporting, processing,

[234] CNGBI 2000.01D *supra* note 258 at para. 4.e.; CNGBM 2000.01B *supra* note 258 at Encl E, para. 3.

[235] CNGBI 2000.01D *supra* note 258 at para. 4.e.

[236] Acquisition and Storage of Information Concerning Persons and Organization Not Affiliated with the Department of Defense, CNGBI 3000.07, November 15, 2023.

and storing information on persons and organizations not affiliated with the DoD, except in those limited circumstances where such information is essential to accomplishing an authorized mission such as:

1. Protection of DoD and NG Functions and Property,
2. Personnel security, and
3. Operations related to a (federally-declared) civil disturbance.[237]

Furthermore, only NG Provost Marshals and affiliated staffs, Security Forces (SF) and affiliated staffs, military law Enforcement officers, and antiterrorism officers and personnel associated with law enforcement elements may acquire information on non-DoD and non-NG affiliated civilians for the purpose of protecting DoD and NG personnel, functions, and property. [238] Additionally, NG counterdrug element personnel supporting civilian law enforcement agencies must comply with procedures in the Counter Drug Program's authorities. The analysis information is the property of the supported Law Enforcement Agency and is not intelligence information and not retained by NG personnel.[239] NG Chemical Biological Radiological and high yield Explosive Response Enterprise Weapons of Mass Destruction-Civil Support Teams, Homeland Response Forces, and Chemical Biological Radiological and high yield Explosive Response Enhanced Response Force Commanders will ensure that any information concerning any non-DoD affiliated person or organization gathered during operations will not be disseminated or retained upon operation completion. All entries regarding non-DoD persons and organizations information in the Civil Support Team Incident Management System unit logs and Mobile Field Kit (SQL) database will be redacted from the system upon mission completion.[240]

4. Medical Information

It is not uncommon to hear the term "medical intelligence" (MEDINT) used incorrectly as well.

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[237] CNGBI 3000.07 *supra* note 263 at para 4.b. Authorized Missions contains descriptions and details of each category. See also Title 5 United States Code, Section 552a, "Privacy Act of 1974" and U.S. DEP'T OF DEF., DIR. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE, January 7, 1980.

[238] CNGBI 3000.07 *supra* note 263 at para. 4.A.(1); see also U.S. DEP'T OF DEF., MANUAL 5240.01, PROCEDURES GOVERNING THE CONDUCT OF DOD INTELLIGENCE ACTIVITIES (8 August 2016); U.S. DEP'T OF DEF., INSTR. 2000.26, DOD USE OF THE FEDERAL BUREAU OF INVESTIGATION (FBI) E-GUARDIAN SYSTEM (4 Dec. 2019); U.S. DEP'T OF DEF., INSTR. 5505.17, COLLECTION, MAINTENANCE, USE, AND DISSEMINATION OF PERSONALLY IDENTIFIABLE INFORMATION AND LAW ENFORCEMENT INFORMATION BY DOD LAW ENFORCEMENT ACTIVITIES (17 Oct. 2013) (C3, 3 Aug. 2020); U.S. DEP'T OF DEF., INSTR. 5525.18, LAW ENFORCEMENT CRIMINAL INTELLIGENCE (CRIMINT) IN DOD (18 Oct. 2013) (C3, 1 Oct. 2020); U.S. DEP'T OF DEF. System of Records Notices listing, https://dpcld.defense.gov/Privacy/SORNsindex/ (last visited 26 June 2024); and CNGB Instruction 7102.01, 09 February 2018, "National Guard Provost Marshal's Responsibilities and Selection Criteria".

[239] See CNGB Instruction 3100.01B, 06 March 2020, "National Guard Counterdrug Support Program"; CNGB Manual 3100.01, 30 July 2021, "National Guard Counterdrug Support"; Office the Assistant Secretary of Defense for Special Operations and Low Intensity/ Conflict – Memorandum, 07 March 2022, "National Guard Counter Drug Program (CDP) Guidance".

[240] CNGBI 3000.07 *supra* note 263 at para. 4.a.(3). See also CNGB Instruction 3501.00A, 29 April 2022, "Weapons of Mass Destruction Civil Support Team Management'; CNGB Manual 3501.00, 10 January 2020, "Weapons of Mass Destruction—Civil Support Team Management (For Official Use Only)"

MEDINT is a specific intelligence discipline that requires mission and authority. MEDINT is defined as "That category of intelligence resulting from collection, evaluation, analysis, and interpretation of **foreign** medical, bioscientific, and environmental information that is of interest to strategic planning and to military medical planning and operations for the conservation of the fighting strength of friendly forces and the formation of assessments of foreign medical capabilities in both military and civilian sectors."[241] State Surgeons General and other medical personnel are likely reporting medical information, to include medical surveillance information,[242] and not MEDINT. However, it is well within the mission and authority of an all-source intelligence analyst to report on or to include Intelligence Community MEDINT in COVID-19 intelligence updates. Intelligence personnel may also report on general all-hazards medical information (e.g. XXX cases of COVID-19 have been reported worldwide or XXX cases of COVID-19 have been reported in in Town, State). It is not within the scope of the NG intelligence component's mission to report on who has tested positive.

Medical personnel and planners are the experts and will likely provide a large amount of COVID-19 reporting. While these personnel are not subject to intelligence oversight, they are required to protect all personally identifiable information (PII) and protected health information (PHI) pursuant to applicable information handling policies and laws, to include the Health Insurance Portability and Accountability Act (HIPAA).

E. Availability of National Guard Funding under the CARES Act [243]

Congress provided supplemental funding for the National Guard Personnel, Army; National Guard Personnel, Air Force; Operations and Maintenance, Army National Guard; and Operations and Maintenance, Air National Guard; appropriations accounts in the CARES Act.[244]

Except as provided below regarding the District of Columbia National Guard, the subject funding is available only for the purpose of expenses incurred by the National Guard in preventing, preparing for, and responding to the COVID-19 virus within the force. This funding was not for the purpose of providing support (including planning or other forms of enabling support) to other Federal departments and agencies, or to State, local, territorial, or tribal governments in preventing, preparing for, or responding to the coronavirus. Summarily, the Department of Defense did not receive appropriations for, and had no authority to provide, such support on a non-reimbursable basis.

Accordingly, DoD's assistance to other Federal departments and agencies, States, and territories in response to the COVID-19 virus remained available on a fully reimbursable basis through the usual approved mission assignments from the Federal Emergency Management Agency

[241] Source: JP 2-01, 5 July 2017, "Joint and National Intelligence Support to Military Operations", GL-11.
[242] Medical surveillance is the ongoing, systematic collection, analysis, and interpretation of data derived from instances of medical care or medical evaluation, and the reporting of population-based information for characterizing and countering threats to a population's health, well-being, and performance. (Source: JP 4-02, "Joint Health Services", 26 July 2012, GL-10).
[243] Public Law 116-136 Mar 27, 2020.
[244] Public Law 116-136 Mar 27, 2020, Division B, Title III.

(FEMA).[245]

Nevertheless, the President directed FEMA to reimburse DoD fully for costs incurred providing support through the activation of National Guard personnel in 32 U.S.C. §502(f) duty status (FTNGD-OS).[246] Accordingly, the National Guard Bureau tracked all incremental costs incurred while executing FEMA mission assignments through the use of National Guard personnel in FTNGD-OS, including pay and allowances, to ensure reimbursement.

Furthermore, in cases where the Secretary of the Army has authorized members of the District of Columbia National Guard to be called to duty to "aid the civil authorities in the execution of the laws" pursuant to section 49-404 of the District of Columbia Code, and where such aid in the execution of the laws is for the purpose of preventing, preparing for, or responding to the COVID-19 virus, supplemental funds provided in the CARES Act remained available for expenses associated with the performance of such duty, including expenses for pay and allowances of members of the District of Columbia National Guard.

Finally, although the CARES Act allowed funds to be transferred and merged with other appropriations, the transfer authority did not authorize DoD to use its appropriations to support other Federal departments and agencies, and State, local, and Indian tribal governments, in preventing, preparing for, or responding to the coronavirus. Department of Defense appropriations may be transferred to other DoD appropriation accounts under section 13001 only to meet the Department's requirements to prevent, prepare for or respond to the COVID-19 virus, and transferred funds remain subject to all limitations of the appropriation account into which they are transferred.[247]

F. Security versus Law Enforcement Operations Defined

The broad term “Security” as defined by Army and Air Force policy and regulation is paraphrased as; those operations undertaken by a commander to provide early and accurate warning of enemy operations, to provide the force being protected with time and maneuver space within which to react to the enemy, protection of friendly resources, and to develop the situation to allow the commander to effectively use the protected force.

Law enforcement includes those activities performed by personnel authorized by legal authority to compel compliance with, and investigate violations of, laws, directives, and punitive regulations. Law enforcement occurs in direct support of governance and the rule of law and is typically performed by personnel trained as police officers who are held directly accountable to the governmental source of their authority.

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[245] See discussion of the Stafford and Economy Acts in Chapter 2, Parts E and F of this publication.

[246] See Presidential Memorandum, subject: "Providing Federal Support for Governors' Use of the National Guard to Respond to COVID-19," dated March 22, 2020 granting assistance to the States of California, New York, and Washington; Presidential Memorandum, subject: "Providing Federal Support for Governors' Use of the National Guard to Respond to COVID-19," dated March 28, 2020, granting assistance to Florida, Louisiana, Maryland, Massachusetts, and New Jersey, along with the territories of Guam and Puerto Rico.

[247] Public Law 116-136 § 13001.

In either case of Security or Law Enforcement, Servicemembers supporting COVID-19 operations may be armed (dependent on individual State laws), at the direction of the appropriate command authority and with a proper Rules for Use of Force (RUF) in place, in a State Active Duty or Title 32 status. Neither term implies or infers that the Servicemember is enforcing civilian rule of law unless specifically stated by the command authority.

The intent of the mission determines the proper classification and nomenclature. If it is to allow freedom of movement and protection for friendly forces as directed by legal authority then Security is the appropriate terminology to be used. If in any way, a Servicemember is acting as would a Civilian Law Enforcement Officer (CLEO), e.g., traffic control, crowd control, detention, apprehension, or any function that limits the rights of a United States Person under law then the appropriate term is Law Enforcement.

Non-Law Enforcement/Security operational terms for COVID-19 response (unarmed):

1. Crowd Management: Any NG Force in support of civilian run operations that require additional manpower to help give directions, manage personnel flow, provide information, or generally support the maximum effectiveness of on-going Department of Health and Human Services (HHS) and State efforts to create social distancing and test/support USPERS in the treatment and identification of infected citizens.
2. Support: Any NG Force that is supporting an on-going civilian operation in any capacity, with a caveat to which type of support it is, e.g., EOC, medical, logistics, engineering, communications, planning, documentation, registration, etc.
1. Transportation: Any NG Force that physically moves needed supplies and commodities via government vehicle in support of COVID-19 operations (Separate function from logistics support).

Law Enforcement/Security operational terms for COVID-19 response (RUF required whether armed or unarmed).

1. Security: Any NG Force that is safeguarding NG personnel and equipment ISO COVID-19 operations.
2. Civil Disturbance: Any NG Force deployed ISO civilian police force “less than lethal” operations IOT maintain the rule of law and protect the general public.
3. Law Enforcement: Any NG Force, with specific consent of the Governor and authorized by State law, to perform law enforcement activities previously defined in support of COVID-19 operations.

Caveat: Typically, SecDef approval for the use of FTNGD-OS in support of civil authorities prohibits their use for law enforcement purposes without prior SecDef approval. The preference is for law enforcement activities to be performed in SAD status. Often a request for approval for FTNGD-OS for law enforcement activities will require an explanation why SAD is not adequate.

G. National Guard Personnel Augmenting Prisons

The language in the National Guard Title 32 Mission Assignment Template (pursuant to the

President's Title 32 memorandum) is confusing on whether National Guard Soldiers in a Title 32 status can perform law enforcement functions. The template says that during the COVID-19 PHE, DoD stated in relation to FTNGD-OS, that "[s]afety and security missions, not to include law enforcement activities, are authorized as part of this mission assignment." OSD General Counsel's Office indicated that National Guard Soldiers may perform safety and security missions as long as they do not conduct any direct, active law enforcement functions such as, "search, seizure, arrest, and other actions that subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory."

National Guard Servicemembers did perform perimeter security and security patrols, maned observation stations, took accountability, performed escort duties, and other similar tasks at prisons so long as they did not search, seize, arrest, or perform other actions that subject a prisoner to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory. Put simply, they were directed "Not to Put Your Hands On Prisoners."

H. Federal and State Records Request

Many HCPs in the National Guard started the mission in SAD and converted to FTNGD-OS once approved. Therefore, those HCPs created both state and federal records. Many states have open records statutes that are broader and contain stricter time limits on responses than the federal Freedom of Information Act. Remember to correctly identify whether responsive records are state or federal to ensure compliance with those deadlines

CHAPTER 7

KEY ISSUES BY PRACTICE AREA

A. Public Health Emergency and Military Health Care Practitioners

For a thorough discussion on the basics on the DoD's role and authorities in Domestic Operations, see Chapter II of this publication, "DOMOPS Framework," as well as the Domestic Operational Law Handbook.[248] The following sections address specific operational issues encountered by judge advocates advising DoD forces supporting pandemic response efforts by civil authorities.

This section begins with a discussion provided by the Department of Health and Human Services (HHS) regarding the Public Readiness and Emergency Preparedness Act (PREP Act)[249] and the role of military medical providers in supporting the whole of government pandemic response, with a focus on vaccination efforts.

1. HHS Guidance Pursuant to the PREP Act

On March 10, 2020, the Secretary invoked the PREP Act and determined that COVID-19 constitutes a public health emergency, retroactive to February 4, 2020. The HHS Declaration authorizes PREP Act immunity for the "manufacture, testing, development, distribution, administration, and use" of covered countermeasures. (These activities, however, must either relate to present or future federal contracts, or be part of the public health response to COVID-19 authorized by an "authority having jurisdiction," such as federal, state, Tribal, or local governments.) The immunity applies to all covered persons as defined in the PREP Act, including any person authorized by state and local public health agencies (or an emergency use authorization) to "prescribe, administer, deliver, distribute or dispense" covered countermeasures. Covered countermeasures include "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19." The "administration" of a covered countermeasure includes "physical provision of the countermeasures" to patients, as well as "activities and decisions directly relating to . . . delivery, distribution and dispensing of" the countermeasures. The HHS Declaration provides PREP Act immunity "without geographic limitation" beginning on February 4, 2020, and ending as late as October 1, 2025.[250]

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[248] Center for Law and Military Operations, Domestic Operational Law, 2021 Handbook for Judge Advocates. https://tjaglcs.army.mil/documents/35956/56919/2021+DOPLAW+Handbook+for+Judge+Advocates.pdf/9350efbc-b5c0-2294-952f-94fb1170111d?t=1624915611838.

[249] "The Public Readiness and Emergency Preparedness Act (PREP Act) authorizes the Secretary of Health and Human Services (the Secretary) to issue a Declaration to provide liability immunity to certain individuals and entities (Covered Persons) against any claim of loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of medical countermeasures (Covered Countermeasures), except for claims involving ''willful misconduct'' as defined in the PREP Act. Under the PREP Act, a Declaration may be amended as circumstances warrant." See, Department of Health and Human Services, PREP Act Guidance, https://www.phe.gov/Preparedness/legal/prepact/Pages/PREP-Act-Guidance.aspx/ 11 Mar 2021.

[250] See 85 Fed. Reg. 15,198, 15,202 (March 17, 2020); see also Pub. L. No. 109-148, Public Health Service Act § 319F-3, 42 U.S.C. § 247d-6d and 42 U.S.C. § 247d-6e.

A key component of that response is access to COVID-19 vaccines across the United States. Early in pandemic response operations, the government anticipated deploying federal personnel, including members of the armed forces, contractors, and volunteers to assist states in their vaccination campaigns.

The Department of Defense (DoD) includes the Military Health System (MHS),[251] composed of hundreds of hospitals and clinics, and thousands of trained and qualified medical personnel. Throughout the pandemic response, the DOD provided military medical personnel in support of prior Federal Emergency Management Agency (FEMA) mission assignments for COVID-19 response.

In addition to providing basic medical care and treatment, DoD health and medical personnel, contractors, and volunteers are well-positioned to increase access to COVID-19 vaccinations across the country. DoD has a range of providers that it has authorized to administer such vaccines. Examples include, but are not limited to, physicians, nurse practitioners, physician assistants, nurses, emergency medical technicians, corpsmen, and medics, to administer vaccines. DoD regulations provide directive requirements for the DoD Immunization Program, establish general principles, procedures, policies, and responsibilities for the immunization program, and implement military and international health regulations and requirements.[252]

Therefore, as an "Authority Having Jurisdiction" pursuant to the HHS Secretary's March 10, 2020, declaration under the Public Readiness and Emergency Preparedness Act (PREP Act), as amended, the HHS Office of the Assistant Secretary for Preparedness and Response issued guidance authorizing qualified DoD personnel, contractors, and volunteers as "covered persons" to administer COVID-19 vaccinations that have been authorized or licensed by the Food and Drug Administration (FDA).

Such DoD personnel, contractors, or volunteers qualified as "covered persons" under the PREP Act, subject to other applicable requirements of the Act and the requirements discussed below. They also received immunity under the PREP Act with respect to all claims for loss caused by, arising out of, relating to, or resulting from, the administration or use of HHS Food and Drug Administration (FDA)-authorized or FDA-licensed COVID-19 vaccines. 42 U.S.C. § 247d-6d(a)(1).

To qualify as "covered persons" under 42 U.S.C. § 247d-6d((i)(8)(B) when administering FDA authorized or licensed COVID-19 vaccines, DoD personnel, contractors, and volunteers had to satisfy the following requirements:

1. The vaccine must be FDA-authorized or FDA-licensed.
2. The vaccination must be ordered and administered according to the Advisory Committee on Immunization Practices' (ACIP's) COVID-19 vaccine recommendation that the

[251] 10 U.S.C. Chapter 55.

[252] E.g., Department of Defense Instruction 6205.02, "DoD Immunization Program," July 23, 2019, available at: https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/620502p.pdf?ver=2019-07-23-085404-617

vaccine be used for the prevention of COVID-19.[253]

3. The DoD personnel, contractors or volunteers must be authorized by DoD to administer vaccines.
4. The DoD personnel, contractors or volunteers must have a current certificate in basic cardiopulmonary resuscitation. This requirement is satisfied by, among other things, a certification in basic cardiopulmonary resuscitation by an online program that has received accreditation from the American Nurses Credentialing Center, the Accreditation Council for Pharmacy Education, or the Accreditation Council for Continuing Medical Education.
5. The DoD personnel, contractors or volunteers must comply with recordkeeping and reporting requirements of the respective jurisdictions in which they administer vaccines, including informing the patient's primary-care provider when available, submitting the required immunization information to the State or local immunization information system (vaccine registry), complying with requirements related to reporting adverse events, and complying with requirements whereby the person administering a vaccine must review the vaccine registry or other vaccination records prior to administering a vaccine.
6. The DoD personnel, contractors or volunteers must comply with any applicable requirements (or conditions of use) as set forth in the Centers for Disease Control and Prevention (CDC) COVID-19 vaccination program provider agreement and any other federal requirements that apply to the administration of COVID-19 vaccine(s).
7. The DoD personnel, contractors, or volunteers must comply with any applicable training requirements as determined by the department and the department must maintain documentation of completion of the Centers for Disease Control and Prevention COVID-19 (CDC) Vaccine Training Modules. For individuals who are not currently licensed, certified or trained to administer vaccinations to humans, or who have not administered vaccines to humans within the last year, the department must maintain documentation that a one-hour supervised period was conducted by a currently practicing healthcare professional authorized to administer vaccinations.

This authorization preempts any State and local law that prohibits or effectively prohibits those who satisfy these requirements from ordering or administering COVID-19 vaccines as set forth above.[254] But this authorization shall not preempt State and local laws that permit additional individuals to administer COVID-19 vaccines to additional persons.[255]

[253] See, e.g., Advisory Opinion 21-02 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration under the Act, available at: https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/AO-21-02-PREP-Act_1-12-2021_FINAL_SIGNED.pdf (last visited Feb. 2, 2121)

[254] See, e.g., Advisory Opinion 20-02 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration under the Act, available at https://www.hhs.gov/guidance/sites/default/files/hhs-guidancedocuments/advisory-opinion-20-02-hhs-ogc-prep-act.pdf (last visited Feb. 2, 2121). See also, Department of Justice Office of Legal Counsel Advisory Opinion for Robert P. Charrow, General Counsel of the Department of Health and Human Services, January 12, 2020, available at: https://www.justice.gov/sites/default/files/opinions/attachments/2021/01/19/2021-01-19-prep-act-preemption.pdf (last visited Feb. 2, 2121)

[255] Moreover, nothing herein shall affect federal-law requirements in 42 C.F.R. Part 455, subpart E regarding screening and enrollment of Medicare and Medicaid providers.

2. Use of Military Health Care Practitioners in Military and Civilian Health Care Facilities

During the first several months of the pandemic, civilian hospitals in many parts of the country were understaffed, and under-resourced.[256] In order to augment hospital staffs, FEMA and DHHS requested support from military medical personnel, including doctors, nurses and respiratory therapists.[257] Later, DoD medical personnel would go on not only to assist with patient care in hospitals, but also with staffing mass vaccination sites.[258]

The integration of DoD personnel into civilian hospitals and vaccination sites raised questions about roles, responsibilities, credentialing, licensing, and liability. In order to ensure common understanding on these issues, DoD units supporting civilian hospitals worked with ARNORTH to develop memorandums of agreement (MOAs), negotiated between the supporting DoD entity and the civilian medical facility, documenting the roles of each party, licensing and credentialing requirements, and other operating protocols.

The primary Federal statute regarding credentialing of military personnel is 10 U.S.C. § 1094, Licensure Requirement for Health-Care Professionals. This law states that an Armed Forces health care professionals, who have a current license and performing authorized Federal duties, may practice his or her health care profession in any State, notwithstanding any other health care licensure laws, and regardless of whether the practice occurs in a DoD facility, a civilian facility affiliated with DoD, or any other location authorized by the Secretary of Defense.[259] The Department of Defense has promulgated qualification and coordination requirements for this statutory portability provision as it pertains to off-base duties.[260] The various qualification/coordination with State licensing board requirements pertaining to health care personnel involved in off-base duties can be found in DoD 6025.13, Encl. 4, paragraph 2.[261]

On April 2, 2020 the Secretary of Defense memorandum entitled "Guidance on Activating the National Guard, Reserve, and Individual Ready Reserve for Coronavirus Disease Response," directed that the military departments, in coordination with the Defense Health Agency (DHA):

- Augment DoD military treatment facilities when local healthcare systems are at or near

[256] See, e.g., U.S. Dept of Health and Human Services, Office of Inspector General, *Hospital Experiences Responding to the COVID-19 Pandemic: Results of a National Pulse Survey March 23 – 27, 2020.* April 2020, OEI-06-20-00300, https://oig.hhs.gov/oei/reports/oei-06-20-00300.pdf.

[257] See, U.S. Northern Command, Press Release, *Military hospital support to FEMA to begin in Massachusetts, expand in Arizona, Maine*, 22 Feb. 2022. https://www.northcom.mil/Newsroom/News/Article/Article/2930507/military-hospital-support-to-fema-to-begin-in-massachusetts-expand-in-arizona-m/#:~:text=SAN%20ANTONIO%2C%20Texas%20%E2%80%93-,At%20the%20request%20of%20the%20Federal%20Emergency%20Management%20Agency%2C%20approximately,workers%20treating%20COVID%2D19%20patients.

[258] See, e.g., Vergun, David, *DoD to Support FEMA Vaccination Efforts*, 12 Feb. 2021, https://www.defense.gov/News/News-Stories/Article/Article/2503020/dod-to-support-fema-vaccination-effort/.

[259] 10 U.S.C. § 1094(d)(1)

[260] "Off base duties" are "[o]fficially assigned professional duties performed at an authorized location outside a MTF and any military installation." U.S. DEP'T OF DEF., MANUAL 6025.13, MEDICAL QUALITY ASSURANCE AND CLINICAL QUALITY MANAGEMENT IN THE MILITARY HEALTH SYSTEM (MHS) 82 (29 Oct. 2013).

[261] *Id*. at Encl. 4, para 2.

capacity, to provide appropriate care to those entitled to DoD healthcare, so minimal medical workload shifts from DoD to surrounding communities;
- Present doctrinal medical force elements as described in Joint Publication 4-02. "Joint Health Services," that can be deployed either to support military operations or to augment local healthcare systems as necessary; and
- Augment non-military healthcare systems with scalable medical personnel augmentation to work in civilian healthcare facilities and/or use civilian healthcare as required. These packages may be tailored to this mission and not strictly conform to doctrinal organizations.

The NG Health Care Practitioners (HCP) may provide healthcare in (SAD), Title 32, or Title 10, either within their own state or outside, based on IRA, an Emergency Management Assistance Compact (EMAC),[262] a FEMA MA, or as a volunteer.[263] Their status and mission set affect their licensure/certification, privileges, credentialing, and liability they can potentially face. Because patient treatment can be provided in all statuses, it is important to note that SAD, Title 32 and Title 10 each have different, licensure, privileging credentialing, liability protections and legal authorities that should be considered when employing NG HCP medical support.

Although this is not an exhaustive or complete list, the following grid lists some planning considerations for the employment of NG medical forces:

	State Active Duty	EMAC(SAD)	T-32 502(f)	T-10
Licensure	State Law	Requesting State	10 U.S.C. § 1094	10 U.S.C. §1094
Credentialing	Centralized**	Centralized**	Centralized**	Centralized**
Privileging	MOA, or CIV	Requesting State	Supported State or Facility	ICTB, MTF, MOA or CIV
Liability Protection	State Law	State Law, or Requesting State	FTCA, Requesting State, and/ or Facility	FTCA, Requesting State, and/ or Facility
Scope of Practice	State Law	State Law	Federal	Federal
Patient Population	JCCQAS*-ANG/ARNG	JCCQAS*-ANG/ARNG	JCCQAS*	JCCQAS*
	MIL/CIV	MIL/CIV	MIL/CIV	MIL/CIV

[262] For more information on EMAC, see EMERGENCY MGMT. ASSISTANCE COMPACT, http://www.emacweb.org/ (last visited 8 Feb 2024).

[263] See generally, Joint Publication 4-02, Joint Health Services, 11 December 2017, Incorporating Change 1 September 28, 2018; DoDI 3025.24, DoD Public Health and Medical Services In Support Of Civil Authorities, January 30, 2017; DoDI 6200.03, Public Health Emergency Management (PHEM) Within the DoD, March 28, 2019; DoD Manual 3025.01, V2, Defense Support of Civil Authorities: DoD Incident Response, August 11, 2016 (inc. Ch. 1 April 12, 2017); Defense Health Agency-Procedural Manual, 6025.13, Volume 4, Clinical Quality Management in the Military Health System Volume 4: Credentialing and Privileging, August 29, 2019.

**ICTB-Clinical Transfer Brief send from credentialing office to receiving MTF to verify clinician; s licensure and practice specialty Memorandum of Agreement between the NG and Civilian Institution that treatment is being provided at. *JCCQAS-Joint Centralized Credentialing and Quality Assurance System

Liability Protections. In SAD, tort liability coverage is based on state law. Many states having immunity from civil and criminal liability for military service also have statutes which provide statutory civil and criminal immunity for NG members performing military duty. In addition, many states may shield NG HCPs under "Good Samaritan" laws. Several states also have "first responder-disaster" immunity statutes which provide immunity those responding to a state or local disaster. Therefore, it is important to first look to the requesting state law in determining coverage for NG HCPs regardless of their state of origin.

Further, as a result of COVID 19, some states provide limited liability waivers specifically for HCPs who come to the aid of the state. These waivers are usually laid out in the state declarations of emergency and corresponding executive orders. These waivers must be carefully examined as many of them are very specific regarding the covered manner of treatment (i.e. only as to medical records requirements) or the covered HCPs (limited to physicians or nurses, but not EMTs/paramedics etc.).

NG HCPs in a duty status under 32 U.S.C. §502 and Title 10 are generally considered federal employees for Federal Torts Claim Act (FTCA) purposes. If a tort claim is received, the appropriate claims service and/or the local U.S. Attorney will analyze whether the NG HCP was in a covered duty status and whether they were acting "within the scope" of his or her federal employment.

State law is applied to determine the scope of duty analysis and will involve an analysis of the nature of the duties being performed. In that event, the nature of the duties and relevant documentation pertaining to the member's duty status are transmitted to the U.S. Attorney via declarations from the respective MTF or HCP commanders.

FTCA coverage is linked to the state law in which the claim arose. Therefore, if the NG HCP is performing 32 U.S.C. §502(f) or Title 10 duties within a non-DoD facility, they may also be covered by any of the previously mentioned state statutory liability or immunity waivers/ indemnifications. For example, a State's healthcare facility may have a volunteer program where volunteer HCPs are considered "employees" for the purpose of liability (except for gross negligence) and the NG HCP/United States may take advantage of this defense/indemnification if an action is brought.

Additionally, HHS instituted waivers that applied to out of state HCPs treating patients who are recipients of Medicaid/Medicare and applied to HIPAA. Judge Advocates and staff sections will be responsible during any PHE to maintain awareness of these types of actions that can affect operations See: https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx

For waivers for hospitals and facilities primarily regarding privileging, transfers, and records, see: https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf

Privileging Definitions

> Clinical privileges. Permission granted by the Privileging Authority to provide medical and other patient care services. Clinical privileges define the scope and limits of practice for HCPs and are based on the capability of the healthcare facility, licensure, relevant training and experience, current competence, health status, judgment, and peer and department head recommendations.
>
> Clinical privileging. The granting of permission and responsibility of an HCP to provide specified or delineated healthcare within the scope of the provider's license, certification, or registration.
>
> Privileging Options. In accordance with national standards for accreditation, military and local civilian leadership may cross-level providers to provide patient care, treatment and services necessary as a lifesaving or harm reducing measures, provided the care, treatment, and services within the scope of the individual's license without modification of existing privileges.
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> Privileging by proxy is a procedure established in DHA-PM 6025.13, Volume 4, Credentialing and Privileging, to quickly and efficiently share providers across the MHS. It allows a privileging authority to permit a provider with current privileges awarded by a different PA to work in his/her facility using existing privileges by leveraging the existing Inter-facility Credentials Transfer Brief (ICTB) process with greater efficiency and less administrative burden.

Disaster Privileges are highly expedited privileges predicated on activation of an MTF Emergency Management Plan or analogous emergency status for non-MTF based units. Disaster privileges in the Military Health System can be granted to volunteer licensed independent practitioners when the Emergency Operations Plan has been activated. During emergencies, providers undergoing "just in time" training for work outside their normal areas may work within the scope of their individual licensure and do not require privilege modification, addition or supervision. Privileging authorities may award disaster privileges on activation of their emergency management plans consistent with provisions established in DHA PM 6025.13, Volume 4 and DHA Memorandum, 3 April 2020, Subject: Streamlined Credentialing and Privileging in Response to COVID-19 to Augment MTF Providers and Expedite Cross-leveling. This allows for Disaster Privileging, Privileging by Proxy (PbP) and Delegation of Privileging Authority to allow timely and efficient credentialing and privileging of Military Health Service providers to maximize emergency response. During emergencies, HCPs undergoing just-in-time training or otherwise re-purposed for work outside their normal areas may work within the scope of their individual licensure and do not require privilege modification, addition or supervision.

Armed Forces HCPs at Non-DoD Facilities. If HCP will be working in a non-DoD facility, arrangements for recognition of their licensure, privileges, credentials and/or registrations must be made at that facility. Also, arrangements must be made for supervision in accordance with pertinent regulations. Unless tasked with a FEMA MA, requirements for civilian institutions to request support from military institutions depend on the circumstances of the request for support. Requirements are contained in DoDM 3025.01 and DODI 3025.24. When treating in non-

military facility, the major source of guidance is state law and EMACS. State emergency declarations regarding credentials, licensure and privileging should be reviewed as many of the statutes/regulations have been modified or waived. Also Judge Advocates should review the federal declarations which also effected credentialing and privileging in hospitals and healthcare facilities nationwide.

a. Memorandums of Agreement

Memorandums of Agreement (MOA)[264] between DoD units and civilian medical facilities were key to ensuring both parties shared a common understanding of each party's roles and responsibilities. MOAs generally covered topics including credentialing, privileges, liability, public affairs, and personal protective equipment (PPE). MOAs also answered critical questions regarding how patients would be billed for services. The agreements were used to document the shared understanding that civilian medical facilities would not bill patients for services by military medical providers. Hospitals did, however, charge patients for associated costs (i.e. using a room or equipment).

The U.S. Army North (ARNORTH) Staff Judge Advocate (SJA) drafted an initial template MOA, with critical input from the Surgeon's cell, G4 and PAO. ARNORTH OSJA also encouraged FEMA Region II legal counsel to provide suggestions and input U.S. Northern Command (USNORTHCOM) SJA approved the use of the template as well.

3. Quarantine/Isolation [265]

State and local health authorities are primarily responsible for decisions to impose quarantine or isolation, and the power to enforce these is generally considered to be part of a jurisdiction's police powers.[266] Federal power to impose quarantine and isolation measures arises with attempts to halt or impede the "introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."[267]
Regardless of whether the quarantine and isolation measures are imposed at the Federal, State, or local level, DoD enforcement actions may be subject to the Posse Comitatus Act (PCA),[268] absent an alternative statutory or constitutional authority. A potential exception to PCA restrictions is 42 U.S.C. § 97 (involving State quarantine laws), which is listed in DoDI 3025.21

[264] An MOA is used to document agreements and execute or deliver support with or without reimbursement between any two or more parties. When a support agreement involves reimbursement, an MOA can be used to further detail terms and conditions in addition to the FS Form 7600A. An MOU is used to document a mutual understanding between any two or more parties that does not contain an expectation of payment, and under which the parties do not rely on each other to execute or deliver on any responsibilities. See, DoDI 4000.19 for more guidance on support agreements generally.
[265] See footnote 8 for definitions.
[266] Jared P. Cole, Federal and State Quarantine and Isolation Authority 2, U.S. Congressional Research Service, RL33201, (Oct. 9, 2014).
[267] 42 U.S.C. § 264(a) (2018). Additionally, in some situations, the Federal government may intervene if it deems State and local control measures to be inadequate. 42 C.F.R. § 70.2 (2017).
[268] 18 U.S.C. § 1385

as one of the specific laws that allows direct DoD participation in law enforcement, subject to applicable limitations.[269] It is also possible that a quarantine or isolation actions could lead to conditions necessitating a Presidential invocation of the Insurrection Act.[270] Typically, however, any DoD support provided to quarantine and isolation support will be limited to logistical, communications, medical, and other support commonly envisioned by the Stafford Act. Measures provided by DoD may or may not amount to direct participation in law enforcement activity, and, therefore, a strict analysis of PCA applicability should occur in all cases.[271]

During COVID-19, masking orders, business restrictions, and other quarantine-related measures were implemented by States and at the local level. Federal quarantine and other emergency authorities were leveraged at borders and Ports of Entry, but quarantine restrictions not involving foreign and interstate travel, were handled predominantly at the state and local level. Throughout the pandemic, The National Guard Bureau General Counsel (NGB-GC) maintained a file with each states' quarantine and related authorities.[272]

Federal quarantine authority generally lies with the Secretary of the Department of Health and Human Services and is carried out by the Center for Disease Control (CDC).[273] However, pursuant to 42 U.S.C. § 264, the Surgeon General, with the approval of the Secretary of Health and Human Services, is authorized to make and enforce such regulations as necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.

The Secretary of HHS may only exercise quarantine authority for communicable disease when permitted by executive order.[274] While HHS may authorize quarantine and isolation under certain circumstances, it is CDC policy to generally defer to state and local health authorities for restrictions impacting people and businesses within those communities. However, the CDC Director is authorized to take broad measures, as necessary, if it is determined that local authorities are taking inadequate actions to prevent the spread of the disease.

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[269] 42 U.S.C. § 97 (2018) specifically states "The quarantines and other restraints established by the health laws of any State, respecting any vessels arriving in, or bound to, any port or district thereof, shall be duly observed by the officers of the customs revenue of the United States, by the masters and crews of the several Coast Guard vessels, and by the military officers commanding in any fort or station upon the seacoast; and all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws, according to their respective powers and within their respective precincts, and as they shall be directed, from time to time, by the Secretary of Health and Human Services." *See also* U.S. DEP'T OF DEFENSE, INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES Encl. 3, para. 1.b.5(i) (27 Feb. 2013), (Ch. 1, 8 Feb. 2019) [hereinafter DoDI 3025.21].

[270] 10 U.S.C. §§ 251–255

[271] DOPLAW Handbook, Chapter 4, *Military Support to Civilian Law Enforcement*, has an extensive discussion on how to ensure compliance with the PCA.

[272] See also, Centers for Disease Control and Prevention, *Legal Authorities for Isolation and Quarantine*, https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html.

[273] 42 U.S.C. §264(a)

[274] https://www.federalregister.gov/documents/2014/08/06/2014-18682/revised-list-of-quarantinable-communicable-diseases

a. Impact of State quarantine and "stay at home" orders

In response to the pandemic, the Governors of several U.S. States and Territories have issued public health quarantine orders restricting the travel and movement of personnel within their jurisdictions. However, an order issued by a State authority does not restrict the exercise of federal authority, and does not restrict military members engaging in travel or other movement necessary to conduct their federal duties.

The U.S. Constitution's Supremacy Clause prohibits state quarantine laws and related travel restrictions from interfering with federal agency missions and the acts, duties, travel, and movement of federal personnel engaged in official business.[275] In particular, the doctrine of federal preemption, which arises from the Supremacy Clause, is the power of the federal government to supplant state law with respect to matters the federal government has the power to regulate under the Constitution. Moreover, the Supreme Court has ruled that the doctrine of federal preemption, via the Supremacy Clause, applies specifically to State police powers related to quarantine laws, public health orders restricting personnel movement, and other sanitation laws when such laws interfere with the conduct of official federal business and activities within the domain of the federal government.

An area that is exclusively confided to Congress by the U.S. Constitution is the domain of raising, funding, and governing the U.S. Armed Forces and committing them to war by legislative declaration. Congress has heavily regulated in this domain to ensure the DoD, and the Coast Guard through the DHS, faithfully execute Homeland Defense and Homeland Security missions in the domestic United States and its Territories. In accordance with the Supremacy Clause, both the U.S. Attorney General and the SECDEF have affirmed that despite state quarantine restrictions federal employees must be allowed to travel and conduct federal business in response to the coronavirus pandemic. [276]

Military members engaged in official business were encouraged to carry a memo (template below) explaining that they are exempt from state quarantine restrictions to execute federal missions. Likewise, Military Commanders were encouraged to communicate and coordinate with State Emergency Operations Centers (EOCs), local civil authorities, and local quarantine law

[275] *See* U.S. Const. Art VI, Cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

[276] On 20 March 2020, the U.S. Attorney General confirmed that State and local coronavirus quarantine restrictions do not hinder Federal employees in the conduct of official business and ordered the U.S. Attorneys to "ensure that local law enforcement officials enforcing travel restrictions are aware of the fact that Federal employees must be allowed to travel and commute to perform law enforcement and other functions and should not be prevented from doing so, even when travel restrictions are in place." U.S. Department of Justice, U.S. Attorney General Memo, Subject: "Memorandum for All United States Attorneys," 20 March 2020; *see also* Secretary of Defense Memorandum, "Travel Restrictions for DoD Components in Response to Corona virus Disease 2019" March 11 , 2020; Office of the Under Secretary of Defense for Personnel and Readiness Memorandum, "Force Health Protection Guidance (Supplement 2) "Department of Defense Guidance for Military Installation Commander' Risk Based Measured Responses to the Novel Coronavirus Outbreak" February 25, 2020; see also DoDI 6200.03 *supra* note 168, para. 1.2.e (noting military commanders will act in accordance with the applicable provisions of public health emergency declarations made by U.S. public health officials while maintaining operational effectiveness).

enforcement authorities (police, fire, and emergency personnel) to notify these State agencies to expect encounters with military and federal personnel engaging in official business.

b. State Quarantine Orders and Contractors

DoD contractors were designated part of the Defense Industrial Base (DIB) Essential Critical Infrastructure workforce. The DIB was identified as a Critical Infrastructure Sector by DHS as part of DHS's guidance to state and local officials as they sought to protect their communities while ensuring continuity of functions critical to public health and safety as well as economic and national security. Therefore, this designation by DoD provided sufficient justification to DoD contractors to provide to local law enforcement enforcing local stay at home orders, if questioned as part of their travel in support of contract work performance.[277] As contractors often face challenges when there are unscheduled interruptions of contract performance, no matter whether the cause is a weather event, a government shutdown, or a potential pandemic, relevant Federal Acquisition Regulation (FAR) clauses should be included in the subject contract to mitigate issues related to unscheduled interruptions or the inability to perform.. Various AOR-specific guidance applies related to specific international travel and installation access.[278]

B. Common DSCA-Related Intelligence Issues

One of the most common intelligence-related issues a judge advocate will encounter during DSCA operations is the use of DoD assets (including UAS) to collect imagery over the Homeland. Imagery helps commanders create a common operating picture and gain situational awareness of the geography, the location of stranded citizens, damage to roads, bridges, and ports, and potential APOD/SPOD sites, etc., in the affected area. Additionally, imagery collection is generally one of the first MAs requested by the LFA.

Imagery collected ISO DSCA operations can fall into one of two categories: Domestic Imagery or Incident Awareness and Assessment (IAA) imagery. The basic rules for each are as follows:

Domestic Imagery. Imagery that is collected that does not involve the use of DoD Intelligence Community (IC) capabilities must comply with all law and policy applicable to DoD non-intelligence components to include the Privacy Act and DoDD 5200.27 (Collection on U.S. Persons). By policy, DoD may only collect, report, process, or store information on individuals or organizations affiliated with the DoD. To collect on others, information must be essential to the accomplishment of specific DoD missions and a DoD nexus must exist that permits the use of an exception. Prior to capturing aerial imagery (when IC is not involved), Title 10 units are required to submit a Domestic Imagery Legal Review (DILR). The DILR is drafted and signed by a judge advocate and an intelligence staff collections management representative (e.g., from the J2/G2/N2 staff) and forwarded to the CCDR for approval and retention. DILR certify

[277] Memorandum from Under Secretary of Defense, Acquisition and Sustainment, subject: Defense Industrial Base Essential Critical Infrastructure Workforce, 20 Mar. 2020.

[278] Memorandum from Under Secretary of Defense, Acquisition and Sustainment, to Commander, United States Cyber Command et.al., subject: Planning for Potential Novel Coronavirus Contract Impacts, 10 Mar. 2020

compliance with DoDD 5200.27 policies and restrictions.

Incident Awareness and Assessment (IAA). SecDef approved the use of Title 10 DoD intelligence, surveillance, reconnaissance (ISR), and other intelligence capabilities for domestic non-intelligence support for DSCA under the 2019 CJCS DSCA EXORD. Use of DoD ISR capabilities as described above is referred to as Incident Awareness and Assessment (IAA).279 Prior to IAA collection by a Title 10 unit, a Proper Use Memorandum (PUM) is required whenever the capture, processing, exploitation and dissemination of the domestic imagery obtained involves any capability of the IC. Title 10 units will prepare and send their PUMs to the CCDR who will forward to SecDef for approval. The PUM is drafted and signed by a judge advocate and an intelligence staff collections management representative (e.g., from the J2/G2/N2 staff) and certifies compliance with Intelligence Oversight restrictions.

The National Guard uses a different process for imagery collection. IAW CNGBM 2000.01A, any NG JFHQs-State that owns or has operational control over NG assets that conduct domestic imagery activities is responsible for creating and seeking approval for a PUM before executing a domestic imagery collection mission. In a Title 32 status, the JFHQs-State J2 route PUMs to the NGB-J2 for initial review. The NGB-J2 will then route the PUM to NGB-GC for legal review. Once the document is found to be legally sufficient, NGB-J2 will approve the PUM and notify the requesting State. When the National Guard is in its Title 10 status, the gaining CCMD or major command is responsible for the PUM. Use of Unmanned Aerial Vehicles for Domestic Imagery and IAA. CCDRs and State TAGs are delegated approval authority for the domestic use of small UAS for the purposes of IAA and Search & Rescue in support of DSCA operations.[280] SecDef retains authority for all other UAS operations associated with DSCA operations. Use of UAS domestically requires consultation with the FAA. In addition, UAS may not be used to conduct surveillance on U.S. persons.[281]

C. Coast Guard Operations[282]

In accordance with 14 U.S.C. §§ 101 and 102, and 10 U.S.C. § 101(a)(4), the United States Coast Guard (USCG) is designated as both an Armed Force and a federal law enforcement agency. It is also a regulator of the maritime industry and a statutory member of the intelligence community, among other designations. The Coast Guard protects vital economic and security interests of the United States, including the safety and security of the maritime public, natural and economic resources, the global maritime transportation system, and the integrity of U.S. maritime borders.

While force protection was critical to ensure mission readiness, because of its broad mandate, Coast Guard operations during the pandemic extended beyond internally-focused force

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280 SECDEF Policy Memorandum, Guidance for the Domestic Use of Unmanned Aircraft Systems (UAS) in U.S. National Airspace, (18 AUG 18); CJCS Defense Support of Civil Authorities EXORD (30 Jul. 2019).

281 See DOPLAW Handbook, Chapter 9, Intelligence and Information Acquisition and Handling During Domestic Operations.

282 Additional details about the history, unique missions, capabilities, and authorities of the Coast Guard are available in UNITED STATES COAST GUARD, PUBLICATION 1, DOCTRINE FOR THE U.S. COAST GUARD (Feb. 2014).

protection, and were primarily focused with protecting the safety and security of the maritime transportation system, keeping commerce moving safely and efficiently, and protecting the safety of mariners and the boating public.

The Coast Guard has eleven statutory missions divided into two categories: homeland security and non-homeland security missions. The homeland security missions are: (1) port, waterways and coastal security; (2) drug interdiction; (3) migrant interdiction; (4) defense readiness; and (5) other law enforcement. The non-homeland security missions include: (1) marine safety; (2) search and rescue; (3) aids to navigation; (4) living marine resources; (5) marine environmental protection; and (6) ice operations. [283]

Each mission was impacted to some degree by the pandemic. The sections below will cover some of legal issues addressed by Coast Guard Judge Advocates, focused primarily on Captain of the Port authorities.

a. Captain of the Port Authorities and Crewmember Quarantine

Certain senior Coast Guard officers in command of operational units called "Sectors" in major U.S. Ports, serve not only as Sector Commanders, but also as "Captains of the Port (COTP)." COTP is a designation formalized in Title 33 of the Code of Federal Regulations, conferring broad authority to the officer holding that title, for the safety, security, and environmental protection of the particular Port.[284] The two primary statutory authorities relied upon by a COTP include the Magnusson Act of 1950 (50 U.S.C. § 191, et seq.) and the Ports and Waterways Safety Act of 1972 (PWSA) (33 U.S.C. § 1221, et seq.).

The Magnuson Act is primarily concerned with security and homeland defense. It empowers a COTP to take certain measures to regulate the movement or operation of vessels or facilities in response to certain declared disasters or threats to the security of the United States. Because use of this authority is predicated on a declaration of emergency, this authority is not routinely relied upon by the USCG.

The PWSA, on the other hand, very broadly empowers a COTP to issue orders to control the movement or operation of a vessel, facility, or individual, in response to a threat to the safety or security of the Port. It requires no national emergency declaration or other executive action, and is used routinely to issue orders requiring, for example, a vessel repair a mechanical failure before entering port, to direct a vessel to a particular anchorage pending an inspection.

To mitigate the spread of COVID-19, the Coast Guard used COTP orders to require that crewmembers' onboard vessels arriving from high-risk countries quarantine for a particular period of time before disembarking. This authority was leveraged by every COTP overseeing Ports handling vessels arriving on international voyages. It cited two primary authorities: (1) the

[283] 6 U.S.C. § 468.

[284] 33 C.F.R. § 1.01-30. Captains of the Port and their representatives enforce within their respective areas port safety and security and marine environmental protection regulations, including, without limitation, regulations for the protection and security of vessels, harbors, and waterfront facilities; anchorages; security zones; safety zones; regulated navigation areas; deep-water ports; water pollution; and ports and waterways safety.

PWSA, and (2): Presidential Proclamation 9984,[285] which barred individuals traveling from certain regions from entering the United States. Coast Guard COTPs worked closely with U.S. Customs and Border Protection (CBP) to ensure that crews abided by quarantine requirements before disembarking. A sample COTP order can be found in Appendix B.

b. COVID-19 as a Hazardous Condition

33 C.F.R. Part 160.201(f) requires that vessels immediately report hazardous conditions to the cognizant COTP. A "hazardous condition" is defined as

> any condition that may adversely affect the safety of any vessel, bridge, structure, or shore areas or the environmental quality of any port, harbor, or navigable waterway of the United States. It may, but need not, involve collision, allusion, fire, explosion, grounding, leaking, damage, injury or illness of a person aboard, or manning-shortage.

Because COVID-19 was considered an illness that may affect the safety or vessel or port facility, it was considered a "hazardous condition" for purpose of this regulation. As such, a positive COVID test, or symptoms of COVID among crew members required reporting to the Coast Guard "immediately."[286] Failure to report a hazardous condition could result in fines, civil penalties, or other enforcement action that could delay vessel movement. A sample COTP order for a suspected case of COVID onboard a cargo vessel is included (appendix/enclosure/x).

c. Enforcing the CDC Mask Order

President Biden issued Executive Order 13998, Promoting COVID-19 Safety in Domestic and International Travel, on January 21, 2021.[287] The order required mask-wearing on certain domestic modes of public transportation, including ferries and other "public maritime vessels." The Centers for Disease Control and Prevention (CDC) then issued an order implementing the EO, requiring persons to wear masks while on conveyances and at transportation hubs.[288]

The Coast Guard was generally responsible for implementing the EO in the maritime domain and enforcing the CDC mask-order onboard ferries and public vessels. The Coast Guard referenced 42 U.S.C. § 268, as a source of authority to enforce the CDC Order. It states in part, "[i]t shall be the duty of the customs officers and of Coast Guard officers to aid in the enforcement of quarantine rule and regulations."

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[285] 85 FR 6709, *Suspension of Entry of Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures To Address This Risk*, Proclamation 9984 of January 31, 2020.

[286] 33 C.F.R. § 160.216

[287] Executive Order 13998, Promoting COVID-19 Safety in Domestic and International Travel, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-promoting-covid-19-safety-in-domestic-and-international-travel/, (Jan 21, 2022).

[288] CDC Order, Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, Section 361 of Public Health Service Act (42 U.S.C. 264) and 42 C.F.R 70.2, 71.31(b), 71.32(b), (Jan. 27, 2021). https://www.cdc.gov/quarantine/pdf/Mask-Order-CDC_GMTF_01-29-21-p.pdf

"Quarantine rules and regulations" are described in the Public Health Services Act of 1944 to give the CDC the authorization to "make and enforce such regulations as in [their] judgement are necessary to prevent the introduction, transmission, or spread of communicable disease..."[289] Masks mandates, aimed at curbing the spread of COVID-19, were therefore believed to be within the scope of the CDC's authority.[290]

Assuming that the mask mandate was within the scope of the CDC's authority, the Coast Guard's authority to enforce the mandate in the maritime domain is clearly established under 42 U.S.C. § 268.

A notice attached to a CDC order read as follows.[291]

NOTICE TO U.S. CUSTOMS OFFICERS, U.S. COAST GUARD OFFICERS, OR OTHER FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT OFFICIALS:

Under 42 U.S.C. § 268, U.S. Customs and U.S. Coast Guard Officers are required to aid in the enforcement of federal quarantine rules and regulations. Under 42 U.S.C. § 243, the U.S. Department of Health and Human Services is authorized to cooperate with and aid state and local authorities in the enforcement of their quarantine and other health regulations and to accept state and local assistance in the enforcement of federal quarantine rules and regulations.

Violation of this order, in whole or in part, as well as other federal quarantine rules and regulations, constitutes a criminal misdemeanor, punishable by a fine and/or imprisonment pursuant to federal law, including 42 U.S.C. § 271 and 18 U.S.C. §§ 3559 and 3571, as may be amended from time to time.

As an alternate source of authority, the Coast Guard could have used its organic authorities under the PWSA and Title 33 of the Code of Federal Regulations to issue COTP orders to individuals or vessels, requiring masking in order to protect the safety of the Port. The COTP order would have been within the Coast Guard's authority, as long as the COVID-19 could be identified as a "hazardous condition" as described above.

While these enforcement tools were available, they were not used to enforce mask mandates onboard vessels. Rather, the Coast Guard focused on educating vessel owners and operators on their obligations under federal law through both local engagements and at the headquarters level

[289] 42 U.S.C. § 264(a).

[290] There are differing legal opinions regarding the extent of the CDC's authority to issue mask mandates under certain circumstances. At the time of this writing, the federal government is appealing a decision in U.S. District Court for the Middle District of Florida, in which a federal judge found that the CDC did not have the authority to issue the masking order at issue in this section. See, *Health Freedom Def. Fund v. Biden*, 8:21-cv-1693-KKM-AEP (M.D. Fla. Apr. 18, 2022).

[291] CDC Order, No Sail and Information Request Order, issued to the masters of the following cruise ships: Carribbean Princess, Royal Princess, Regal Princess.

through Marine Safety Information Bulletins (MSIBs).[292]

d. CDC No-Sail Order[293]

The following discussion provided by the USCG District 7 legal office. It can also be found in the National Security Law Quarterly, Volume 20-3. The authorities relied upon by the Coast Guard to enforce the CDC No-Sail order are the same as those discussed in the preceding section. Additionally, it should be noted that a federal judge ruled that the CDC's Conditional No Sail Order (though not the initial order discussed here) issued on October 30, 2020 [294] exceeded its statutory authority.[295]

On March 13, 2020, the CDC Director issued a No Sail order for all cruise ships, requiring the vessels to disembark passengers and suspend future operations.[296] In response to the suspension of operations and CDC's No Sail Order, cruise ships descended upon ports within the Coast Guard's Seventh District looking to comply with CDC's order. Such a rapid increase in maritime traffic and demand for pier space posed significant safety and security concerns for Coast Guard commanders. While the maritime industry organized contracts and arrangements to transfer passengers and crew ashore, numerous cruise ships, some with thousands of persons on board, loitered outside of U.S. territorial seas while awaiting approval to bring people ashore. Approval to engage in disembarkations included the regulatory interests of numerous local, state and federal agencies. COTPs, while carrying out their responsibilities and maintaining [maritime domain awareness], rely on their other government agency (OGA) partnerships to carry out their missions. In the interest of protecting those relationships, COTPs worked closely with OGAs to ensure partners' interests and concerns were addressed. This was particularly important as some incoming cruise ships, including the Rotterdam, Zaandam, and the Costa Luminosa, were carrying passengers exhibiting COVID-19 symptoms.[297] Such vessels attracted substantial

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[292] MSIBs related to mask mandates include MSIB 02-21 and associated changes. https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/MSIB/2021/MSIB%2002-21%20ch5%20%20Mask%20Requirement%20(suspended).pdf?ver=NE4QlSFkeH8ODZ98KxN-Xg%3d%3d&timestamp=1650402095092. For a complete list of MSIBs issued in response to COVID-19, see, U.S. Coast Guard, Marine Information Safety Information Bulletins (MSIBs), https://www.dco.uscg.mil/Featured-Content/Mariners/Marine-Safety-Information-Bulletins-MSIB/.

[293] This section is excerpted from Briggs, Cahill, *Commanders, Cruise Ships, and COVID-19: Advising Coast Guard Leaders in the Nation's Largest Passenger Vessel Operating Area During a Pandemic*, Nat'l Sec. L. Q. Vol 20-3, 18 Sept 2020.

[294] CDC Order, Framework for Conditional Sailing and Initial Phase Covid-19 Testing Requirements for Protection of Crew, 30 October 2020, https://www.cdc.gov/quarantine/pdf/CDC-Conditional-Sail-Order_10_30_2020-p.pdf.

[295] *Florida v. Becerra*, 544 F. Supp. 3d 1241, 1272 (M.D. Fla. 2021).

[296] U.S. Dept. of Health and Human Services Centers for Disease Control and Prevention, *No Sail Order And Other Measures Related To Operations* (March 14, 2020), https://www.cdc.gov/quarantine/pdf/signed-manifest-order_031520.pdf. (The CDC then extended this order until the earliest of (1) the expiration of the Secretary of Health and Human Services' declaration that COVID-19 constitutes a public health emergency; (2) the CDC Director rescinds or modifies the order based on specific public health or other considerations; or (3) September 30, 2020.) *See also*, No Sail Order and Suspension of Further Embarkation; Second Modification and Extension of No Sail Order and Other Measures Related to Operations, 85 Fed. Reg 44,085 (July 21, 2020).

[297] Taylor Dolven, et al., *Zaandam Cruise Ship With COVID-19 On Board Docked In Florida After 12 Days At Sea*. MIAMI HERALD (April 2, 2020), https://www.miamiherald.com/news/business/tourism-cruises/article241707936.html#storylink=cpy. *See also*, Taylor Dolven, *'It's been a horrific nightmare.' Three*

interest from the public and local authorities, who informed COTPs of local restrictions associated with disembarking passengers, both well and ill, in local ports. Under these circumstances and with an awareness of state and local interests, Coast Guard commanders leveraged their statutory authorities to maintain MDA and mitigate adverse impacts to U.S. ports, such as port congestion associated with allowing in multiple ships and passengers when local authorities had yet to make final arrangements for accommodating the vessels, passengers, and crew shore side.

e. Search and Rescue Operations and Medical Evacuation Plans

The following discussion is provided by USCG District 7 and can be found in the National Security Law Quarterly, Vol. 20-3.

The United States has Search and Rescue (SAR) obligations under a mosaic of international agreements. The 1974 Safety of Life at Sea (SOLAS) Convention, the 1979 International Convention on Maritime Search and Rescue (SAR Convention), the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1965 Convention on Facilitation of International Maritime Traffic, and the 1958 Convention on the High Seas collectively define and operationalize the international norm of rescuing those in peril from the sea. The National Search and Rescue plan, among other guiding documents, details how the United States will satisfy its international legal and humanitarian obligations. The international agreements underpinning U.S. SAR obligations are further implemented by the Coast Guard through the policies in the U.S. Coast Guard Addendum to the United States National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual.

Maintaining Maritime Domain Awareness (MDA) and protecting the Maritime Transportation System (MTS) is critically important to ensuring effective SAR operations and efficient medical evacuations. Coast Guard commanders can leverage OGA relationships to maintain an awareness of local concerns related to the provision of medical care and ability to serve additional patients associated with maritime SAR cases. When the CDC released its No Sail Order in mid-March, some cruise ships, (e.g. the Zaandam and Rotterdam) had a large number of ill persons onboard and had been denied entry to various other countries prior to coming to Coast Guard Sector Miami's COTP zone.[298] Vessels such as these were subject to intense public interest. Likewise, the willingness of local jurisdictions to accept ill persons, particularly foreign crew members, was not readily apparent to Coast Guard commanders.

Although hospitals have a general obligation to accept patients in need of emergency care, the logistics associated with getting patients to receiving medical facilities can be a tremendous challenge.[299] For medical evacuations completed at sea with surface assets (boats and cutters),

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Americans have COVID-19 after Costa cruise, MIAMI HERALD (March 20, 2020), https://www.miamiherald.com/news/business/tourism-cruises/article241370891.html#storylink=cpy

[298] *See* Michael Smith, Drake Bennett & K. Oanh Ha, *The Pariah Ship*, BLOOMBERG BUSINESS WEEK (Jun. 11, 2020, 5:00 AM), https://www.bloomberg.com/features/2020-zaandam-pariah-ship/.

[299] 42 U.S.C. § 1395dd (2020) (requiring hospital emergency departments to provide medical screening for an emergency medical condition upon request).

local medical shore side transportation is needed to ensure the patient can arrive at the emergency care center. medical evacuations completed with aviation assets face similar challenges as hospital landing pads must also be free and available for arriving patients. If locals are unable or unwilling to assist with shore side medical transport or availability of landing pads, Coast Guard commanders may struggle to effectively medical evacuation patients without upsetting the critical OGA relationships upon which they frequently rely.

For vessels operating within U.S. territorial seas, District Commander and COTP orders can facilitate effective and efficient SAR operations during an increased demand for MEDVACs by requiring vessels have medical evacuation plans.[300] Cruise ships may have individuals on board that exhibit symptoms while the vessel is at sea, transiting to a U.S. port, or within U.S. territorial seas. Prior to requesting a medical evacuation, cruise ships typically consult their own medical officer, in addition to a Coast Guard flight surgeon, who may advise on the need to evacuate an individual and the level of care needed to treat that patient. When a vessel lacks the equipment necessary to treat the patient onboard and such equipment cannot be supplied to the ship at sea, medical evacuation may be arranged. Pre-arranged medical evacuation plans can ensure ill persons are quickly and efficiently brought ashore to get necessary care. medical evacuation plans can also reduce strain on local Coast Guard and OGA assets by including pre-arranged transportation to take ill persons from the vessel to the pier. Plans that also identify a willing and able medical transportation and receiving medical facility further ensure the efficiency of medical evacuations and avoid delays in getting patients critical care. This is particularly important during a pandemic, when there is a greater concern regarding strains on vital medical resources. However, such medical evacuation plans can be complicated by local jurisdictions citing local quarantine restrictions to refuse entry of medically evacuated personnel.

During the initial response to COVID-19, Coast Guard commanders effectively facilitated the safe medical evacuation of ill persons from cruise ships.[301] Even when medical evacuation plans are in place, clear communications between the Coast Guard, ships, and responding personnel are vital to ensuring an efficient medical evacuation. During a pandemic, routine SAR missions do not stop. When response personnel are medically evacuating any ill patient, it is vital to ensuring an efficient response that responding parties are aware of the illness presented. Illnesses, such as COVID-19, that have high public interest and concern may tend to increase private responders' apprehension with medically evacuating patients and risking potential exposure. Failure to communicate the type of illness forming the basis for a medical evacuation may result in a private responding party refusing to transport the individual, creating confusion and increasing strain on Coast Guard and OGA assets.

[300] Such orders are applicable to U.S. flagged vessels, generally, and foreign-flagged vessels operating within U.S. territorial waters. As most cruise ships are foreign-flagged vessels, such orders do not extend to them when they operate beyond U.S. territorial seas. To facilitate foreign-flagged vessels within U.S. territorial seas making arrangements for medical evaluations of ill persons with symptoms of COVID-19 when operating beyond U.S. territorial seas, District Commanders and COTPs can issue orders with a requirement to meet the demands prior to departing port.

[301] Miami-Dade County, *Unified Command addresses sick crew members aboard Costa Magica and Favolosa*, MIAMI –DADE COUNTY NEW RELEASE (26 March, 2020), https://www.miamidade.gov/releases/2020-03-26-seaport-sick-crewmembers-favolosa-magica.asp. See also, Staff Writer, *Coast Guard medical evacuations passenger, delivers supplies to Grand Princess* COAST GUARD NEWS (March 7, 2020), https://coastguardnews.com/coast-guard-medical evacuations-passenger-delivers-supplies-to-grand-princess/2020/03/07/.

As cruise ships disembarked passengers in accordance with CDC's No Sail Order, many of the ships anchored off Bimini, Bahamas, within Bahamian territorial seas with thousands of crew members on board.[302] While the vessels loitered outside U.S. territorial seas, beyond the jurisdictional limit of District Commander or COTP Orders but still within the reach of Coast Guard SAR assets, they continued to pose a SAR concern for Coast Guard commanders. Vessels operating beyond U.S. territorial seas pose greater challenges to Coast Guard commanders to balance the Coast Guard's SAR obligations with local concerns related to the acceptance and accommodation of ill persons during a pandemic.

The SAR Convention requires that parties "ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found" (emphasis added).[303] In the National Search and Rescue Plan, the participants further agree "to keep political, economic, jurisdictional, or other such factors secondary when coordinating and conducting SAR operations."[304]

Faced with jurisdictions attempting to reject medical evacuation patients, Coast Guard leaders engaged in norm affirming behavior, applying their influence to encourage OGAs and local jurisdictions to voluntarily comply with the international norms and obligations designed to protect those in need of rescue. Refusing medical evacuation patients could jeopardize the lives of American mariners around the globe if the U.S. failed to render assistance to foreign nationals in distress; that is to say, if foreign nationals did not receive care under prevailing SAR standards while in a U.S. SAR zone, their home nations might treat American mariners similarly, placing U.S. mariners at grave risk. Leveraging OGA relationships and applying pressure to remind local leaders of standing international obligations and the potential consequences of their actions, Coast Guard leaders urged decision makers to continue accepting medical evacuation patients.

The undermining of international Search and Rescue norms, particularly if met by reciprocal action in other affected jurisdictions, places countless mariners at greater risk. The broader maritime community must be able to rely on the fulfillment of these international obligations in order to confidently conduct commerce and other activities. The Coast Guard, designated the Federal SAR Coordinator for the U.S. aeronautical and maritime SAR regions in the maritime environment, is at the center of these international obligations.[305] Because SAR in the maritime environment requires unity of effort from so many participants, the Coast Guard must shepherd SAR partners, including OGAs and local jurisdictions, into compliance by promoting the vital importance of mutually executed SAR operations to rescue anyone in distress, regardless of

[302] See, e.g., Taylor Doven. *No information. No way off. 100,000 crew members remain in cruise ship limbo for months***,** MIAMI HERALD (May 17, 2020), https://www.miamiherald.com/news/business/tourism-cruises/article242565281.html. (reporting "five of the [cruise lines]'s ships are still lingering near its private island in the Bahamas, and occasionally coming into Port Miami.")

[303] International Convention on Maritime Search and Rescue, Annex 2.1.10, 27 April 1979, 1405 U.N.T.S. 97.

[304] *National Search and Rescue Plan of the United States*, ¶ 55 (2016) at https://www.dco.uscg.mil/Portals/9/CG-5R/manuals/National_SAR_Plan_2016.pdf. *See also*, *United States National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual*, Version 2.0 (April 23, 2018) Table 1-4-1, General SAR Principles, indicating "Jurisdictional and lifesaving concerns must be balanced: political, economic, jurisdictional, or other such factors should normally remain secondary when conducting lifesaving operations."

[305] *See* National Search and Rescue Plan of the United States (2016), https://www.dco.uscg.mil/Portals/9/CG-5R/manuals/National_SAR_Plan_2016.pdf

medical situation, demographic factors, or outside considerations.

While this section focused exclusively on Coast Guard operations domestically, the impacts of COVID-19 on the Coast Guard's international and other law enforcement missions was also significant. For example, policies put in place by the Panama Canal Authority, requiring Coast Guard vessels to submit to certain health related inspections prior to transiting the canal raised issues regarding U.S. policy with respect to the sovereign immune status of Coast Guard vessels. These issues and others were largely handled by the State Department and interagency and are outside of the scope of this publication.

D. Defense Support to Civilian Law Enforcement Agencies

Posse Comitatus Act (PCA).[306] The PCA is a criminal statute that prohibits the willful use of the Army, Navy, Marine Corps, Air Force, or Space Force to execute state, federal, or local laws unless expressly authorized by the Constitution or an Act of Congress. However, in accordance with Title 14 of the U.S. Code, the Coast Guard is always exempt from PCA proscription because it is statutorily authorized to serve in a law enforcement capacity. Additionally, the PCA is not violated when Title 10 forces conduct activities for a military purpose, such as force protection, even if it affords incidental benefits to civil law enforcement authorities.

Pursuant to the PCA and DoD policy, DoD personnel are prevented from performing active or direct law enforcement "functions," except for limited exceptions, to civilian law enforcement, which includes arrest, interdiction, search and seizure, security patrols, surveillance, stop and frisk, traffic control points, or enforcement of a quarantine. The PCA applies to all Title 10 military personnel, DoD civilians and contractors employed by the DoD. The PCA does not apply to the NG in Title 32 or SAD status. If the requested support from the State requires DoD personnel to compel civilians to take some act or refrain from acting (e.g., if the support DoD provides is regulatory, proscriptive, prescriptive, or compulsory), then such support is generally prohibited. However, the DoD can provide passive or indirect "support" with the proper authority, such as providing logistical support or operating equipment in support of Customs and Border Protection to detect, monitor, and communicate surface traffic outside of the United States along the Southwest Border. Section III.A.1. (a) of this Handbook provides detailed guidance on this topic.

Rules for the Use of Force. The Standing Rules for the Use of Force (SRUF)[307] apply to personnel action under Title 10 in support of DSCA operations. SRUF must be coordinated with a federal agency when DoD forces are operating in coordination with that agency's security forces. In support of DSCA operations, judge advocates (in coordination with operators) may be tasked to develop and provide SRUF training to units prior to deployment and develop SRUF cards/brochures for issuance to unit personnel prior to engaging in operations.[308] When NG personnel are in SAD or Title 32 status, they follow the RUF of the supported state, and use of

[306] 18 U.S.C. § 1385.
[307] CJCSI 3121.01B.
[308] Judge advocates should contact the office of the Staff Judge Advocate U.S. Army North (phone: (210) 221-1515), for the latest DSCA-related SRUF training materials.

force is governed by state law.

Weapons Status. SecDef is the approval authority for Title 10 military personnel to carry individual service weapons within U.S. territory during a DSCA operation.[309] The only exception to obtaining SecDef approval for individual weapon carry, is for "law enforcement, force protection, and security personnel who carry an issued firearm for duty on a routine basis." When the carrying of individual service weapons is authorized by SecDef, the supported CCDR retains the authority to establish and change the arming posture/weapons status.[310]

E. Administrative and Civil Law

1. Contact Tracing and Voluntary COVID Mapping

The ability to leverage existing technologies to geographically track ("geotrack") individuals is an emerging tool to combat viral spread. Several states and municipalities have started to use it, although success is difficult to determine. This section analyzes the use of geotracking in the context of military members.

a. Blue Force Tracking (BFT)

Geotracking of "on-duty" military or civilian personnel for accountability and/or status purposes as these relate to the ongoing COVID-19 pandemic is lawful and permissible, to the extent authorized by the Systems of Records Notice (SORN) for the DoD Personnel Accountability and Assessment System. However, there is no authority to mandate the "off-duty" geotracking of civilian personnel, and the mandatory geotracking of "off-duty" military personnel would only be permissible in order to achieve an articulable, valid military purpose. Additionally, geotracking beyond the scope of the SORN (which applies to accountability information in the context of an emergency) would require a Privacy Impact Assessment PIA). DoD privacy policies require mitigation to privacy impacts and therefore a PIA may result in restraints that are narrower than what the law might require.

Scope of SORN. The DOD Personnel Accountability and Assessment System operates under the SORN published at 85 FR 17047. Of note, the PII is stored for "DoD-affiliated personnel in a natural or man-made disaster or PHE, or when Directed by SECDEF." The expanded use of geotracking beyond the scope of the SORN would trigger the requirement for a Privacy Impact Assessment under DoDI 5400.16. Even if permissible as a matter of law, expanded collection of PII for geotracking would be subject to review and restriction for the purpose of mitigating privacy concerns.

[309] CJCS DSCA EXORD, 30 July 2019, paragraph 3.K.5.
[310] See Chapter 6, Part G for further information about use of the National Guard during the COVID-19 pandemic

b. Contact Tracing and Tracking Service member Cell Phone Data

During the COVID-19 PHE, two major communication companies proposed using cell phone contact tracing via Bluetooth technology.[311] The Services currently do not have similar technology. However, questions have been raised as to whether a commander has the authority to use this cell phone data tracking or other existing data tracking that could potentially provide information about a Service member's location.[312]

While Commanders are authorized to conduct certain inspections, they may only be conducted for specified purposes. Use of cell phone data tracking contained on personal cell phones would not be an authorized inspection. Furthermore, it would be improper to require a Service member to download the application in order to conduct an inspection. Finally, use of such data raises concerns related to OPSEC and collection of non-DoD person information.

Privacy. The 4th Amendment protects individuals, including Services members, against unreasonable searches and seizures. For Service members, official intrusions where there is a reasonable expectation of privacy require a search authorization supported by probable cause.

Inspections under M.R.E. 313(b): The President has authorized commanding officers to conduct inspection of their units when "the primary purpose. . . is to determine and to ensure the security, military fitness, or good order and discipline of the unit." The reasonableness of an inspection is determined by whether the inspection is conducted in accordance with the commander's inspection authorization, both as to the area to be inspected, and as to the specific purpose set forth by the commander ordering the inspection. The scope of an inspection must reflect the purpose. This restriction has been applied as general policy – not just in an evidentiary setting.[313]

Reasonable Expectation of Privacy in Private Cell Phone.[314] The Supreme Court has recently decided in a line of cases, that the digital data stored on a cell phone is categorically different from physical objects, and owing to continued technical advances, individuals have a unique privacy interest in these capabilities. Among the differences are the quantity of data, different types of data, pervasiveness of cell phones in society, and qualitative scope of the data. The Court of Appeals for the Armed Forces has also weighed in on the subject in United States v.

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[311] One proposed solution from two major communication companies is the use of cell phone contact tracing via Bluetooth technology. Individuals would be required to consent by downloading the application onto their device. The technology would pick up the signals of nearby phones and store the connections in a database. If somebody tests positive, they contact the app which would notify connections stored in the database.

[312] The Army currently has Threat Reporting technology that enables military personnel and civilians to turn in tips about potential crimes, security threats, or suspicious activities to appropriate law enforcement agencies. Mobile applications such as this, or other applications that allow individuals to voluntarily opt-in for reporting, could be considered for as alternatives to track the location of users.

[313] See e.g., COMDTINST M5810.H, Ch. 27.G.6.

[314] The discussion here relates to private cell phones, not government furnished equipment (GFE). There no reasonable expectation of privacy when using government equipment and systems. The government also has the authority to download software and applications in order to operate that equipment. This could include contact tracing applications if deemed operationally necessary, and consistent with the standards to obtain such applications. However, the government may not issue GFE to personnel for tracking purposes as a subterfuge to the warrant requirement.

Wicks,[315] holding that searches of a cell phone should be limited in scope. While these rulings would not specifically bar a commander from conducting an authorized inspection of a cell phone, the scope of that inspection should reflect a specific purpose. Because of the privacy interest in cell phones, inspections should not go beyond the specified purpose. Furthermore, currently no capabilities exist to do contact tracing without individuals consenting to the tracing and downloading an application. Consequently, it would be improper to require Service members to download the application in order to conduct an inspection.

System of Record Notice (SORN). The Privacy Act requires federal agencies to publish a notice in the Federal Register for each system of records that an agency maintains. The notice ensures that privacy considerations have been addressed in implementing the system. Contact tracing would likely be unique to the Service members and could require a SORN. While systems may use existing SORNs, at this time, there does not appear to be an Army or DoD SORN that covers these types of records.

Operational Security. On 3 August 2018, DEPSECDEF issued a memo prohibiting the use of geolocation-capable devices on both non-government and government-issued devices, applications, and services while in locations designated as operational areas in accordance with DoDD 5205.02E. For all other locations, installations and activities will consider the inherent risks associated with such capabilities by personnel both on duty and off duty. These considerations should be taken prior to any applications being used for COVID-19 purposes, either on government furnished devices or personal devices.

Non-DoD Affiliated Person. DoDD 5200.27 establishes policies prohibiting the collection, reporting, processing, or storing of information on individuals or organizations not affiliated with the DoD, with limited exceptions. The exceptions do not include collecting cell phone tracking information on non-DoD persons. If the Army were to access Soldier cell phones with contact tracing information of non-DoD affiliated personnel, that information could not be retained.

Conclusion. Commanders may not use Service members' personal cell phone data to assist in contact tracing COVID-19 efforts. The Constitution provides for basic protections against unreasonable searches and seizures absent a warrant, with certain exceptions. While Commanders are authorized to conduct certain inspections, they may only be conducted for specified purposes.[316] Use of cell phone data tracking on personal cell phones would not be an authorized inspection. Furthermore, it would be improper to require Service members to download the application on personal cell phones in order to conduct such an inspection. Because of the privacy, OPSEC, and records retention issues related to contact tracing data for COVID-19 purposes, Commanders may not require any personnel to access these applications either on personal or government issued cell phones.[317] Furthermore, on 3 August 2018,

[315] U.S. v. Wicks, 73 M.J. 93 C.A.A.F. (2014).

[316] Inspections under M.R.E. 313(b): The President has authorized commanding officers to conduct inspection of their units when "the primary purpose. . . is to determine and to ensure the security, military fitness, or good order and discipline of the unit."

[317] The Privacy Act requires federal agencies to publish a notice in the Federal Register for each system of records that an agency maintains. While systems may use existing SORNs, at this time, there does not appear to be an Army or DoD SORN that covers these type of records.

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2. Ethics

a. Standard of Conduct Office – Ethics Reminder During COVID Pandemic

Despite the significantly changed working environment COVID-19 has created for the military, the DoD and its employees are still subject to the rules and policies regarding government ethics. The following ethics issues continue to present challenges during the DoD's response to the crisis.

The Office of Government Ethics (OGE) and DoD Standards of Conduct Office (SOCO) released guidance highlighting relevant ethics topics during the COVID-19 pandemic.[319] The highlighted topics were as follows:

Gifts to the Agency. Like most disaster responses, numerous generous non-government organizations (NGOs) and other non-federal entities (NFEs) respond by offering gratuitous assistance and donations. All gift offers should be referred to appropriate department channels for review, acceptance or rejection, coordination, and reporting.

In response to the numerous offers to donate supplies in support of the DoD response to COVID-19, the DEPSECDEF issued a memorandum on 5 May 2020 designating the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) to serve as the DoD focal point for receipt, staffing, and response of all donations to the DoD, Defense Agencies, and Defense Field Activities to support COVID-19 response activities that are valued over $500,000 and to be accepted under Tile 10 U.S.C. Section 2601.[320]

Offers for donation of non-medical equipment, supplies, and services valued under $500,000 may be accepted after appropriate legal review and in accordance with established service procedures; however, USD(A&S) "shall promptly" be notified upon receipt of any offer regardless of whether the gift is accepted or not. Offers of medical equipment, supplies, and services should be referred to FEMA for proper federal coordination. Early coordination between agencies is key in a multi-agency location to ensure consistent ethics advice across all agencies. Other uniformed services as well as non-DoD agencies interpret OGE ethics guidance differently, so having a consistent message to federal employees working in one location is

[318] See DOPLAW Handbook, Chapter 9 and Chapter 6, Part B, Chapter 7, Part B of this publication.
[319] *See* OGE Program Advisory 20-01; DoD SOCO Advisory 20-01; OGE Program Advisory 20-02; DoD SOCO Advisory 20-02 dtd 2 Apr 2020.
[320] *See* DEPSECDEF Memorandum dtd 5 May 2020 "Offers of Donation to the DoD in Support of the Coronavirus Disease 2019 Response." This memorandum superseded the previous memo dated 24 April 2020.

important.

USNORTHCOM released fragmentary order 121.048 to provide directive guidance pertaining to medical gift offers from non-federal entities. All medical gift offers should be directed to FEMA, as FEMA is best positioned to assess where critical medical supplies, medical equipment, and medical supplies are needed.[321]

Gifts from Outside Sources. Prohibitions regarding solicitation or acceptance of gifts offered because of one's official position continue to remain the same.[322] This includes all the contractor employees assigned to DoD offices. Employees may accept gifts from contractors and their employees, so long as the total amount from each contractor (which includes all its employees) does not exceed a market value of $20 per occasion or $50 dollars per calendar year. Employees may not solicit such gifts. If contractor employees volunteer to make a contribution to the donating group, the donation collector may accept as long as the total amount for that contractor does not exceed $20.

Judge advocates should also be mindful that while supporting DoD response to COVID-19, it is likely that non-governmental organizations may offer gifts such as meals, transportation, etc., to Service members. This was the case in New York City where COVID response was robust. For example, World Central Kitchen had been distributing free meals to all volunteers supporting COVID-19 response and active duty members were accepting free meals at the distribution center despite receiving per diem and having availability to agency-contracted meals. All employees must remember agency rules regarding soliciting and accepting gifts, unauthorized commitments, and issues of improper appearance.[323]

Crowdsourcing. Employees and their families experiencing hardships due to the COVID-19 pandemic may seek financial assistance from crowdsourced or web-based fundraising, such as GoFundMe or Fundly. This method will inevitably violate the Joint Ethics Regulation (JER), especially if the solicitation reaches the general public or the federal employee receives donations from a prohibited source (from which an employee generally may not accept a gift).[324] Other problematic donors include subordinates or other DoD employees who make less pay than the person receiving the crowdsourced fundraising. Employees must be able to identify the source of any donations received, so that they do not accept impermissible gifts from prohibited donors such as individual subordinates or contractors. Anonymity of donors does not mitigate or resolve concerns about violation of the ethics rules. Employees seeking this type of assistance should receive advice from their local ethics office.[325]

Political Activities. The rise of teleworking during the PHE exacerbated issues involving partisan political activities. During scheduled telework hours, no DoD employee may engage in improper political activity. Active duty Service members and SES employees are prohibited

[321] https://www.fema.gov/covid19offers.
[322] *See* 5 C.F.R. § 2635, Subpart B.
[323] *See generally,* 5 C.F.R. Part 2635.
[324] *See* DoD SOCO Advisory, 19-03, dated 12 Jul 19, available at: https://ogc.osd.mil/defense_ethics/resource_library/2019_03_advisory.pdf.
[325] *See* DoD SOCO Advisory 20-02 for additional information.

from participating in partisan activities at any time, including on social medial. DoD SOCO Advisory 20-02 has additional guidance.

Financial Disclosure Extensions. During the PHE, OGE and DoD SOCO did not extend the 2020 OGE 278 filing season. Since relevant online systems allow permits access by users without a CAC/PIV enabled computer, current social distancing or stay at home requirements alone do not justify a blanket extension under the requirements of 5 C.F.R. § 2634.201(g) and implementing guidance. Extensions for disclosures should be filed appropriately with the relevant agency.

b. Political Activities and the Hatch Act Guidance for Army Civilians

Political activity is defined as an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.

Teleworking away from the traditional office is considered "while on duty." From whatever location an employee teleworks, that site constitutes his or her place of duty for that particular workday. If the employee is teleworking from home, he or she is on duty and may not engage in political activities in their home while they are on duty. Employees participating in virtual work-related conferences are subject to the same on- duty Hatch Act restrictions as when they attend meetings or communicate in-person with others at work. For example, employees should not wear a campaign shirt or hat while participating in a work-related video conference call, and they should ensure that any partisan materials, like campaign signs or candidate pictures, are not visible to others during the call.

Additionally, some teleconferencing programs and email applications allow individuals to add a profile picture, which is visible to others. Employees using email or other conferencing programs for work purposes may not use the profile pictures associated with these platforms to show support for or opposition to a political party, partisan political group, or candidate for partisan political office. For example, employees may not use candidate images, campaign slogans, or political party symbols for profile pictures associated with official accounts or when communicating on official matters.

DoD personnel may not use their government computer or government mobile phone to engage in partisan political activity after they finish teleworking for the day. Employees are prohibited from using Government-issued office equipment, email, and the internet at any time for the purpose of engaging in political activities. For example, employees may not send or forward political material or messages using their government laptop or government mobile phone after completing a day of telework.

Army personnel may not fundraise for a partisan political party, candidate for partisan political office, or partisan political group, to include during their personal time and using personal devices. The Hatch Act prohibits federal employees from soliciting or receiving political contributions. Fundraising is a 24/7 prohibition. For example, Army personnel may not ask for contributions, collect contributions, host or forward an online political fundraiser, or promote political fundraisers.

Army employees may, after they finish teleworking for the day, use their personal computer or personal mobile phone to engage in partisan political activity. But they may not, while still teleworking, use their personal computer or personal mobile phone to check social media and engage in partisan political activity. While teleworking, Army employees are on duty and therefore cannot use their personal devices to participate in political activity.

An employee, may, however, use their personal computer or mobile phone to engage in political activity while on their lunch break during a telework day, provided they are not in a federal building or vehicle. If a civilian employee is on their lunch break, they are on personal time. Therefore, the employee may use his or her personal computer or personal mobile phone to engage in political activity while on a lunch break during a home telework day. Remember, employees may not use their personal computer or personal mobile phone to engage in political activity if they are in a federal building during a lunch break.

Employees may use their government computer or government mobile phone to post a comment on a professional association's online discussion forum or an online news article about a current policy or a proposed policy change. Commenting about a current policy or proposed policy change is not considered political activity and therefore the Hatch Act does not restrict this activity. Federal employees may express their opinions about current events and matters of public interest, such as referendum matters, changes in municipal ordinances, constitutional amendments, pending legislation or other matters of public interest, like issues involving highways, schools, housing, and taxes. Employees must still be mindful of using official time for official purposes and of DoD computer-use policies and must ensure they do not use or make any reference to their official position or title when expressing personal opinions.

The Hatch Act is a very complex law and involves nuanced analysis. There are different prohibitions that apply depending on whether the employee is a Further or Lesser Restricted Employee, or a Political Appointee. Political Activity by Members of the Armed Forces is covered under DoDD 1344.10.

c. Acceptance of Gifts by Members of the National Guard from NFE Related to COVID Response Activities

This section highlights and clarifies the applicability of policies that apply to the acceptance of gifts by members of the National Guard related to COVID-19 response activities.

As a result of interest in supporting COVID-19 response efforts, many individuals and organizations have offered medical supplies, services, and equipment to the Department of Defense (DoD), military personnel, and their families. USNORTHCOM, who has overall responsibility for military personnel supporting the DSCA effort in a Title 10 status, has issued specific guidance directing all gift inquiries related to medical supplies, services and equipment received by DoD personnel be directed to FEMA.[326]

[326] FRAGO 121.048 to USNORTHCOM OPORD 01-17 provides that FEMA is the appropriate Federal agency to process offers of donated medical supplies, equipment, and services offered from NFEs, and that military units should not solicit or accept these offers on behalf of the DoD.

NGB-JA has clarified with USNORTHCOM that this FRAGO is in no way meant to impact the ability of The Adjutants General to accept offers of medical equipment, supplies, or services in their State capacities. However, the underlying facts should be considered by state ethics advisors as they assist their leadership in assessing the TAGs' legal basis to accept gifts related to COVID-19 response efforts. The potential authorities differ depending upon whether gifts are offered to Service members individually; a State performing a purely State mission (a State gift acceptance authority matter); or to a DoD Component.

Gifts to Service members and Their Families. The specific rules that apply to gift acceptance by individual National Guard members will depend on their status. National Guard personnel in a Title 10 or 32 status, or those taking affirmative action to use their DoD title, position, or authority, may not directly or indirectly accept or solicit for gifts given: (1) Because of their official position; or (2) Offered by a "prohibited source." 5 C.F.R. § 2635.203(d). Exemptions and exceptions to these rules are detailed in 5 C.F.R. § 2635.203(b) and 5 C.F.R. § 2635.204(a)-(l). For more information on the nuances of status and applicability of Federal Ethics rules, see the 2014 DoD Standards of Conduct advisory.[327]

Gifts to the State or Territory. Where non-federal entities have offered goods or services specifically to State personnel such as The Adjutant General in support of State Guard efforts, State gift acceptance rules (if any) would apply.

Gifts to the Department of Defense. Where the rules prevent DoD personnel or their families from accepting a gift, an appropriate official with gift acceptance authority may be able to accept the gift on behalf of the DoD or a Military Department via various statutes or service regulations. The following is a non-exhaustive list of gift acceptance authorities. These authorities are generally reserved at the Service or Defense Secretarial level.

For the benefit of Military Departments or those wounded in the line of duty. 10 U.S.C. § 2601.

Gifts from foreign governments or international organizations. DoD Financial Management Regulation (FMR), Volume 12, Chapter 30, section 3003.

Secretary of Defense Acceptance of real or personal property, cash, or services of any kind from any entity, including a foreign government or international organizations. 10 U.S.C. § 2608.

Voluntary Services. 10 U.S.C. § 1588.

d. Posing in Photos with Elected Officials

Like other major disasters or incidents, congressional representatives would show-up unannounced at hospitals where DoD medical personnel were augmenting the hospital staff and would request using the DoD military personnel as a backdrop for pictures. The concern was that these pictures could be used for a political ad in the coming months during the congressperson's campaign for reelection, a violation of DODD 1344.10. See DoDD 1344.10, Title 5 USC 7324,

[327] https://ogc.osd.mil/defense_ethics/ethics_counselors/resources/advisories/2014_03_advisory.html.

and Title 5 Code of Federal Regulations 734.306, 734.502-503

e. Proper Lodging/Berthing for Service members

During the COVID-19 PHE, Title 10 and Title 32 personnel were conducting support operations in the same location. Lodging or berthing of Title 10 personnel at a National Guard facility can be accomplished with either of two different methods.

The facility can be treated as a service lodging or installation hotel-like facility and Title 10 personnel are billed per room/per day at the flat rate given to any Title 32 personnel. In this case, Title 10 personnel use their Government travel credit card and are reimbursed via the Defense Travel System (DTS). Each individual's per diem is adjusted for the geographical area.

The other option is to treat the ISF as a barracks room, in which case there would be no cost to Service members. In order for this to occur, DoD Instruction 4000.19 requires an interagency support agreement, to reimburse the State for its costs. The State's U.S. Property & Fiscal Officer (USPFO) can accomplish and sign such an agreement. It is the USPFO's job to enter into reimbursable arrangements such as this and receive other Title 10 funds for various purposes. Such agreements require legal review for compliance with DoDI 4000.19, the DoD FMR, Vol. 11A, Chapter 3; and Title 31, U.S. Code, Sec. 1535, Agency Agreements, also known as the Economy Act.

f. Offers of Medical Care to Service Members

A Soldier at the Urban Augmentation Medical Task Force (UAMTF) 811-1, Bennett Medical Center, Stamford, Connecticut tested positive for COVID-19. The hospital offered to keep the Solider as a patient on a different floor, in the sleep room offered to providers to rest, similar to an on-call room. It was separate from patient areas and a bed that does not generate income for the hospital. The hospital did not intend to bill the Solider or TRICARE for the bed space or medical care. The Solider in question was low acuity and did not require much medical care. However, any medical care that was needed would be provided by the UAMTF medical staff. Meals would be within the Soldier's per diem.

In this case, the acceptance would constitute an augmentation of the command's operations and maintenance (O&M) funds because contract quarters are available that were already procured with O&M funding.[328] Additionally, the JFLCC published COVID-19 protocol for confirmed cases. The recommended procedure for symptomatic medical personnel included the following steps:

1. Isolate in quarters with twice daily health checks conducted by medical personnel.
2. If evacuation is required, utilize appropriate PPE and evacuate to a Military Treatment Facility (MTF) or designated isolation facility at the Base Support Installation (BSI) as the mission dictates.
3. If symptoms do not improve in 3 days, medical Service members should be transferred to

[328] 5 C.F.R. §§ 2635.202 and 2635.203

the nearest MTF capable of handling positive COVID-19 patients.

g. Health Insurance Portability and Accountability Act (HIPAA) and the Privacy Act of 1974

Given the impact of COVID-19 on the Federal workplace, the following general guidance on HIPAA and the Privacy Act is provided with respect to the issues that are most likely to present themselves. Following this guidance will ensure that the Department of Defense provides consistent advice on this subject.

General Rule. The HHS HIPAA Privacy Final Rule is implemented in the Department of Defense by DoD Manual 6025.18 (March 13, 2019). In general, Protected Health Information (PHI) must not be disclosed by DoD covered entities or their business associates without patient authorization, except for specifically permitted or required purposes. A covered entity is defined as a health plan or a health care provider who transmits certain health information in electronic form. A business associate is a person or entity that performs certain functions or activities that involve the use or disclosure of Personal Health Information (PHI) for a covered entity.

HIPAA PHI release protections only apply to covered entities and their business associates. Once PHI is released to a third person or entity that is not another covered entity or a business associate, it is no longer covered by HIPAA and any subsequent release is not protected by the rule. If, however, the third person or entity receiving the information is a government entity, the information may be covered by the Privacy Act. (Refer to the below section on the Privacy Act.)

There are very few covered entities or business associates within the Department of Defense outside of the Military Health System.

Self-Reported Health Information. If an individual self-reports PHI to his or her employer, the information is not covered by HIPAA (e.g., Service member, civilian employee, or contractor employee reports to his or her supervisor that he or she has tested positive for COVID-19; it is not protected by HIPAA but may be subject to the Privacy Act).

Permitted Disclosures of PHI Without Patient Authorization by Covered Entities Relevant to COVID-19:

h. Uses and Disclosures for Specialized Government Functions

A Department of Defense covered entity (and a covered entity not part of or affiliated with the Department of Defense) may use and disclose the PHI of individuals who are Service members for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission.

Appropriate command authorities include the Secretary of Defense, the Secretary of the Military Department responsible for the Service member, all commanders who exercise authority over the Service member, and any official delegated authority by one of the aforementioned Secretaries.

This is very broad release authority and covers the release of COVID-19 PHI of Service members from a covered entity to a command authority. Once released to the command authority, any subsequent release by the command authority would not be covered under HIPAA. However, the subsequent release may be covered by the Privacy Act. (Refer to the below section on the Privacy Act.)

This exception is only applicable to PHI of Service members; it does not apply to civilians in any capacity, including, but not limited to, civilian employees, contractor employees, and family members.

i. Uses and Disclosures for Public Health Activities

A covered entity may use or disclose PHI for public health activities to a public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, including, but not limited to, the reporting of disease and the conduct of public health surveillance, public health investigations, and public health interventions. For example, if a civilian employee is tested by the covered entity, the covered entity may disclose PHI to the state department of health; the state department of health can use this information to contact those with whom the employee had close contact.

A Department of Defense covered entity (e.g., an occupational health clinic) that provides health care to a Department of Defense civilian employee at the request of the employee's supervisor to evaluate whether the employee has a work-related illness can disclose PHI that consists of findings concerning that work-related illness or workplace-related medical surveillance.

j. Uses and Disclosures to Avert a Serious Threat to Health or Safety

A Department of Defense covered entity may use or disclose PHI if the Department of Defense covered entity, in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public and is to a person or persons reasonably able to prevent or lessen the threat.

This exception may be used for COVID-19 if the Department of Defense covered entity has a good faith belief that the person is positive for COVID-19 and engages in behavior that constitutes a serious and imminent threat to the health or safety of a person or the public (e.g., the person fails to follow applicable CDC guidance).

k. Disclosures of PHI must be limited to the information reasonably necessary to accomplish the purpose for which disclosure is sought.

Privacy Act. To be subject to the Privacy Act, information must be contained within a "system of records," that is, groups of records "about individuals" under agency control that are retrieved

by the individual's name or some other personal identifier.[329]

The Privacy Act prohibits the disclosure of a record about an individual from a system of records absent written consent of the individual unless the disclosure is pursuant to one of twelve statutory exceptions. The Privacy Act is implemented by the Department of Defense in DoD 5400.11-R, Department of Defense Privacy Program (May 14, 2007), DoD Instruction 5400.11, DoD Privacy and Civil Liberties Programs (January 29, 2019), and 32 C.F.R. Part 310.

Under the Privacy Act, records pertaining to an individual contained within a Department of Defense system of records may be disclosed to a Department of Defense official or employee provided the recipient has a need for the record in the performance of his or her assigned duties.

In the absence of an individual's written consent, records pertaining to an individual contained within a Department of Defense system of records may only be disclosed outside of the Department of Defense if there is authority under one of the Privacy Act's other exceptions. One of the more common exceptions is a disclosure pursuant to a published routine use in the System of Records Notice (SORN) that identifies the purpose of the disclosure and the category of recipient. Another exception (though infrequently invoked) permits disclosure outside of the agency if there has been a showing of "compelling circumstances affecting the health or safety of an individual," provided that the record subject is also notified of the disclosure.

If information is not contained in a system of records, the Privacy Act would not apply.

Best Practices. Department of Defense entities informed that one of its Service members, civilian employees, or contractor employees have contracted COVID-19 (by notification from a covered entity, public health authority, or the employee directly) should only disclose personally identifiable information (PII) of the person to Department of Defense officials with a need to know. Such information should be disclosed in a secure manner (e.g., encryption).

If covered by the Privacy Act, disclosures outside of the Department of Defense will require either written consent of the individual or authority under one of the Privacy Act exceptions.

When notifying people who may have had close contact with the infected individual, Department of Defense officials must ensure proper authority exists for any release of PII (e.g., written consent of the individual, published routine use, etc. if Privacy Act applies).

l. Health Insurance Portability and Accountability Act (HIPAA) as it Relates to Public Health Emergency Disclosures

The HIPAA Privacy Rule permits covered entities to disclose the amount and type of protected health information that is needed for public health purposes (45 CFR 164.512(b)). This provision is intended to allow covered entities to continue current voluntary reporting practices that are critically important to public health and safety. In some cases, the disclosure will be required by

[329] Department of Defense's system of records notices (SORNs) are available at https://dpcld.defense.gov/Privacy/SORNs/.

other law, in which case, covered entities may make the required disclosure pursuant to 45 CFR 164.512(a) of the Rule. In HHS OCR's Frequently Asked Questions section on public health, they specifically authorize disclosure of facially identifiable protected health information, such as name, address, and social security number, for public health purposes.

For disclosures that are not required by law, covered entities may disclose, without authorization from the patient, the information that is reasonably limited to that which is minimally necessary to accomplish the intended purpose of the disclosure. For routine or recurring public health disclosures, a covered entity may develop protocols as part of its minimum necessary policies and procedures to address the type and amount of information that may be disclosed for such purposes. Covered entities may also rely on the requested public health authority's determination of the minimally necessary information.

In order to protect the health of the public, it is frequently necessary for public health officials to obtain information about the persons affected by a disease. In some cases, they may need to contact those affected in order to determine the cause of the disease to allow for actions to prevent further illness. The Privacy Rule continues to allow for the existing practice of sharing protected health information with public health authorities that are authorized by law to collect or receive such information to aid them in their mission of protecting the health of the public.

Generally, the Army cooperates with public health authorities. AR 40–5, Preventive Medicine, 25 May 2007, requires that commanders of military treatment facilities report communicable diseases to state and local public health authorities.[330]

Further, DoDI 6200.03, Public Health Emergency Management within the Department of Defense, 28 March 2019, provides the following at section 1.2 (Policy) e and f:

DoDI 6200.03(1)2.e. To the extent practicable, military commanders will act in accordance with the applicable provisions of PHE declarations made by U.S. public health officials at the federal level and at the State, local, tribal, and territorial (SLTT) levels. Overseas military commanders will act in accordance with host nation (HN) and allied forces PHE declarations as applicable, practicable, and as otherwise defined in relevant agreements, including status-of-forces agreements, defense cooperation agreements, and base rights agreements.

DoDI 6200.3(1)2.f. DoD Components will cooperate closely with the federal and SLTT public health officials, as appropriate, to provide a unified response regarding public health emergencies.

Finally, DoDI 6200.3, paragraph 3.2c(6), states that "Pursuant to DoDD 5400.11 and DoD Manual 6025.18, personally identifiable information (PII), including protected health information (PHI), will be used and disclosed only as necessary to safeguard public health and safety."

Below are some specific examples and guidance for reference.

[330] Department of the Army Pamphlet 40–11, Preventive Medicine, 22 July 2005, RAR 9 October 2009, amplifies this requirement in Chapter 2, Communicable Disease Prevention and Control, referencing specific diseases.

1. A Commander has the authority to mandate that military members under their command are required to inform the command if they test positive for COVID-19. A Commander does not yet have the authority to mandate Contract employees inform the command if they were to test positive for COVID-19.
2. Management can ask an employee whether they have been exposed to someone with COVID-19 but cannot ask the identity of the individual to whom they were exposed.
3. Management can ask an employee whether they have tested positive for COVID-19 if management determines, based upon CDC/state/local health authorities, that COVID-19 presents a direct threat to the community workforce.

m. Privacy Protection of COVID-19 Information

All personally identifiable information (PII), including health information protected under the Privacy Act, maintained on DoD personnel and affiliated individuals, should be collected, used, and disclosed only as necessary to safeguard public health and safety in accordance with relevant privacy laws, regulations, and policies.

As a guiding principle, only collect and disclose the minimum amount of PII regarding COVID-19 necessary to persons with an authorized need to know. You should also actively seek to minimize the amount of data sharing to safeguard the PII for access by those persons with a need to know.

An example of PII is information contained on recall roster lists, such as names that are linked with phone numbers and email addresses. Another example of PII is an instance in which an employee reports a positive test result for COVID-19 to his or her supervisor. For these uses, this is not patient information, but is considered employment- and readiness-related information. Therefore, this information is not protected health information under the Health Insurance Portability and Accountability Act (HIPAA) but should be protected as PII consistent with the Privacy Act.

Best practices when handling PII include the following:

1. Limit distribution of PII to those who have a valid need to know. For example, if a DoD employee (military member or civilian) tests positive for COVID-19, they should inform their supervisor immediately. The supervisor will then notify the appropriate persons within the chain of command designated as need to know for COVID-19. This information along with any other related details, such as quarantine date(s), exposure date(s), duty status date(s), etc., will be provided only to persons with an authorized need to know
2. If a DoD employee self-identifies with a higher risk susceptibility to COVID-19, in accordance with CDC guidelines, the information should be reported to the supervisor and reporting limited to only those who have a need to know.
3. Employ good data security practices, such as encrypting email transmission of PII on all classification systems (NIPR, SIPR, or JWICs). For example, a supervisor should not transmit names, social security numbers, personal phone numbers, or health or readiness

status via unencrypted email.
4. Do not use personal email accounts to transmit PII.
5. Do not use collaboration platforms to communicate PII. For example, do not discuss or disclose an individual's current or potential COVID-19 status on a work-related blog or instant message system.
6. Do not post recall rosters or excel spreadsheets with PII to internal shared drives, Share Point, or similar sites without proper safeguards and role-based access restrictions. This will ensure only individuals within the designated chain of command with a need to know will be able to access the PII.
7. HIPAA Rules do not apply to employment records, even if the information in those records is health-related, as the HIPAA does not apply to the actions of an employer.

n. DoD Identification number and PII

Throughout COVID response, the DoD ID # was regularly collected and reported via the military chain of command as part of service specific requirements. As detailed in DoDI1000.30, "exposure of the DoD ID Number shall not be considered a breach when exposed as a part of a DoD business function."

o. Disclosure of COVID Information to Privatized Hosing Project Owners (PHPO) and Maintenance Personnel

Various DoD installations have received inquiries from the installation PHPOs concerned about protecting their residents, maintenance staffs and other personnel from exposure to COVID-19.

Personally identifiable information (PII), including the fact that a specific individual is under quarantine, should be protected consistent with the Privacy Act. Under that statute, installation senior commanders may disclose quarantine information to PHPOs under multiple authorities, including the following:

1) the government may disclose information if the individual to whom it pertains consents in writing. 5 U.S.C. § 552a(b). Consent provided via email, or even a text message, is permissible.

2) the Privacy Act places no restrictions on disclosing information that would not identify a specific individual. 5 U.S.C. § 552a(a)(4), (b). For instance, disclosing an address where multiple people lived would be consistent with the Privacy Act.

3) the government may disclose information to DoD personnel who have a "need to know" for necessary, official purposes. 5 U.S.C. § 552a(b)(1). This exception extends to government contractors and employees of government contractors who are serving the function of agency employees.[331] The provision of housing pursuant to 10 U.S.C. § 2872 is an authorized agency function and PHPOs engaged in that function on behalf of the agency may be informed of hazards known to the government associated with the performance of that function. Furthermore,

[331] *Mount v. USPS*, 79 F.3d 531, 532-34 (6th Cir. 1996).

the projects' property managers are agents of the PHPOs who are engaged in the maintenance and operation of privatized housing and also have a "need to know" of quarantine information that is necessary to protect their workforce, other housing residents, and the installation population from the spread of COVID-19.

4) the government may disclose information to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual. 5 U.S.C. § 552a(b)(8). Preventing the spread of the COVID-19 virus on a military installation during a declared, national pandemic satisfies the need to show "compelling circumstances affecting the health of safety of an individual." Thus, disclosure of quarantine information is appropriate under this exception.

4. Boards of Inquiry and Administrative Separation Boards – Presence Requirement

Statutes and Army policy create a procedural right for respondents to be present, in person, before a board with defense counsel present, also in person. While an officer or enlisted Soldier may consent to appear by VTC, neither a Board of Inquiry, WOFR, nor separation board, can proceed with the respondent, board members, or defense counsel via VTC over the objection of a respondent, regardless of component (Regular Army (RA), ARNG, or Army Reserve (USAR). Boards may proceed with witnesses available via VTC or telephone, despite objection of the respondent.[332]

F. Labor and Employment Law

1. Understanding Employment Definitions (Key, Mission Essential, and Emergency personnel)

Background. During the early stages of COVID-19, confusion in understanding these definitional distinctions caused delay and frustration. Consequently, judge advocates new to domestic incidents affecting working personnel on board installations must have a firm understanding of the administrative terms associated with mission-essential and related personnel.

Discussion. The following definitions are critical to understanding administrative policies and instructions related to situations like COVID-19, which limit types and numbers of individuals in the workplace.

Key Position/Employee. A key position is one that shall not be vacated during a national emergency or mobilization without seriously impairing the capability of the organization or office to function effectively. Placement in a key position designates that individual as a key

[332] For a more detailed discussion of this issue, search in the "2020 COVID-19 Key Leader Guide" Folder within the "RA and USAR VTC BOI and Admin Seps" Information Paper on the CLAMO website at: https://intelshare.intelink.gov/sites/clamo/ (CAC required for access).

employee. Positions and employees designated as emergency essential and non-combat essential are considered "key."[333]

Mission Essential Position/Employee. Mission essential positions are those required for the continued operation of mission essential functions of an activity, as defined in DoDI 3020.42. Local leaders determine which functions are "essential" based on the type of work and supporting activities necessary to ensure organization or facility continuity of operations and/or completion of tasks that are considered essential to the mission. A mission essential employee is a distinct designation, as such, they may, but do not have to be, also designated as key, emergency essential, or non-combat essential.[334]

Emergency Essential Personnel. Emergency essential (E-E) personnel are those who have duties that meet all of the following criteria: (1) it is the duty of the employee to provide immediate and continuing support for combat operations or to support maintenance and repair of combat essential systems of the armed forces; (2) it is necessary for the employee to perform that duty in a combat zone after the evacuation of nonessential personnel, including any dependents of members of the armed forces, from the zone in connection with a war, a national emergency declared by Congress or the President, or the commencement of combat operations of the armed forces in the zone; and (3) it is impracticable to convert the employee's position to a position authorized to be filled by a member of the armed forces because of a necessity for that duty to be performed without interruption.[335] E-E personnel affirm at the time of their hiring this special status as a condition of their employment, along with the requirement to maintain certain levels of medical, security, performance, conduct, and overall fitness that make them suitable for assignment to an austere and stressful combat environment. Management may assign E-E personnel to any location worldwide. Even though these individuals are intended to provide civilian support to combat operations, they could also deploy to non-combat locations in response to contingencies, disaster relief, or other emergency operations.

Non-combat Essential Personnel. A non-combat essential (NCE) position is designated to support expeditionary requirements in other than combat or combat support situations. An NCE employee could be deployed to support emergency operations, humanitarian missions, disaster relief, or other expeditionary missions in the continental United States or overseas, that are not considered "combat" locations. The key difference between E-E and NCE designations is that E-E includes all types of contingency missions, even those in support of combat operations, and NCE includes everything other than combat operations.[336]

Standby Duty Status. An employee is on duty, and time spent on standby duty is hours of work if, for work- related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. A finding that an employee's activities are substantially limited may not be

[333] DoDD 1200.7.
[334] DoDI 3020.42, para. 6.1.1; Army Regulation (AR) 500-3, Glossary, Section II; AR 690-11, para. 1-6(d).
[335] 5 U.S.C. § 1580(a); Memorandum, Office of the Undersecretary of Defense, Directive-type Memorandum-17-004 (OSD DTM-17-004).
[336] OSD DTM-17- 004.

based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restrictions on alcohol consumption or use of certain medications.[337]

On-call Duty Status. An employee is considered off duty, and time spent in an on-call status shall not be considered hours of work, if (1) the employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or (2) the employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person.[338]

2. Authority to quarantine Department of the Army Civilian Employees

Purpose. To provide authorities and limitations on quarantining civilian employees of the Department of the Army.

Discussion. Although requesting employees to voluntarily quarantine themselves, in appropriate circumstances, is permissible, involuntary quarantine may be authorized or ordered only by a limited number of governmental agencies or officials. The following summarizes a few of the more important rules involving quarantine. This information comes from the OPM website.

The definition of quarantine is an action that separates and restricts the movement of people who were exposed to a contagious disease to see if they become sick. Under section 361 of the Public Health Service Act (42 U.S. Code § 264), the U.S. Secretary of Health and Human Services is authorized to take measures to prevent the entry and spread of communicable diseases from foreign countries into the United States and between states. The authority for carrying out these functions on a daily basis has been delegated to the Centers for Disease Control and Prevention (CDC).

Under 42 Code of Federal Regulations parts 70 and 71, CDC is authorized to detain, medically examine, and release persons arriving in the United States and traveling between states who are suspected of carrying these communicable diseases.

States also have police power functions to protect the health, safety, and welfare of persons within their borders. To control the spread of disease within their borders, states likewise have laws to enforce the use of isolation and quarantine. These laws can vary from state to state and can be specific or broad. In some states, local health authorities implement state law. In most states, breaking a quarantine order is a criminal misdemeanor. Quarantine may also be ordered by local governments.

Commanders and the Secretaries of Defense and Army do not, however, have the authority to order the quarantine of civilian employees. If at some point the CDC orders a federal quarantine, as the federal government did with the 1918 Flu Pandemic, Commanders and DoD leaders will

[337] 5 C.F.R §§ 550.112(k), 551.431(a).
[338] 5 C.F.R §§ 550.112(l), 551.431(b).

have an obligation to comply.

3. Restriction of Movement of Civilian Employees on Military Installations in a PHE

Commanders may not involuntarily quarantine civilian employees, but they may set in place conditions and restrictions on entry and exit to the installation as well as require the wearing of protective gear and adherence to social distancing rules.

Discussion. Section 2672(a) of 10 U.S.C. directs SECDEF to "protect the buildings, grounds, and property that are under the jurisdiction, custody, or control of the DoD and the persons on that property." DoDI 5200.08 declares as DoD policy that "DoD installations, property, and personnel shall be protected, and that applicable laws and regulations shall be enforced." To effectuate this policy, the instruction authorizes a commander "to take reasonably necessary and lawful measures to maintain law and order and to protect installation personnel and property." These measures may include "removal from, or the denial of access to, an installation or site of individuals who threaten the orderly administration of the installation or site." To enforce such removal actions, commanders may prohibit individuals from reentering an installation after they have been removed and ordered not to reenter pursuant to 18 U.S.C. § 1382. Offenses for trespass may be prosecuted in the U.S. District Courts, or more likely, in a U.S. Magistrate Court.

During the height of the COVID-19 response, FRAGO 14 to HQDA EXORD 144-20 directed the Army to assume a minimum HPCON C at all locations. Commanders had wide latitude to dictate appropriate health measures in response to this heightened HPCON. However, such measures needed to align with the installation's force protection condition level and could include restricting access to the entire installation or specific activities within the post (unless directed otherwise by superior authority). Commanders had the authority to implement pre-conditions for gaining access to the installations, to include the use of an electronic thermometer to take a visitor's temperature, and the posing of various questions (such as the visitor's recent travels, to include to COVID-19 "hotspots," whether the visitor feels sick, or has experienced any of the symptoms of the virus, and/or whether they had been in close contact with someone who tested positive for COVID-19). The wearing of personal protective gear, such as face masks, or social distancing, as defined by appropriate authority, may also be required for entrance or movement around a post. While the authority permits denial of entry to the installation, it does not extend to directing the visitor to quarantine at their residence.

Conclusion. While commanders have wide latitude to protect the safety, health, and welfare of personnel under their authority, and to protect the government property under their control, that inherent authority does not include the involuntary quarantine of Department of the Army civilians (DACs), on or off an installation, regardless of whether a commander has declared a PHE.[339] Commanders do, however, have wide latitude to control entry onto the reservation, or into its facilities, to include requiring pre-conditions to entry, such as the wear of personal

[339] For a more detailed discussion of this issue, search in the "2020 COVID-19 Key Leader Guide" Folder within the "DAC ROM Declared PHE" Information Paper on the CLAMO website at: https://intelshare.intelink.gov/sites/clamo/ (CAC required for access).

protective gear, or answering questions regarding the visitor's recent travels. For DACs already on an installation who disregard, without authority, command-directed Restriction of Movement (ROM), commanders may remove the DAC from the installation, with or without a subsequent bar to post, or temporarily detain them until civil authorities respond (depending on the nature of the transgression).

4. Civilian Workforce Protection Measures

This section addresses the complicated issues that can arise with testing, vaccination, and workplace limitations for civilian employees.

On 18 June 2020, the Under Secretary of Defense for Personnel and Readiness published two memoranda, "Force Health Protection Guidance (Supplement 10) - Department of Defense Guidance for Coronavirus Disease 2019 Clinical Laboratory Diagnostic Testing Services," and "Force Health Protection Guidance (Supplement 11) - Department of Defense Guidance for Coronavirus Disease 2019 Surveillance and Screening with Testing." At that time, neither of these documents provided authority to order testing for DoD civilian employees. Supplement 10 explicitly stated that DoD civilian employees "may be offered testing…if their supervisor [had] determined that their presence was urgently required in the DoD workplace." Such testing was not mandatory.

Civilian employees could have been directed to undergo non-intrusive screening measure such as no-contact temperature readings and questions about health-related matters, but they were not directed to undergo diagnostic medical testing as a general access control measure. Such testing could have been offered to DoD civilian employees in accordance with the guidance that was in place at that time.

If a DoD civilian employee declined the opportunity to take a test, no adverse personnel action could be taken pursuant to current DoD guidance in place at that time related to COVID-19. The Under Secretary of Defense for Personnel and Readiness Memorandum, "Force Health Protection Guidance (Supplement 8) - Department of Defense Guidance for Protecting Personnel in Workplaces during the Response to the Coronavirus Disease 2019 Pandemic," April 13, 2020, provides guidance regarding actions that may be taken to protect DoD personnel in workplaces through such measures as access control.

However, in Force Health Protection Guidance (Supplement23) Revision 2 - Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation, Screening Testing, and Vaccination Verification, published on 29 October 2021, the above guidance was rescinded and updated guidance for implementing additional force health protection and workplace safety measures directed by the White House Safer Federal Workforce Task Force to reduce the transmission of the virus. This new guidance required DoD civilian employees to be fully vaccinated by 22 November 2021, subject to exemptions as required by law. For purposes of this guidance, "DoD civilian employee," includes foreign nationals employed by DoD outside the United States, to the maximum extent possible while respecting host nation agreements and laws. It also includes DoD civilian employees who are engaged in full-time telework or remote work.

Additionally, this guidance stated that DoD contractor personnel and official visitors must attest to being fully vaccinated and, if not fully vaccinated, present the results of a recent negative COVID-19 test as a condition of physical access to DoD buildings and DoD-leased spaces in non-DoD buildings in which official DoD business takes place. (See Force Health Protection Guidance (Supplement 23) Revision 2, for additional details)

a. Vaccination Data Collection and DACs

While updated FRAGO 3 guidance is pending, labor counselors should focus on ensuring supervisors obtain guidance on Privacy Act concerns before collecting data on civilian employees and ensuring supervisors understand EEOC guidance on COVID 19 Emergency Use Authorization (EUA) Vaccinations.

Labor counselors should ensure Commands and supervisors coordinate any data collection efforts with Privacy Act experts and specialists. The collection, maintenance, and disclosure of identifiable data by Commanders and supervisors in support of reporting requirements must comply with the Privacy Act, 5 USC 552a. Among other requirements, the Privacy Act limits the collection of personally identifiable information (PII) data to only relevant and necessary information to accomplish an Agency purpose as defined by statute or executive order. Any collection of personal data on civilian employees must comply with the Privacy Act. Senior Commanders wishing to collect such data on civilian employees should consult their legal advisors.

In accordance with EEOC Guidance, although the administration of a vaccination is not a medical examination, pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries. Commanders should consult their labor counselor prior to asking civilian employees questions regarding the vaccine. EEOC Guidance on Coronavirus Vaccines is available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

Because the COVID 19 vaccines currently available are approved under an EUA, they must be voluntary. If an employer has offered a vaccination to employees on a voluntary basis (i.e. employees choose whether to be vaccinated), the ADA requires that the employee's decision to answer pre-screening, disability-related questions also must be voluntary. 42 U.S.C. 12112(d)(4)(B); 29 C.F.R. 1630.14(d). If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions. Based on the risk that reasons for vaccination denial implicate the ADA provisions on disability related questions, supervisors and Commanders should leave all inquiries regarding vaccine refusals to the medical providers.

b. Civilian Employees' Transition to the Federal Workspace

The following is general guidance from the Civilian Personnel, Labor & Employment Law, Office of The Judge Advocate General for HQDA Principal Officials and supervisors. The points

covered include likely civilian employee issues and scenarios as HQDA, in the national capital region, transitions from HPCON CHARLIE / Phase Zero of the HQDA Reintegration Plan to eventual HPCON 0 / Phase Four. The vast majority of civilian employee issues are fact-dependent and should be handled case-by-case.

Returning civilian employees to the workplace. As of 10 June 2020, HQDA was at HPCON CHARLIE / Phase Zero, which means telework was maximized. However, as principal officials and supervisors began to plan and schedule employees' return to work, the challenge was determining who should return to work during each phase of the plan. While many employees expressed that there were ready, willing, and able to return to work as soon as possible, others were resistant. To determine when to require employees to return to work, HQDA Principal Officials should employ a balancing test between employees' duties and their individual (personal) situations.

Duties. Are the employees' duties such that none of them can be performed via telework? Have employees been on 80 hours of Weather and Safety Leave this whole time? Is their presence required, or simply preferred? Can the duties that would normally require their presence in the office be re-distributed to another employee? Can duties amongst a particular work group be re-distributed to allow for greater flexibility for employees who are more vulnerable? These types of questions are what supervisors are prompted to consider under Washington Headquarters Service (WHS) Plan's Phase Four, when it references "Optimized workforce" and "Increased opportunities for distributed and virtual work" under the "Workforce" column, and "Optimized telework and new work arrangements" under the "Telework" column.

Individual (personal) situations. Is an employee in the category of higher risk of severe infection to COVID-19 symptoms as determined by the CDC? Does an employee have pre-school or school-aged children at home? Is the employee the caregiver for a vulnerable or high-risk family member? Do they use mass transit, carpool, or a van pool to commute? Do they work in a separate office, or in a cubicle area that doesn't allow for social distancing? Balancing personal situations against duties will help supervisors create an optimal plan for employees' return to their normal workspace.

Please note, asking about an employee's "personal situation" is something supervisors have been trained to do cautiously. While soliciting this information from employees is proper for planning each employee's appropriate return to work timeline, supervisors should use the interpersonal skills necessary for this discussion, and senior leaders should be ready to provide assistance as required.

Medical Examinations and Medical Documentation. During a pandemic such as COVID-19, management may obtain limited medical information from employees and applicants, by means consistent with the most current guidelines from the CDC and local public health authorities. These include: screening for body temperature as a condition for entry; asking individuals in the workplace if they have symptoms associated with the disease; and requiring a medical clearance to on board or return to work after illness. The EEO laws, including the ADA and the Rehabilitation Act, continue to apply. Information must be gathered in an equitable, non-discriminatory manner, and any associated documents – logs, statements, etc. – must be kept

confidential, to be shared only with appropriate designated officials. These records must also be stored separately from the employees' regular personnel files, whether in physical or electronic format.

Common requests/demands from employees:

1. "I would like to telework 100%/50%/more.

   Generally, supervisors should not make decisions about telework and then apply them to whole organizations or work groups. They should, however, solicit input from employees who request to continue to telework. In the near-term, supervisors should maximize telework flexibilities for eligible employees, with the decision as to how much telework is appropriate for each employee made on an individualized basis. Be sure to document that additional telework flexibilities are being granted on a temporary basis, based on current conditions, and are subject to periodic review.

   For example, some supervisors may find that while on one hand, collaborating with coworkers and advising supervisors and staff is best done face-to-face, on the other hand, researching and writing papers and briefs is sometimes best done in the quiet of a home office.

2. "I need a Reasonable Accommodation."

   A process for these requests already exists, and it begins with an employee's request, followed by an interactive and flexible discussion between the requester and the supervisor. Employee requests that seek to avoid or minimize returning to the workplace and cite a medical concern should be treated as requests for accommodation. To ensure employees are treated appropriately, please ensure supervisors coordinate any such requests with the HQDA Reasonable Accommodation Manager.

   Requests to change schedules, or to telework more, or other such flexibilities that do not cite a medical concern should be treated as any other request by an employee and should be considered using a balancing test.

3. "I'm not coming in."

   Supervisors decide what duties will be performed and the employee's place of duty. While disciplinary or administrative action is a possibility in extreme cases, supervisors should take into consideration the unique circumstances surrounding COVID-19. As a rule, supervisors should be as flexible as possible within the framework of the multi-phased HQDA Reintegration Plan and local public health and safety conditions.

4. "I'm not wearing a mask."

> All employees, unless they receive an exception, will wear face coverings. Offices may purchase and provide government-funded face masks to DA Civilians, as authorized by FRAGOs 21 and 28 of HQDA EXORD 144-20. If an employee wishes to wear their own preferred color or style mask, they may do so as long as the covering does not contain a political message or profanity. Employees who refuse to wear a face covering may be removed from the premises.

Unions. The general rule is any change in conditions of employment must be bargained with the union. That means notifying the union of the change and giving the union an opportunity to negotiate the "impact and implementation" of the change. For the most part, the Army (both in the field and at HQDA) was unable to bargain its "closing" pre-implementation given the emergency nature of COVID-19. But that doesn't mean organizations don't have time to notify the union(s) and give unions an opportunity to comment/bargain how we're going to "re-open." HQDA in the national capital region have multiple unions, and the HQDA CPAC is responsible for handling the notification process. HQDA Principal Officials and supervisors should validate with your administrative support staff whether or not you have employees who are bargaining unit members, and if so, ensure your organization is working closely with the CPAC.

Treating different employees differently. It seems counter-intuitive, but, in situations like this, it's the right thing to do. Merit System Principles require that all employees are afforded an equal opportunity to perform their duties successfully. This will require supervisors to make individualized assessments and allow enhanced flexibilities within the framework of this plan. Some complaints may arise when employees perceive unfair or unequal treatment; HQDA Principal Officials should ensure supervisors document their reasons for both allowing, and not allowing, requested flexibilities.

c. Restriction of Movement of Department of the Army Civilian Employees on a Military Installation

Issue. To provide authorities and limitations for on-post restriction of movement of Department of the Army civilian employees (DACs) in general and following a declared PHE).[340]

Discussion. The Labor and Employment Law Division, Office of The Judge Advocate General, continues to receive inquiries regarding the quarantine of civilian employees, and other forms of restrictions of movement (ROM), either before or after a commander's declared PHE, and in response to the coronavirus pandemic.[341] As there exists potentially conflicting information on this subject, the intent is to address the various types of ROM as they relate to DACs, and to inform legal advisors in the field as to which are permissible, given a commander's inherent and existing authorities.

[340] Throughout this Information Paper section, "post," "installation," and "reservation" are used interchangeably.

[341] Department of Defense Instruction 6200.03, Public Health Emergency Management Within the DoD, 28 March 2019 (hereinafter DoDI 6200.03) defines ROM as "[l]imiting movement of an individual or group to prevent or diminish the transmission of a communicable disease, including limiting ingress and egress to, from, or on a military installation; isolation; quarantine; and conditional release." *Id*., Glossary, G.2.

As explained below, while commanders have wide latitude to protect the safety, health, and welfare of personnel under their authority, and to protect the government property under their control, that inherent authority does not include the involuntary quarantine of DACs, on or off an installation, regardless of whether a commander has declared a PHE.[342] Commanders do, though, have wide latitude to control entry onto the reservation, or into its facilities, to include requiring pre-conditions to entry, such as the wear of personal protective gear, or answering questions regarding the visitor's recent travels. For DACs already on an installation who disregard, without authority, command-directed ROM, commanders may remove the DAC from the installation, with or without a subsequent bar to post, or temporarily detain them until civil authorities respond (depending on the nature of the transgression).

Authority to Protect Department of Defense (hereinafter DoD) Persons and Property. There are multiple authorities that empower military commanders to protect both persons and government property on a military installation. 10 U.S.C. § 2672(a) directs the Secretary of Defense to "protect the buildings, grounds, and property that are under the jurisdiction, custody, or control of the DoD and the persons on that property."[343] DoDI 5200.08 declares as DoD policy that "DoD installations, property, and personnel shall be protected and that applicable laws and regulations shall be enforced."[344]

To effectuate this policy, DoDI 5200.08 authorizes a commander "to take reasonably necessary and lawful measures to maintain law and order and to protect installation personnel and property."[345] These measures may include "removal from, or the denial of access to, an installation or site of individuals who threaten the orderly administration of the installation or site."346 To enforce such removal actions, commanders may prohibit individuals from reentering an installation after they have been removed and ordered not to reenter pursuant to 18

[342] A DAC may voluntarily enter into isolation or quarantine, either on or off post. Isolation is defined as "the separation of an individual or group infected or reasonably believed to be infected with a communicable disease from those who are healthy in such a place and manner to prevent the spread of the communicable disease," while a quarantine is "the separation of an individual or group that has been exposed to a communicable disease, but is not yet ill, from others who have not been so exposed, in such manner and place to prevent the possible spread of the communicable disease." DoDI 6200.03, Glossary, G.2. See also, 42 C.F.R. § 70.1; FRAGO 5 to HQDA EXORD 144-20, Army Wide Preparedness and Response to Coronavirus (COVID-19) Outbreak (hereinafter FRAGO 5), paras. 3.C.31.A; 3.C.31.B.

[343] 10 U.S.C. § 2672(a).

[344] Department of Defense Instruction 5200.08, Security of DoD Installations and Resources and the DoD Physical Security Review Board, 10 December 2005, IC 3, Effective 20 November 2015 (hereinafter DoDI 5200.08), para. 3.1.

[345] *Id*., para. 3.2. See also, DoDI 5200.08, para. 3.4 (commanders at all levels "have the authority to enforce appropriate security measures to ensure the protection of DoD property and personnel assigned, attached, or subject to their control"); Army Regulation 600-20, Army Command Policy, 6 November 2014, para. 2-5(b)(1) (the installation's Senior Commander's "authority includes all authorities inherent in command, including the authority to ensure the maintenance of good order and discipline for the installation"); FRAGO 5, para. 3.C.32 ("commanders have the authority to take all necessary actions to ensure the health and safety of personnel on their military installations or otherwise under their control").

[346] DoDI 5200.08, paras. 3.2., 3.2.2. That authority though "[shall] not be exercised in an arbitrary, unpredictable, or discriminatory manner. Removal or denial actions must be based on reasonable grounds and be judiciously applied." *Id*., para. 3.2.3.

U.S.C. § 1382.[347] Offenses for trespass may be prosecuted in the U.S. District Courts, or more likely, in a U.S. Magistrate Court.[348]

FRAGO 14 to HQDA EXORD 144-20 directed the Army to assume a minimum health protection condition (HPCON) C at all locations.[349] Commanders have wide latitude to dictate appropriate health measures in response to this heightened HPCON. Such measures will be synchronized with the installation's force protection condition level, and may include restricting access to the entire installation or specific activities within the post (unless directed otherwise by superior authority).[350] Commanders may implement pre-conditions for gaining access to the installations, to include the use of an electronic thermometer to take a visitor's temperature, and the posing of various questions (such as the visitor's recent travels, to include to COVID-19 "hotspots," whether the visitor feels sick, or has experienced any of the symptoms of the virus, and/or whether they had been in close contact with someone who tested positive for COVID-19).[351] The wearing of personal protective gear, such as face masks, or social distancing, as defined by appropriate authority, may also be required for entrance or movement around a post.[352] While the authority permits denial of entry to the installation, it does not extend to directing the visitor to quarantine at their residence.353

Quarantine and Isolation Authorities in General. Sections 243, 248, 249, and 264-272 of Title 42, United States Code (U.S.C.), and Parts 70 and 71 of Title 42, Code of Federal Regulations, contain regulations for preventing the introduction, transmission, and spread of communicable diseases and hazardous substances from foreign countries into the United States, and from one State or possession into another. These references also authorize the Director of the Centers for Disease Control and Prevention (CDC), through delegated authority of the Secretary of the U.S. Department of Health and Human Services (HHS), to apprehend, detain, and conditionally release individuals with the quarantinable communicable diseases listed in Executive Order (E.O.) 13295, as amended by E.O. 13375 and E.O. 13674.[354]

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[347] 18 U.S.C. § 1382; DoDI 5200.08, para. 3.2.4. The DoDI continues that "[if] this order is violated, the commander of a DoD installation may detain individuals not subject to military law until the civil authorities may respond. Offenders may be appropriately prosecuted in accordance with the law." DoDI 5200.08, para. 3.2.4.

[348] See generally, Army Regulation 27-10, Military Justice, 11 May 2016, Chapter 23; Army Regulation 190-45, Law Enforcement Reporting, 27 September 2016, Chapter 10.

[349] FRAGO 14 to HQDA EXORD 144-20. HPCON C is appropriate when there is a "[high] morbidity epidemic or contamination" in the community. In response, health protection measures rise to the level of "substantial," to include directing "social distancing (limit or cancel in-person meetings, gatherings, temporary duty assignments), shelter in-place indoors, utilize respirators, [and] mass distribution of medical countermeasures." DoDI 6200.03, Figure 8.

[350] DoDI 6200.03, para. 4.1.(a)(9)(a). The installation commander must clearly define those increased health protection measures, which would include, among other actions, public messaging throughout the installation and surrounding community to ensure broad awareness of the HPCON level and resultant restrictions. DoDI 6200.03, paras. 2.9.(g); 4.1.(a)(14); 4.1.(d)(4)(a).

[351] E.g., Fort Belvoir's Appendix 5 to Annex E (HPCON Visitor Screening Questions) to OPORD 20-019, USAG FBVA Response to COVID 19.

[352] See e.g., Secretary of Defense Memorandum, "Department of Defense Guidance on the Use of Cloth Face Coverings," dated 5 April 2020.

[353] Leaders should also ensure proper training and understanding for those enforcing these policies, as such authority "[shall] not be exercised in an arbitrary, unpredictable, or discriminatory manner." DoDI 5200.08, para. 3.2.3

[354] DoDI 6200.03, para. 1.2(a)(6). See also, CDC, Legal Authorities for Isolation and Quarantine, at: https://www.cdc.gov/quarantine/aboutlawsregulationsquarantine isolation.html (last visited 31 March 2020).

Though the CDC has authority to monitor and respond to the spread of communicable diseases if a state government is unwilling or unable to effectively respond, state and local governments, through their police powers, are primarily responsible for maintaining public health and controlling the spread of communicable diseases within state borders, to include directing and enforcing quarantine.[355] In some states, local health authorities implement state law; in most, breaking a quarantine order is a criminal misdemeanor.[356] While it is possible for military leadership to enforce restrictions of movement of U.S. citizens imposed by civil authorities for the protection of public health, to include in furtherance of isolation or quarantine orders, doing so exceeds an installation or local commander's inherent authorities under title 10 of the U.S.C.[357]

Restrictions of Movement Following a Declared PHE. To further effectuate and satisfy those obligations addressed above, and "to achieve the greatest public health benefit while maintaining operational effectiveness," DoD military installation commanders may declare a PHE pursuant to DoDI 6200.03.[358] In general, "to the extent necessary [to protect] DoD property [and] Service members," the commander may implement relevant emergency health powers.[359] These powers "may [extend to] include persons other than Service members who are present on a DoD installation or other areas under DoD control, including DoD civilian personnel, contractors, beneficiaries, and other persons within the scope of the military commander's authority."[360] As it relates to ROM and DACs, they: (1) may be required as a condition of exemption or release from ROM to submit to an appropriate examination or testing, as necessary, to diagnose and prevent the transmission of a communicable disease and enhance public health and safety; (2) submit to controlled evacuation routes on, and ingress and egress to and from, the affected DoD installation or military command; and (3) face restrictions on movement to prevent the introduction, transmission, and spread of communicable diseases.[361]

The degree of ROM available to a commander is controlled by the status of the individual. The applicable DoDI 6200.03 section begins "[q]uarantine, isolation, and conditional release are types of ROM that can be imposed in certain circumstances by a military commander for

[355] National Conference of State Legislatures (NCSL), State Quarantine and isolation Statutes, located at: https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx (last visited 31 March 2020).

[356] CDC, Legal Authorities for Isolation and Quarantine, at: https://www.cdc.gov/quarantine/aboutlaws regulationsquarantineisolation.html (last visited 31 March 2020). For a state-by-state listing of quarantine and isolation state statutes, see NCSL's website: https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx (last visited 31 March 2020).

[357] Such action involves Defense Support to Civil Authorities, and is, therefore, outside the scope of this Information Paper.section. See generally, 18 U.S.C. § 1385; Department of Defense Directive 3025.18, Defense Support of Civil Authorities (DSCA), 29 December 2010, IC 2, 19 March 2018; DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, 27 February 2013, IC 1, Effective 8 February 2019. For the history, authorities, and challenges of using the military to enforce federal and state quarantines, see Federal Enforcement of Mass Involuntary Quarantines: Toward a Specialized Standing Rules for the Use of Force, sec. III, by Lieutenant Colonel Jesse T. Greene, Harvard National Security Journal / Vol. 6, available at: https://harvardnsj.org/wp-content/uploads/sites/13/2015/02/Greene-Vol6.pdf (last visited 31 March 2020).

[358] DoDI 6200.03, para. 1.2(b). The section continues that, "[to] the extent practicable, military commanders will act in accordance with the applicable provisions of public health emergency declarations made by U.S. public health officials at the federal level and at the [SLTT] levels." *Id*., at para. 1.2(e).

[359] *Id*., para. 1.2(b).

[360] *Id*., para. 3.2.(a)(2).

[361] *Id*., paras. 3.2.(b)(1), 3.2.(b)(6), 3.2.(b)(8).

individuals within the scope of the commander's authority."[362] But the section then differentiates types of ROM by the individual's status. As it relates to Soldiers, ROM includes "isolation, quarantine, conditional release, or any other measure necessary to prevent or limit transmitting a communicable disease and enhance public safety may be implemented."[363] For all others under the commander's authority, ROM "may include isolation or limiting ingress and egress to, from, or on a DoD installation or military command."[364] As the word "quarantine" is absent from the types of ROM available (and despite the non-exclusive language used), a commander may not, inherent within this declared PHE authority (or in the absence of it), direct or enforce the involuntary quarantine of non-Service members under his area of control (e.g., of a DAC on a military installation).[365] Directing a DAC into isolation on-post is permitted.[366] While ROM may include limiting egress from a DoD installation, a DAC should generally not be prevented from departing the installation should he/she wish to depart, but to prevent him/her from re-entering the installation once departed.[367]

Coordination with Civilian Public Health Authorities, and PHE Punitive Measures. The remaining portions of DoDI 6200.08, para. 3.2., encourages coordination with civilian authorities to most effectuate control over the movements of their citizens.[368] For example, the DoDI provided that in the United States, ROM "should be considered in coordination with the local CDC quarantine officer and [state, local, tribal and territorial] public health [departments]. These agencies have public health authorities that may be applicable when the military commander's authority is limited."[369]

The potential punitive measures for breaking a military directed quarantine listed within DoDI 6200.03 may presume such coordination has already occurred. In the absence of such coordination, the language supports the position that a commander lacks independent authority to direct or enforce the quarantine of DACs (or other non-Service member individuals), absent his or her operating under some other federal, state, or local authority. DoDI 6200.03, para. (c)(14), states that "[i]ndividuals and groups subject to quarantine will be advised that violators may be charged with a crime pursuant to law (including Section 797 of Title 50, U.S.C.; Section 1382 of Title 18, U.S.C.; or Parts 70 or 71 of Title 42, CFR) and subject to punishment of a fine up to $1,000 or imprisonment for not more than 1 year, or both."[370] Section 797 of Title 50, U.S.C., and Section 1382 of Title 18, U.S.C., pertain to ingress, egress, or removal in general of persons from military controlled property, not an enforcement mechanism, or independent authority, of a

[362] *Id*., para. 3.2.(c)(1).
[363] *Id*., para. 3.2.(c)(1)(a).
[364] *Id*., para. 3.2.(c)(1)(b).
[365] It logically follows that if a commander lacks the inherent authority to involuntarily direct a DAC into a quarantine on-post following a declared PHE, that he lacks the authority to inherently direct the same action off an installation.
[366] While it is conceivable that a commander may place a DAC into isolation within their on-post housing or lodging, regardless of the circumstances that brought them to reside on the installation, the recommended enforcement mechanism should the DAC violate the terms of the isolation without proper authority, is removal from the on-post residence or lodging, removal from the installation, and potentially, a bar to post. See endnote 3, above, concerning the difference between isolation and quarantine.
[367] DoDI 6200.03, para. 3.2.(c)(1)(b).
[368] *See, Id*., para. 3.2.(c)(1)(b).
[369] *Id*., para. 3.2.(c)(2). Paras. 3.2.(c)(2)(b) and 3.2.(c)(2)(c) reemphasize the general guidance concerning federal and SLTT authority over this subject.
[370] *Id*., para. 3.2.(c)(14).

military commander's quarantine order. Parts 70 or 71 of Title 42, CFR, is an authority empowering the CDC to order quarantine or isolation involving international or inter-state travel.[371]

Inapplicable punitive language is likewise found in the DoDI's template for written notice of a quarantine. It provides that "[v]iolators of procedures, protocols, provisions, or orders detailed in this memorandum may be charged with a crime under Section 271 of Title 42, U.S.C., and subject to punishment of a fine up to $1,000 or imprisonment for not more than one year, or both."[372] 42 U.S.C. Chapter 6A concerns the Public Health Service, which is a division of HHS and is concerned with public health. The first section of the applicable part, 42 U.S.C. § 264(a), empowers the Surgeon General to create regulations concerning quarantine and isolation.[373] Section 271 begins with "any person who violates any regulation [pursuant to this title], or who enters or departs from the limits of any quarantine station … without the permission of the quarantine officer in charge …"[374] As no authority permits a military commander to exercise powers granted to HHS and the CDC, DoDI 6200.03's threat of imprisonment and fines, at least as derived from title 42 of the U.S.C., for a violation of a military quarantine order, is erroneous.[375] As explained above though, for those not subject to military law, violations of procedures, protocols, provisions, or orders issued in conjunction with PHE declarations may result in removal and an administrative bar to the installation.

Conclusion. As discussed throughout this section, commanders have broad authorities to protect the persons and property on a military installation or reservation, and to control the movement of persons on such locations who threaten the maintenance of good order and discipline, and the safety and welfare, of personnel under the commander's authority. While those ROM authorities are most encompassing for Service members, they are limited to some degree for those individuals other than Service members, even following the declaration of a PHE, and do not include the authority to direct a quarantine. Commanders have wide latitude to control entry onto the installation, to include requiring pre-conditions to entry, such as the taking of a visitor's temperature before granting admittance to the post. When faced with a DAC already on the post

[371] But see, DoDI 6200.03, para. 3.2.(c)(14), which states that "individuals or groups not subject to military law and who refuse to obey or otherwise violate an order issued in accordance with [DoDI 6200.03] may be detained by the military commander until appropriate civil authorities can respond." *Id*.

[372] *Id*., Figure 3. This threat is repeated in the DoDI's template for a declaration of a PHE. The template states that "[any] person who refuses to obey or otherwise violates an order during this declared PHE may be detained. Those not subject to military law may be detained until civil authorities can respond. Violators of … orders issued in conjunction with this PHE may be charged with a crime under the Uniform Code of Military Justice and under [42 U.S.C. § 271], [and] are subject to a fine up to $1,000 or imprisonment for not more than one year, or both." *Id*., Figure 2.

[373] 42 U.S.C. § 264(a). The following subparagraph then limits this broad authority, as it explains that "[regulations] prescribed under this section shall not provide for the apprehension, detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in Executive orders of the President upon the recommendation of the Secretary, in consultation with the Surgeon General." 42 U.S.C. § 264(b).

[374] 42 U.S.C. § 271(a).

[375] It is outside the scope of this Information Paper section to explain the procedural steps for how a military commander may act under the authority of, or enforce an order by, the CDC or a state government. For a discussion on how to enforce orders by a commander involving Service members, see Information Paper, subject: Breach of Medical Quarantine, Article 84, UCMJ, DASA-CL, Office of The Judge Advocate General, 13 March 2020, available at: https://www.milsuite.mil/book/community/spaces/armyjag/covid-19.

who disregards ROM policies, or otherwise poses a risk to the safety, health, or welfare of other personnel on the installation, commanders may either temporarily detain them until civil authorities respond, or may remove them from the installation, with or without a subsequent bar to the installation.

d. Return to Work Guidance

Returning APF Employees from Weather and Safety Leave back to duty status and returning employees from situational telework to duty at the physical worksite.

Issue. Summarized guidelines for returning an **appropriated fund (APF) employee** to work at the physical worksite from Weather and Safety Leave or returning employees from situational telework status when the employee is reluctant to return to the physical worksite during the COVID-19 pandemic.

Discussion. Be fair and equitable when scheduling employees for work, particularly if not all employees in your work unit will be required to report to the physical worksite. Apply reasonable standards and enforce them consistently. Treat employees fairly and reasonably with dignity and respect. Communicate with them frequently and candidly. Avoid favoritism and any appearance of favoritism. Remind all of your employees that they are important to you and their work is important to the Soldiers and Families that rely on your employees' service. Consider that your employees are experiencing a pandemic, and they are naturally concerned for their health and the health of their families.

Before assigning work, weigh the need for the work and/or the need for work at the physical worksite against the risk to the employee and the workforce.[376] Provide a safe work environment for employees. If the employee has been on Weather and Safety leave or performing duties through telework, determine whether the employee should remain in that status given mission requirements, duties, and safety considerations. Employees should remain away from the workplace on Weather and Safety leave or continue to telework when:

The employee was directed by a medical professional, public health authority, Commander or supervisor to stay home because of possible exposure or because the employee has symptoms that might be COVID-19 in which the employee may request sick leave;

The employee belongs to the groups of individuals identified by the Centers for Disease Control and Prevention (CDC) who need to take extra precautions to avoid contracting COVID-19 ("vulnerable individuals").[377] Commanders and supervisors should consider local conditions as well as guidance from the DoD and the DA to determine when it is appropriate to return these employees to the physical worksite. Management can, however, offer vulnerable individuals alternative accommodations (masks, gloves, sanitizing wipes, etc) and require the employee to

[376] In making these assessments, management officials should consider the most recent guidance issued from the DoD, the DA, local, state, and federal officials regarding COVID-19 conditions.

[377] The CDC provides more detail regarding individuals who require extra precautions at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html. These are the same individuals identified in the "Guidelines for Opening Up America" as "vulnerable individuals."

return to work if continuing to grant situational telework or Weather and Safety leave imposes an undue hardship given the mission but only if management determines the employee can return to work safely, considering the most recent guidance issued from the DoD, the DA, local, state, and federal officials regarding COVID-19 conditions.

The employee returns from travel and is directed by a medical professional, public health authority, commander, or supervisor to stay home.

The Equal Employment Opportunity Commission (EEOC) has advised that a request for Weather and Safety leave or for situational telework by an employee stating she or he is at high risk (apart from age-based) is a request for reasonable accommodation. If an employee self-identifies as high risk and requests to remain on Weather and Safety Leave or situational telework, you must treat their request as a request for a reasonable accommodation. This means that, unless the high-risk condition is already known by you to exist (e.g., age as documented in the OPF), you should ask the employee to identity which high risk factor applies, and you also may ask for substantiating medical documentation. As with any request for a reasonable accommodation, the employee is not entitled to his or her accommodation of choice, which means you can proffer alternative accommodations such as furnishing masks, gloves, sanitizing wipes, etc. However, in every instance where reasonable accommodation is requested, you must engage in an interactive discussion with the employee before denying the employee's request.

Direct the employee to return to the physical worksite if their services are needed and the employee is not in one of the categories of employees that should remain on Weather and Safety leave and telework is not appropriate.

A person-to-person discussion with the employee may be sufficient. Supervisors should direct the employee to return to work and inform the employee when and where they are required to report. This telephone call should be followed immediately by an email or a memorandum for record (MFR) documenting the instructions you provided the employee.

If the employee refuses to return to work, the supervisor should direct the employee in writing to return. Indicate the time and place the employee is required to work. Warn the employee that failing to return to duty will place them in an absent without leave (AWOL) status and pay will stop, unless annual leave, sick leave, or leave without pay is requested and approved. Also warn the employee that their failure to return to the physical worksite may be considered a voluntary resignation, that they may be separated from the rolls, and/or disciplined for AWOL. Mail the written directive via certified mail with return receipt requested. If certified mail is impractical, consider mailing via priority mail with tracking, email with read receipt, or some other reasonable method of delivery that ensures a record of delivery. Maintain copies of the directive and the record of delivery. Allow reasonable time between the directive and the employee's report date so that the employee has time to report to work after receiving the directive.

Consider leave requests. Normal procedures for requesting and approving leave still apply.

Sick leave. Accumulated sick leave is available for use when the employee is incapacitated for the performance of duties because of sickness, injury, pregnancy or childbirth, medical, dental or

optical treatment, exposure to a contagious disease where the health of coworkers is endangered, and for activities related to adoption. A medical certificate is normally required to support all absences of more than 3 days. However, when circumstances are such that requirement of a medical certificate is not reasonable, the employee's personal statement of illness may be accepted. When an employee is on sick leave for more than three days, the supervisor may request additional documentation from a health care provider as circumstances warrant. Review any applicable collective bargaining agreement (CBA) for medical certificate requirements.

Annual leave. Each employee has the right to use annual leave to his or her credit; however, supervisors have the responsibility for determining when the leave will be used. Leave should be approved or disapproved based on mission requirements. Denial of the use of annual leave will be based upon factors which are reasonable, equitable, and which do not discriminate against any employee or group of employees. Employees have the responsibility for cooperating with management in the use of annual leave when their services can best be spared. If COVID-19 has adversely affected your workforce and you cannot meet mission requirements, then you may determine it necessary to deny a request for annual leave, and if necessary, proceed IAW the other guidance provided in this information paper

Leave without pay (LWOP). LWOP is an approved absence granted at the employee's request. LWOP must be approved for disabled veterans needing medical attention; Reserve and National Guard personnel authorized military training or duties; for employees injured in the performance of their duties; for employees who are spouses of active duty military members or civilians seeking employment at a new location due to the transfer of a spouse; for military furlough; employees may use up to 24 hours of LWOP in a leave year to meet the needs of an employee's children for school and early childhood educational activities, routine family purposes, and elderly health and care needs; and upon request of an employee under the coverage of the Family Medical Leave Act (FMLA). FMLA leave can be complex. Coordinate with your servicing Civilian Personnel Advisory Center (CPAC) if you receive a request for FMLA leave.

Absence without leave (AWOL). An employee's absence from duty that was not authorized or approved is charged on the time and attendance record as AWOL. Pay is withheld for the entire period of AWOL. AWOL differs from LWOP in that AWOL is an unauthorized absence and LWOP is an authorized absence. AWOL is misconduct and subject to discipline, while LWOP is an approved status.

Consider administratively separating AWOL employees.

Probationary employees may be separated with little or no advance notice for failing to fully demonstrate their qualifications for continued employment, which may include being AWOL or other misconduct during their probationary period. Probationary periods can differ or be extended depending on factors such as the type of employee, prior federal employment, certain absences, and some personnel actions (reassignments, transfers, etc.). Consult with your Civilian Personnel Advisory Center (CPAC) and legal advisor regarding any probationary questions.

Employees may be separated from the rolls upon a determination that they have abandoned their positions. Please see your CPAC and local Office of the Staff Judge Advocate for more advice.

Consider disciplinary action for AWOL employees. Discipline is typically the responsibility of the first level supervisor. However, it may be pulled to a higher level for efficiency and consistency such as the case when multiple employees are AWOL and they have different first level supervisors but a common second level supervisor.

If a supervisor is considering formal disciplinary action against an employee, the supervisor should gather all available information. Do your best to understand the situation before moving forward with any disciplinary action.

Discuss the incident with the employee to ensure all relevant facts are known and the employee is afforded the opportunity to explain the basis for his or her actions. Supervisors should use a memorandum for record to memorialize this discussion if it occurs. (Note: Since disciplinary action could result from these types of interviews, the employee must be provided the opportunity to be accompanied by a personal representative if he/she is a member of a bargaining unit and requests representation.)

There is no single mandatory penalty for failing to report to work. Supervisors should determine the most appropriate disciplinary action for the individual employee's misconduct. Supervisors must consider the relevant Douglas Factors: the nature and seriousness of the offense, the employee's job level and type of employment, past disciplinary record; past work record, ability to perform in the future, consistency with other penalties, consistency with the table of penalties, the notoriety and impact of the offense, the clarity of the notice the employee was on regarding the offense, the potential for rehabilitation, any mitigating circumstances, and the availability of alternative sanctions. Not all of these factors are applicable in all circumstances, and some of these factors will have greater weight than others. For example, an employee's job may be very important to the Army's mission. However, circumstances exist which may reasonably cause employees to fear coming to work. Supervisors should consider all of this before determining what penalty is appropriate.

CBAs may impact the tools and procedures available to you at your garrison. Ensure you use the tools and procedures available to you under the CBA applicable to your employees if one exists.

Conclusion. Support is available for supervisors. Your servicing CPAC and your local labor attorney can assist you with employee misconduct issues, especially since COVID-19 guidance is continuously evolving. Contact them immediately if you have a significant problem with employees refusing to report to work from Weather and Safety leave. In all cases the CPAC must review all disciplinary actions and coordinate with the local servicing labor attorney before a supervisor issues a disciplinary action to an employee.

ii. Returning NAF employees from Weather and Safety Leave back to duty status and returning employees from situational telework to duty at the physical worksite.

Issue. Summarized guidelines for returning a **non-appropriated fund (NAF) employee** to work at the physical worksite from Weather and Safety Leave or returning employees from situational telework status when the employee is reluctant to return to the physical worksite during the COVID-19 pandemic.

Discussion. Be fair and equitable when scheduling employees for work, particularly if not all employees in your work unit will be required to report to the physical worksite. Apply reasonable standards and enforce them consistently. Treat employees fairly and reasonably with dignity and respect. Communicate with them frequently and candidly. Avoid favoritism and any appearance of favoritism. Remind all of your employees that they are important to you and their work is important to the Soldiers and Families that rely on your employees' service. Consider that your employees are experiencing a pandemic and they are naturally concerned for their health and the health of their families.

Before assigning work, weigh the need for the work and/or the need for work at the physical worksite against the risk to the employee, the NAFI and the workforce.[378] Provide a safe work environment for employees.

If the employee has been on Weather and Safety Leave or performing duties through telework, determine whether the employee should remain in that status given mission requirements, duties, and safety considerations. Employees should remain away from the workplace on Weather and Safety Leave or continue telework when:

The employee was directed by a medical professional, public health authority, commander or supervisor to stay home because of possible exposure or because the employee has symptoms that might be COVID-19 in which the employee may request sick leave;

The employee belongs to the groups of individuals identified by the Centers for Disease Control and Prevention (CDC) who need to take extra precautions to avoid contracting COVID-19 ("vulnerable individuals").[379] Commanders and supervisors should consider local conditions as well as guidance from the DoD and the DA to determine when it is appropriate to return these employees to the physical worksite. Management can, however, offer vulnerable individuals alternative accommodations (masks, gloves, sanitizing wipes, etc) and require the employee to return to work if continuing to grant situational telework or Weather and Safety Leave imposes an undue hardship given the mission but only if management determines the employee can return to work safely, considering the most recent guidance issued from the DoD, the DA, local, state, and federal officials regarding COVID-19 conditions.

The employee returns from travel and is directed by a medical professional, Public health authority, commander, or supervisor to stay home.

The Equal Employment Opportunity Commission (EEOC) has advised that a request for Weather and Safety leave or for situational telework by an employee stating she or he is at high risk (apart from age-based) is a request for reasonable accommodation. If an employee self-identifies as high risk and requests to remain on Weather and Safety Leave or situational telework, you must treat their request as a request for a reasonable accommodation. This means

[378] In making these assessments, management officials should consider the most recent guidance issued from the DoD, the DA, local, state, and federal officials regarding COVID-19 conditions.

[379] The CDC provides more detail regarding individuals who require extra precautions at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html. These are the same individuals identified in the "Guidelines for Opening Up America" as "vulnerable individuals."

that, unless the high-risk condition is already known by you to exist (e.g., age as documented in the OPF), you should ask the employee to identity which high risk factor applies, and you also may ask for substantiating medical documentation. As with any request for a reasonable accommodation, the employee is not entitled to his or her accommodation of choice, which means you can proffer alternative accommodations such as furnishing masks, gloves, sanitizing wipes, etc. However, in every instance where reasonable accommodation is requested, you must engage in an interactive discussion with the employee before denying the employee's request.

Direct the employee to return to the physical worksite if their services are needed and the employee is not in one of the categories of employees that should remain on Weather and Safety leave and telework is not appropriate.

A person-to-person discussion with the employee may be sufficient. Supervisors should direct the employee to return to the worksite and inform the employee when and where they are required to report. This telephone call should be followed immediately by an email or a memorandum for record (MFR) documenting the instructions you provided the employee.

If the employee refuses to return to the worksite, the supervisor should direct the employee in writing to return. Indicate the time and place the employee is required to work. Warn the employee that failing to return to duty will place them in an absent without leave (AWOL) status and pay will stop, unless annual leave, sick leave, or leave without pay is requested and approved. Also warn the employee that they may be separated from the rolls and/or disciplined for AWOL. Mail the written directive via certified mail with return receipt requested. If certified mail is impractical, consider mailing via priority mail with tracking, email with read receipt, or some other reasonable method of delivery that ensures a record of delivery. Maintain copies of the directive and the record of delivery. Allow reasonable time between the directive and the employee's report date so that the employee has time to report to work after receiving the directive.

Consider leave requests. Normal procedures for requesting and approving leave still apply.

Sick leave. Accumulated sick leave is available for use when the employee is incapacitated for the performance of duties because of sickness, injury, pregnancy or childbirth, medical, dental or optical treatment, exposure to a contagious disease where the health of coworkers is endangered, and for activities related to adoption. A medical certificate is normally required to support all absences of more than 3 days. However, when circumstances are such that requirement of a medical certificate is not reasonable, the employee's personal statement of illness may be accepted. When an employee is on sick leave for more than two weeks (except for pregnancy), the employee will be required to submit a doctor's certificate at least every two weeks during the absence, unless the leave approving authority determines circumstances do not warrant a certificate. Review any applicable collective bargaining agreement (CBA) for medical certificate requirements.

Annual leave. Each employee has the right to use annual leave to his or her credit; however, supervisors have the responsibility for determining when the leave will be used. Leave should be approved or disapproved based on mission requirements. Denial of the use of annual leave will

be based upon factors which are reasonable, equitable, and which do not discriminate against any employee or group of employees. Employees have the responsibility for cooperating with management in the use of annual leave when their services can best be spared. If COVID-19 has adversely affected your workforce and you cannot meet mission requirements, then you may determine it necessary to deny a request for annual leave, and if necessary, proceed IAW the other guidance provided in this information paper.

Leave without pay (LWOP). LWOP is an approved absence granted at the employee's request. LWOP must be approved for disabled veterans needing medical attention; Reserve and National Guard personnel authorized military training or duties; for employees injured in the performance of their duties; for employees who are spouses of active duty military members or civilians seeking employment at a new location due to the transfer of a spouse; for military furlough; regular employees and regularly scheduled flexible employees may use up to 24 hours of LWOP in a leave year to meet the needs of an employee's children for school and early childhood educational activities, routine family purposes, and elderly health and care needs; and upon request of an employee under the coverage of the Family Medical Leave Act (FMLA). FMLA leave can be complex. Coordinate with your servicing Civilian Personnel Advisory Center (CPAC) if you receive a request for FMLA leave.

Absence without leave (AWOL). An employee's absence from duty that was not authorized or approved is charged on the time and attendance record as AWOL. Pay is withheld for the entire period of AWOL. AWOL differs from LWOP in that AWOL is an unauthorized absence and LWOP is an authorized absence. AWOL is misconduct and subject to discipline while LWOP is an approved status.

Place employees in an AWOL status for time and attendance purposes if they do not report to work as directed and their absence is not authorized or approved. This stops the employee's pay. This consequence alone may be sufficient to convince the employee to return to work. Merely placing an employee in an AWOL status for time and attendance is not a disciplinary action.

Consider administratively separating AWOL employees.

Probationary employees may be separated with little or no advance notice for failing to fully demonstrate their qualifications for continued employment, which may include being AWOL or for other misconduct during their one-year probationary period. Probationary periods can differ or be extended while in a non-pay status.

All employees may be separated from the rolls upon a determination that they have abandoned their positions. An employee who fails to report for duty and is carried in an AWOL status for three consecutive scheduled workdays may be determined to have abandoned his or her position regardless of any expressed intent to return to duty at a subsequent date. No advance notice is required for this form of administrative separation. There is no rebuttal for such separations and is taken without prejudice to reemployment.

Consider disciplinary action for AWOL employees. Discipline is typically the responsibility of the first level supervisor. However, it may be pulled to a higher level for efficiency and

consistency such as the case when multiple employees are AWOL and they have different first level supervisors but a common second level supervisor. Disciplinary procedures for NAF employees are found in AR 215-3, chapter 7. AR 215-3, chapter 7 provides the following process:

If a supervisor is considering formal disciplinary action against an employee, the supervisor should gather all available information. Do your best to understand the situation before moving forward with any disciplinary action.

Discuss the incident with the employee to ensure all relevant facts are known and the employee is afforded the opportunity to explain the basis for his or her actions. AR 215-3 encourages but does not require this discussion. Supervisors should use a memorandum for record to memorialize this discussion if it occurs. (Note: Since disciplinary action could result from these types of interviews, the employee must be provided the opportunity to be accompanied by a personal representative if he/she is a member of a bargaining unit and requests representation.)

There is no single mandatory penalty for failing to report to work. Supervisors should determine the most appropriate disciplinary action for the individual employee's misconduct. Supervisors must consider the seriousness of the offense, past record of the employee, circumstances surrounding the offense, effectiveness of the penalty in stimulating improvement, consistency of the penalty with past penalties other employees received in similar circumstances, time period since a previous offense, impact of the offense on the morale of other employees, and any other pertinent factors. Not all of these factors are applicable in all circumstances, and some of these factors will have greater weight than others. For example, an employee's job may be very important to the Army's mission. However, circumstances exist which may reasonably cause employees to fear coming to work. Supervisors should consider all of this before determining what penalty is appropriate.

AR 215-3, Table 7-1 suggests ranges of penalties for common offenses. The table should be used as a guide only. For the offense of AWOL, Table 7-1 suggests a reprimand to a 3-day suspension for a first offense; 4-6 days suspension for a second offense; and 7-14-day suspension for a third offense. Using Table 7-1 helps supervisors remain reasonable and consistent.

AR 215-3 provides four disciplinary actions for NAF employees: 1) oral admonishment; 2) letter of reprimand; 3) suspension (without pay); and 4) separation for cause. Suspensions for NAF employees who are AWOL may not exceed 14 calendar days. Letters of reprimand may be issued by a supervisor without any approval by the next level supervisor. Letters of reprimand may be filed in an employee's eOPF for up to two years. Suspensions and separations for cause require a proposal by a supervisor, an opportunity for an employee to reply, and a written decision by the next level supervisor. Employees may request review of reprimands and may grieve suspensions and separations.

AR 215-3, chapters 2, 5, and 7 provide the tools and procedures described above. However, CBAs may impact the tools and procedures available to you at your garrison. Ensure you use the tools and procedures available to you under the CBA applicable to your employees if one exists.

Conclusion. Support is available for supervisors. Your servicing CPAC and your local labor attorney can assist you with employee misconduct issues, especially since COVID19 guidance is continuously evolving. Contact them immediately if you have a significant problem with employees refusing to report to work from Weather and Safety leave. Also, templates are available for disciplinary actions. (Encl 2) In all cases the CPAC must review all disciplinary actions and coordinate with the local servicing labor attorney before a supervisor issues a disciplinary action to an employee.

iv. Employees who need to take extra precautions with respect to COVID-19

Issue: Summarized guidance relative to employees identified as needing to take extra precautions with respect to COVID-19, including those at higher risk for severe complications and other populations.

CDC Guidance. The Centers for Disease Control and Prevention (CDC) identified two groups of individuals who needed to take extra precautions with respect the COVID-19. Those included people who are at higher risk for severe illness and other populations who should take extra precautions.[380] The CDC states "[b]ased on currently available information and clinical expertise, older adults and people of any age who have serious underlying medical conditions might be at higher risk from COVID-19."

Higher Risk. The CDC defines people who are at higher risk for severe illness as:

1. People 65 years and older;
2. People who live in a nursing home or other long-term care facility;
3. People of all ages with underlying medical conditions, particularly if not well controlled, including: people with chronic lung disease or moderate to severe asthma; people who have serious heart conditions; people who are immunocompromised (many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications); people with severe obesity (body mass index [BMI] of 40 or higher); people with diabetes; people with chronic kidney disease undergoing dialysis; and people with liver disease.
4. Others at Risk/Other Populations: "Others at Risk/Other Population" is a category of people who the CDC identifies as at higher risk for severe complications of COVID-19. These people include individuals with certain disabilities (people who have limited mobility or who cannot avoid coming into close contact with others who may be infected, people who have trouble understanding information or practicing preventative measures such as hand washing and social distancing, and people who may not be able to communicate symptoms of illness), individuals in racial and ethnic minority groups (with contributing factors of living in densely populated areas, residential segregation, living in neighborhoods far from grocery stores and medical facilities, living in a multigenerational household, underlying health conditions coupled with lower access to medical care, and working in essential industries which may not have paid sick leave), and pregnant women.

[380] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/other-at-risk-populations.html

Office of Management and Budget/Office of Personnel Management Memo. On 20 April 2020 the Office of Management and Budget and the Office of Personnel Management issued a joint memorandum (OMB/OPM memo), Aligning Federal Agency Operations with the National Guidelines for Opening Up America Again.[381] The OMB/OPM memo, which is applicable to all Federal Agencies including the Department of Defense (DoD), sets out gating criteria aligned with those in the Opening Up America Again. The OMB/OPM memo recognizes the differing circumstance between agencies, specifically missions and geographical locations, and leaves the agencies with the discretion as to how to implement these guidelines.

Telework guidance. The OMB/OPM memo, in Part B. Telework Status Guidelines, states "[u]ntil agencies have resumed normal operation and risk is minimal, all Federal agencies are encouraged to maximize telework flexibilities to all eligible workers within those populations that the CDC has identified as being at higher risk for serious complications from COVID-19 (CDC High Risk Complications) and to CDC-identified special populations including pregnant women (CDC Special Populations) regardless of location. If a vulnerable employee's duty location is within an area that is classified as Phase 3, they may return to work at their duty location, but should continue physical distancing protocols and other mitigation measures. Agencies do not need to require certification by a medical professional and may accept self-identification by employees that they are in one of these populations." While the terms used in the OMB/OPM memo to describe who is at higher risk and who needs to take extra precaution don't track exactly with the terms used on the CDC website (e.g. CDC High Risk Complications v. people who are higher risk for severe complications) the terms are near enough to each other, such that using them interchangeably does not lead to confusion.

Leave guidance. In addition to addressing telework, the OMB/OPM memo further states that if employees are not telework eligible agencies are encouraged to "approve leave for safety reasons to employees who are in a vulnerable population as identified by the CDC, not telework-eligible, and whose duty location is not returning to normal operations. Federal agencies may also grant weather and safety leave due to a 'condition that prevents the employee or group of employees from safely traveling to or performing work at the approved location'" citing 5 U.S.C. § 6328c(b). And that "if employees are not eligible for telework, agency heads continue to have the discretion to grant weather and safety leave."

Supervisory/Employee Interaction. During the phasing in to return to normal operations, supervisors should inform employees of the plan, the expected date for their return to the physical workplace and ask employees if there are any personal circumstances which would prevent their return on the anticipated date. Supervisors should not make determinations regarding their employees' personal circumstances without discussing those concerns with their employees. There is no provision in the OMB/OPM memo that would require management to prevent from entering the physical workplace only based on the fact that they fall within either category, Higher Risk (see paragraph 3) or Others at Risk/Other Populations (see paragraph 4). While the intent is that agencies will make maximum use of telework flexibilities, there is no authority for management to unilaterally prevent an employee from entering the workplace solely on the basis that they belong to one of the identified categories. For example, if a supervisor knows an employee is over 65, they can ask the employee if there are circumstances

[381] https://www.whitehouse.gov/wp-content/uploads/2020/04/M-20-23.pdf

which would prevent them from returning to the physical workplace, but the supervisor should not automatically tell that employee that s/he is prevented from working at the physical workplace. Conversely, if the employee informs his/her supervisor that they are over 65 and wish to remain away from the physical work site, the OMB/OPM memo encourages maximizing telework for employees over 65 (and other individuals, as identified in paragraph 3 and 4) until a duty station is back to normal operations.

Guidance from the Equal Employment Opportunity Commission (EEOC). The EEOC has issued guidance "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws."[382] The guidance is presented in a question-and-answer format, and the following relate directly to higher risk employees returning to the physical workplace and how these issues intersect with the Americans with Disabilities Act (ADA)/Rehabilitation Act of 1973:[383]

e. **What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions that CDC says may put her at higher risk for severe illness from COVID-19?**

An employee – or a third party, such as an employee's doctor – must let the employer know that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, she may do so. The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided.

The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer act.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee – or take any other adverse action – solely because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.

[382] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
[383] Federal employees and applicants are covered by the Rehabilitation Act of 1973. The protections are mostly the same.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under 29 C.F.R. section 1630.2(r). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

f. What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self?

Accommodations may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other

things, on an employee's job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (www.askjan.org) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

Supervisors and leaders should consult with their L/MER specialists, EEO specialist, and legal advisors for advice regarding specific situations.

G. Criminal Law

1. Responses to Potential COVID-19 Related Orders Violation

Purpose. To summarize the legal basis for punitive or adverse administrative action where a Service member violates a COVID-19 related order. This guidance does not apply to civilian employees or government contractors.

Discussion.

Example 1:

CDRUSCYBERCOM issued orders and guidance to military personnel for restrictions of movement based on the emergency circumstances presented by the COVID-19 virus. On 17 March, the CDR stated, "personal travel is going to be restricted for military personnel. I determine that that will be 100 miles from your home of record." On 31 March, CDRUSCYBERCOM reiterated the 100-mile maximum with the clarification that, "if you're not at work, if you're on admin leave, if you're away from work because you're a military person, you should be home." This direction augments Department of Defense, military Service, and state and local orders following the President's declared National Emergency Concerning the Novel Coronavirus Disease Outbreak, dated 13 March 2020.[384]

Leave and travel restrictions are appropriate and necessary to accomplish a legitimate military purpose for the maintenance of good order and discipline of the force. The declared PHE concerning the spread of COVID-19 reinforces the commander's prerogative to take appropriate response measures for the health and safety of personnel, and to ensure optimum readiness.

Example 2:

State Orders. Over a 30-day period the governors of the State of Maryland and the Commonwealth of Virginia, as well as the Mayor of Washington, D.C., issued similar orders directing residents to remain at home, with certain exceptions. Violation of these orders led to civil or criminal penalties.

[384] Available at: https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergencyconcerning-novel-coronavirus-disease-covid-19-outbreak/

Application of Military Law. Failure to comply with travel and movement restrictions and associated health and welfare and guidance may be a violation of the UCMJ,[385] leading to administrative or disciplinary action. The following UCMJ Articles are applicable:

(1) Article 84 – Breach of medical quarantine.
(2) Article 86 – Absence without leave.
(3) Article 90 – Willfully disobeying superior commissioned officer.
(4) Article 92 – Failure to obey order or regulation (This includes dereliction in the performance of duties including those arising from COVID-19 mitigation measures).
(5) Article 133 – Conduct unbecoming an officer and a gentleman.
(6) Article 134 – General Article (Under certain circumstances state and local laws may form the basis for a charge under the UCMJ, including those related to restrictions on movement and mitigation measures associated with the COVID-19 outbreak).

a. Additional Considerations

Orders published by other competent military authorities, such as general orders issued by the Commander of the U.S. Army Military District of Washington, and other commanders with authority over military installations and districts, may be enforceable based on a Service member's assignment or location.

In addition to administrative or disciplinary action, exposure to COVID-19 through misconduct may warrant a Line of Duty Determination.

Summary. Service members are obligated to follow the orders and guidance issued by CDRUSCYBERCOM and other military, federal, state and local authorities concerning the COVID-19 outbreak and may be held accountable for violations.

2. Commanders' authority to Issue and Enforce Orders During COVID-19

Background. Given the impacts of the COVID-19 global pandemic, commanders were required to take actions that both maintain readiness and protect the force. Certain restrictions on the off-duty activities of military Service members which, under normal circumstances might be unlawful, became legally supportable to protect health and mission readiness. The following discussion outlines the authorities commanders could have used to restrict the movement of Service members and limit COVID-19 exposure to Service members, family members, and civilians.[386]

Restriction of Movement (ROM). Where reasonably necessary for a valid military purpose (e.g., mitigating the impacts of COVID-19), commanders may issue orders restricting the movement

[385] 10 U.S. Code Chapter 47
[386] Refer to Section III.B.3 of this Guide for additional information on the restriction of DoD civilian employees and contractors.

of Service members under their authority, to include Service members who may not yet have been exposed to COVID-19.

ROM is a limitation on personal liberty and should be narrowly tailored for the purpose of ensuring health, safety, and welfare. Commanders should issue ROM orders in writing. In addition to notifying individual Service members of the specific limitations on liberty, the written orders may, depending on specific circumstances, be used by a Service member to receive entitlements that offset costs associated with the commander-issued ROM order. Commanders may issue ROM orders that incorporate or exceed ROM guidance issued by federal, state, or local public health agencies and organizations, including those within the DoD. Commanders issuing ROM orders should normally consult with medical experts and assess impacts on Service members as part of their reasonable necessity analysis. Likewise, commanders should consider calibrating ROM restrictions on an individual or categorical basis as warranted by evolving conditions. However, no specific procedure is legally required.

ROM orders may include lawful (1) orders to restrict travel, (2) orders to restrict certain activities, (3) orders for medical quarantine, (4) administrative restrictions to a specific location, and (5) orders to remain together with a unit. Sample language and detailed explanations for these types of orders are available on the CLAMO website link.[387]

When issuing any of these categories of orders, commanders will normally inform affected Service members of the ability to request a variance, modification or exception if undue hardship will otherwise result. For example, if a single parent cannot comply with the order without extreme hardship, a commander should consider a modification or exception.

General Orders. Commanders may consider issuing general orders to prevent or mitigate the exposure of service members and civilians to COVID-19. General orders serve as an effective means for commanders to direct the activities of those under their command by clearly identifying prohibited activities, referencing (and possibly distinguishing) similar state and local orders, and establishing additional policies for installation-specific activities.

"Prohibited Activity" Provisions. An effective general order clearly identifies prohibited activities and defines ambiguous terms. The items listed in a paragraph labeled as "prohibitions" should be explicitly stated as prohibitions. Examples of prohibited activities include a prohibition on gatherings greater than a certain number of people (e.g., parties) and travel limitations.

A statement such as "violations of the restrictive portions of [the prohibitions paragraph] are punitive" facilitates Service member understanding and adds further clarity to the order. Subordinate commanders should also be directed to inform their Service members of the order.

General orders may be a good way to communicate expectations with respect to social distancing and hygiene with the force and their families. However, many times these

[387] Search in the "2020 COVID-19 Key Leader Guide" Folder within the "ROM Orders Enforcement" Information Paper by Navy Code 20 on the CLAMO website at: https://intelshare.intelink.gov/sites/clamo/ (CAC required for access).

expectations do not actually prohibit conduct but rather create a duty for Service members to obey. For instance, directives to frequently wash hands, to maintain a certain distance from others, or to follow CDC guidance are not prohibitions on conduct. For this reason, these directives should not be placed in a portion of the order the commander intends to be punitive. Often, the actions of others place circumstances outside a Service member's control, such as the ability to comply with social distancing requirements. Nevertheless, using these activities to create an affirmative duty for Service members allows the commander to hold Service members accountable for violations of these requirements as a dereliction of duty when the circumstances warrant.

Overly restrictive prohibitions are difficult to enforce and may have the unintended effect of diminishing compliance with the entire order. For instance, if a commander was to strictly prohibit being within six feet of anyone (including family members) as a violation of social distancing guidelines, that order would be impractical to enforce in numerous circumstances. Including prohibitions beyond those necessary to ensure the health and safety of the force and their families has the potential to cause undue confusion or cause Service members to give little weight to the order.

State and Local Orders. To the extent the unit's mission or the installation's location allows, prohibitions should be tailored to match prohibitions issued by local authorities. This achieves three important objectives. First, it limits Service member confusion about differing prohibitions. Second, it protects family members, particularly off-post residents, by not shifting the risk of activities deemed essential by local authorities but prohibited under a general order solely to them. Third, it avoids making the order a de facto off-limits list in circumvention of service regulations. Referencing the locality's executive order or attaching it to the general order as an enclosure is advisable. If a standard different from the locality's standard is necessary, Service members should be informed that they are obligated to meet the more restrictive standard and have a duty to comply with both the general order and the local requirements. The authority to restrict a Service member's movement in this context, regardless of location, is through an order, enforceable under Articles 90 or 92, UCMJ. This is a separate and distinct authority from a commander's authority to enforce a ROM order, discussed above.

Travel Restrictions. Prohibitions on leaving one's residence should contemplate both the type of travel outside the home permitted under the order as well as the distance of permissible travel. Subjective limitations such as "to the closest store" lend themselves to ambiguity and the need for exceptions. Other tools offer more clarity and aid enforceability, like straight-line distances from the Service member's residence or a map depicting travel limits that is enclosed with the order. As discussed above, commanders have limited authority to restrict the off-post travel of DoD civilian employees and dependents.

Curfew Provisions. Garrison or Senior Mission Commanders considering issuing curfews should keep in mind the intent behind the curfew and its practical effects. Some reasons for issuing a curfew order may include preventing vandalism and other criminal activity by minors impacted by school closures, limiting travel by Service members and their families, and reducing exposure to police, fire, and emergency medical services personnel.

Commanders must also keep in mind potential unintended consequences. First, curfews may unintentionally prevent out-of-home activities such as pet walking, emergency veterinary care, and other unforeseen but reasonable needs. Second, curfews tend to have a disparate impact on those who live on installations. Even if a curfew applies to the residences of Service members both on and off post, the curfew will likely be enforced only on post. Third, the avenues of enforcement with respect to dependents are limited and may not be advisable under the current environment.

Enforcement of Orders. Enforcing violations of the orders discussed above is within the sole discretion of a commander. The range of options includes no action, non-punitive action such as counseling, non-judicial punishment, administrative action, or court-martial. Appendix 2.1 of the Manual for Court-Martial contains factors for consideration when evaluating the disposition options. Failure to comply with travel and movement restrictions and associated health-and-welfare and guidance may be a violation of the UCMJ, leading to administrative or disciplinary action.

Example: Article 84 – Breach of medical quarantine.

Article 84, UCMJ – BREACH OF MEDICAL QUARANTINE			
Applicability	Knowledge Requirement	Form of Order	Example
A commander may place a Service member into a medical quarantine in order to separate an individual or group already infected or reasonably believed to be infected with a communicable disease (whether defined by 42 C.F.R. § 70.1 or not*) from those who are healthy in such a place and manner to prevent the spread of the communicable disease.[388]	The Service member must be aware that he has been placed into a medical quarantine.	An order into medical quarantine must specifically state that the purpose of the order is for medical quarantine. Neither placing a Service member on quarters nor otherwise excusing a Service member from duty due to illness per se constitutes an order into medical quarantine. As a best practice, an order into medical quarantine should state both the geographical limits of the	A Service member violates his Commander's order to remain in quarantine at his off-post quarters for 14 days after testing positive with COVID-19 by taking his dog for a walk, going to the grocery store, and visiting his mother at an assisted living facility. *See also Article 87b(c) – Breaking restriction

[388] A medical quarantine may also be appropriate to separate an individual or group that has been exposed to a communicable disease (COVID-19), but is not yet ill, from others who have not been so exposed, in such manner and place to prevent the possible spread of the communicable disease. However, as a practical matter, issuing an order to "self-isolate" under Article 90 or 92 is a better practice for individuals who have not tested positive for COVID-19. Moreover, DoDI 6200.03 sets forth a construct within which military installation Commanders, having coordinated with local civilian authorities, declare a public health emergency and direct, for example, an installation-wide medical quarantine. However, DoDI 6200.03 should not be read as limiting the legal authority of individual unit Commanders under their respective service regulations to order a medical quarantine or similar

*COVID-19 is a communicable disease as defined by 42 C.F.R. § 70.1		quarantine as well as prohibitions during the quarantine period.[389]	

Example: Article 86 – Absence without leave.

Article 86, UCMJ – ABSENCE FROM UNIT OR PLACE OF DUTY WITHOUT LEAVE			
Applicability	Knowledge Requirement	Form of Order	Example
Article 86 applies to any member of the Armed Forces who through the member's own fault is not at the place where the member is required to be at a prescribed time.	The Service member must have actual knowledge of his or her duty to be at a certain place. Therefore, restriction of movement orders should be provided directly to the Service member.	The appointed place of duty should be understood by the Service member. Providing the order to a place of duty in writing is the best practice, but verbal orders are also enforceable, although more difficult to prove.[390]	A unit commander orders his entire unit to remain at the unit location after return from a deployment. During this time, the unit location is the place of duty and unit members are prohibited from leaving without prior approval.

Example: Article 87b(c) – Breach of Restriction. "Restriction" is the moral restraint imposed by an order directing a person to remain within certain specified limits. Although restriction is normally thought of as punishment imposed by non-judicial punishment, court-martial, or pretrial restriction pending charges, valid restriction may also include "administrative restriction in the interest of training, operations, security, or safety." MCM, Part IV, para. 13.c.(4). As a practical matter, administrative restriction orders should document the legitimate government purpose of the restriction and the terms of the restriction, which must not amount to punishment and must not be unduly rigorous.[391]

Example: Article 90 – Willfully disobeying superior commissioned officer. A breach of medical quarantine under Article 84, UCMJ, is a general-intent offense born out of a violated order. So long as an order of restriction is not issued for the sole purpose of improperly

restrictions on movement where reasonably necessary to protect their command's mission readiness. App. 17, ¶ 8, MCM (2019).

[389] For a detailed discussion of Article 84, UCMJ within the COVID-19 context, search in the "2020 COVID-19 Key Leader Guide" Folder within the "Breach of Medical Quarantine, Article 84 UCMJ" Information Paper on the CLAMO website at: https://intelshare.intelink.gov/sites/clamo/ (CAC required for access).

[390] Article 86 may also pertain to violations of a unit Commander's order that the entire unit remain together immediately prior to or immediately upon return from, for example, an OCONUS deployment, underway period, or port visit.

[391] The purposes served by the administrative restriction or condition must be reasonably related to a legitimate governmental interest. United States v. Reyesesquer, No. 201700342, 2018 CCA LEXIS 255 (N-M. Ct. Crim. App. May 29, 2018) (finding that "[l]egitimate governmental interests include protection of the morale, welfare, and safety of the unit or the accused, protection of victims or witnesses, or to ensure the accused's presence at trial"). *See also* United States v. Mack, 65 M.J. 108, 109 (C.A.A.F. 2007).

escalating the punishment, the order is valid and punishable under Article 90, UCMJ.[392]

Article 90, UCMJ – WILLFULLY DISOBEYING SUPERIOR COMMISSIONED OFFICER			
Applicability	Knowledge Requirement	Form of Order	Examples
Article 90 comprises the intentional defiance of the authority of a superior commissioned officer who possesses the authority to give such an order.	The Service member must have actual knowledge of the order and of the fact that the person issuing the order was the Service member's superior commissioned officer.	The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, including in this circumstance to safeguard or promote the usefulness of members of a command. The order may not interfere with private rights or personal affairs without such a valid military purpose. As long as the order is understandable, the form of the order is immaterial, as is the method by which it is transmitted.	A Soldier, with knowledge of the order, violates a verbal order issued by his company commander to remain within 50 miles of the installation. A Sailor violates the order of his commanding officer to "self-isolate" after being potentially exposed to COVID-19. A Marine fails to check in with her supervisor during periods of mandatory telework, in violation of the order of her superior commissioned officer.

Example: Article 92 – Failure to obey order or regulation (to include dereliction in the performance of duties, including those arising from COVID-19 mitigation measures).[393]

Article 92(1) applies when a Service member violates a lawful general order or regulation. It is best practice for the order or regulation to state: This is a lawful [general] order that is effective immediately without further implementation. Any violations of this [general] order are subject to adverse administrative actions and/or disciplinary action under the UCMJ.

[392] *See* United States v. Phillips, 74 M.J. 20 (C.A.A.F. 2015) (finding that a Service Member's plea of guilty to an Article 90 offense for violation of an order of restriction was proper because the offense was not charged solely to escalate the severity of a minor offense).

[393] Foreign or State orders that restrict movement: For situations where the state or foreign government has issued an order to self-quarantine, "lockdown," or similar "stay-at-home" orders, that order is not enforceable under the UCMJ. In order to enforce a foreign or state order upon Servicemembers, a commander must issue a separate order, meeting all the requirements for a valid military order, and that requires all Servicemembers to comply with the foreign or state order. Once that order has been issued, if a Servicemember violates that order, they can be charged with a violation of Article 90 or 92. *Exception*: An order issued by a local or foreign official may be enforced using Article 134 (clause 1 or clause 2). Clause 1 offenses under Article 134 requires that the accused's conduct be prejudicial to good order and discipline. Clause 2 offenses under Article 134 require proof that the accused's conduct, under the circumstances, was of a nature to bring discredit upon the armed forces.

Article 92(2) applies when a Service member knowingly violates any other lawful order issued by a member of the armed forces, which is his duty to obey.

Article 92(3) applies when a Service member is derelict in the performance of his duties. A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service.

Article 92, UCMJ – FAILURE TO OBEY AN ORDER OR REGULATION			
Applicability	Knowledge Requirement	Form of Order	Example
Article 92(1): Applies when a Service member violates a lawful general order or regulation issued by the proper authority.394	Knowledge of the lawful general order or regulation is not an element and lack of knowledge does not constitute a defense to a violation of Article 92(1).	Best practice: Ensure the written order declares violations are punitive and may result in admin and/or disciplinary action. Orders that only supply general guidelines for performing military functions may not be enforceable.	A Service member violates the general order of an installation's senior mission commander to only leave his home for essential purposes by attending a party at the home of a friend.
Article 92(2): Applies when a Service member knowingly violates any other lawful order issued by a member of the armed forces, which is his duty to obey, and the violation is not chargeable under Articles 90, 91, or 92(1).	A Service member must have actual knowledge of the order or regulation.	See discussion under Article 90, above.	A Service member living on-post, with knowledge of the order, violates a garrison commander's order imposing a curfew.
Article 92(3): Applies when a Service member is derelict in the performance of his duties.	The Service member must have known or should have known of the duty.	A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service.	A Service member maintains poor hygiene practices despite being informed of proper practices.

Example: Article 133 – Conduct unbecoming an officer and a gentleman.

Article 134 – General Article (to include certain circumstances where state and local laws form the basis for a charge under the UCMJ, such as those related to restrictions on movement and mitigation measures associated with the COVID-19 outbreak).

Additional Considerations. Orders published by other competent military authorities, such as

394 See MCM, pt. IV, ¶ 18c(1)(a) for a list of those with authority to issue a general order.

general orders issued by the commander of the U.S. Army Military District of Washington, and other commanders with authority over military installations and districts, may be enforceable based on a Service member's assignment or location. In addition to administrative or disciplinary action, exposure to COVID-19 through misconduct may warrant a Line of Duty determination.

Conclusion. Service members are obligated to follow the orders and guidance issued by military, federal, state, and local authorities concerning the COVID-19 outbreak and may be held accountable for violations. Commanders have a variety of tools under the UCMJ at their disposal to ensure Service members comply with such orders.

a. Pandemic Restriction of Movement Orders and their Enforceability (Navy – Code 20)

Observation. During the initial drafting of Restriction of Movement (ROM) orders, many commanders initially attempted to place limitations and restrictions on the movement of civilian and contractor personnel that were identical to the restrictions placed on active duty military personnel. This created issues since the same regulations and authorities do not apply to the distinct classifications of personnel.

Discussion. ROM guidance cannot be applied to DoD civilians and contractors in quite the same manner as it can be applied to military personnel. For civilian personnel, limitations on movement is less restrictive while off duty. While active duty personnel are subject to the UCMJ and can be restricted to home/work travel or limited in their ability to frequent off-duty establishments (as long as deemed a lawful general order), civilians generally cannot be restricted in the same manner, especially if local and state restrictions are not as stringent. Civilians can, of course, be subject to the same screening procedures and excluded from the Federal workplace if not in compliance with established parameters for access. For contractor personnel, ROM procedures must be incorporated into the contract itself. While contractors may be subject to screening procedures and excluded from the Federal workplace absent ROM compliance as well, authority to enforce a ROM lies solely with the contractor's employer and must be in accordance with the terms and conditions of the subject contract.

Recommendation. Ensure commanders understand the differences with regard to military, DoD civilian and contractor personnel, and the limitations that can be placed on each distinct group of individuals. The Navy Bureau of Medicine and Surgery Return to Work guidelines of 12 May 2020 provides helpful guidance for screening procedures. USFF memo entitled "Reinforcement of Expectations During Pandemic (COVID-19 memo #8) of 14 May 20 also applies.

3. Commanders Authority to Restrict Sailor's Off-Duty Activities During a Health Crisis

Observation. Can a commander prevent or hold a Sailor accountable for participating in an activity which could compromise a unit's health (e.g. densely attended party)? Should commanders prohibit behavior prohibited by the states? Can they? If they can, how are those

orders enforceable? Who should promulgate these orders?

Discussion. During COVID-19, commanders can legally restrict the off-duty activities of Sailors in order to protect the health of the unit and promote mission readiness. Restriction of Movement (ROM) refers to the limitation of personal liberty and should be narrowly tailored for the purpose of ensuring health, safety, and welfare. Commanders may issue ROM orders that incorporate or exceed ROM guidance issued by Federal, State, or local public health agencies. ROM orders may: 1) restrict travel; 2) restrict certain activities; 3) require medical quarantine; 4) restrict movement to a specific location; or 5) require members to remain together as a unit. Generally, in order to make state or foreign government lock down orders enforceable under the UCMJ, commanders must issue a separate military order requiring compliance with said state or foreign order.

Recommendation. ROM orders should be in writing. Commanders should consult with medical experts and assess whether the order is necessary to protect the unit, promote mission readiness, and mitigate the impact of COVID-19. Because each command's mission and requirements are different, ROM orders might be best promulgated by Echelon IV (or below) commanders.

4. Courts Martial Best Practices During COVID-19

Issue. Given the stringent travel restrictions and social distancing requirements, holding courts-martial during the pandemic continues to pose unique challenges. As of 13 May 2020, over 172 courts-martial have been impacted by COVID-19, with over 130 of those currently continued to the June-December 2020 timeframe. Getting the necessary people to the courthouse and ensuring the appropriate screening, sanitization, and social distancing, without impacting the due process rights of the accused or the need for public access to trials, has significantly reduced the number of courts-martial completed. Many OSJAs have devised solutions in order to move forward with guilty pleas and a limited number of contested cases, resulting in an uptick in trials over the past two weeks. However, there remains a significant backlog of contested trials, which will result in a large wave of courts-martial through the remainder of the calendar year.

Discussion. Using remote means in the courtroom, streamlining the exception-to-policy approval process to authorize travel of necessary personnel, and employing extensive mitigation measures in the courthouse are some of the effective methods being utilized to proceed with trial.

Utilizing Remote Methods in the Courtroom.[395] Ordinarily, the law requires that all parties are present during the entire court-martial process. However, certain exceptions apply depending on the stage of trial and the party who will be remote. In general, the following types of hearings may be conducted remotely, but each category has specific rules for military judge, accused, and counsel.

Article 32 Preliminary Hearings. Article 32 preliminary hearings may be conducted remotely.[396]

[395] *See* The Trial Counsel Assistance Program Information Paper, "Conducting Courts-Martial Hearings via Remote Means" (25 March 2020).

[396] R.C.M. 405 outlines the substantive and procedural rules for preliminary hearings and contains specific provisions concerning the rights of the accused and the testimony of witnesses.

Very generally, the proceedings could be accomplished with the remote presence of the accused, provided his attorney is co-located or, if the accused does not object, at a different location with the ability to consult confidentially.[397] Due to the fact that RCM 405 does not directly address the issue of remote presence of the accused at an Art 32, if the hearing is held over the objection of the accused, there may be litigation on this issue. Judge advocates should consult with the Trial Counsel Assistance Program if they want to proceed with a remote Article 32 hearing over the accused's objection. Likewise, R.C.M. 405(h)(2)(A)(iii) provides that a military witness may testify remotely based on operational necessity or mission requirements.[398]

Arraignments and Art. 39(a) sessions. RCM 804(b) allows the military judge to order the use of audiovisual technology between the parties and the military judge for purposes of Article 39(a) sessions. The appearance of the accused via audiovisual technology will satisfy the presence requirement of the accused when the accused and the accused's counsel are in the same physical location, or if the accused does not object, at different locations with the ability to consult confidentially.[399] RCM 703(b)(1) authorizes witnesses to testify via remote means.[400]

Guilty Pleas. Under R.C.M. 804(b), the accused is permitted to be present by remote means during an inquiry prior to the acceptance of a guilty plea. Defense counsel must be physically present at the accused's location during an inquiry prior to the acceptance of a plea.[401] However, presence by remote means is not authorized during presentencing proceedings under R.C.M. 1001. Although the accused can waive the presence requirement, the accused needs to be present at the announcement of the sentence in the event he is sentenced to confinement. Concerning witnesses, RCM 1001(f)(1) gives the military judge greater latitude during presentencing proceedings to receive information via remote means.

Travel Approval Authorities. In accordance with Version 16, COVID-19 Travel Authorities Matrix, dated 30 April 2020, there are three separate approval authorities relevant to travel for courts-martial. In addition, USATDS has published internal policy applicable to their personnel.

TDY: Trial Judiciary Movements. The travel approval authority for movement of a military judge is Commander, USALSA.[402] Military judges will submit an exception to policy through

[397] R.C.M. 405(f)(5) gives the accused the right to be present throughout the taking of evidence, except for circumstances prescribed in R.C.M. 804(c)(2) (concerning a disruptive accused). The rule does not go on to define presence. Comparing R.C.M. 405(f)(5) with R.C.M. 405(h)(2) (allowing for the remote testimony of military and civilian witnesses) and R.C.M. 804(b) (allowing for remote presence for Article 39(a) sessions) leads to the reasonable conclusion that the remote presence of the accused is authorized.

[398] The Discussion of R.C.M. 405 provides factors to consider when making the determination to permit remote testimony, to include the timing of the request, the potential delay in the proceedings, the willingness of the witness to testify, and, for child witnesses, the traumatic effect.

[399] The Discussion to R.C.M. 804(b) also explicitly states that presence by remote means does not require consent of the accused.

[400] Specifically, R.C.M. 703(b)(1) states, "With the consent of both the accused and Government, the military judge may authorize any witness to testify via remote means. Over a party's objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness' personal appearance (although such testimony will not be admissible over the accused's objection as evidence on the ultimate issue of guilt)."

[401] *See* R.C.M. 910(d)-(f).

[402] *See* SA Memo (23 Apr. 2020).

their Circuit Judge to the Chief Trial Judge, who will staff it to Commander, USALSA. This JAGC internal process for movement of judges was not in place until 23 April 2020. Since its inception, travel for judges has become a more streamlined process, eliminating any potential issues with commanders approving judicial travel.

TDY: Mission Essential ISO operational/critical missions. This provision should be read to include travel related to courts-martial. Therefore, approval by a 3-star general is required for the mission-essential travel of court-martial participants (except the military judge).[403] The GCMCA responsible for the court-martial will process the ETP request, after coordination with the chain of command of any Service member witness or participant. Corps commanders will review and approve ETP requests for travel by the accused, defense counsel, and witnesses. Successful ETP requests have included specific details on why the physical presence of an individual is necessary at the court-martial, what steps will be in place to ensure the safety of the traveler, and what mitigation measures will be taken in the courtroom. A draft ETP template is available on the Criminal Law milSuite page.

Prisoner Movement with Escorts. Approval by a 1-star general is required for the movement of pre-trial or post-trial prisoners and their escorts.[404] Ensuring that an ETP for prisoner transport has been approved prior to the commencement of the court-martial is necessary to facilitate movement to the designated confinement facility upon an adjudged sentence to confinement.

USATDS. On 30 March 2020, USATDS published Health and Safety Guidance, which prohibited USATDS personnel from traveling outside their immediate duty locations to perform any TDS duties, without approval from the Chief, USATDS, even if an exception to policy for a court-martial or other proceeding has been separately approved.[405] Therefore, travel by a defense counsel is a two-step process: (1) approval by a 3-star general to authorize the travel of a mission-essential court-martial participant and (2) approval by Chief, USATDS, for travel of a defense counsel outside their immediate duty location.

Courthouse Mitigation Measures. When trial is feasible, significant mitigation measures ensure the health and safety of all participants without impacting the due process rights of the accused or the need for public access to trials. At the HQDA level, there are no mandatory requirements specific to holding courts-martial. However, OSJAs, in coordination with military judges and defense counsel, have developed local SOPs and policies to implement appropriate mitigation measures. Below is a list of measures taken at a majority of the courts-martial during the summer of 2020.

(1) A pre-trial courtroom risk assessment from a medical officer to determine if trial may safely proceed.
(2) A COVID-19 Mitigation Plan Order issued by the judge.
(3) Medical screening for all persons prior to entering the courtroom.
(4) The use of gloves by all counsel and court reporters when handling documents/evidence.
(5) Limited seating in the gallery to ensure social distancing.

[403] *See* SA Memo (23 Apr. 2020); FRAGO 16 (3.C.73.A).
[404] *See* SA Memo (23 Apr. 2020).
[405] *See* USATDS Memo, "SUBJECT: USATDS COVID-19 Health and Safety Guidance" (30 Mar. 2020).

(6) Distancing of at least 6 feet between all court-martial participants.
(7) The use of masks by all paralegals, spectators, and witnesses.
(8) Staggered arrival time for testifying witnesses to limit personnel in witness rooms.
(9) Limited personnel in the courtroom (no bailiff, 1 TC, 1 paralegal, 1 defense paralegal).
(10) Liberal breaks for DC/Accused to consult due to their distance at opposite ends of two counsel tables.
(11) Specific and detailed sanitation plan employed by the Government.
(12) Specific guidance concerning trial procedures (e.g., panel seating, using Elmo in lieu of handling exhibits or approaching the bench).

Conclusion. Courts-martial are not on pause during a pandemic. Commanders and their SJAs, in coordination with the defense counsel and judges, must assess each case to determine whether it can safely proceed or whether a continuance is necessary while the Army and the United States seek to prevent the spread of the virus. This determination will be based on factors specific to that location, that courtroom, and those participants. Risk assessments are carefully considered by commanders prior to approval of ETPs for travel. Military judges, government counsel, and defense counsel should work together to employ measures in the courtroom to protect all participants.

H. Contract and Fiscal Law

Background. COVID-19 raised a variety of contract and fiscal law issues associated with the DoD's response. The following discussion summarizes key authorities, policy memos, and references related to these issues. In the National Guard the Head Contracting Authority, HCA, is responsible for pushing contract and fiscal related information down to the USPFOs/State-level contracting officers who then advise state leadership. On 1 April 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) which provides supplemental funding for expenses incurred by the National Guard in preventing, preparing for and responding to COVID-19. See Undersecretary of Defense Memorandum for Director, Programs and Resources/Comptroller (NGB-J8) dtd 1 April 2020 for more guidance.

Discussion: Supplemental DoD Appropriations. On 18 March 2020, the President submitted a $46 Billion emergency funding request to replenish Executive Branch agencies whose budgets and appropriated Fiscal Year 2020 funds have been depleted as a result of COVID-19. Of that amount, $8.3 billon was designated to the DoD. Until additional appropriations are enacted, tasked commands will continue to self-fund directed COVID-19 support to their service.

DoD Economy Act Support to Federal Agencies and DoD Components. DoD components may provide reimbursable support to other DoD components and other federal agencies under the authority of the Economy Act, 31 U.S.C. § 1535, and the DoD FMR, Vol. 11A, Ch. 3. Examples of Economy Act support during COVID-19 response operations include the provision of DoD facilities to house non-DoD civilians under federal quarantine (e.g. Department of State civil servants evacuated from China and civilian cruise ship passengers evacuated from California), and the provision of surgical masks to DHHS from DLA and service stocks. These cases generally involve a formal request from the DHHS Director to the Secretary of Defense, which is staffed through OSD/JS and the services. Combatant Command and service EXORDS direct

subordinate units to provide the requested support, and capture costs for subsequent reimbursement. The Economy Act support among services is a "steady state" authority and does not require the invocation of emergency authorities.

DoD Stafford Act Support to State and Local Governments. Under the Stafford Act,[406] in an emergency or major disaster, the President may direct any Federal agency to utilize its authorities and resources in support of State and local emergency assistance and disaster response efforts. Disaster relief participation is not a budgeted program for DoD; accordingly, DSCA is provided on a cost reimbursable basis unless the President or SECDEF direct otherwise. FEMA provides reimbursement from its Disaster Relief Fund (DRF), an appropriation which becomes available for obligation upon a Presidential Stafford Act declaration. For COVID-19, examples of DoD Stafford Act assistance could include a Governor's request for USACE engineering/construction support to create a temporary ICU-capable hospital (e.g. by converting an existing school, emplacing sprung clamshells, etc). The DoD FMR, Vol. 11A, Ch. 19 provides detailed guidance on DoD financial policy for such transactions when SECDEF approves a request to provide DSCA under DoDD 3025.18.

Command Authority over Contractors. Generally, command authority does not include direction of contractor employees outside the terms and conditions of the contract. In emergency situations, however, DoDI 6200.03 authorizes DoD installation commanders to declare a PHE, and exercise certain emergency health powers over individuals present on a DoD installation, including contractors. These powers include limiting ingress/egress to and from, or movement on a DoD installation, and requiring individuals, as a condition of accessing the installation, to submit to a medical screening. OCONUS exercise of these authorities over host nation (HN) contractors is subject to the relevant Status of Forces Agreement (SOFA). Commanders should consult closely with legal advisors and supporting contracting activities when exercising these authorities.

DASA(P) Memo on Contract Performance Delays. On 12 March 2020, DASA(P) issued guidance to contracting officers faced with COVID-19-related performance delays and requests for equitable adjustment (REAs). This memorandum provides an excellent summary of pertinent FAR clauses and emphasizes that excusable delays generally do not create a corresponding entitlement to compensation.[407]

Emergency Acquisition Flexibilities. On 19 March 2020, Army Contracting Command (ACC) issued ACC Contracting Note 20-25, which provides an excellent overview of emergency contracting authorities contained in FAR Part 18 and DFARS Part 218.[408]

Increased MPT and SAT. On 16 March 2020, the DASA(P) issued a PARC Policy Alert providing guidance on increases to the Micro-Purchase Threshold (MPT), Simplified Acquisition

[406] 42 U.S.C. § 5121-5207

[407] The 12 March 2020 DASA(P) memo is embedded as an attachment to the "KFAD-Covid-19 KFL Issues" Information Paper in the "2020 COVID-19 Key Leader Guide" Folder on the CLAMO website at: https://intelshare.intelink.gov/sites/clamo/ (CAC required for access).

[408] ACC Contracting Note 20-25 is embedded as an attachment to the "KFAD-Covid-19 KFL Issues" Information Paper in the "2020 COVID-19 Key Leader Guide" Folder on the CLAMO website at: https://intelshare.intelink.gov/sites/clamo/ (CAC required for access).

Threshold (SAT) and Special Emergency Procurement Authorities, for acquisition actions related to COVID-19.409 For contracts to be awarded and performed, or purchases to be made, inside the United States, MPT is increased to $20K and SAT is increased to $750K. For contracts to be awarded and performed, or purchases to be made, outside the United States, MPT is increased to $30K and SAT is increased to $1.5M. Increases apply to DoD acquisitions of supplies or services funded by DoD appropriations that HCA determines are to be used to support COVID-19 emergency assistance activities.410

Conclusion. Congress has not appropriated money to federal agencies, including the DoD, for domestic incident response. Rather, fiscal reimbursements flow through FEMA via the MA process to ensure a unity of effort and efficiency in the response from both a fiscal and operational perspective. In addition, understanding how fiscal authorities interplay with military contracting rules during emergencies is critical to avoiding a variety of Anti-Deficiency Act violations.

1. Defense Production Act

Purpose. To provide an analysis of the statutory authorities and limitations related to the Defense Production Act of 1950 (DPA), 50 U.S.C. §§ 4501 et seq.

BLUF. DPA provides authority for POTUS to: (1) prioritize contractor performance in support of national defense matters over other customers' orders; (2) incentivize contractor performance in support of national defense matters; and (3) exercise control for scarce or critical material necessary for national defense.

Authorities under DPA.

(1) 50 U.S.C.§ 4511(a)(1) (i.e., First In line) authorizes POTUS to require contractors to prioritize performance of government orders/contracts that are in support of national defense before they perform for other purposes.
   a. First in line does not apply to employment contracts.
   b. First in line does not mean you can force a company to open their doors if they are closed – cannot force them to operate, but if they do operate, we get served first.
(2) 50 U.S.C.§ 4511(a)(2) (i.e., Control of goods/materials) authorizes POTUS to allocate materials, services, and facilities as he deems necessary or appropriate to promote national defense
   a. Control of goods/materials in civilian marketplace is limited to when POTUS finds that:
      i. material is scarce and critical to national defense; and

409 The PARC Policy Alert is embedded as an attachment to the "KFAD-Covid-19 KFL Issues" Information Paper in the "2020 COVID-19 Key Leader Guide" Folder on the CLAMO website at: https://intelshare.intelink.gov/sites/clamo/ (CAC required for access).

410 *Id.*; *see also* PARC Policy Alert # 18-114, Class Deviation 2018-O0018, "Micro-Purchase Threshold, Simplified Acquisition Threshold, and Special Emergency Procurement Authority (available at: https://www.acq.osd.mil/dpap/policy/policyvault/USA002260-18-DPC.pdf).

ii. national defense requirements for such material cannot be met without exercise of this authority.

(3) 50 U.S.C. § 4517(a) (i.e., Incentives to perform) POTUS may "provide appropriate incentives to develop, maintain, modernize, restore, and expand the productive capacities of domestic sources for critical components, critical technology items, materials, and industrial resources essential for the execution of the national security strategy of the United States."
   a. Loans to private institutions to finance development of critical technologies or essential materials (50 U.S.C. § 4532).
   b. POTUS can authorize purchase of an industrial resource or critical technology item for Government use of resale. Requires non-delegable POTUS determination that action is essential to national defense and cannot be provided in timely manner without POTUS action (50 U.S.C. § 4533(a)).
   c. POTUS may procure and install equipment in private plants/facilities/factories if it will aid in national defense (50 U.S.C. § 4533(e)).

(4) 50 U.S.C. § 4517(b) (i.e., Ensuring reliable sources) allows POTUS to take appropriate actions to ensure critical components, technology, essential materials and industrial resources are available from reliable sources to meet defense requirements
   a. Action to ensure reliable sources includes:
      i. restrict contract solicitations to reliable sources
      ii. restrict contract solicitations to domestic sources
      iii. stockpiling critical components

(5) developing substitutes for critical components and tech items.

a. DSCA and 32 U.S.C. 502(f) Funding – Overview of DSCA authorities, procedures, and funding, and their applications to National Guard Forces

Purpose. To provide an overview of DSCA authorities, procedures, and funding, and their application to National Guard forces operating in a 32 U.S.C. 502(f) status.

BLUF. Under the Stafford Act, FEMA directs and coordinates the federal response to disasters such as COVID-19. FEMA mission assignments approved by SecDef are sourced and executed by DoD, and fully reimbursed by FEMA. National Guard units may support COVID-19 response efforts in one of three distinct statuses: state active duty (state mobilized and funded); T-32 (state mobilized, DoD funded), or T-10 (DoD mobilized and funded). From the state perspective, T-32 status – including 32 U.S.C. 502(f) operational support to DoD missions – offers two distinct advantages: first, FEMA reimburses 100% of DoD's 502(f) costs (vs. 75% of state active duty costs); second, NG units in 502(f) status continue to support their local communities (vs. T-10, which may require NG units to deploy outside their home state). From DoD's perspective, use of 502(f) status can mitigate sourcing and logistics challenges by providing local, DSCA- trained NG units to execute DoD MAs in their local communities, eliminating the need to source and deploy a T-10 unit, while enhancing public perception of DSCA operations.

2. DSCA Authorities and Funding: The Basic Framework

The Stafford Act and FEMA Mission Assignments

(1) State governments bear primary responsibility to respond to natural disasters within their states. However, if a Governor determines that a disaster exceeds State capabilities and Federal assistance is necessary, the Governor may request a Presidential emergency or major disaster declaration under the Stafford Act.[411]
(2) Pursuant to a Stafford Act declaration, the President may: (1) direct Federal agencies to utilize their authorities and resources to support State and local response or recovery efforts; and (2) coordinate all disaster relief assistance provided by Federal agencies.[412] On 13 Mar 20, POTUS issued a nationwide Stafford Act emergency declaration for COVID-19.[413]
(3) FEMA directs and coordinates the federal response on behalf of the President by issuing "Mission Assignments" (MAs) to federal agencies. Under this construct, FEMA Region Federal Coordinating Officials (FCOs) identify requirements for federal support and the federal agency best postured to provide it.[414] The FCO then drafts a MA defining the required task or mission, and forwards it to the federal agency lead. Within DoD, Defense Coordinating Officers (DCO) embedded in FEMA regions serve as the FCO's single POC for DoD support, and forward validated MAs to DoD for approval.[415]
(4) SecDef has overall authority for DSCA and retains approval for the use of forces, personnel, units, and equipment.[416] The Joint Staff (JS) identifies sourcing solutions for FEMA MAs and issues EXORDs to the appropriate CCDR to implement SecDef approved actions.[417] CCDRs with DSCA Responsibilities provide command and control of DoD DSCA operations as directed by SecDef.[418]

[411] 42 U.S.C. § 5170(a).
[412] 42 U.S.C. § 5170a(1) and (2).
[413] *See* https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency- determination-stafford-act/
[414] U.S. DEP'T OF DEFENSE, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (29 Dec. 2010, inc. Ch. 1, 19 Mar 2018).
[415] U.S. DEP'T OF DEFENSE, INST. 3025.23, DOMESTIC DEFENSE LIAISON WITH CIVIL AUTHORITIES (25 May 2016) at Encl. 3 para. 2.a(3)(a).
[416] DoD 7000.14R, DEPARTMENT OF DEFENSE FINANCIAL MANAGEMENT REGULATION (DOD FMR), Vol. 11A, Ch. 19 at para. 1906.A
[417] *Id*. at para. 1906.F.
[418] *Id*. at para. 1906.F. The Unified Command Plan assigns DSCA responsibilities to the Commander, USNORTHCOM within the 48 contiguous states, the District of Columbia, Alaska, Puerto Rico, and the U.S. Virgin Islands; and to the Commander, USPACOM within Hawaii, U.S. territories or insular areas, and possessions in the USPACOM area of responsibility.

Funding DSCA

(1) DSCA is provided on a cost-reimbursable basis unless the President or SecDef direct otherwise.[419] DoD policy requires that all FEMA requests for DSCA include a commitment to reimburse DoD in accordance with the Stafford Act.[420] FEMA reimburses DoD for DSCA from the Disaster Relief Fund (DRF) which Congress appropriates to FEMA for use pursuant to the Stafford Act.[421]
(2) DoD Components performing work under an approved MA submit requests for reimbursement as prescribed in SecDef-approved and USNORTHCOM standing DSCA EXORDs.[422] Reimbursement requests must cite the approved MA under which the work was performed, and the major disaster or emergency identification number.[423]
(3) DoD Components receiving FEMA reimbursement for goods and services furnished under the Stafford Act must credit such funds to the appropriation used to make such expenditures that is available for obligation on the date of reimbursement.[424]

a. Use of 32 U.S.C. 502(f) Duty Status in DSCA Missions

DoD may provide reimbursable support to FEMA using its organic T-10 forces, or by means of National Guard personnel activated by state governments under 32 U.S.C. 502(f). Section 502(f) authorizes a member of the National Guard "to be ordered to perform training or other duty…includ[ing] support of operations or missions undertaken by the member's unit at the request of the Secretary of Defense." DoD support to FEMA pursuant to reimbursable mission assignments is a permissible "other duty" for which NG personnel may be placed in Section 502(f) duty status.

SecDef, with the concurrence of the affected Governors, is the sole authority to authorize National Guard personnel to be placed in a 502(f) duty status to support DoD operations and missions, including DSCA.[425] SecDef approval to fund NG forces in a 502(f) status for DSCA requires receipt of a reimbursable request from FEMA, selection of the NG as the sourcing solution; and concurrence from the applicable Governor.[426] Pursuant to the Stafford Act, FEMA will fully reimburse DoD for expenses incurred in activating National Guard personnel under Section 502(f).

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[419] DoD 7000.14R, DEPARTMENT OF DEFENSE FINANCIAL MANAGEMENT REGULATION (DOD FMR), Vol. 11A,
Ch. 19 at para. 1902.
[420] *Id*.; DoDD 3025.18, para. 4.d.
[421] DoD FMR, Vol. 11A, Ch. 19 at para. 1907.
[422] *Id*. at para. 190803.
[423] *Id*.
[424] *Id*. at para. 190804.C.
[425] U.S. DEP'T OF DEFENSE, INST. 3025.22, THE USE OF THE NATIONAL GUARD FOR DEFENSE SUPPORT TO CIVIL AUTHORITIES (Jul. 26, 2013, inc. Ch. 1, May 15, 2017), at para. 3.a. ICW the CJCS, other appropriate DoD Component heads, and the CNGB, the Assistant Secretary of Defense for Homeland Defense and Global Security (ASD(HD&GS)), as the principal civilian advisor for DSCA, makes recommendations to SecDef for the use of National Guard forces in a 502(f) duty status.
[426] DoDI 3025.22, para. 3.d(2).

On 28 Mar 20, the Secretary of Defense "pre-approved" the use of National Guard forces under 502(f), subject to three conditions: first, States must identify specific requirements for COVID-19 support IAW the Stafford Act; second, these requests must be submitted to FEMA; and third, FEMA must provide DoD with a fully reimbursable MA.[427] SecDef informed state governors that DOD "will immediately approve requests meeting these conditions."[428] Conditioning DoD funding on execution of DoD MAs ensures that the statutory prerequisite for 502(f) status – "support of operations or missions undertaken…at the request of the Secretary of Defense" – is satisfied.

Additional Benefits of 32 U.S.C. 502(f) status:

1. States are responsible for funding the cost of NG units performing in SAD status. Following a Presidential Stafford Act declaration, however, FEMA will reimburse 75% of a state's disaster-related costs (including costs of SAD), with the State bearing the remaining 25%.[429] If those same NG units are in a 502(f) status, however, FEMA will reimburse DoD for 100% of the costs of FEMA MAs approved by SecDef and executed by 502(f) NG units.[430] Thus, use of 502(f) status can mitigate the financial burden on states, many of which face severe resourcing shortfalls ICW COVID-19.
2. 502(f) status extends Federal Supremacy Clause immunity to NG personnel. This includes protections under the Federal Tort Claims Act (FTCA) for suits against Service members acting in their official capacity; Uniformed Services Employment and Reemployment Rights Act (USERRA) rights for employment and re-employment following active duty; the Service members Civil Relief Act (SCRA) for Service members with civil actions pending against them during active duty; federal medical care for injuries incurred in the line of duty; and eligibility for death gratuities during the covered period of service. In contrast, NG personnel responding on SAD are subject to state law, which may not afford the same protections and benefits as T-32 or T-10 status.
3. T-32 status and 502(f) funding for the NG can aid DoD and the Army in its total force sourcing concept. NG units in a 502(f) status can fulfill a MA that SecDef, and associated sourcing staffs, would otherwise have assigned to an AC unit with a non- disaster response related doctrinal mission. 502(f) allows DoD to fulfill a MA with geographically proximate forces, while also allowing state NG forces to respond within their local communities, enhancing public perception of DSCA operations.

Conclusion. For state governors, 502(f) offers distinct advantages over SAD and T-10 mobilization. In contrast to T-10, which may require NG units to deploy outside their home state, NG units in 502(f) status continue to support their local communities. At the same time, DoD (and ultimately FEMA) shoulder 100% of the costs of 502(f) service – unlike SAD, which is reimbursed by FEMA only up to 75%. From DoD's perspective, 502(f) status mitigates sourcing and logistics challenges by providing local, DSCA- trained NG units to execute DoD MAs in

[427] https://www.defense.gov/Newsroom/Releases/Release/Article/2129455/department-of-defense- statement-on-the-use-of-national-guard-forces-under-title/
[428] *Id*.
[429] 42 U.S.C. 5170b.
[430] 42 USC 5147.

their local communities, eliminating the need to source and deploy a T-10 unit for that mission.

3. Use of Appropriated Funds to Purchase Cloth Face coverings

Issue. May Commanders use appropriated funds (APF) to purchase cloth face masks during the COVID-19 pandemic?

Discussion. Operation and Maintenance, Army (OMA) appropriations are legally available to procure protective cloth face coverings for Army uniformed personnel, Department of the Army (DA) civilians (DACs), DA contractors in the workplace, and DA dependents. The lifting of Army policy restrictions by FRAGO 26 to HQDA EXORD 144-20 authorizes commands to procure cloth face coverings outside supply channels, e.g., from readily available commercial sources.

On 5 April 2020, the SECDEF issued a memorandum providing that "[e]ffective immediately, to the extent practical, all individuals on DoD property, installations, and facilities will wear cloth face coverings when they cannot maintain six feet of social distance in public areas or work centers." This requirement applies to military personnel, DoD civilian employees, family members, DoD contractors, and all other individuals on DoD property, installations, and facilities. The Secretary's memorandum further stated that "as an interim measure, all individuals are encouraged to fashion face coverings from household items or common materials, such as clean t-shirts or other clean clothes that can cover the nose and mouth area. Medical personal protective equipment such as N95 respirators or surgical masks will not be issued for this purpose as these will be reserved for the appropriate personnel."

ASA (ALT) and HQDA DCS, G4 are procuring cloth face masks for Army-wide distribution. Currently, DLA has established National Stock Numbers (NSNs) for cloth face coverings so that commands can order them through the supply chain. Pending fielding of this centralized materiel solution, Army OSJAs have inquired as to whether APFs may be obligated to purchase cloth face coverings for Soldiers, DA Civilians, DA contractors, and/or dependents.

Categories:

b. Department of the Army Civilian Employees. Pursuant to 5 U.S.C. §§ 7902(d) and 7903, DA may obligate its O&M appropriations for the purpose of purchasing cloth face coverings for issuance to its civilian employees. 5 U.S.C. § 7902(d) requires Agency heads to develop and support organized safety promotion to reduce accidents and injuries among agency employees, encourage safe practices, and eliminate work hazards and health risks. It further provides that appropriations available for the procurement of supplies, material, or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks. Although GAO has historically interpreted this statute narrowly, the hazards of COVID-19 transmission are sufficient to satisfy the requirements of the statute, as interpreted by GAO.
c. Uniformed Army Personnel. With respect to the provision of cloth face coverings

for military personnel, DA may rely upon the "Necessary Expense" doctrine. Under this doctrine, DA's O&M appropriations are available to purchase cloth face coverings, because that expense is reasonably necessary for the operation of the Department in the current pandemic environment, and the expenditure is neither specifically provided for in another appropriation nor prohibited by law.

1. Application of this doctrine here is supported by subsections (b) of 7013, 8013 and 9013 of title 10, U.S. Code (assigning responsibility and conferring authority to the Service Secretaries as necessary to conduct all affairs of their respective Department).
2. In addition, subsections 2241(a)(1) and (b) of Title 10 provide that O&M appropriations are available for the welfare of active forces and amounts appropriated to the DoD may be used for all necessary expenses in connection with supplies that may be necessary for the national defense.
3. The Comptroller General has issued an opinion describing additional considerations that, applied here, support a determination that expenditures for provision of cloth face coverings to individuals in DOD workspaces are necessary, and that cloth face coverings are not in the nature of personal expenses of individuals.[431]

d. DA Contractors and NAFI workforce. As a necessary expense to eliminate work hazards and health risks required by 5 U.S.C. § 7902(d), DA may use its O&M appropriations to procure and provide cloth face coverings to contractor employees who perform in DoD furnished facilities, and may make cloth face coverings available to contractor employees who are in proximity to DoD personnel, because doing so will reduce risk of exposing others to the virus.[432]

e. DA Dependents. DA may make cloth face coverings available to DA dependents who are in proximity to DA personnel, because doing so will reduce risk of exposing others to the virus. Army commands, units, and other organizational elements cannot execute their assigned missions if Soldiers and DACs are exposed to COVID-positive family members in their homes. While family members and dependents may wear the masks, the intended beneficiary of the obligation of funds is not the family member, but the soldier or DAC who is at risk of secondary infection from their family member.[433] In prior cases addressing the permissibility of a particular health care or health-related item expense, GAO has applied "the longstanding principle of the necessary expense rule, as refined

[431] *See* Comp. Gen. B-301152 (May 28, 2002).

[432] *See* Proposed Purchase of Protective Hoods, B-301152, May 28, 2003 (finding that GAO could purchase protective hoods not only for employees but also to protect anyone who may be in the building when the hoods are needed: "Consistent with societal expectations rooted in common law, and as reflected in our decisions, the cases and statutes discussed as well as the federal government's response to recent and Cold War threats, when viewed together, evidence the government's willingness to provide not only for the safety and health of government employees and their work environment, but also for maintaining the safety and health of the premises . . . . whether as an owner of the work premises or as an occupant or supervisor of the premises, [agencies may use] appropriations to supply appropriate equipment and services to maintain the safety and healthiness of those premises in response to legitimately anticipated dangers and exigencies.")

[433] *See* CDC Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission, April 3, 2020, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html.

> for personal expenses, which is that appropriations are available if the expense advances the purpose of the appropriation and if it primarily benefits the government, despite incidental benefit to the employee."[434] Here, the use of APFs to provide cloth masks to DA dependents primarily benefits the government, as it is necessary to ensure the protection of Soldiers and DACs, and the Army's capability to execute assigned missions and functions.[435]

Acquisition Policy Restrictions. Although the procurement of cloth face coverings for the personnel described above satisfies the Purpose Statute, 31 U.S.C. § 1301, Army policy until recently limited the procurement of cloth face coverings to DLA supply channels. However, on 14 May 2020, FRAGO 26 to HQDA EXORD 144-20 rescinded this policy restriction. [436] As a result, commands may now procure cloth face coverings outside supply channels, e.g. from readily available commercial sources.

Conclusion. Commanders may use appropriated funds, specifically OMA, to purchase protective cloth face coverings for Army uniformed personnel, DA civilians (DACs), DA contractors in the workplace, and DA dependents. Commanders may make such purchases using readily available commercial sources.

4. Joint Materiel Priority Allocation Board (JMPAB)

Summary. The Joint Staff issued a memo titled: "COVID-19 Personal Protective Equipment (PPE) and Infection Control Supplies Joint Materiel Priorities and Allocation Board (JMPAB) on 10 MAR 2020. The intent of the memo was to remind DoD Services that any DoD Service may elect to initiate a JMPAB in the event that they are unable to find or fulfill orders for COVID-19 related items or services. A JMPAB is a Joint Board comprised of three-star level representatives from each DoD Service. To initiate a request for a JMPAB, a Service should raise a request through existing logistics channels (G4) and copy the supporting contracting organization for information purposes.

Key Point of Clarity. It is important to note that the Defense Prioritization and Allocation System (DPAS) DX/DO rating process and the JMPAB are two distinct processes, which are not linked. A JMPAB does not have the authority to provide DPAS ratings on orders.

Army Takeaway. Authorities for each Service to acquire COVID-19 related supplies and services on their own, remain intact and unchanged. The Army should only initiate a JMPAB in the event that they are having trouble procuring a COVID-19 supply. The Army can continue to procure PPE on existing or new contracts.

Example. The Army is having trouble acquiring a particular supply (e.g. ventilators). In that

[434] U.S. Government Accountability Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 4th Ed., 2017 Revision, at p. 3-193.
[435] *See* Customs Service, B -270446, February 11, 1992 (finding that Customs Service could obligate funds for psychological assessment and referrals of employee family members if the agency can demonstrate that the expenses in question primarily benefit the agency).
[436] HQDA EXORD 144-20, FRAGO 21, para. 4.I.2.B.

event, the Army would request to initiate a JMPAB to adjudicate among the other Services who may have access to ventilators and the JMPAB (3-star level Board) will decide how to allocate ventilators to the Army and other Services.

Bottom Line. The Army should only initiate a JMPAB in the event that they are having trouble procuring a COVID-19 supply. The Army can continue to procure PPE on existing or new contracts. For example, if the Army has an existing contract for PPE, they may use it to acquire PPE, no other approvals are necessary. The JMPAB memo was not intended to be a pre-clearance requirement for any Service to acquire supplies or to vet their requirements.

5. Contract Modification Regarding Access to Installation

Observation. To mitigate the risk of COVID-19 exposure/transmission, it became necessary to restrict access to U.S. Government work sites and installations. These restrictions include denial of access to U.S. military installations and other U.S. Government work sites for 14 days to anyone returning from areas in which the CDC and/or the State Department determined an advisory level of three or higher travel restriction.

Discussion. Commands needed to identify service contracts requiring contractor employee access to the installation and other U.S. Government work sites. Contracting Officer's Representatives (CORs) then had to inform the Contracting Officer (KO) in writing of force health protection mitigation efforts and request that the KO inform the contractor of these efforts. The COR's written notice needed to include, at a minimum, the following: notification that all persons returning from areas in which the CDC and/or the State Department determined an advisory level of three or higher travel restriction were prohibited from accessing the installation/other Government work site for 14 days from the date of departure from the restricted area. If after 14 days of self-monitoring, the contract employee was asymptomatic, he/she was able to return to the military installation/Government work site. During this period, the contractor was also encouraged to request their employees follow CDC guidelines that included avoiding congregate settings, limiting close contact with people and pets/animals to the greatest extent possible, avoiding traveling, self-monitoring, and seeking immediate medical care if symptoms developed.

Recommendation. Commanders and CORs should never take any unilateral steps to impose a change order or other contractual modification that will directly affect the purpose, time, or amount of a contract. Only the KO has the authority to implement a change to the contract terms and conditions. OSD memo, Planning for Potential Novel Coronavirus Contract Impacts, of 10 Mar 20 applies.

Implication. Prevention of unauthorized commitments and subsequent litigation resulting from improper contract modification and/or administration.

I. Legal Assistance

The Legal Assistance Policy Division (LAPD) took on two primary missions during the COVID

response. The first was providing technical oversight and substantive guidance to all 67 Army Legal Assistance Offices (LAO) throughout the Army, both CONUS and OCONUS. This included a robust information sharing and preventative law program as LAPD distributed the information it received from various HQDA, DoD, and other governmental sources out to our offices with an analysis of potential impact on clients. The second mission was policy focused, identifying issues across the Army that required DA level support to resolve and providing policy analysis and solutions. The biggest of these issues was a gap in the Service members Civil Relief Act (SCRA). This gap potentially exposed Service members to the payment of rent at two locations when the Service members entered a lease at a new duty station but were subsequently prevented from moving due to travel restrictions (discussed below).

1. **Service member Civil Relief Act (SCRA) Guidance for Soldiers with Lease Obligations Impacted by the DoD Travel Restrictions (Navy LAPD/ HQDA)**

Subj: SCRA LEASE RELIEF DUE TO STOP MOVEMENT ORDERS

On August 14, 2020, 50 U.S.C. § 3955, the Service members Civil Relief Act (SCRA), was amended by Congress and approved by the President. This amendment extends lease protection to Service members (SM) who were/are unable to proceed on their military orders due to a Stop Movement Order (SMO) issued by the Secretary of Defense. The amendment is retroactive to SMOs issued on or after March 1, 2020.

Leases at New Duty Location: Section 3955 of the Service members Civil Relief Act (SCRA) allows for termination of leases (auto and dwelling) upon receipt of certain types of military orders, including PCS or deployment orders. The orders must be for a period of not less than 90 days. The DoD Stop Movement Order alone is not sufficient to trigger automatic cancellation under the SCRA as it is not considered PCS orders.

Service members and Families who seek to either cancel a lease at their new duty station or request a pause to their rent obligations should seek assistance from a Legal Assistance attorney. A Legal Assistance attorney can help you prepare a letter to request that your landlord voluntarily allow you to either terminate your lease, or to request your landlord suspend your rent payments until you can occupy the premises. Landlords are not required by law to either terminate a lease based on the DoD Stop Movement Order, or to suspend rent payments, as a result, these letters are requests only.

If a landlord will not voluntarily agree to allow for lease termination, you should work with your Legal Assistance attorney and your command to obtain a request for new orders. The new orders should order you to your current duty location for a period of not less than 90 days.

Once you have amended/new PCS orders, you should work with your Legal Assistance attorney to provide those orders to your landlord in order to validly terminate your lease under the SCRA. You will need to provide a copy of your orders and a written request to your landlord. Once this is provided, your termination will be effective 30 days after the first date on which the next rental payment is due.

Leases at Your Present Duty Location: If you have not yet cancelled your lease at your current duty location, we advise you not to do so. There is no legal requirement for a landlord to re-lease the premises or to allow you to retain your belongings on the premises after ending your lease. For clients who have already requested termination, contact landlords immediately to see if the landlords will agree voluntarily to a lease extension or a temporary re-lease. If you have terminated your lease and your landlord will not agree to let you stay, you may need to execute two moves: one from the terminated residence, and then again when their PCS orders are re-issued.

Chapter 051904, para. B. of the Joint Travel Regulation (JTR), authorizes a short- distance move when vacating local private-sector housing due to involuntary tour extension. A short-distance HHG move is authorized when the tour of duty at a permanent duty station (PDS) is extended and the move is required for reasons beyond the Service member's control. The move is authorized from the residence from which the Soldier commuted daily to the permanent duty station to another residence, or from non-temporary storage to Government or private-sector housing.

Mortgage at New Duty Location: There is no provision under the SCRA that would allow a Service members to cancel a home purchase (mortgage) obligation entered into at their new duty location - section 3955 pertains to leased, not mortgaged, premises. Consult with a legal assistance attorney to determine whether your mortgage agreement contains any provisions for cancellation due to unforeseen circumstances.

2. Notary Services During a Pandemic

The inability to provide remote notary services to Service members and eligible clients under 10 USC § 1044a and AR 27-55 was problematic. LAPD's assessment early in the crisis was that neither authority allowed military notaries to perform services remotely. This had significant impacts across the Army as offices adjusted to providing notary while teleworking. As staff at the William Beaumont Medical Center in El Paso stated:

Estate planning and powers of attorney demand were not fully addressed. We leveraged the SRP site which remained open for mobilizing Soldiers, but retirees, dependents, and those not deploying were out-of-luck. We also had a paralegal come into the office once a week and perform notary services. Some in the community were satisfied while others were not.

The most common solution was to provide notary services on a limited basis at certain designated times and locations, with necessary safety precautions. For example, Fort Leavenworth dealt with this issue in the following manner:

To accomplish the mission of assisting these urgent and deploying needs, we held an in-house POA/will screening and LAO appointment screening event to help mitigate the rush of appointments once we were allowed to reopen. It also allowed us to provide the walk-in POA services to those soldiers who needed them.

In addition, LAOs that had notaries commissioned by states who allowed for remote notarization

performed notary services under that authority. This was useful in states like Georgia, whose Governor authorized remote notary services, as documented by Fort Gordon:

In two instances, emergency powers of attorney were notarized remotely by a civilian notary/attorney following the State Bar of Georgia Fiduciary Law Section's guidance upon Georgia Governor Brian Kemp's Executive Order authorizing such remote notaries. Personal I-phone Facetime technology of both the client and the notary/attorney was utilized to verify client eligibility by having the clients hold their military ID cards up to the screen for the notary/attorney to see and to see the clients sign the documents.

Finally, some offices, such as Fort Benning, referred clients to civilian notary services as necessary, but did attempt to exercise some quality control over products such as POAs that Service members would have notarized from a private source, either by drafting the documents or directing the Service member to a known military resource to assist with self-drafting (e.g. a Navy website). As Fort Benning described:

The Navy JAG website had a special power of attorney generator where the client selects the type, then fills in a series of questions to produce the document. The client then prints and takes to a notary…. However, the Navy website did not have any special powers of attorney for real estate, such as buying and selling a home. We posted a second website with a super power of attorney, provided by the Marine JAG Office at 29 Palms, which has one document where the client has 19 boxes, including a choice for real estate and special – other (fill in the blank). The client signs in front of the boxes he wants to grant and puts an X in front of those not granted… Clients were directed to use notaries at local UPS offices – for a fee, and also Regions Bank, notarizing for free, including for those without a Regions Bank account. Both options were provided because we were unsure how long Regions Bank would provide their free notary service.

3. Identity and Personally Identifiable Information

Most LAOs faced two major issues related to identity and PII. The first was confirming eligibility. Early on, LAPD opined that 18 USC § 701 and DODI 1000.13, Enclosure 3, Paragraph 2.a allowed eligible clients to photograph or otherwise reproduce their ID cards in order to confirm edibility. Legal Assistance offices therefore used this provision to allow clients to confirm their eligibility with methods ranging from sending a copy of the ID along with appointment request to verifying via FaceTime or some other video chat option.

The other PII issue related to client files and clients transmitting information to the legal assistance attorney via remote means. For clients who still had access to their military email accounts, this was done via encrypted emails. However, a large majority of clients seen by LAOs did not have access to DoD encrypted email or other resources. Most offices allowed for some form of client hard file drop offs. In addition, at least one office (U.S. Army Africa) approached this issue by including a disclaimer with their request for services, requesting that the client understand and consent to transmitting PII and other potentially protected information via unsecured methods.

In an attempt to mitigate privacy/PII concerns, [the U.S. Army Africa] office incorporated a notification of increased risk of PII exposure into our client intake card, stating "Consent to Unencrypted Email Correspondence: I, the above-named individual, acknowledge that I am sharing the above personally identifiable information with the Legal Assistance Office. By transmitting this information via unencrypted email, I authorize the Legal Assistance Office to correspond with me via unencrypted email, including using the above personally identifiable information, for the purposes of client intake and attorney-client communications.

One office, Fort Knox, shared that obtaining information from clients and the subsequent effort to review it using digital means was one of the most significant issues they faced:

Assisting clients remotely worked well for certain types of cases, usually cases that didn't involve reviewing a large volume of documents with clients…. It was also more difficult to work complex military administrative matters, especially those with a short suspense. For example, one of our attorneys had to assist a Soldier with a FLIPL rebuttal that was complex and due the next day. The attorney ended up coming into the office to meet with the client and work on the rebuttal that afternoon. If the attorney hadn't been able to do so the matter would've been much more difficult to work for the client, especially because it was often difficult to locate unit POCs to discuss matters like extension requests.

LAPD assesses that this is the biggest resourcing issue faced by installation OSJAs as they prepare for future max teleworking situations. At a minimum, legal assistance personnel need to have access to computers that they can use remotely with the ability to receive encrypted communication.

3. Remote Work Challenges

Many offices showed creativity in approaching remote operations. This is best seen in the way offices approached the issue of communicating with clients. Most LAOs reported that their OSJA were unable to provide them with government phones, so many set up Google Voice accounts, especially if they were unable to forward their office numbers. Fort Knox described the benefit of this process:

Before we began remote operations, attorneys set up Google Voice accounts so they could make/receive calls with clients with our personal cell phones without the clients having access to our personal cell numbers. That worked very well. If this had not been available, we would not have been able to communicate with clients by phone because our post could not forward our office lines.

In addition, several offices had creative approaches to scheduling, including the standard voicemail monitoring, shared google documents among the staff, and an online appointment requests system. Fort Campbell had a novel approach to this issue:

We have moved to an on-line scheduling. Our clients were being given a URL to schedule appointments online by utilizing SETMORE services. It was exceptionally helpful and allowed us to continue helping close to the same number of clients as we did before COVID-19, albeit

mostly remotely. We had to come once a week in person and sign wills, POAs, and notarize documents for the deploying medical units. We prepared appointments ahead of time and had a good control of client influx that allowed us to disinfect space after each client.

In addition, several offices reported success with MS Teams or other secure conferencing software. Finally, many offices had to adjust their notification to clients regarding shift to remote operations and the subsequent scheduling of appointments since the initial feedback was the word was not getting out. Most reported they identified these issues upfront within days of going to remote operations, and they took several steps to adjust.

In the end, most office plans worked well. However, remote operations over a sustained period of time would have impact on the depth and scope of services legal assistance offices could provide. As Fort Gordon noted:

The remote operations model our Division established is sustainable; however, the scope of available legal services is limited by the absence of in-person services. It is not feasible or sustainable to remotely provide every legal assistance service outlined in AR 27-3. Except for emergency issues, we were unable to provide power of attorney and will execution services, as well as notary and other ministerial services, while employing exclusively telework appointments.

CHAPTER 8

FEDERALLY RECOGNIZED INDIAN TRIBES

Issue: Can a Federally-recognized Indian Tribe request a Stafford Act declaration and request assistance from FEMA directly or does it need to go through the State?

Discussion. Yes. The United States has a trust relationship with Federally-recognized Indian tribes and recognizes their right to self-government. Under the Stafford Act, Federally-recognized Indian tribes may directly request their own emergency or major disaster declaration, or they may request assistance under a State's request. In addition, Federally-recognized Indian tribes can request Federal assistance for incidents that impact the tribe, but do not result in a Stafford Act declaration. Federal agencies that provide such assistance to Federally-recognized Indian tribes include the Department of Health and Human Services, Department of Homeland Security, Department of the Interior, and the Department of Agriculture.

CHAPTER 9

VACCINATION ADMINISTRATION

The following is from a National Guard Bureau Memorandum, Line of Duty Considerations for T-32 & SAD Personnel with Adverse Reactions After Receiving Voluntary COVID Vaccinations, dated 18 December 2020. [437]

A. Guidance for Mandatory COVID-19 Vaccination of National Guard

The information paper was meant to give guidance on determining Line of Duty status of T-32 and SAD personnel who suffer adverse reactions after voluntarily COVID vaccinations.

TAGs and commanders expressed concern that some T-32 and SAD personnel might be reluctant to get voluntary COVID vaccinations out of fear that they may not be found to be in the line of duty if they suffer an adverse reaction to the vaccine.

The NG is receiving COVID-19 vaccine allotments as part of the DoD Vaccination Program. Service members are authorized to receive the vaccine and are not obligated to receive the vaccination.

B. Line of Duty Considerations

Line of duty determinations are conducted in accordance with service specific guidance. Army and Air Force regulations regarding line of duty determinations apply to National Guard Service members who are in a T-32 or T-10 status and suffer a disease or injury connected to their service. (AR 600-8- 4 and AFI 36-2910).

NG SMs who are in a covered (Title 32 or Title 10) status and voluntarily receive the vaccine may be found in the line of duty, IAW their service regulations, if they suffer an adverse reaction to the vaccine. It is the NG SM's status at the time of vaccination that is key to being considered to be in the line of duty.

As State Active Duty (SAD) is not a qualified duty status under the above referenced regulations, state commanders would lack any basis to find personnel in a SAD status to be in the line of duty in accordance with the above referenced service regulations in such cases. States may provide for coverage IAW the State Workers Compensation laws.

This document is not a formal legal opinion of the Chief Counsel, National Guard Bureau but rather constitutes general legal guidance on this point. The issuance of a legal opinion is reserved to the consideration of a specific set of facts or circumstances. If State Judge Advocates have questions regarding the proper considerations for line of duty determinations in this context they

[437] This is not a formal legal opinion of the Office of the Chief Counsel National Guard Bureau

should contact the Administrative Law Division of the Office of the Chief Counsel, National Guard Bureau. (LTC Susan Lynch: susan.j.lynch.mil@mail.mil)

C. National Guard Health Care Practitioners and Administering Vaccines

Purpose. Discuss legal considerations for NG HCPs providing vaccines.

Subject. NG Health Care Practitioners (HCP) in COVID-19 Vaccine Administration Operations

Key Point. Duly licensed and credentialed NG HCPs may administer COVID-19 vaccines IAW the CDC Interim Playbook, if authorized.[438] The mission sets would have to be authorized as a state mission, FEMA MA, or other authority because there is no general authority to immunize the general public by NG HCPs.

Licensing. Immunizations can be administered in all duty statuses for licensed/certified NG HCPs. For SAD, licensure is IAW state law. Out of state licensure may be reciprocal under an EMAC.

For T-32 and T-10, IAW 10 U.S.C. § 1094, NG HCPs may practice their profession in any location in any jurisdiction of the United States, so long as the practice is within the scope of authorized federal duties. Specification of what constitutes a licensed individual "within the scope of authorized federal duties" is defined in DHA-PM 6025.13, Volume 4, "Clinical Quality Management in the Military Health System Volume 4: Credentialing and Privileging," August 29, 2019.

Credentialing. Credentialed NG HCPs in a non-federal status are subject to their respective service regulations, or the laws of the State/territory, in which they are credentialed and/or privileged. NG HCPs in T-10 comply with DHA's credentialing/privileging requirements. Credentialed NG HCPs meet the CDC requirements for vaccine administration.[439]

Liability. Authorized NG HCPs administer vaccines based on validated requests for assistance, such as through EMAC, a FEMA MA through a DSCA RFA, or as a volunteer, and their status and mission set will affect the liability they face. However, all are potentially covered by immunity IAW the Public Readiness and Emergency Preparedness Act (PREP) and compensation could be limited by Health Resources and Services Administration's Countermeasures Injury Compensation Program (CICP) for participation in the COVID-19 Vaccination Program.[440]

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[438] On Sept 16, 20 the CDC issued the "COVID-19 Vaccination Program Interim Playbook for Jurisdiction Operations," which provides for a three-phased vaccine program and that vaccine providers must; (1) enroll in the federal COVID-19 Vaccination Program; (2) be credentialed and licensed in the jurisdiction where the vaccination takes place and;(3) sign and agree to the conditions in the CDC COVID-19 Vaccination Program Provider Agreement. NG HCPs meet requirements (2) and conditions of (3) by virtue of their military practice.

[439] Military HCPs authorized to perform vaccinations are trained to DoD, USCG, and CDC guidelines.

[440] Robert P. Charrow, General Counsel, Department of Health and Human Services, Advisory Opinion on the Public Readiness and Emergency Preparedness Act and the March 10, 2020 Declaration Under the Act April 17, 2020, as modified on May 19, 2020, May 19, 2020.

In SAD, tort liability coverage is based on state law. Many states have statutes regarding NG HCP immunity from civil and criminal liability for military service. In addition, there are Good Samaritan Laws, which may cover NG HCPs from potential liability. Further, as a result of COVID 19, many states have invoked, within their declarations of emergency and Executive Orders, liability waivers specifically for NG HCPs who come to the aid of the state. State's declarations can be found at the National Governors Association website at https://www.nga.org/coronavirus/.

NG HCPs in T-32 and T-10 are covered for tort liability under the FTCA. FTCA coverage is initially based on the duty status. If the NG HCP is in an applicable status, then the local U.S. Attorney will analyze whether the NG HCP was "within the scope" of his or her federal employment and covered by the FTCA.

If the NG HCP is in a non-DoD facility in applicable status with FTCA coverage, then there may be other statutory liability or immunity waiver, protection, or indemnification that the NG HCP/United States may take advantage.

CHAPTER 10

VACCINATION MANDATES

The FY22 NDAA, Section 736 – Limitation on Certain Discharges Solely on the Basis of Failure to Obey Lawful Order to Receive COVID-19 Vaccine. This section of the recently passed FY22 NDAA requires anyone separated for refusing the COVID vaccine to receive an honorable or general discharge:

> LIMITATION.—During the period of time beginning on August 24, 2021, and ending on the date that is two years after the date of the enactment of this Act, any administrative discharge of a covered member, on the sole basis that the covered member failed to obey a lawful order to receive a vaccine for COVID–19, shall be—
> an honorable discharge; or a general discharge under honorable conditions.
>
> DEFINITIONS.—In this section The terms ‘‘Armed Forces’’ and ‘‘military departments’’ have the meanings given such terms in section 101 of title 10, United States Code. The term ‘‘covered member’’ means a member of an Armed Force under the jurisdiction of the Secretary of a military department.

A. Emergency Use Authorization

Overview. The U.S. Food and Drug Administration (FDA) has granted Emergency Use Authorization (EUA) for three COVID-19 vaccines: Pfizer, Moderna, and Johnson & Johnson (J&J) Janssen. Each EUA contains a restriction on the use of these unapproved vaccines that grants recipients the option to accept or refuse inoculation. Although the Secretary of Defense (SECDEF) may request a presidential waiver to mandate immunization for Service members, it appears that SECDEF and the President will likely keep the vaccines voluntary until they are fully approved by the FDA. Once the FDA fully approves a COVID-19 vaccine for introduction into interstate commerce, SECDEF will be able to mandate vaccinations for Service members and some other Department of Defense personnel.

Pathways to Vaccine Approval.

1. *FDA Approval*. The FDA may fully approve a vaccine for introduction into interstate commerce. The Secretary of Defense (SECDEF) may make any FDA-approved vaccine mandatory for Service members.
2. *Emergency Use Authorization Without an Option to Refuse*. If a vaccine is not fully approved, the FDA may authorize the vaccine with an EUA. The EUA will likely contain restrictions on the use of the unapproved vaccine – such as recipients having the option to accept or refuse administration of the vaccine. If an EUA does not require an option to refuse the vaccine, then SECDEF may mandate vaccination for Service members.
3. *Presidential Waiver*. If an EUA requires an option to refuse the vaccine, SECDEF may request that the President provide a waiver, in writing, reflecting the President’s determination “that complying with such requirement is not in the interests of national

security." If the President grants the waiver, SECDEF could direct mandatory vaccination of Service members. As of the publication of this paper, it appears unlikely that SECDEF will request such a waiver.

Mandatory Vaccination upon FDA Approval.

1. *Service members*. SECDEF may make any FDA-approved vaccine mandatory for Service members. Once a COVID-19 vaccine is fully approved, the Secretaries of the Military Departments; the Commandant, U.S. Coast Guard; the CJCS; and the Director, Defense Health Agency, will coordinate with the Deputy Assistant Secretary of Defense for Health Readiness Policy and Oversight (DASD(HRP&O)) to provide recommendations to the Assistant Secretary of Defense for Health Affairs (ASD(HA)) on the initiation of a mandatory immunization program.[441] The Combatant Commanders will also submit their recommendations through the CJCS to the ASD(HA) for approval to initiate mandatory COVID-19 immunization within their areas of responsibility.
2. *OUTSF – Other Than U.S. Forces*. SECDEF may make any FDA-approved vaccine mandatory for category 1 OUTSF personnel.[442] This category includes emergency-essential and combat-essential DoD civilian employees[443] and DoD contractors performing mission-essential DoD contractor services.[444] This will primarily impact deployable Department of the Army Civilian employees and contractors. When contractor personnel are required to be immunized, the Army will modify contracts as necessary to implement this requirement.

Command Authority and Voluntary Nature of Vaccine.

If SECDEF mandates COVID-19 vaccination under one of the pathways above, then commanders may issue clear, specific, and narrowly drawn orders for Service members under their respective command to receive the vaccine. United States v. Schwartz, 61 M.J. 567, 569 (N.M.C.C.A. 2005) (citing United States v. Womack, 29 M.J. 88 (C.M.A. 1989)). Orders are presumed lawful, and the Service member bears the burden of demonstrating illegality. *United States v. Kisala*, 64 M.J. 50, 53 (C.A.A.F. 2006).

If a COVID-19 vaccine is authorized under an EUA with an option to refuse, then commanders may not order their Service members to receive the vaccine. Commanders may also not take any punitive or adverse administrative action against Service members who exercise their right to refuse the vaccine.

Commanders continue to have broad authority to direct actions that protect the health and safety of their personnel during the COVID-19 global pandemic. Commanders should continue to adhere to the policies contained within DoDI 6200.02 and other force health protection guidelines when enacting reasonable and necessary protective measures in response to the risk of

[441] Department of Defense Instruction (DoDI) 6205.02, DoD Immunization Program, July 23, 2019.
[442] DODI 6205.02
[443] In accordance with DODI 1400.32, DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures, April 24, 1995.
[444] In accordance with DODI 3020.41, Operational Contract Support, December 20, 2011.

COVID-19. Decisions regarding the force health protection measures should continue to be informed by the advice of medical experts. This includes decisions regarding the interactions and duty statuses of vaccinated and unvaccinated Service members. Judge advocates should advise commanders to avoid instituting restrictive force health protection measures that may be perceived as incentivizing or coercing consent to receiving the vaccine unless such measures are informed by the advice of medical experts. Correspondingly, commanders may exempt vaccinated Soldiers from certain health protection measures as appropriate and as informed by the advice of medical experts.

B. DoD Mandate for COVID-19 Vaccination to National Guard Personnel

Purpose. Provide an overview of the applicability of any Potential DoD mandate for COVID-19 vaccination to National Guard personnel.

Background. In comments at the White House on July 29, 2021, POTUS stopped short of imposing a vaccine mandate for military personnel. Instead, he asked the DoD to look into how, and when, the military will add vaccines to protect against COVID-19 to the list of other vaccinations Service members must receive.

Although the full terms have not been officially released, it appears that Federal workers will be required to verify they have been vaccinated against the coronavirus or else face mandatory masking, weekly testing, and social distancing.

1. National Guard Military Service members

All National Guard (NG) Service members (SM), other than those in State Active Duty, will be subject to any mandatory vaccination directive to the same extent as active component personnel. (DoDI 6205.02)

NG SM may receive a COVID-19 vaccine in the civilian community free of charge and bring proof of vaccination status to their units for official recording in the electronic military health records.

All NG SM will be offered a COVID-19 vaccine and must be in a duty status to receive the COVID-19 vaccine militarily.

Immunizations of NG SM may be delayed due to postponed or canceled unit training assemblies resulting from fiscal restraints due to unreimbursed Capital Response expenditures.

NG SM may be lawfully ordered to take the COVID-19 vaccine.

SM who refuse should be counseled by medical personnel to ensure that they understand the importance and safety of the immunization. After such counseling, if the SM persists in refusing the vaccine, the commander may give the SM a direct order to submit to the immunization.

If the SM fails to obey the order, commanders may take administrative action or punitive action under applicable military code.[445]

Religious administrative exemptions may be granted according to Service-specific policies.

Medical exemptions will be determined by health care providers based on the health of the vaccine candidate and the nature of the immunization under consideration. Medical exemptions may be temporary (up to 365 days) or permanent in accordance with Service-specific policy.

2. National Guard Civilian Personnel

Any requirement for Title 5 NG employees and Military Technicians (in their civilian capacity) to obtain the COVID-19 vaccination should follow Office of Personnel Management (OPM) guidance. (5 CFR 339.202)

After OPM issues instructions, federal agencies may issue COVID-19 vaccination requirements for employees. (5 CFR 339.205)

Adverse action (up to removal) for refusal to comply with the vaccine requirement may be taken against employees. Employees may administratively challenge a removal, demotion, or suspension.

C. Full Approval of COVID-19 Vaccine and Authority to Mandate Immunization

Overview. As the U.S. Food and Drug Administration (FDA) nears the completion of its review of potential COVID-19 vaccines, judge advocates must be prepared to advise their commanders concerning whether they can order Service members to submit to vaccination. This information paper lays out the three pathways for mandating vaccination of Service members and the impact if a vaccine is only approved for voluntary use. As of the publication of this paper, it appears likely that the FDA will approve COVID-19 vaccines under Emergency Use Authorizations (EUA), and Service members will have the option to refuse COVID-19 vaccination.

[445] The 2022 NDAA repealed the COVID-19 vaccine mandate. Service members can only be encouraged to receive the vaccination. No administrative or punitive actions may be taken against an unvaccinated Service member.

CHAPTER 11

MISCELLANEOUS QUESTIONS AND ANSWERS

A. Roll and Authority of the Installation Police

Observation. Military Installations were used to house quarantined individuals evacuated from overseas by the Department of State. The question was who has authority on the installation to enforce the quarantine and prevent people from leaving?

Discussion. While Military Police (MP) have law enforcement authority on installations, there is no basis to empower MPs to enforce civilian laws by locating civilian operations on military installations. Because the quarantine authority was DHHS/CDC and not DOD, it was determined MPs should have no role in enforcement. They would, however, retain the normal installation security responsibilities.

The quarantine facilities were turned entirely over to DHHS who was responsible for providing all support, to include law enforcement. Law enforcement was handled primarily by U.S. Marshals. This arrangement was documented in the Request for Assistance from DHHS and the SECDEF approval memorandum.

Related to enforcement, there were questions about what would happen when a quarantine period expired and the individual wished to depart the installation. Some State/Local authorities did not want released quarantined individuals in the community. DOD decided it was not going to restrict the individuals from leaving. It was DOD's position that local authorities would have to determine if they could restrict movement in their jurisdiction. However, DOD had no role in this.

B. Medical Treatment of Undocumented Persons and non-US Citizens

Observation. While DoD was supporting whole of gov't response to this pandemic, questions were raised about potential restrictions on patient eligibility.

Discussion. Per FEMA Mission Assignment 4482DR-CA-DOD-02, DOD will "deploy, staff, and operate one DOD maritime medical treatment facility...to accommodate and medically treat non-COVID19 patients IOT decompress land based civilian hospitals. "DOD provides such medical support in accordance with DODD 3025.18, DODI 6010.22, and the Stafford Act (specifically, 42 USC 5170a and 5192). In accordance with the Stafford Act, DOD has been directed to utilize its resources in support of state and local efforts.

Recommendation. FEMA mission assignments seek assistance in supplementing local medical care to patients distinction based on immigration status,

Implication. US forces assigned/allocated to NORTHCOM in support of FEMA may provide FEMA-authorized medical services to people for treatment w/o regard to citizenship status, and

state and local authorities are to determine which patients require diversion to the hospital ship to "decompress land based civilian hospitals. "DoD medical personnel are not required to report the presence of undocumented aliens.

C. Restriction or Sequester of Mission Essential Civilian Employees

Observation. (Taken from an Air Force AAR). Installation commanders should not restrict mission essential civilian employees to their respective installations or portions thereof during the current pandemic in order to ensure their availability to perform their duties. Doing so presents an extremely high risk of litigation. Installation commanders may, however, ask civilian employees to voluntarily self-isolate on an installation or part thereof in order to ensure the ongoing success of the mission.

Discussion. AFI 10-2519 addresses an installation commander's authorities when considering restriction of movement (ROM) of "persons other than military personnel." This category of individual includes but is not necessarily limited to civilian employees, dependents, contractors, retirees and dependents of retirees. ROM is defined as, "isolation or limiting ingress and egress to, from or on an Air Force installation." Additionally, AFI 10-2519 provides the framework that installation commanders should follow when making decisions in order to stay within the confines of the law and to ensure a measured consistent response across command chains. NOTE: 21 SW/CC is the appropriate authority for any ROM measures on Peterson AFB or in CMAFS. ROM is not contemplated until the HPCON-D level. During HPCON D, an installation commander may restrict access to the installation to only individuals who are mission essential or mission critical.

There are no provisions that allow the installation commander to unilaterally isolate, sequester or confine persons other than military personnel on base or to specific locations on base like a workplace, dining facility or lodging facility, even if those persons have been designated as mission essential or mission critical. All forms of ROM of civilians are to be coordinated through the nearest CDC Quarantine Officer. None of the authorities provide an installation commander with the authority to order that mission essential civilian employees be quarantined or otherwise restricted to the installation or any part thereof.

During an evacuation, an agency may not unilaterally require an employee to relocate to a secure location on the installation. A civilian employee may, however, agree to the agency's request that the employee relocate to a secure location on the installation. Id. In such a case, the location on the installation may serve as the civilian employee's safe haven location.

D. What are the legal considerations for the use of National Guard facilities?

Generally, National Guard facilities are broken into two groups:

(1) property that is federally owned; and
(2) property that is state-owned.

The authority, approval and reimbursement for these facilities and the personnel supporting these facilities starts with the proper identification of the facilities within one of these two groups.

1. Facilities federally owned or leased by the Air Force or Army and licensed to the state

National Guard facilities which are federally owned or leased by the Air Force or Army, and then licensed to the states to operate, are federally owned. Following an approved mission assignment, the Secretary of Defense may direct the National Guard to make available any federal facility for purposes of temporary housing in support of the quarantine. §2815 of the 2017 NDAA requires the Secretary of Defense to certify to the House and Senate Armed Services Committees that the provision of the facility will not negatively affect military training, operations, readiness or other military requirements, including Guard and Reserve readiness.

2. State Owned facilities, to include those that receive federal funding

Installations that are state-owned and 100% federally funded remain under the ownership of the state. Therefore, the state has final authority on what is permissible, and use of property must be in accordance with state law. Coordination for support should occur between HHS and the state regarding use and reimbursement of facilities on such installations.

E. What DoD support can civilian, military and contract personnel provide?

1. Support Services and Personnel for Federally Owned Facilities

DOD policy relating to the provision of March ARB states, "[n]o DOD civilian employees, military personnel, or contractor personnel would be involved in the services. DOD personnel will generally not have contact with evacuees or personnel supporting the observation period."[446] Specifically, DOD policy requires "HHS be responsible for all care of evacuees, including supervision, transportation of evacuees and support personnel, security, meals, clothing, communications, linens/laundry services, and routine or specialized medical services at the local civilian hospital; for provision, handling and disposal of hazardous materials and personal protective equipment; and for decontamination of DOD facilities. HHS will also provide custodial services and any necessary ground maintenance."[447] Civilian employees and military personnel could be redirected by their chain of command as appropriate, and any impacts on the contractor workforce will be determined based on applicable contract terms.

The costs associated with sustaining, repairing, and operating ARNG facilities (such as Regional Training Institutes) usually fall under Appendix 1 to that state's Master Cooperative Agreement (MCA) with NGB. The majority of MCA's are set up as reimbursement instruments-meaning that ARNG O&M funding reimburses the allowable costs connected with ARNG facilities. Due

[446] Secretary Of Defense Action Memo from Kenneth Rapuano, ASD, Homeland Defense and Global Security, dated Jan 29, 2020.
[447] Ibid.

to fiscal law constraints, it is critical that USPFOs ensure that all DHHS-driven costs associated with this mission are captured and ultimately paid for out of the appropriate DHHS-controlled appropriation. Specifically, such costs should be set out in a memorandum of agreement that includes NGB and DHHS as parties.

2. Support Services and Personnel for State Owned Facilities

The Secretary of HHS is authorized to accept assistance from state and local authorities in the enforcement of quarantine operations, and is further authorized to provide assistance to state and local authorities in the enforcement of their quarantines.[448] Following this broad authority to provide and accept assistance during quarantine operations, NG personnel and employees could provide support to HHS in accordance with applicable state laws.

F. Navy Miscellaneous Questions and Answers

1. Chaplain Clinical Pastoral Care vice Religious Services.

A chaplain under MCE-E (C2F) inquired whether he could provide services to civilians in an emergency situation.

Observation. FEMA Mission Assignments (MA) did not task COMFORT or MERCY with providing religious services. Both MCE-E (COMFORT) and MCE-W (MERCY) encountered questions about the lack of FEMA MA regarding religious services and distinctions between clinical pastoral care and religious services.

Discussion. Joint Publication 1.05 includes a four-prong test for emergency religious services. Military chaplains are intended to provide services to uniformed personnel, so a military chaplain providing services to unaffiliated civilians might present an Establishment Clause problem.C3F Fleet Chaplain was queried about the distinction and responded that clinical pastoral care is a routine part of medical services. Therefore, MA language for MERCY may imply, in the correct circumstances, that a properly trained chaplain could provide clinical pastoral care. Not every Navy chaplain is trained in clinical pastoral care. MCE-E determined that FEMA MA did not task COMFORT with providing religious services.

Recommendation. Chaplain should devise alternate means of providing access to civilian religious services and work with the chaplain technical chain on this issue. Establish SOPs with the 5Ws.

Implication. This establishes the “red lines” of whether chaplains are acting within the scope of their official duties, have access to resources ($) and protected or beyond the line of duty and may be liable.

[448] 42 USC 243(a)

2. Competing State Requests for maritime Military Treatment Facilities

Observation. Both California and Washington in March 2020 requested Maritime Treatment Facilities to alleviate strain to civilian medical facilities.

Discussion. A FEMA mission assignment (MA) was received to support CA with a maritime MTF. At around the same time, WA sent a letter to the President requesting the same support, creating uncertainty about whether FEMA was also processing a MA for WA. Advance preparations for deployment of the maritime MTF (USNS MERCY) pending SECDEF approval were hampered due to uncertainty about the location for any approved support. Prior DoD guidance planned for USNS MERCY to support WA in Seattle.

Recommendation. For unique capabilities/assets such as USNS MERCY expected to be the subject of a MA, DoD should ensure early and close coordination and sharing of information with the Navy (or applicable Military Department), continuing through MA processing and SECDEF approval.

3. Environmental concerns involving MER dumping grey water while in port and regarding fuel spill at port from train derailment

Observation. Citizen made complaint about alleged dumping of grey water into Port of Los Angeles. The Navy leaned forward into monitoring the civilian fuel spill response.

Discussion. Embarked LN conducted PI into grey water dumping and transmitted result back to MCE-W Environmental Law SME that the water discharged was cooling water used to cool the engines, not grey water. Additionally, MER Master had obtained prior approval from the EPA to dump grey water if necessary. On 31 March 2020 a train derailed 300 yards short of the MER and the fuel onboard spilled into the port. Clean up was conducted by LA County authorities to minimize environmental impact. Report was made to MCE-W Environmental Law SME to ensure incident tracking.

Recommendation. With regards to the fuel spill, communications must be flattened with various subject matter experts ensure embarked legal staff received proper support to triage and track potential issues. As this particular incident was not for Navy to track, confirmation with SME provided embarked legal team ability to quickly triage and move on.

Implication. Failure to strictly comply with all Federal and State environmental laws and regulations can result in regulator enforcement, litigation, fines, and potential personal liability.

4. Impact on Panama Canal Transit

Issue. Panama Canal Transit amid additional Panamanian requirements that could violate the vessel's sovereign immunity and conflict with the Neutrality Treaty.

Observation. The Government of Panama could prevent U.S. Government vessels from transiting the Panama Canal during a pandemic such as COVID-19.

Discussion. On 1 Apr 20, Panama Canal Authority (ACP) promulgated ACP Advisory 12-2020 which: (1) required inspections of vessels if they visited a port with confirmed COVID-19 cases within 14 days of Canal transit, and may require the vessel to quarantine if crew change was performed in infected port; and (2) directed that vessels with confirmed or suspected cases of COVID-19 shall be prohibited from transiting the Canal and must quarantine for 14 days. Health inspections conflict with the Neutrality Treaty between the U.S. and Panama and violate the vessel's sovereign immunity. C4F/NAVSOUTH Legal drafted legal summary (coordinated with Code 10, OPNAV N3/N5, USFF, C2F, C3F, COMSC, USCG) of this issue which was provided to SOUTHCOM and SDO/DATT.

Recommendation. High level engagement with ACP and Government of Panama if Panama promulgates pandemic-specific advisories. This type of engagement enabled cruise ships with infected personnel to transit for "extraordinary conditions and humanitarian reasons". Unknown if would apply same exception to warship or auxiliary.

Implication. Significant operational impacts to U.S. Government military and humanitarian aid if vessels are hindered/prohibited from transiting Canal.

CHAPTER 12

FEDERAL AGENCY COVID-19 GUIDANCE AND RESOURCES

A. Executive Orders (EO)

1. EO 13909: Prioritizing and Allocating health and Medical Resources to Respond to the Spread of COVID-19, 85 Fed. Reg. 16227 (Mar. 23, 2020), available at: https://www.federalregister.gov/d/2020-06161.
2. EO: Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID-19, 85 Fed. Reg. 18403 (Apr. 1, 2020), available at: https://www.federalregister.gov/d/2020-06969.
3. EO 13917: Delegating Authority Under the Defense Production Act With Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID- 19, 85 Fed. Reg. 26313 (May 1, 2020), available at: https://www.federalregister.gov/d/2020-09536.
4. EO 13922: Delegating Authority Under the Defense Production Act to the Chief Executive Officer of the United States International Development Finance Corporation To Respond to the COVID-19 Outbreak, 85 Fed. Reg. 30583 (May 14, 2020), available at: https://www.federalregister.gov/d/2020-10953.
5. EO 13927: Accelerating the Nation's Economic Recovery From the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities, 85 Fed. Reg. 35165 (Jun. 4, 2020), available at: https://www.federalregister.gov/d/2020-12584.
6. EO 13944: Combating Public Health Emergencies and Strengthening National Security by Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs Are Made in the United States, 85 Fed. Reg. 49929 (Aug. 6, 2020), available at: https://www.federalregister.gov/d/2020-18012.
7. EO 13945: Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, 85 Fed. Reg. 49935 (Aug. 14, 2020), available at: https://www.federalregister.gov/d/2020-18015.
8. EO 13962: Ensuring Access to the United States Government COVID-19 Vaccines, 85 Fed. Reg. 79777 (Dec. 11, 2020), available at: https://www.federalregister.gov/d/2020-27455.
9. EO 13987: Organizing and Mobilizing the United States Government To Provide a Unified and Effective Response To Combat COVID-19 and To Provide United States Leadership on Global Health and Security, 86 Fed. Reg. 7019 (Jan. 20, 2021), available at: https://www.federalregister.gov/d/2021-01759.

10. EO 13994: Ensuring a Data-Driven Response to COVID-19 and Future High-Consequence Public Health Threats, 86 Fed. Reg. 7189 (Jan. 21, 2021), available at: https://www.federalregister.gov/d/2021-01849.
11. EO 13996: Establishing the COVID-19 Pandemic Testing Board and Ensuring a Sustainable Public Health Workforce for COVID-19 and Other Biological Threats, 86 Fed. Reg. 7197 (Jan. 21, 2021), available at: https://www.federalregister.gov/d/2021-01854.
12. EO 13997: Improving and Expanding Access to Care and Treatments for COVID-19, 86 Fed. Reg. 7201 (Jan. 21, 2021), available at: https://www.federalregister.gov/d/2021-01858.
13. EO 13998: Promoting COVID-19 Safety in Domestic and International Travel, 86 Fed. Reg. 7205 (Jan. 21, 2021), available at: https://www.federalregister.gov/d/2021-01859.
14. EO 14002: Economic Relief Related to the COVID-19 Pandemic, 86 Fed. Reg. 7229 (Jan. 22, 2021), available at: https://www.federalregister.gov/d/2021-01923.
15. EO 1401: Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50985 (Sep. 9, 2021), available at: https://www.federalregister.gov/d/2021-19924.

B. Department of Defense

All DoD guidance and memoranda can be found at: https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/Latest-DOD-Guidance/

C. Defense Health Agency

Defense Health Agency information can be found at: https://www.health.mil/Military-Health-Topics/Health-Readiness/Public-Health/Coronavirus.

D. Department of Health and Human Services

The Department of Health and Human Services COVID-19 resources can be found at: https://www.hhs.gov/coronavirus/index.html.

E. Office of Personnel Management

The Office of Personnel Management has a robust Frequently Asked Questions page available at: https://www.opm.gov/frequently-asked-questions/coronavirus-faq/.

F. Federal Emergency Management Agency

The Federal Emergency Management Agency works with the Centers for Disease Control and

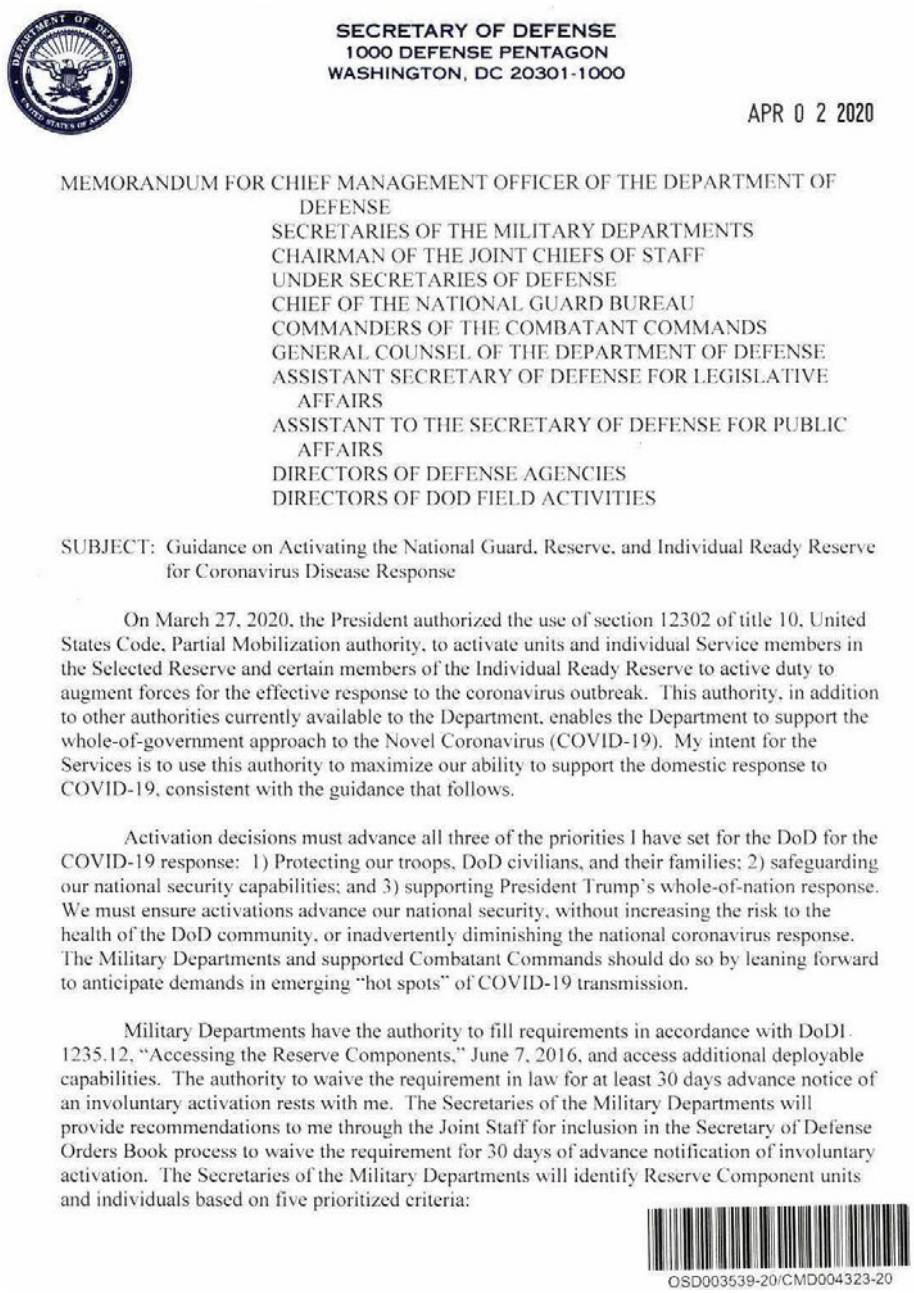
other federal agencies to coordinate with state, tribal, and territorial authorities, private sector partners and others to assist with vaccine distribution. Information is available at: https://www.fema.gov/disasters/coronavirus.

G. Congressional Research service

The Congressional Research Service has a robust catalogue of COVID-19 products divided by issue area, e.g., agriculture, education, economy, transportation, etc. It is available at: https://crsreports.congress.gov/resources/covid19/.

Appendix A

A. Guidance on Activating the National Guard, Reserve, and Individual Ready Reserve for Coronavirus Disease Response (Memo from SecDef)



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

APR 0 2 2020

MEMORANDUM FOR CHIEF MANAGEMENT OFFICER OF THE DEPARTMENT OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEF OF THE NATIONAL GUARD BUREAU
COMMANDERS OF THE COMBATANT COMMANDS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
DIRECTORS OF DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Guidance on Activating the National Guard, Reserve, and Individual Ready Reserve for Coronavirus Disease Response

On March 27, 2020, the President authorized the use of section 12302 of title 10, United States Code, Partial Mobilization authority, to activate units and individual Service members in the Selected Reserve and certain members of the Individual Ready Reserve to active duty to augment forces for the effective response to the coronavirus outbreak. This authority, in addition to other authorities currently available to the Department, enables the Department to support the whole-of-government approach to the Novel Coronavirus (COVID-19). My intent for the Services is to use this authority to maximize our ability to support the domestic response to COVID-19, consistent with the guidance that follows.

Activation decisions must advance all three of the priorities I have set for the DoD for the COVID-19 response: 1) Protecting our troops, DoD civilians, and their families; 2) safeguarding our national security capabilities; and 3) supporting President Trump's whole-of-nation response. We must ensure activations advance our national security, without increasing the risk to the health of the DoD community, or inadvertently diminishing the national coronavirus response. The Military Departments and supported Combatant Commands should do so by leaning forward to anticipate demands in emerging "hot spots" of COVID-19 transmission.

Military Departments have the authority to fill requirements in accordance with DoDI 1235.12, "Accessing the Reserve Components," June 7, 2016, and access additional deployable capabilities. The authority to waive the requirement in law for at least 30 days advance notice of an involuntary activation rests with me. The Secretaries of the Military Departments will provide recommendations to me through the Joint Staff for inclusion in the Secretary of Defense Orders Book process to waive the requirement for 30 days of advance notification of involuntary activation. The Secretaries of the Military Departments will identify Reserve Component units and individuals based on five prioritized criteria:

OSD003539-20/CMD004323-20

A.

1. Ability to deliver high quality health care in order to mitigate the impact of the COVID-19 outbreak on the DoD and the American people;
2. De-confliction with all States' current and planned use of the National Guard, through coordination with the National Guard Bureau;
3. Consideration of impact to federal, state and local capabilities, particularly for removing personnel from or placing in to COVID-19 "hot spots" areas; as well as activating Reserve Component members serving in the local healthcare system or the Department of Veterans Affairs;
4. Identification of Individual Ready Reserve and Retired Reserve through a call for volunteers in priority specialties; and
5. Advanced screening of activated Reserve Service members for COVID-19 infection.

Involuntary activation of members in the Individual Ready Reserve and the Retired Reserve should be used sparingly and only when necessary; however, voluntary activation is encouraged. The Secretaries of the Military Departments should include in their planning that my approval, in writing, is required for the involuntary activation of Individual Ready Reserve members, and any member to be activated from his or unit, within 120 days of activation date.

The Military Services are authorized to:

1. Activate members in the Selected Reserve, Individual Ready Reserve, and Retired Reserve;
2. Increase screening of their Ready Reserve to determine deployability and availability;
3. Activate Individual Mobilization Augmentees;
4. Approve travel exceptions for travel required to facilitate individual and unit mobilizations in accordance with the March 11, 2020 and March 13, 2020 Travel Restrictions memorandums.

As the Department responds to the need for Reserve Component units and individuals across our Nation, I will continue to preserve DoD medical capability and capacity to ensure that the United States is prepared at any time to defend vital U.S. national security interests. To do so, the Military Departments, in coordination with the Defense Health Agency, should:

1. Augment DoD military treatment facilities when local healthcare systems are at or near capacity, to provide appropriate care to those entitled to DoD healthcare, so minimal medical workload shifts from DoD to surrounding communities;
2. Present doctrinal medical force elements as described in Joint Publication 4-02, "Joint Health Services," that can be deployed either to support military operations or to augment local healthcare systems as necessary; and
3. Augment non-military healthcare systems with scalable medical personnel augmentation to work in civilian healthcare facilities and/or use civilian healthcare as required. These packages may be tailored to this mission and not strictly conform to doctrinal organizations.

Beginning April 2, 2020, the Secretaries of the Military Departments and the Commanders of the Combatant Commands are instructed to provide daily updates to the Joint Staff on the number and types of activated Reserve Component personnel, any constraints to

rapid mobilization, and the employment of Military Service-retained activated personnel. Additionally, the National Guard Bureau will report daily the number of National Guard personnel in title 32 or State Active Duty Status in Direct Support of COVID-19 Response. The Joint Staff will consolidate reporting using the Joint Staff daily report and provide updates to the DoD COVID-19 Task Force every Friday. The Joint Staff will coordinate with the Under Secretary of Defense for Personnel and Readiness on Reserve Component activation policy recommended changes. The Joint Staff will support the Combatant Commands, U.S. Northern Command in particular, to repurpose these forces once local healthcare system capacity is able to meet local demand, in accordance with applicable authorities governing Reserve Component activations. Use the attached table, which provides a framework of currently available reserve authorities for COVID-19 response efforts.

My point of contact for this guidance is [redacted], Deputy Assistant Secretary of Defense Reserve Integration, at [redacted].

Mark T. Esper

B. Implementation guidance from the Office of The Under Secretary of Defense for Acquisition and Sustainment

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
AND SUSTAINMENT

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was enacted on March 27, 2020, in response to the Coronavirus Disease 2019 (COVID-19) national emergency. Section 3610 of the CARES Act allows agencies to reimburse, at the minimum applicable contract billing rates (not to exceed an average of 40 hours per week), any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, during the public health emergency declared for COVID-19 on January 31, 2020, through September 30, 2020. Contractors usually include employee leave in calculating their indirect rates. Therefore, leave is included in any fixed price, or labor hour rate (under Time and Materials or Labor Hour contracts), or as an element of cost on cost-reimbursement contracts. Deviation 2020-O0013 establishes a new cost principle that will allow recovery of such costs where appropriate.

To ensure traceability, it is critical that the contract and supporting documentation clearly identify these costs for reimbursement paid to contractors under section 3610 authority, as well as how such costs are identified, segregated, recorded, invoiced, and reimbursed.

Implementation of section 3610 will vary based on contract type:

1. Under Fixed Price contracts (including those with incentive provisions), upon receipt of a request for equitable adjustment, the contracting officer will need to negotiate equitable adjustments to the price and delivery schedule to recognize the impact of any COVID-19 caused shutdowns. In the case of incentive contracts, this should be a separate fixed price line and not subject to the incentive structure. When the permissive authority under section 3610 is used, equitable adjustments should compensate only for the costs of providing paid leave as permitted by section 3610, for maintaining the workforce, and shall not increase profit. To the extent that the contractor workforce is shared across multiple contracts, contracting officers will need to coordinate on a reasonable allocation of costs, ideally through the administrative contracting officer. Contracting officers shall establish one or more separate contract line items for section 3610 COVID-19 payments to ensure traceability of expenditures and clarify whether payments under section 3610 constitute acceptance of the supplies or services that are not being delivered or performed.

   A suggested approach is to create a line item or set of line items, such as "Labor Force Retention COVID-19," at a fixed price per appropriate unit of measure, e.g. "Hours" or "Days," exclusive of profit. Contractors should be able to distinguish all leave paid under these line items from actual hours worked, and submit a monthly invoice under these line items with the number of hours of eligible leave per labor category. The invoice should contain supporting documentation to identify and explain why claimed hours could not be worked, along with a statement that these costs are not being reimbursed under other authorities. The acceptor (i.e. contracting officer or designee) would then verify that the conditions exist and accept the effort under that line item. The "Invoice 2in1" fixed price service only, combined invoice and acceptance document in Wide Area WorkFlow, should be used to submit the request for payment.

2. Under cost-reimbursement contracts, the recommended approach is for costs to be charged to a separate account, such as "Other Direct Cost - COVID 19." Contracting officers will need to work with the contractor to establish appropriate cost procedures. Additional efforts will be needed to adjust the estimated costs, again by segregating these on a separate line item. The information on supporting documentation would be retained for audit, while the interim voucher would be provisionally approved and paid under existing procedures.

3. Under Time and Materials or Labor Hour contracts, creation of a separate line item for this reimbursement under section 3610 authority should enable segregation of these costs, upon receipt of a request for equitable adjustment. The information on supporting documentation would be retained for audit, while the interim voucher would be provisionally approved and paid under existing procedures.

4. Because contractors can only recover once for section 3610 covered impacts, when a contract has a mix of fixed price and cost type line items, recovery need not be addressed separately for each contract type. In most cases the cost reimbursement approach is preferable.

Proper administration and traceability of actions under section 3610 will require special attention to contracting procedures and contract administration by contracting officers, the Defense Contract Audit Agency (DCAA), and contracting officer's representatives (CORs). Specifically, contracting officers are reminded to ensure that they document the dates when the applicable conditions begin and end; the extent of the conditions; specific reasons why the CARES Act applies; impact on cost and pricing; and the effect on contract performance. Furthermore, CORs must use the Surveillance and Performance Monitoring Module of the Procurement Integrated Enterprise Environment to document actions impacting contract performance due to the COVID-19 pandemic. Contracting officers should work with the CORs to ensure, when accepting services under fixed price contracts, CORs only accept completed services, as section 3610 does not allow acceptance of services that have not been delivered.

DCAA has oversight of billings under cost-reimbursement, time and materials, and labor hour line items. Contracting officers must include instructions on the proper type of payment request to be used as set forth in Defense Federal Acquisition Regulation Supplement (DFARS) 252.232-7006 Wide Area WorkFlow Payment Instructions (December 2018). Note that this version of DFARS 252.232-7006 eliminates the possibility of confusion about which type of payment request to use for cost-reimbursement line items. This policy change was designed to ensure that the contract auditor has visibility of the contract billings and is able to address the impact of the contractor's controls in ensuring that these costs are properly billed. CORs should continue to monitor the billings and notify the contract auditor of any concerns.

Remember, section 3610 is contingent upon the availability of funds and no adjustment to the contract or approval of a request for equitable adjustment should be made without sufficient funds. Contractors bear the burden of supporting any claimed costs, including claimed leave costs for their employees, allocated appropriately against individual contracts, with appropriate documentation and identifying credits that may reduce reimbursement.

To identify actions against contracts and other transactions, allowing payments authorized by section 3610, report them to the Federal Procurement Data System and enter "COVID-19 3610" at the beginning of the Description of Requirements data field on the contract action report (CAR). These CARs must also include the National Interest Action designation for identifying all COVID related actions (COVID-19 2020).

As additional information is available, updates will be provided to the Frequently Asked Questions document for Section 3610 of the CARES Act at https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html.

My point of contact for policy is [redacted]
[redacted] for pricing is [redacted]
[redacted] and for Wide Area WorkFlow is [redacted]
[redacted]

[redacted]
[redacted]
Acting Principal Director,
Defense Pricing and Contracting

Appendix B

Sample Captain of the Port (COTP) Order

U.S. Department of Homeland Security
United States Coast Guard

Commander
United States Coast Guard
Sector New York

212 Coast Guard Drive
Staten Island, NY 10305
Phone: (718)354-4356
FAX: (718)354-4125

16600
August 24, 2020

Master of M/T CABO FROWARD
Attn: GAC Shipping
200 Middlesex Turnpike STE 101
Iselin, NJ 08830

CAPTAIN OF THE PORT ORDER 634-20: M/T CABO FROWARD / 9311359 / PA

By the authority of the Ports and Waterways Safety Act, 46 U.S.C. § 70002, and Title 33, Code of Federal Regulations, Part 160, vested in me as the Captain of the Port (COTP), your vessel is authorized to enter port and conduct operations, with restrictions. Crewmembers on these vessels will be required under COTP authority to remain aboard the vessel except to conduct specific activities directly related to vessel cargo or provisioning operations.

The President found that unrestricted entry into the United States of certain defined aliens would be detrimental to the interests of the United States in Presidential Proclamation #9984, entitled "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures To Address This Risk." As a precautionary measure and in alignment with the proclamation, I am directing the above action. You must notify the Sector New York Command Center to request the recension of this Order and to provide any amplifying information that would justify its recension.

PENALTY FOR VIOLATING THIS ORDER

Section 70036 of Title 46 United States Code provides for penalties to any person who violates this order. The statute authorizes a maximum civil penalty in the amount of $25,000 as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, for each day of a continuing violation. The statute further states that:

"Any vessel that is used in violation of subchapter [I, II, or III] or this subchapter, or any regulations issued under such subchapter, shall be liable in rem for any civil penalty assessed pursuant to subsection (a) and may be proceeded against in the United States district court for any district in which such vessel may be found."

A willful and knowing violation of this order may also be tried as a Class D felony.

APPEAL OF THIS ORDER

Should you be aggrieved by this order, you may appeal under the procedures described in Title 33, Code of Federal Regulations, Section 160.7, and request reconsideration orally or in writing to me directly. Should you be further aggrieved, appeal orally or in writing through this office to the Commander, First Coast Guard District. However, if the appeal is made orally, a written submission is required within five days of the oral presentation. Crewmembers with a transit visa requesting travel through the United States to return to their country of origin may be permitted to disembark if requested, and authorized by me in writing. While any request or appeal is pending, all provisions of this order remain in effect.

CAPTAIN OF THE PORT ORDER 634-20: M/T CABO FROWARD / 9311359 / PA

COAST GUARD POINT OF CONTACT FOR THIS ORDER

All questions pertaining to this order may be directed to the Sector Command Center at (718) 354-4353.

TERMINATION OF THIS ORDER

This order will remain in effect until the vessel has departed from the Port of New York/New Jersey, or until rescinded by me in writing.

Captain of the Port
New York and New Jersey

Received by:_____Position:_____

Date: _____Time:_____

2

Appendix C

Example Memorandum to Exempt Members from State Quarantine Restrictions

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Example Memorandum to Exempt Members from State Quarantine Restrictions

MEMORANDUM FOR RECORD Date

SUBJECT: Notice of Required Duty Supporting Military Operations

1. The bearer of this memorandum has been designated as either a mission critical _____ [list branch of service] Employee or a _____ [list branch of service] Contractor performing mission critical functions.

2. In accordance with the Constitution and the laws of the United States, the bearer is exempt from all state, county, and municipal quarantine travel and movement restrictions imposed in response to the COVID-19 Public Health Emergency.

3. Please do not hinder or impede the bearer of this memorandum in the execution of their federal official duties.

4. The bearer of this memorandum is subject to COVID-19 screening protocols and procedures established by the Commander, United States _____ [list bearer's military command].

5. If there are any questions, or additional validation is required regarding the travel requirements of the bearer, please contact _____ [list bearer's unit] at _____ [list phone number and email of unit point of contact who is able to verify personnel identities and mission essential duties].

Command Signature Block

Pandemic RESPONSE Case study and AAR from the Covid-19 Health Emergency

Center for Law and Military Operations (CLAMO)
The Judge Advocate General's Legal Center and School
United States Army
Charlottesville, Virginia 22903-1781

2024