To understand the role of the National Guard in national defense and homeland security, one must understand the constitutional and statutory provisions governing use of military force by the federal and state governments.

It is important to have a clear understanding of current and evolving national defense and homeland security strategies and the organizational structure, funding sources and operational capabilities of today’s Army and Air National Guard.

During the Cold War, elected officials were often veterans or active reserve-component members whose personal experiences helped shape their understanding of these issues.

Today, few public officials are reservists or veterans. It is vital, therefore, that Governors, Adjutants General, National Guard members and the American people understand their responsibilities and that they be able to articulate the vital role of the National Guard in national defense and homeland security. This primer addresses these important constitutional and policy issues.

**Use of Military Force in Defense and Security of the United States**

Formation of the militias predates the founding of our country. The Massachusetts National Guard traces its lineage to the first regiments established by the General Court of the Massachusetts Bay Colony in 1636.

Each state, the U.S. territories and the District of Columbia (referred to herein as “the states”) have equally rich histories. Militia units patterned after the English militia system were common throughout the colonies and played a central role in our fight for independence. They also assured the security of new states as the nation expanded westward. Because of this role in the birth and expansion of our nation, the right of the states to raise, maintain and employ their own military forces (known since 1824 as the “National Guard”) is guaranteed by the U.S. Constitution and the constitutions and statutes of the several states.

As a unique state-based military force (albeit largely funded by the federal government and trained in accordance with federal standards), the National Guard is the only military force shared by the states and the federal government. It is a ready and reliable force accessible to the states for both state and combined state and federal purposes and to the federal government for federal purposes.

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**State Active Duty**

States are free to employ their National Guard forces under state control for state purposes and at state expense as provided in the state’s constitution and statutes. In doing so, Governors, as commanders-in-chief, can directly access and utilize the Guard’s federally assigned aircraft, vehicles and other equipment so long as the federal government is reimbursed for the use of fungible equipment and supplies such as fuel, food stocks, etc.

This is the authority under which Governors activate and deploy National Guard forces in response to man-made emergencies such as riots (e.g., World Trade Organization meeting, Seattle, 1999), civil unrest (e.g., World Bank meeting, District of Columbia, 2000) and terrorist attacks (e.g., World Trade Center attacks, New York City, Sept. 11, 2001).

Unlike active-duty and federal military reserve forces such as the Army and Air Force Reserves, all National Guard personnel and equipment (or so much thereof as are not already “federalized”) are directly accessible to the Governor in state or local emergencies and as otherwise provided by state law. Such service is performed in accordance with state law; National Guard members performing duty at the call of the Governor are therefore said to be in “State Active Duty status,” meaning, among other things, that command and control rests solely with the Governor and the state or territorial government. Execution of state active-duty missions is accomplished by delegation of authority from the Governor to the Adjutant General.

**Title 32 Duty**

Article 1, Section 8 of the U.S. Constitution (the Militia Clause) also authorizes use of the National Guard under continuing state control but in the service of the federal government to “execute the laws of the Union, suppress insurrections and repel invasions.”

These provisions are unique to the National Guard and are the authority by which Governors answered the President’s request for deployment of National Guard forces to our nation’s airports following the terrorist attacks of Sept. 11, 2001.

State-controlled National Guard forces were deployed by Governors at federal expense and in compliance with prescribed federal operational standards to assure aerial port security and compliance with federal interstate commerce and aviation laws. Unlike subsequent border-security missions (described below), National Guard forces mobilized within hours and promptly deployed to airports where they remained under state control for the duration of the six-month airport security mission. These arrangements preserved state-level management of National Guard personnel and assured maximum flexibility for responding to other unforeseen or emerging state and federal requirements.

These and similar domestic military missions have been performed by the National Guard at various times since Sept. 11, 2001, under the authority of Title 32 United States Code (USC); National Guard members performing such duty are therefore commonly said to be serving in “Title 32 duty status”, meaning, among other things, that command and control remains with the Governor and the state or territorial government even though the Guard forces are being employed “in the service of the United States” for a primary federal purpose.

Notwithstanding clear constitutional authority for these arrangements (state control of Guard operations having a primary federal purpose or a shared state-federal purpose), questions were raised about the statutory authority for Title 32 domestic operations. Statutory authority for National Guard training at federal expense is clear.

The argument, however, was that 32 USC 502(f), which authorizes use of the National Guard at federal expense but under continuing state control for “training or other duty”, was intended to authorize “training” only, as opposed to domestic “operations.” Recent enactment of 32 USC 901 et seq., resolves any such ambiguity by authorizing the Secretary of Defense to “provide funds to a Governor to employ National Guard units or members to conduct homeland defense activities that the Secretary determines to be necessary and appropriate.” (32 USC 902).

The statute defines “homeland defense activities” as activities “undertaken for the military protection of the territory or domestic population of the United States, or of the infrastructure or other assets of the United States determined by the secretary of defense as being critical to national security, from a threat or aggression against the United States.” (32 USC 901(1)). The Secretary of Defense may request domestic use of National Guard forces and fund such operations (as was done with the Governors’ support for airport security in 2001-2002). “A Governor of a state may [also] request funding assistance for the homeland defense activities of the National Guard of [their] State.” (32 USC 906).

The Adjutants General Association of the United States (AGAUS) is coordinating with the Assistant Secretary of Defense for Homeland Defense in the development of implementing regulations. Title 32 USC 901 et.seq. therefore authorizes use of the Guard under continuing state control but at federal expense, when approved by the Secretary of Defense, for a wide variety of operations, including, when appropriate, protection of oil refineries, nuclear power plants and other critical infrastructure.
**Title 10 Duty**

The War Powers Clause of the Constitution grants the federal government plenary authority to raise military forces and to employ such forces, including mobilized (sometimes referred to as “federalized”) National Guard units, under federal control and at federal expense for national defense purposes.

This is the authority under which the federal government mobilizes and deploys National Guard units and personnel for combat, combat support and combat service support missions at home and throughout the world. Such service is performed under the authority of Title 10 USC; service members performing such duty are therefore commonly said to be in “Title 10 duty status,” meaning, among other things, that command and control rests solely with the President and the federal government.

Since the Army, Navy, Air Force, Marine and Coast Guard Reserves, like their active-duty counterparts, are federal military forces wholly controlled by the federal government, they are not directly accessible by Governors and duty performed by such personnel is always in “Title 10 status.” When performed within the United States, Title 10 duty (including Title 10 duty performed by National Guard personnel) is subject to a number of legal restrictions, including provisions of the Posse Comitatus Act (18 USC 1385), which severely limits the use of federal military forces in support of domestic law enforcement operations.

When employed at home or abroad in Title 10 status, National Guard forces are stripped of all state control and become indistinguishable elements of the federal military force. This was the authority used by the federal government to mobilize and deploy National Guard forces to augment federal law enforcement agencies at the Canadian and Mexican borders in the spring and summer of 2002.

In stark contrast to the speed and efficiency with which Governors deployed National Guard troops to our airports (more than 450 airports were secured within a matter of hours or days), it took more than six months for the Defense Department to agree to a memorandum of understanding with the U.S. Border Patrol and increased security at our nation’s borders was delayed until these negotiations and legal arrangements had been finalized.

**Duty Statuses Summarized**

As explained above, federal and state constitutions and statutes provide the primary authority for use of military force by the federal and state governments. These provisions, in so far as they apply to the National Guard, reflect the constitutional balance of power between the sovereign states and the central federal government. National Guard forces are unique among all other military components in that they may be used in one of three legally distinct ways:

1. by the Governor for a state purpose authorized by state law (state active duty); or
2. by the Governor, with the concurrence of the President or the President’s designee (e.g., the Secretary of Defense), for shared state/federal purposes or for a primary federal purpose (Title 32 Duty); or
3. by the President for a federal purpose authorized by federal law (Title 10 duty).

When in state active duty or Title 32 status, National Guard forces remain under the operational, tactical and administrative control of the Governor and the state government. This authority is reposed in the Governor, as commander in chief, and executed by the Adjutant General, as the state’s senior military commander.

By contrast, Title 10 military forces (active duty, reserve and “federalized” National Guard forces) are under the exclusive control of the President and the federal government and are beyond the access, control or supervision of the Governor even when operating within his or her state.

Each of these operational statuses carries significant operational, fiscal, force management and legal advantages or disadvantages that call for conscious decisions about how the National Guard should be employed domestically. Use of the National Guard under state control (e.g., Title 32) for domestic missions always protects vital state interests and nearly always maximizes attainment of national defense and homeland security objectives as well. Regrettably, these considerations are not always understood or taken into account by federal authorities. The National Governors Association (NGA) has therefore adopted the following position:

“Governors believe when the National Guard members perform domestic missions they should do so in Title 32 USC status rather than Title 10 USC status, unless the President has called them in Title 10 for a federal mission requiring federal troops, such as to repel an invasion. In Title 32 status, National Guard members can continue to train with their regular units and in times of federal mobilization these Guard members are available to deploy with their units. The Governors further note that Title 32 status for domestic deployments avoids all posse comitatus issues.” (NGA HR-6, Army and Air National Guard Policy, most recently adopted effective Winter Meeting 2003 – Winter Meeting 2005).

**Past and Emerging National Defense and Homeland Security Strategies**

One of the first things the central federal government did upon attaining independence from England two century was form a standing army to supplement the war-tested organized militias. The founding fathers thought the United States needed a standing army to take our rightful place among the nations of the world.

The full-time force was relatively small, however, and national defense strategy continued to rely heavily on the states’ military forces. State militias were used to expand the size of the federal force in times of peril. They were then demobilized at the conclusion of each foreign engagement. This reliance on state military forces remained a central tenet of our national defense strategy until the dawn of the nuclear age.

At the end of World War II, in reaction to the Soviet Union’s expansionist ideology and growing nuclear arsenal, we maintained a large standing military force for the first time in our nation’s history and deployed that force throughout the world to “contain” the Soviet Union and its allies.

Today’s National Guard force structure...
and the federal statutes and regulations governing use of the Guard are largely a product of these Cold War defense strategies. Although the federal government funded the National Guard throughout the Cold War, the National Guard had “hand-me-down” equipment and was resourced at a lower tier of readiness, the assumption being that large, forward deployed active-duty forces could initiate and sustain combat operations for a long period of time permitting months or even years for “strategic” Guard and reserve forces to be properly equipped, trained, certified, mobilized and eventually deployed.

State Laws re: Use of the Guard

Many 1940’s and 1950’s-era state military statutes reflect a similar view of the Guard as a “strategic” reserve or a later responding “reaction” force. Many state statutes, for example, allow the Governor to activate the Guard only in response to a disaster that has already occurred or a life safety threat that is “imminent.” These statutes prevent the Governor from using the Guard to plan, train and exercise with other emergency responders, conduct critical infrastructure vulnerability assessments or otherwise draw upon National Guard skills that materially advance the state’s terrorism prevention strategies.

Nearly half of all National Guard members have performed overseas combat duty in the past three years. They have unique skills that are in short supply in the civilian community. National Guard members who have been deeply involved in foreign port security operations, for example, can contribute significantly to domestic port security vulnerability assessments and help construct critical infrastructure and key asset protection plans for state and local governments.

If these activities are undertaken in state active duty status, they can be funded with Department of Homeland Security grant monies. Under many existing state laws, however, Governors are unable to access National Guard subject matter experts in the absence of specific actionable intelligence rising to the level of an “imminent” domestic threat.

States have begun addressing these self-imposed restrictions by advancing agency-request or Governor-request legislation that authorizes the Governor to activate National Guard units or individual subject matter experts for planning, training, exercising and other disaster prevention purposes.

Total Force Policy

The presence of large active duty forces allowed the U.S. to engage in a strategy of global engagement after World War II, including combat operations in Korea and, later, Vietnam, with marginal use of National Guard and reserve forces. Against the advice of military leaders, President Johnson prosecuted the Vietnam conflict with career active duty personnel and draftees rather than mobilizing Guard or reserve units.

As the Vietnam conflict dragged on, public support for the war effort eroded. When the conflict ended, federal authorities adopted the Total Force Policy (also known as the “Abrams Doctrine”), a policy that rebalanced and reapportioned combat, combat support and combat service support resources from active-duty services to the National Guard and federal reserve components.

The reallocation of resources was intended to assure that Guard and reserve forces would have to be used from the early stages of any future conflict, thereby prompting a national discussion about whether to initiate the foreign military engagement in the first place.

A secondary reason for the policy shift was to take advantage of the cost savings inherent in the Guard and reserves. Unlike active-duty counterparts, National Guard members are compensated only when actually performing military duty. Their fringe benefits and eventual retirement allowances are also substantially less than full-time active duty personnel.

The rebalancing of military force structure to more cost efficient Guard and reserve components has allowed the United States to maintain global reach and global power for the past three decades at a cost of no more than 3 percent to 4 percent of our gross domestic product.

“Total Force” Funding and Equipping

The Total Force Policy was especially important following dissolution of the Soviet Union and the reunification of Germany in the early 1990s. When the Cold War ended, the federal government downsized each of the active duty services by 50 percent to 60 percent. The result was a reversion to our historic reliance on the National Guard and reserves.

Following adoption of the Total Force policy in the late 1970’s, the Air Force began integrating the Air National Guard (ANG) into Air Force operations and funding the ANG at close to 100 percent of validated Air Force staffing and equipment requirements. These actions transformed the ANG from a strategic reserve to a combat ready and combat-tested operational reserve force.

With Air Force funding for full-time manning, equipment, facilities, planning, training and exercising on par with active-duty units, the ANG has become a force that responds in hours to federal or state mission requirements. Inclusion in the Total Force also buoyed ANG morale, resulting in the Air Force being able to meet all mission requirements without having to involuntarily mobilize ANG personnel.

Until the beginning of the recent Global War on Terrorism, the Total Force Policy unfortunately failed to spark a comparable level of Army support for the Army National Guard (ARNG). Throughout most of the period described above, ARNG full-time staffing has remained mired at 55 percent or less of the Army’s validated full-time staffing requirements.

Until the just-in-time fielding of equipment for ARNG units deploying to Afghanistan and Iraq, modern equipment also continued to be disproportionately allocated to active duty forces, resulting in ARNG units remaining equipped with older, hand-me-down equipment that is not interoperable with active duty units.

The Army also remains wed to time consuming World War II-era force mobilization processes that require months for Army National Guard units to mobilize, re-train, certify and eventually deploy. The impact on the states and on national
homeland security is that while Air National Guard units are pre-trained, pre-certified, mobilized and deployed in a matter of hours or days (thereby making them available more often and for longer periods for state missions), Army National Guard units are forced to adhere to the Army’s protracted “train, mobilize, re-train, certify and deploy” process which usually requires 18 months of Title 10 federal service to produce 12 months or less of actual overseas duty.

During this 18-month period, affected ARNG personnel and equipment are no longer accessible to the Governor and no longer available for state emergencies.

As ARNG units complete their current overseas missions and leave equipment behind for the follow-on forces, many of our units are returning to state control with unresolved equipment shortfalls and often with a substantially degraded capacity for responding to state missions. These and other equipment, staffing and funding challenges require leadership and continued vigilance on the part of Governors and their Adjutants General.

**Total Force Policy and Transnational Terrorism**

Transnational terrorism makes our militia-nation construct and the core tenets of the Total Force Policy more relevant and more essential than ever before. The American homeland is now part of a global battle space and, with the proliferation of weapons of mass destruction, could easily become the epicenter of that battle space, exposing citizens to chemical, biological, radiological, nuclear or conventional high-yield explosive attacks.

In this unprecedented lethal threat environment, national defense and homeland security are a shared responsibility of the federal government and the several states. Bright lines between national defense and homeland security and bright lines between federal and state responsibilities and capabilities produce unintended gaps and unacceptable risks.

State constitutions and statutes give Governors emergency powers that are often more extensive and more responsive than the emergency powers of the President. Under the aegis of the national Emergency Management Assistance Compact (EMAC), 48 of 50 Governors can support one another with immediate state-to-state emergency assistance.

The Governors’ ability to directly task ANG unit equipped C-130s, KC-135s and other tactical airlift aircraft and related equipment is critical to the states’ collective ability to respond to local, regional and national emergencies. These aircraft have proven crucial in intra-state and interstate responses to disasters ranging from hurricanes to terrorist attacks.

Just as National Guard personnel can be directly accessed by Governors and the President alike in times of national peril, so too unit equipped National Guard aircraft and other unit assigned National Guard equipment can be directly accessed by Governors and the President in times of crisis.

When there are conflicting requirements, the power of the President unquestionably prevails under the War Powers clause of the Constitution. When there is no conflict, however, Governors’ direct access to aircraft and other unit equipped materials provides a crucial safety net for individual life safety and for our collective national defense and homeland security.

In the near-term aftermath of the Sept. 11, 2001 terrorist attacks, it took more than 6 months for federal agencies directly accountable to the President to reach agreement on emergency support arrangements for the security of our borders. States cannot afford six months of wrangling over a federal-state emergency response memorandum when the next disaster strikes. With properly equipped National Guard units, including unit equipped ANG aircraft, Governors can respond to domestic emergencies as circumstances require while preserving the President’s ability to carry out all federal requirements.

Although the focus of this primer is on conventional military operations and support to domestic authorities, it should be noted that states are also deeply involved in national defense and homeland security operations through State Partnership Program (SPP) alignments of state military departments with partner nations throughout the world.

The SPP was begun by the U.S. State Department, the Department of Defense and the National Guard Bureau as a way of stabilizing U.S. relations with newly independent countries of the former Soviet Union. The Pennsylvania National Guard, for example, was paired with Lithuania, one of the first Republics to gain independence from the Soviet Union. The Illinois National Guard was paired with Poland, Alabama with Romania, and so on.

The program proved so successful that it was expanded to central Asia (e.g., Arizona and Kazakhstan), Central and South America (e.g., Kentucky and Ecuador) and Southeast Asia (e.g., Washington and the Kingdom of Thailand). More recently, state National Guards are being paired with nations in Africa (e.g., North Dakota and Ghana) and the Middle East (e.g., Colorado and Jordan).

These partnerships have focused on issues such as emergency responder training, port security and critical infrastructure vulnerability assessments, border security, narco-terrorism strategies, national emergency call center systems and similar initiatives that make these countries more capable of surviving terrorist threats and of increasing the security of outbound passenger and cargo traffic from these countries to aerial and sea ports in the continental U.S.
The F/A-22 Raptor, the Air Force’s newest fighter, is in final testing.


The National Strategy for Homeland Security calls for shared state and federal accountability for the security of our homeland. As an organization with shared state and federal mission objectives, the National Guard is the perfect fusion agent for synchronizing state and federal defense and homeland security efforts.

At the national level, the Department of Defense and Department of Homeland Security still draw bright lines between “defense” and “security” activities. Neither wants to pay for or encroach upon the mission prerogatives of the other.

At the state level, the National Guard straddles the operational, fiscal and mission lanes of these federal agencies and has mission responsibilities under both overarching national strategies. In more than half the states and territories, the Military Department is also responsible for the state’s emergency management functions and for administering Department of Homeland Security grants in addition to Department of Defense funding.

As a state agency, the military department can also place National Guard members on state active duty (to the extent permitted by state law) and assign them duties that qualify for reimbursement under Department of Homeland Security (ODP) grants. As the Governor’s designated homeland security advisor in many states, the Adjutant General also deals routinely with the Secretary of Homeland Security in addition to civilian and uniformed officials of the Department of Defense.

These National Guard missions and responsibilities add immeasurably to the state’s overall domestic security preparedness. They also make the adjutant general a crucial “go to” official in time of crisis. The Governor expects the adjutant general to exercise control over all military forces operating within his or her state. This expectation is satisfied when National Guard forces employed within the state are in State Active Duty or Title 32 status. The expectations and requirements are also met when National Guard forces from supporting states are operating within a supported state.

In such circumstances, the adjutant general of the supporting state routinely sur-

renders command and control of deployed forces to the adjutant general of the supported state. Such is not the case when Title 10 federal forces are deployed domestically. Active-duty commanders historically insist on retaining control over federal forces during domestic emergencies. The Adjutants General believe this policy should be changed.

Governor Accountability and Governor Control

Every state now has a National Guard Joint Force Headquarters with liaison officers from the active duty services. The Adjutants General believe Governors should exercise control over all military forces engaged in emergency response and security operations within their state (the focus being on the Governor’s control of in-state military operations, as opposed to active duty forces simply based in or transiting the state).

State control can be maintained by appointment of a National Guard task force commander with combined Title 32/Title 10 authority. Title 32 USC 325 provides for the appointment of a National Guard officer familiar with the state and local area of operations to command in both a state (Title 32) and federal (Title 10) status thereby assuring a state-federal unity of effort. The dual status appointment requires the authorization of the President and the consent of the Governor.

The arrangement was used with great success in 2004 for the G-8 Summit, the Democratic National Convention, the Republican National Convention, and Operation Winter Freeze (a national security event in the northeast). Similar unity of effort and control can be achieved without the formality of 32 USC 325 by simply having federal authorities direct Title 10 personnel to operate under the “supervisory authority” of the state’s task force commander.

The question is when, not if, the next domestic disaster will occur. The question is also when, not if, federal military forces will be deployed domestically in response to a humanitarian disaster or emergency. The question for Governors is whether they will be bystanders or whether they will control all military forces operating within their state.

Unmanned aerial vehicles are among the Air Force’s emerging missions.

The F/A-22 Raptor, the Air Force’s newest fighter, is in final testing.
Transformation of the ANG and ARNG

Current Air Force Base Realignment and Closure (BRAC) recommendations represent a radical departure from the formerly inclusive integration of ANG units and personnel with Air Force operations. The net result is a harsh repudiation of the Total Force Policy.

The Air Force seeks to take the assigned aircraft and related equipment away from 29 ANG flying units. This would leave one-third of the ANG’s flying units without aircraft and several states, for the first time in modern history, without a single ANG flying unit. If approved by the BRAC Commission, KC-135 and C-130 unit equipped aircraft historically used by Governors in responding to domestic emergencies will be under the exclusive control of the active-duty Air Force. Fighter aircraft responsible for the air sovereignty of the U.S. will no longer be stationed within meaningful response times to many of our nation’s largest population centers.

Personnel authorizations for these gutted ANG units will ostensibly remain, at least for a time, but without immediate follow-on missions funding support will quickly evaporate and our nation’s most experienced and cost-efficient subject matter experts (pilots and mechanics with thousands of hours of experience in their weapons systems) will predictably leave the service of their state and country. To make matters worse, the Air Force does not project Air National Guard participation in any of their future aircraft systems.

Although the purpose of the BRAC Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense, 83 percent of the Air Force recommendations pertain to the most cost-efficient part of its force, the Air National Guard, and the majority of these recommendations have nothing to do with real estate or capital structures.

The ANG changes, by the Air Force’s own calculation, would produce very few savings and those savings do not take into account obvious costs. As for homeland security considerations, the Adjutants General can find only two out of 1,800 BRAC data-call questions that were related to homeland defense or homeland security and neither of them were calculated in the Air Force Mission Compatibility Index rating.

None of the Air Force actions was revealed to the Adjutants General prior to release of the BRAC recommendations. In fact, the Adjutants General and, by extension, the Governors were intentionally and systematically excluded from the BRAC process.

By contrast, the Army has been striving in the past few years to make the ARNG a more integral and seamless part of the total Army structure. Although funding and resourcing challenges still abound, the Army has conferred with Adjutants General in good faith concerning current and future force structure initiatives. The AGAUS has therefore not voiced any criticism or concern about the Army’s BRAC recommendations.

Conclusion

The United States enters the 21st Century with unresolved questions about what our national defense and homeland security strategies should be. The life safety of our citizens and the future of our nation hang in the balance. Now, as at the founding of our nation, the states and the central federal government must work in harmony to assure our collective safety and security. Governors, as state commanders in chief, must take a central role in shaping our national policy on use of military force. The Adjutants General stand ready to assist in this historic endeavor.