

Been There, Doing That in a Title 32 Status
The National Guard Now Authorized to Perform Its 400-Year Old Domestic Mission in Title 32 Status

*Major Christopher R. Brown**

*The events of September 11th, 2001, required the National Guard to change from a strategic reserve . . . [to] an operational force capable of generating capabilities here at home for homeland defense*¹

I. Introduction.

Since the first settlers reached the new world, militia members have protected and defended the lives and properties of their fellow community members. The individual states have and will continue to call upon their organized militias²—their National Guard³—to provide these same protections and defenses prior to, during, and in the wake of various natural and man-made domestic threats and disasters. As the states continued to control and fund their National Guard while performing these historical militia-based domestic *operations*, our Federal Government incrementally funded the *training*⁴ of these same National Guard forces to fight the nation’s wars.

National Guard members would ultimately perform this federal wartime mission training under Title 32 of the United States Code, in a “Title 32 status.”⁵ Title 32 status and authority finds its roots in the Constitution;⁶ however, the use of federal funding under Title 32 for the National Guard to perform domestic operations to protect citizens’ lives and property was, until recently, limited at best. However, since 2001, with the recognition of new national domestic threats coupled with the historic capabilities of the National Guard, Congress has significantly increased the authority for the Federal Government to fund these National Guard domestic operations in Title 32 status.⁷

This article will navigate the historical path the Federal Government has taken in its funding of the National Guard serving in a Title 32 status—initially to *train*, now also to *operate*. Through the examination of our nation’s earliest and continuing reliance upon its militia capabilities in the domestic setting, this article will demonstrate how the United States, both individually and collectively, benefit from this recent, expanded operational use of Title 32 status.

* Judge Advocate, Army National Guard of the United States, Alabama Army National Guard. Presently assigned as Associate Professor of Law, International and Operational Law Division, The Judge Advocate General’s Sch. & Legal Ctr., U.S. Army (TJAGLCS), Charlottesville, Va. LL.M., Military Law (with Administrative and Civil Law Speciality), 2006, TJAGLCS; J.D., 1996, Cumberland School of Law, Samford University, Birmingham, Ala.; B.A., 1992, University of Alabama, Tuscaloosa, Ala. Previous assignments include National Guard Bureau, Arlington, Va., 2003–2005 (Administrative Law Attorney, 2003; Operational Law Attorney, 2004–2005); Special Assistant U.S. Attorney, Eastern District of Virginia, Alexandria, Va., 2003–2004, 81st Regional Support Command, 1998–2003 (Administrative Law Chief, 2001–2003; Administrative Law Attorney, 1998–2001); 122d Support Group, Selma, Alabama, 1997–1998 (Trial Counsel); Senior Print Editor, USAREUR (FWD) Public Affairs Office, Tazsar, Hungary, 1996–1997; 131st Mobile Public Affairs Detachment, 1989–1997 (Broadcastjournalist 1993–1997; Photojournalist, 1990–1993); 31st Support Group, Montgomery, Ala., 1987–1989 (Photojournalist). Member of the bars of Alabama, the Middle District of Alabama, and the U.S. Supreme Court.

¹ *Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 109th Cong. 10 (2005) (statement of Lieutenant General H. Steven Blum, Chief, National Guard Bureau), available at <http://www.ngb.army.mil/media/transcripts/hasctranscriptsblumandschultz2feb05.rtf>.

² The classes of the militia of the United States include “(1) the organized militia, which consists of the National Guard and the Naval Militia; and (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.” 10 U.S.C. § 311 (2000). This article will not discuss the unorganized federal or state militias.

³ For the remainder of this article, the National Guard consists of the individual National Guards of the fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

⁴ See *infra* Part III, IV.

⁵ See *infra* part IVB.

⁶ See *infra* Part IIIA.

⁷ See *infra* Part V.

II. The Colonial Militias

Native Indians shot arrows at the landing party of the first English settlers as they approached the New World.⁸ The settlers withdrew, sailed further south, landed and established the Jamestown Colony in April, 1607.⁹ Shortly after establishing the 100-person settlement, the settlers repelled an assault by 200 native Indian braves.¹⁰ Within a week of the braves' assault, drawing from the English militia systems familiar to the settlers, standing orders were issued requiring the constant carrying of weapons, organized Saturday military training,¹¹ and compulsory militia service.¹²

A few years later in 1620, the Pilgrims reached the New World and established the Plymouth Colony.¹³ The Pilgrims also feared native Indian raids and named Captain Miles Standish as their militia commander, who incorporated militia training as an integral part of the colony's social structure.¹⁴ In the next decade, the Puritans established the Massachusetts Bay Colony and between the years of 1630 and 1636, the Puritan militias evolved from captain-commanded companies to colonel-commanded regiments.¹⁵ On 13 December 1636, the Massachusetts government formally established its militia regiments; the date recognized as the birth date of the National Guard in America.¹⁶ A year later, in 1637, the American Minuteman, the historic symbol of the National Guard, was created due to the certainty of further native Indian conflicts.¹⁷ At any one time, one-third of the Massachusetts minutemen had to be "ready at half an hour's warning" to respond to alarms.¹⁸

By the Revolutionary War, all of the original thirteen colonies, except Pennsylvania, established compulsory militias.¹⁹ Militiamen fired "the shot heard 'round the world'"²⁰ in Concord, Massachusetts, on 19 April 1775, in the beginning of the war that would free the colonies from the British crown.²¹ These colonial militias served with the victorious Continental Army; however, the Continental Army Commander, General George Washington, was somewhat critical of the militiamen who served in his Army, calling them "hooping, hallowing, Gentlemen-Soldiers!"²² Nonetheless, he recognized that "[b]y keeping up in peacetime 'a well regulated, and disciplined Militia,' we shall take the fairest and best method to preserve, for a long time to come, the happiness, dignity, and Independence of our country."²³

⁸ MICHAEL D. DOUBLER, CIVILIAN IN PEACE, SOLDIER IN WAR 11 (2003).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 12.

¹² *Id.* at 14 ("All males aged 16–60, except for 'olde planters' and 'newe commmers,' were liable for militia duty . . .").

¹³ *Id.*

¹⁴ The Pilgrims conducted a militia muster and an exercise of arms as part of the first Thanksgiving celebration in 1621. *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 16; see also About the Army National Guard, National Guard, <http://www.ngb.army.mil/About/arnng.aspx> (last visited May 27, 2008).

¹⁷ DOUBLER, *supra* note 8, at 17.

¹⁸ *Id.*

¹⁹ *Id.* at 19 ("William Penn established Pennsylvania in 1681, but the heavy pacifist influence . . . precluded the establishment of a militia until the middle of the following century." (citations omitted)).

²⁰ "The shot heard 'round the world' comes from the opening stanza of Ralph Waldo Emerson's *Concord Hymn* (1837) referring to the beginning of the American Revolutionary War. It states, "By the rude bridge that arched the flood, Their flag to April's breeze unfurled; Here once the embattled farmers stood; And fired the shot heard 'round the world.'" The Phrase Finder, <http://www.phrases.org.uk/meanings/shot-heard-around-the-world.html> (last visited May 27, 2008).

²¹ DOUBLER, *supra* note 8, at 33.

²² JOSEPH J. ELLIS, HIS EXCELLENCY 28 (2004); see also Frederick Bernays Weiner, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 183 (1940).

²³ See DOUBLER, *supra* note 8, at 39 (quoting George Washington, *Sentiments on a Peace Establishment* (1784)).

III. The Federal Government Incrementally Regulates, Disciplines and Funds the State Controlled Militias²⁴

A. The U.S. Constitution

Following independence, the Founding Fathers chose to maintain a small standing Army and rely on the militias to provide military support.²⁵ During the Constitutional Convention in 1787, many convention members favored a strictly federally controlled militia, but others recognized many states would not consent to this proposition.²⁶ The debates resulted in both federal and state control of the militia through the constitutional “militia clauses.”²⁷ Within the militia clauses, the Federal Government exercised its control in that Congress was “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”²⁸ Congress was also “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States”²⁹

While it was clear that Congress was to provide for governing, or controlling the militia while in federal service, the states retained their control in “the Appointment of the Officers, and the Authority of training the militia according to the discipline prescribed by Congress.”³⁰ These provisions serve as the constitutional basis of Title 32—the use of federal funds to “organize,” “arm,” and “discipline” the militias while the states maintained control of their militias while “training” to federal standards. In 1791, Congress affirmed the necessity of the militias for the nation’s future in the Second Amendment to the U.S. Constitution: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”³¹

While the U.S. Constitution and the Second Amendment provided authority “to provide” for the militia, they remained silent on the actual funding of the militias’ “training” to federal standards while under state control.³² Moreover, no federal funding was provided for the individual militias performing those state controlled domestic operations ensuring “the security of a free state.”³³

B. 1792—The Uniform Militia Act³⁴

Within five years of the Constitutional Convention, Congress increased the nation’s ability to rely on the militias for national defense when it exercised its constitutional power to organize the militia by passing the Uniform Militia Act of 1792 (Militia Act).³⁵ The Act required compulsory militia service,³⁶ but required no drills or musters. It further established that each state was to have an adjutant general,³⁷ who would report the condition of his militia once a year to the “commander-in-

²⁴ 32 U.S.C. § 102 (2000) (“In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the [National Guard] . . . be maintained and assured at all times.”).

²⁵ GARY HART, *THE MINUTEMAN* 100 (1998). This was largely due to fear of the misuse of a large standing Army. Individual states also stated the dangerousness of standing armies in their own constitutions. “North Carolina and Pennsylvania included this interdiction in their constitutions: ‘As standing armies in time of peace are dangerous to liberty, they ought not be kept.’” *Id.*

²⁶ The militia provisions were one of the most vulnerable points of attack in the public debate of the Constitution. See generally WILLIAM H. RIKER, *SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY* 15 (1957).

²⁷ See, e.g., DOUBLER, *supra* note 8, at 65.

²⁸ U.S. CONST. art. 1, § 8, cl. 15.

²⁹ *Id.* art. 1, § 8, cl. 16.

³⁰ *Id.*

³¹ *Id.* amend. II.

³² *Id.* art. 1, § 8, cl. 16.

³³ *Id.* amend. II.

³⁴ An Act More Effectually to Provide for the National Defence [sic] by Establishing an [sic] Uniform Militia Throughout the United States, 1 Stat. 271 (1792) [hereinafter Act of 1792].

³⁵ *Id.*; see also e.g., Jeff Bovarnick, *Perpich v. United States Department of Defense: Who’s in Charge of the National Guard?*, 26 NEW ENG. L. REV. 453, 459 (1991).

³⁶ Act of 1792, *supra* note 34, § 1 (“That each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years . . . shall severally and respectively be enrolled in the militia . . .”).

³⁷ *Id.* § 6.

chief of the said state,”³⁸ and the President of the United States.³⁹ In order to create uniformity, the Militia Act stated that the militias would be similarly organized;⁴⁰ however, the Militia Act’s intent to similarly organize the militias failed because the Militia Act did not require the states to comply with much of the outlined organizational structure.⁴¹ Because the law did not require compliance, the law was considered unenforceable.⁴² Consequently, the Militia Act proved unsuccessful in providing an effectively organized militia as militia performance was unreliable in the War of 1812, and the Civil War.⁴³

Militia performance was presumably subpar because throughout our young nation’s history, the Federal Government apportioned no funds in exercising its constitutional authority of organizing, arming and disciplining the various state militias. The costs, therefore, fell on the individual states or their individual citizens. For example, Congress required the militia members to equip themselves.⁴⁴ More importantly, Congress apportioned no federal funding to “train” the militias for federal service. Little changed in succeeding decades as even through the Civil War period Congress demonstrated scant interest in arming and funding the state militias. Ultimately, however, as the 19th Century progressed and the nation began to heal from the ravages of internal war, Congress became more engaged and began to increase the authority for federal funding of the militias.

C. 1887—The Act of February 12⁴⁵

In 1887, Congress first authorized annual federal funding of the militias within the states when \$400,000 was apportioned among the several states and territories, under the direction of the Secretary of War,⁴⁶ for “the purpose of providing arms, ordnance stores, quartermaster’s stores, and camp equipage for issue to the militia.”⁴⁷ Annually, the governors were to account for that received, “as such arms, ordnance, and quartermaster’s stores and camp equipage . . . shall remain the property of the United States.”⁴⁸

Nonetheless, even with these federal appropriations for militia equipment, the militia’s performance in 1898 during the Spanish-American War was viewed as “undistinguished and ineffective.”⁴⁹ As a result, as our nation entered the 20th century, Congress held “extensive hearings” to determine what reforms were necessary in the U.S. military.⁵⁰ Militia reforms were obviously needed, as since America’s independence, Congress had failed to create the “well-regulated militia” envisioned by Washington.⁵¹

³⁸ *Id.* § 10; *see also* JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 53 (1983) (stating all fifteen states of the Union enacted laws making the governor the commander-in-chief of the militia).

³⁹ Act of 1792, *supra* note 34, § 10.

⁴⁰ *Id.* § 31 (“[T]he militia of the respective states shall be arranged into divisions, brigades, regiments, battalions, and companies, as the legislature of each state shall direct; . . .”).

⁴¹ *Id.* § 3 (“That if the same be convenient, each brigade shall consist of four regiments; each regiment of two battalions; each battalion of five companies; each company of sixty-four privates.”) (emphasis added).

⁴² MAHON, *supra* note 38, at 52.

⁴³ *See* Bovarnick, *supra* note 35, at 453, 458.

⁴⁴ Act of 1792, *supra* note 34, § 1 (“That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty-four cartridges, . . .”).

⁴⁵ An Act . . . Making an Annual Appropriation to Provide Arms and Equipments [sic] for the Militia, ch. 129, 24 Stat. 401, 402 (1887).

⁴⁶ *Id.* § 2.

⁴⁷ *Id.* § 1.

⁴⁸ *Id.* § 3. This remains true today as “[a]ll military property issued by the United States to the National Guard remains the property of the United States.” 32 U.S.C. § 710(a) (2000).

⁴⁹ Bovarnick, *supra* note 35, at 460.

⁵⁰ MAHON, *supra* note 38, at 138.

⁵¹ *See* Bovarnick, *supra* note 35, at 458.

D. 1903—The Dick Act⁵²

Significant reforms in militia organizational requirements began when President McKinley signed the Dick Act on 21 January 1903. The Dick Act repealed the Uniform Militia Act of 1792 and created the organized militia, now known as the National Guard.⁵³ It implemented required National Guard training,⁵⁴ and required “[t]he organization, armament, and discipline of the organized militia . . . shall be the same as that . . . prescribed for the Regular (Army).”⁵⁵ Congress further granted the President authority to call forth the militia “whenever the United States is invaded, or in danger of invasion . . . , or of rebellion against the authority of the Government of the United States, or the President is unable, with the other forces at his command, to execute the laws of the Union”⁵⁶ Additionally, when the militias were called into federal service “at the place of company rendezvous,”⁵⁷ militia members were to receive the same pay and allowances as provided to Regular Army personnel.⁵⁸

Most significantly, the Act authorized what would eventually serve as the basis for the federally funded, state controlled Title 32 “training status.” The Secretary of War was authorized, at the governor’s request, to fund “so much of (the militia’s) allotment out of the said annual appropriation . . . , as shall be necessary for the payment, subsistence, and transportation of such portion of said organized militia as shall engage in actual field or camp service for instruction”⁵⁹ The militia members engaging in this state controlled “field or camp service” were also entitled “the same pay, subsistence, and transportation or travel allowances . . . (as) men of corresponding grades of the Regular Army.”⁶⁰

This increased authority for the Secretary of War to fund the equipment and “field and camp service for (militia) instruction,”⁶¹ authorized the federal funding of the militias’ training for their federal missions while under their respective states’ control. Meanwhile, the states also continued to control their National Guards while performing their historical, operational missions as local response capabilities for natural and man-made threats and disasters. The states, however, remained solely responsible for funding this necessary domestic operational use of the National Guard in this militia-based status.

E. The National Guard Becomes a Federal Reserve Component

1. 1916—The National Defense Act

In light of the world situation prior to World War I,⁶² Congress recognized the likelihood of using National Guard Soldiers to fight abroad.⁶³ Consequently, it passed the National Defense Act of 1916 (1916 NDAA),⁶⁴ requiring enlisted National Guard personnel to sign contracts and oaths to serve as members of both their state National Guard and the “National Guard of the United States.”⁶⁵ They swore to defend both the constitutions of the United States and their

⁵² An Act to Promote the Efficiency of the Militia, and for Other Purposes, ch. 196, 32 Stat. 775 (1903) [hereinafter The Dick Act].

⁵³ *Id.* § 1.

⁵⁴ *Id.* § 18 (requiring the organized militias annually “participate in practice marches or go into camp of instruction at least five consecutive days, and to assemble for drill and instruction . . . or for target practice not less than twenty-four times . . .”).

⁵⁵ *Id.* § 3.

⁵⁶ *Id.* § 4.

⁵⁷ *Id.* § 11.

⁵⁸ *Id.* § 10.

⁵⁹ *Id.* § 14.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See, e.g.,* Weiner, *supra* note 22, at 199.

⁶³ Congress had previously amended the Dick Act in 1908, authorizing National Guard members, in the service of the United States, to serve “either within or without the territory of the United States.” The Dick Act (amended), ch. 204, § 4, 35 Stat. 399, 400 (1908). This provision was debatable, as the Department of Justice opined that the “President has no authority to call forth the organized militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation.” 29 Op. Atty Gen. 322 (1912).

⁶⁴ National Defense Act ch. 134, 39 Stat. 166 (1916).

⁶⁵ *Id.* § 70 (codified at 32 U.S.C. § 304 (2000)).

individual states, and to obey the orders of the President of the United States and governor of their individual states.⁶⁶ National Guard officers, in order to retain their commissions, were also required to take an oath to defend the Constitution of the United States and their individual states as well as obey the orders of both the President and their governors.⁶⁷ This dual oath formally recognized the dual federal and state missions and dual control authorities of the National Guard.

The 1916 NDAA also increased the training requirements of the National Guard,⁶⁸ and authorized federal funding to pay National Guard members for this required, increased training.⁶⁹ The states, nonetheless, retained their constitutional control of their National Guard members while performing this federally funded training for the federal mission. Federal funds, however, were still not authorized for the states' use of their National Guards to perform their historic, domestic operational missions.

2. 1933—*The National Defense Act of 1916, Amended*

In 1933, Congress amended the 1916 NDAA and formally created the federal status of the National Guard when the National Guard of the United States (NGUS) was deemed a federal reserve component.⁷⁰ Therefore, due to the enlistment contracts and oaths as members of their state National Guard and the NGUS required by the 1916 NDAA,⁷¹ National Guard members could now be “ordered” to federal service in their NGUS, reserve component status.⁷² Consequently, even today, when National Guard members serve under the command and control of state authorities, they serve in their militia-based state National Guard status. When they instead serve under the command and control of federal authorities under Title 10, U.S. Code, they serve as members of the NGUS, a statutory reserve component.⁷³

While the 1916 NDAA formally combined the National Guard members' allegiances, when National Guard members remained under state control, federal funds remained authorized only for federal mission training. The individual states remained responsible for funding their various National Guard militia-based domestic operations. Nonetheless, Congress would soon simplify the distinctions of state service—that is both (1) state funded and controlled State Active Duty (SAD) operational status, and (2) federally funded and state controlled “training” status—when it enacted Title 32 of the United States Code.

IV. The National Guard in State Status—the Birth of Title 32

The U.S. Department of Defense (DOD) recognizes “[t]he primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in the State and local governments.”⁷⁴ It further recognizes the “Army and Air National Guard forces, acting under State orders (i.e., not in Federal service), have primary responsibility for providing military assistance to State and local government agencies in civil emergencies.”⁷⁵ As explained below, while National Guard members may be called into federal service as members of the reserve components in their NGUS status, they otherwise remain under the control of state authorities when in a SAD or Title 32 status.

⁶⁶ *Id.*

⁶⁷ *Id.* § 73 (codified at 32 U.S.C. § 312).

⁶⁸ *Id.* § 92 (requiring 48 drills and 15 days of “encampments, maneuvers or other exercises”).

⁶⁹ *Id.* §§ 109, 110.

⁷⁰ Act of June 15, 1933, ch. 87, 48 Stat. 153 (codified at 10 U.S.C. § 10,101).

⁷¹ National Defense Act, ch. 134, 39 Stat. 166 (1916).

⁷² See Bovarnick, *supra* note 35, at 458; see also 10 U.S.C. § 12,301 (“In time of war or national emergency declared by Congress . . . for the duration of the war or emergency and for six months thereafter.”); § 12,302 (“In time of national emergency declared by the President . . . for not more than 24 consecutive months.”); § 12,304 (upon Presidential determination “that it is necessary to augment active forces for any operational mission . . . for not more than 365 days.”).

⁷³ Typically, when a member of the NGUS serves in a federally controlled Title 10 Status, he loses his state controlled National Guard, Title 32 status, and returns to his National Guard, Title 32 status, upon relief from Title 10 duty. 32 U.S.C.S. § 325(a)(1) (LexisNexis 2008); see also *Perpich v. Dep’t of Defense*, 496 U.S. 334, 347 (1990). A National Guard officer serving in a Title 10 status, however, can retain his Title 32 status, while serving in command of a National Guard unit, if the President authorizes and his Governor consents to the dual Title 10 and Title 32 status. 32 U.S.C.S. § 325(a)(2). . Consequently, he may have a “dual status” and command both Title 10 and Title 32 personnel.

⁷⁴ U.S. DEP’T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) para. 4.1.3 (4 Feb. 1994) [hereinafter DODD 3015.12].

⁷⁵ U.S. DEP’T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) para. 4.4.6.1 (15 Jan. 1993).

A. State Active Duty Status—State Funded, State Controlled

National Guard forces perform their historical, militia-based domestic operational missions when their governors mobilize them in state controlled and funded SAD status.⁷⁶ State laws dictate when state authorities may call upon their National Guard to perform SAD,⁷⁷ generally providing broad authority for the use of militias to quell domestic disturbances or assist in disaster relief⁷⁸ when local and state government civil resources have been exhausted.⁷⁹ The states typically pay their National Guard personnel serving in a SAD status at the same rate of pay that the Soldiers or Airmen receive while serving in a federal status.⁸⁰ During a SAD response, the states may use the federal equipment⁸¹ provided to the states' National Guard units for training purposes; however, the states must reimburse the Federal Government for the use of certain resources, such as fuel.⁸²

Although the states are responsible for funding the response of the National Guard when in a SAD status, the Federal Government may proportionally reimburse the state for certain expenses under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (The Stafford Act),⁸³ which may include SAD associated costs.⁸⁴ Nonetheless, while National Guard personnel respond in a SAD status donning U.S. Armed Forces uniforms,⁸⁵ the DOD provides neither funding nor reimbursement, nor does the DOD have any control over the National Guard's response or mission assignment in this pure, historical, state controlled militia response. As will be discussed below, however, the DOD funds the National Guard's activities in a Title 32 status, yet remains outside of the chain of command.

B. Title 32 Status—Federally Funded, State Controlled

1. 1956—*The National Guard "Trains" in a Title 32 Status*

In 1956, Congress revised, codified, and enacted into law, Title 32 of the U.S. Code, entitled "National Guard."⁸⁶ It originally consisted of four chapters governing the National Guard: (1) organization; (2) personnel; (3) training; and (4) service, supply and procurement. Title 32 generally serves as a compilation of most federal statutes affecting the National Guard while serving under state control, yet funded through DOD appropriations.⁸⁷

It is in Title 32 status that the National Guard generally "trains" rather than "operates" because "[t]raining to perform the dual mission of the Army National Guard is the primary task of Army National Guard units in peacetime."⁸⁸ While limited

⁷⁶ U.S. DEP'T OF THE ARMY AND THE AIR FORCE, NATIONAL GUARD REG. 500-1/AIR NATIONAL GUARD INSTR. 10-8101, MILITARY SUPPORT TO CIVIL AUTHORITIES para. 1-4a (1 Feb. 1996) [hereinafter NGR 500-1] ("During periods of state active duty, costs will be funded by the state . . .").

⁷⁷ *Id.* paras. 1-4, 4-3b(4).

⁷⁸ *See, e.g.*, ALA. CODE § 31-2-109 (LexisNexis 2008) (authorizing governor to call out militia "to execute the laws, suppress insurrection and repel invasion, or to provide for assistance in cases of disaster").

⁷⁹ NGR 500-1, *supra* note 76, para. 2-2.

⁸⁰ *See, e.g.*, ALA. CODE § 31-2-88 (providing that National Guard officers, warrant officers, and enlisted personnel shall be paid at the rate authorized by the Department of Defense for members of the regular armed forces of the United States while the National Guard is on active military service for the state).

⁸¹ 32 U.S.C. § 710 (2000).

⁸² NGR 500-1, *supra* note 76, para. 3-6a ("When federal property is used by National Guard personnel in a SAD status . . . the state will be liable for reimbursement (or replenishment in kind) to the federal government . . .").

⁸³ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C.S. §§ 5121–5208 (LexisNexis 2008) [hereinafter Stafford Act].

⁸⁴ *Id.* After a disaster, the federal government, in accordance with provisions of the Stafford Act, assists state and local governments with costs associated with response and recovery efforts that exceed a state or locale's capabilities.

⁸⁵ *See* U.S. DEP'T OF THE ARMY REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 30-2d (3 Feb. 2005) ("Army National Guard personnel also may wear the Army uniform in the performance of State service . . .").

⁸⁶ Aug. 10, 1956, ch. 1041, 70A Stat. 597.

⁸⁷ *See, e.g.*, Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (authorizing federal funding for military personnel, operation and maintenance, and procurement for the federal armed forces, reserve components (including the NGUS) and National Guard members performing authorized duties in a Title 32 status.).

⁸⁸ U.S. DEP'T OF THE ARMY, NATIONAL GUARD REG. 350-1, ARMY NATIONAL GUARD TRAINING para. 1-6a (3 Jun. 1991) [hereinafter NGR (AR) 350-1] (emphasis added).

authority allows federally funded training⁸⁹ to perform the domestic mission,⁹⁰ National Guard members instead spend the overwhelming majority of their Title 32 training periods training “[t]o provide units organized, equipped, and trained to fight and win in time of war or national emergency in support of the Army’s war plans.”⁹¹

2. 1964—Congress Authorizes “Other Duty” in Title 32 Status

Although the National Guard’s primary task is to “train” to perform its dual missions, Congress amended Title 32 in 1964, adding section 502(f), authorizing the National Guard to also perform “other duty” in a Title 32 status.⁹² While this “other duty” language authorized duties in addition to the required training under Title 32,⁹³ it did much more. It opened the door for National Guard personnel to perform operational missions (rather than merely train for operational missions) in what was termed by many as either a Title 32 § 502(f) or “other duty” status. For more than twenty years, however, the use of the Title 32 § 502(f) status was limited to specific, statutorily authorized operational missions performed under state control.

In 1989, federal statutes then authorized National Guard members, serving in a full-time National Guard (FTNG)⁹⁴ Title 32, § 502(f) status, to perform counter-drug activities.⁹⁵ Later, in 1998, Congress authorized FTNG members to serve in 22-member Weapons of Mass Destruction/Civil Support Teams (WMD CSTs) in a Title 32, § 502(f) status to “[p]repare for or respond to any emergency involving the use of a weapon of mass destruction”⁹⁶ Amendments in 2002 further authorized WMD CSTs to prepare for or respond to “[a] terrorist attack or threatened terrorist attack in the United States that results, or could result, in catastrophic loss of life or property.”⁹⁷ Nonetheless, these specifically authorized uses of the National Guard in an operational Title 32 status in the nation’s war against drugs and in response to WMD events or terrorist attacks remained atypical of Title 32 status duty. Title 32 funding remained primarily for “training” because the DOD continued to recognize the individual States’ and local governments’ responsibilities to protect the life and property of their own citizens.⁹⁸

As the United States and its citizenry enjoyed more than a century of relative peace on its soil, the states continued to place their National Guard members in the state controlled and funded SAD status when performing domestic operational missions. These militia-based responses continued protecting and defending the lives and properties of the various states’ citizens.

⁸⁹ NGR 500-1, *supra* note 76, para. 4-3b(1) (“Units assigned a civil disturbance mission will conduct [Military Assistance for Civil Disturbance] training annually in [Title 32] inactive training status. MACDIS training will be resourced from the units annual allocation of 48 IDT periods.”). Training may not exceed one drill weekend without National Guard Bureau approval. *Id.*

⁹⁰ NGR (AR) 350-1, *supra* note 88, para. 1-5b (“To provide units organized, equipped, and trained in the protection of life and property and the preservation of peace, order, and public safety, under competent orders of Federal or State authorities.”)

⁹¹ *Id.* para. 1-5a.

⁹² Act of Oct. 3, 1964, Pub. L. No. 88-621, § 1(1), 78 Stat. 999.

⁹³ 32 U.S.C. § 502(a) (2000) (“Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, . . . the National Guard . . . shall— (1) assemble for drill and instruction . . . at least 48 times per year; and (2) participate in training . . . at least 15 days each year.”)

⁹⁴ 32 U.S.C. § 101(19) (LexisNexis 2008) (“‘Full-time National Guard duty’ means training or other duty, other than inactive duty, performed by a member of the [NGUS] in the member’s status as a member of the National Guard . . . for which the member is entitled to pay from the United States”); § 101(12) (“‘Active Duty’ . . . does not include full-time National Guard duty.”)

⁹⁵ *Id.* § 112.

⁹⁶ Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 511, 112 Stat. 2006 (1998) (codified at 10 U.S.C. § 12,310(c)(1)(A)). See also U.S. DEP’T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 16 (2006), available at <http://www.dod.mil/pubs/pdfs/QDR20060203.pdf> (“The National Guard is fielding 55 WMD Civil Support Teams (CSTs)— in each state, territory and District of Columbia. These 22-member teams can provide critical communications links, quick assessment of damage from any WMD attack and consequence management support to local, state, and Federal agencies.”)

⁹⁷ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 514, 116 Stat. 2458 (2002) (codified at 10 U.S.C. § 12310(c)(1)(B) (LexisNexis 2008)).

⁹⁸ DODD 3025.12, *supra* note 74, para. 4.1.3.

V. Title 32 Status Goes Operational⁹⁹

Deeper analysis of the possible, expanded operational use of Title 32 status resulted from the deadly terror attacks on September 11, 2001. As we know, the attacks of September 11 occurred within the geographic boundaries of the sovereign states of New York, Virginia, and Pennsylvania. No one would argue, though, that the September 11 attacks were merely those states' internal domestic emergencies or that the attackers aimed to attack these individual states—they were national emergencies and attacks upon our collective, and United States. Although this was an attack on our nation, to which all of the nation's citizens should arguably bear the cost of response, when it came to the governors calling upon their militias to respond, Title 32 as written in 2001 did not clearly allow for the DOD to fund this state controlled militia response to this national crisis in a Title 32 status.¹⁰⁰

Shortly after the attacks, the DOD released its required¹⁰¹ Quadrennial Defense Review (QDR) Report.¹⁰² The QDR stated that “before the attack . . . the senior leaders of the Defense Department set out to establish a new strategy for America’s defense . . . [because] America must be safe at home,”¹⁰³ and that the “attacks confirm[ed] the strategic direction and planning principles that resulted from [the QDR], particularly its emphasis on homeland defense.”¹⁰⁴ Ultimately, the terrorist attacks of September 11 energized the DOD’s focus on homeland defense—the National Guard’s historic mission. Since that fateful day, the publication of the 2001 QDR, and the nation’s recognition of the collective and individual threats the United States’ face, Congress has implemented the most significant statutory changes to Title 32 regarding the domestic, operational use of the National Guard since its colonial roots.

A. 2004—Congress Authorizes “Homeland Defense Activities” in Title 32 Status

Recognizing the new threats the country faced, Congress added chapter nine to Title 32 in 2004;¹⁰⁵ the first new chapter since the title’s inception in 1956. This chapter symbolized a new period in National Guard history; it authorized the Federal Government to fund, under state control, the National Guard while performing a broad range of “homeland defense activities”¹⁰⁶ while in a Title 32, FTNG, § 502(f) status.¹⁰⁷ The statutory definition of a “homeland defense activity is broad,” as it is “an activity undertaken for the military protection of the territory or domestic population of the United States, or of infrastructure or other assets of the United States determined by the Secretary of Defense as being critical to the national security, from a threat or aggression against the United States.”¹⁰⁸ Consequently, this authorization ended centuries of restrictions against federal defense funding of the historically state funded domestic, operational use of the National Guard. Ultimately, Chapter Nine signified a dramatic departure from the historical use and “training” nexus restrictions of Title 32.

While the broad definition of “homeland defense activities” opened the door for the expanded domestic operational use of the National Guard in a Title 32 status, governors met somewhat cumbersome administrative requirements when requesting use of this new authority.¹⁰⁹ Nonetheless, in seemingly “necessary and appropriate”¹¹⁰ circumstances soon after

⁹⁹ The distinction between a Title 32 “training” or “operational” status is important as units in a “training” status may only “train” to those tasks forming part of their federal wartime mission. The practical effect is that a Public Affairs unit could not “train” in a Title 32 status to perform Military Police unit functions. Moreover, once a National Guard member actually performs the task, rather than “trains” to perform the task, he is arguably “operating.” Authorizing National Guard members to serve in a Title 32 “operational” status instead allows those National Guard members to perform operational missions not necessarily tied to their federal wartime mission.

¹⁰⁰ 32 U.S.C.S. §§ 101–716 (2001).

¹⁰¹ 10 U.S.C. § 118 (2000).

¹⁰² See U.S. DEP’T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT III (2001) (released 30 Sept. 2001), available at <http://www.defenselink.mil/pubs/pdfs/qdr2001.pdf>.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at V.

¹⁰⁵ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 512, 118 Stat. 1811 (2004) (codified at 32 U.S.C.S. §§ 901–908).

¹⁰⁶ 32 U.S.C.S. § 901.

¹⁰⁷ § 904(a) (“All duty performed under this chapter shall be considered to be full-time National Guard duty under section 502(f) under this title 502(f).”).

¹⁰⁸ § 901(1).

¹⁰⁹ § 906.

A Governor of a State may request funding assistance for the homeland defense activities of the National Guard of that State from the Secretary of Defense. Any such request shall include the following:

the chapter's inclusion to Title 32, various state governors quickly and affirmatively attempted to use the landmark legislation, apparently to no avail. For example, in July 2005, New York Governor George Pataki requested authorization to use the new Title 32, Chapter Nine authority for New York National Guard members "in support of security at critical rail and mass transit facilities in New York State due to the increase in the national threat level at inner-city rail and subway facilities."¹¹¹ The DOD did not approve the request.¹¹² Also, as National Guard personnel responded in SAD status to assist in the recovery from Hurricane Katrina, Alabama Governor Bob Riley specifically requested authority for his National Guard members to perform hurricane relief duties in a Title 32, Chapter Nine duty status.¹¹³ Ultimately, the DOD authorized "federal funding for use of the National Guard in a Title 32 U.S. Code status to support Hurricane Katrina disaster relief efforts";¹¹⁴ however, it was unclear whether this only authorized a Title 32 "training" status or a Title 32, Chapter Nine "operational" status.¹¹⁵

Thus, after events seemingly tailor-made for the use of the new Title 32, Chapter Nine operational status, the states lacked precedence of its authorized use. Further, DOD had not published the required regulations implementing the authority.¹¹⁶ Consequently, it appeared that despite Chapter Nine's intent and purpose, it would go unused. Fortunately, on the horizon was even broader and less administratively burdensome legislation allowing for the National Guard to perform domestic operations in a Title 32 status.

B. 2006—Congress Simplifies Title 32 Operational Status Authority

While confusion and frustration regarding the apparent nonuse of the Chapter Nine began to resonate within the states, Congress amended 32 U.S.C. § 502(f) in 2006, allowing for Title 32 status to simply include: "Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense."¹¹⁷ This broad authority simply allows the National Guard to perform any operational mission in a Title 32 § 502(f) status that the President or Secretary of Defense requests.

VI. The Benefits of the Operational National Guard

This even broader authority to use the National Guard in an operational, Title 32 status is a continuing departure from the historical use and funding of the National Guard. The September 11 attacks caused the nation's executive and legislative leadership to reevaluate the possible use of the National Guard in the protection and response to the nation's citizens, rather than a specific state's citizens. The use of the National Guard in a state controlled, federally funded operational status

(1) The specific intended homeland defense activities of the National Guard of that State.

(2) An explanation of why participation of National Guard units or members, as the case may be, in the homeland defense activities is necessary and appropriate.

(3) A certification that homeland defense activities are to be conducted at a time when the personnel involved are not in Federal service.

Id.

¹¹⁰ § 902 ("The Secretary of Defense may 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* for participation by the National Guard units or members, as the case may be." (emphasis added)).

¹¹¹ Letter from George Pataki, Governor of New York, to The Honorable Donald H. Rumsfeld, Secretary of Defense (July 7, 2005) (on file with author).

¹¹² Telephone Interview with Lieutenant Colonel John Joseph, Chief, Administrative Law Division, National Guard Bureau, in Arlington, Va. (Mar. 16, 2005) ("Whether this request was disapproved is unknown [to me]. It was apparently never acted upon.").

¹¹³ Letter from Alabama Governor Bob Riley, to Honorable Donald H. Rumsfeld, Secretary of Defense (Sept. 2, 2005) (on file with author) (seeking approval of "military duty in title 32 USC 901 status for [Alabama National Guard] soldiers and airmen serving on state active duty in support of Hurricane Katrina relief efforts. . . . Currently, our soldiers and airmen are engaged in the protection of vital infrastructure . . .").

¹¹⁴ Memorandum, Gordon England, Deputy Secretary of Defense, to Secretary of the Army and Acting Secretary of the Air Force, subject; Hurricane Katrina Relief Efforts (7 Sept. 2005) (emphasis added) (on file with author).

¹¹⁵ See Title 32 "training" versus "operational" status discussion, *supra* note 99.

¹¹⁶ 32 U.S.C.S. § 903 (LexisNexis 2008).

¹¹⁷ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 525, 120 Stat. 2083 (2006) (codified at 32 U.S.C. S. § 502(f)(2)(A)). Weapons of Mass Destruction Civil Support Teams (WMD CSTs) were also further authorized to respond to "[A] natural or manmade disaster in the United States that results in, or could result in, catastrophic loss of life or property." *Id.* § 527 (codified at 10 U.S.C. 12,310 (c)(1)(D) (LexisNexis 2008)).

greatly benefits the collective and individual United States in a number of ways. While discussed in detail below, benefits include: restrictions on the use of federal military personnel for law enforcement purposes do not apply; the local authorities maintain control of their National Guards responding within their own local communities; the states receive funding to protect their local resources, structures, and citizens, whose destruction could be a national crisis; and the National Guard personnel benefit from additional and equitable legal protections.

A. The Posse Comitatus Act (PCA) Does Not Apply

The PCA states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years or both.¹¹⁸

The PCA, therefore, prohibits the use of the U.S. Army or U.S. Air Force to enforce domestic law without a constitutional exception¹¹⁹ or an authorizing Act of Congress.¹²⁰ As further directed by Congress in 1981,¹²¹ the DOD generally extended the PCA to the U.S. Navy and Marine Corps through regulations.¹²² Consequently, military personnel commanded by federal military personnel, such as active component and reserve component members when in federal duty status are subject to the PCA.

Alternatively and importantly, Army and Air National Guard members serving in a SAD or Title 32 status are not commanded by federal military personnel, but by state authorities. Consequently, they are not considered part of the U.S. Army or Air Force, so are not bound by the PCA.¹²³ The non-application of the PCA to National Guard members in a non-federal status then allows for the use of National Guard personnel, if authorized by state law, to enforce the domestic law in both SAD or Title 32 status.¹²⁴ The new authority under Title 32 for the operational use of the National Guard ultimately allows for DOD funding of federally trained and uniformed National Guard personnel to enforce domestic law, which would otherwise be precluded by the PCA if they instead served in their federal status.¹²⁵

B. Local Authorities Remain in Control

As previously mentioned, the DOD recognizes “the primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in the State and local governments.”¹²⁶ The states’ National

¹¹⁸ 18 U.S.C. § 1385 (2000).

¹¹⁹ U.S. CONST. art. 4, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

¹²⁰ 10 U.S.C. §§ 331–335 (2000).

¹²¹ *Id.* § 375.

¹²² U.S. DEP’T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS para. 2-1(d) (15 Jan. 1986) [hereinafter DODD 5525.5]; *see also e.g.*, *United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991) (affirming that DODD 5525.5 requires the Navy to comply with the restrictions of the Posse Comitatus Act). The Secretary of the Navy or the Secretary of Defense may grant exceptions to the regulatory prohibitions applying the Posse Comitatus Act to the U.S. Navy or Marine Corps on a case-by-case basis. DODD 5525.5, *supra*, para. E4.3.

¹²³ *See, e.g.*, *Laird v. Tatum*, 408 U.S. 1, 16–17 (1972) (Douglas, J., dissenting); *United States v. Benish*, 5 F.3d 20 (3d Cir. 1993).

¹²⁴ National Guard members serving in a State status are subject to state laws pertaining to authorized police functions and powers, which vary between the states. *See, e.g.*, ALA. CODE § 31-2-126 (LexisNexis 2008) (granting “commanding officer of troops in active service of the state to incarcerate and detain, until such person can be turned over the civil authorities”); GA. CODE ANN. § 38-2-307 (LexisNexis 2008) (“Members of the National Guard, may, at the discretion of the Governor, have the same powers of arrest and apprehension as do law enforcement officers when called to active duty to respond to emergencies”); LA. REV. STAT. ANN. § 29:7.1 (LexisNexis 2008) (“Military police forces of the active Louisiana National Guard, . . . shall have all of the powers and authority of peace officers necessary to perform law enforcement functions related to and in connection with their duties in the active Louisiana National Guard”); W. VA. CODE § 15-1D-1 (LexisNexis 2008) (granting the Governor power “to order the West Virginia national guard, or any part thereof, into the active service of the State, and to cause them to perform such duty as he shall deem proper); MD. CODE ANN., PUBLIC SAFETY § 13-702(c)(1) (LexisNexis 2008) (“To enforce the laws, a member of the militia in State active duty has all the authority of a peace or law enforcement officer”); S.C. CODE ANN. § 25-3-130 (LexisNexis 2008) (“When the South Carolina State Guard is on active service, the commanding officer and his subordinates shall be, and they are hereby, invested with all the authority of, sheriffs and deputy sheriffs in enforcing the laws of this State.”).

¹²⁵ This is assuming they are not called out under Chapter 15 of Title 10, U.S. Code.

¹²⁶ DODD 3025.12, *supra* note 74, para. 4.1.3.

Guards are locally organized, controlled and commanded state assets that can quickly respond at the governors' calls. This remains true when National Guard members serve in a Title 32 status, as the states are able to call upon and command their federally trained, equipped, and uniformed soldiers to respond to emergencies and events within the state with short notice. This significantly aids the states and local governments in performing their recognized responsibilities.

C. The States Receive Federal (DOD) Funding

As the events of September 11 and Hurricanes Katrina and Rita proved, terrorist attacks or natural disasters within a single state or a few states can be a national crisis, costing both the individual states and the nation dearly. Protecting against a potential national crisis, such as a terrorist attack during a nationally significant event, such as a national sporting event or political gathering, can also be very costly. Importantly, the hosting state and its local governments are generally responsible for providing and funding the security. Since September 11, these threats, or recognition of these threats, have multiplied, homeland defense efforts have intensified, and National Special Security Events¹²⁷ have been designated by the Department of Homeland Security.

To provide extra security measures for its citizens to counter these threats, many states have or will call upon their National Guard to provide additional support. If the supporting National Guard forces are funded through Title 32 by the DOD, the states benefit from the cost sharing. Furthermore, when its National Guard members serve in a Title 32 rather than a SAD status, the states are not required to reimburse the federal government for the use of federal equipment.¹²⁸

D. Coverage Under the Federal Torts Claim Act

Generally, National Guard members serving in SAD status are protected by state liability laws.¹²⁹ In the alternative, state controlled National Guard members serving in a Title 32 status are covered by the provisions and protections of the Federal Tort Claims Act.¹³⁰ This provides for much more consistent and reliable protections for National Guardsmen when operating in the domestic environment.

E. National Guard Soldiers and Airmen Receive Federal Benefits

While in a Title 32 status, National Guard members receive federal retirement points,¹³¹ may be protected by the Servicemembers Civil Relief Act,¹³² the Uniformed Services Employment and Reemployment Rights Act,¹³³ and are entitled

¹²⁷ The Secretary of the Department of Homeland Security, after consultation with the Homeland Security Council, is responsible for designating events as National Special Security Events (NSSEs). Homeland Security Presidential Directive 7, Critical Infrastructure Identification, Prioritization, and Protection, 39 WEEKLY COMP. PRES. DOC. 1816 (Dec. 17, 2003). The Secretary and the Homeland Security Council consider a number of factors when designating an NSSE, such as: (1) the anticipated attendance by dignitaries; (2) size of the event; and (3) significance of event. Dep't of Homeland Security, *Fact Sheet: National Special Security Events* (Dec. 28, 2006), http://www.dhs.gov/xnews/releases/pr_1167323822753.shtm. Once an event is designated an NSSE, the U.S. Secret Service (USSS) assumes the role as lead federal agency for the design and implementation of the operational security plan. *Id.* The USSS partners with federal, state, and local law enforcement and public safety officials with the goal of coordinating participating agencies to provide a safe and secure environment for the event and those in attendance. *Id.* Between 1998 and 29 December 2006, the USSS lead federal security operations at twenty-three NSSEs, including the 2005 Presidential Inauguration, the 2004 Republican and Democratic National Conventions, President Ronald Reagan's State Funeral in 2004 and the last three State of the Union addresses. *Id.*

¹²⁸ NGR 500-1, *supra* note 76, para. 3-6a ("When federal property is used by National Guard personnel in a SAD status . . . the state will be liable for reimbursement (or replenishment in kind) to the federal government . . .").

¹²⁹ *See, e.g.*, ALA. CODE § 31-2-89 (LexisNexis 2008) (providing protections for officers or enlisted personnel from liability from civil action or criminal prosecution while in military service to the state "for any act done while in the discharge of his military duty, which act was done in the line of duty.").

¹³⁰ The Federal Tort Claims Act includes in its definition of an "[e]mployee of the [federal] government" those "members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32." It further defines "[a]cting within the scope of his office or employment" as "in the case of . . . a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty." 28 U.S.C.S. § 2671 (LexisNexis 2008).

¹³¹ 10 U.S.C. § 12,732(a)(2) (2000).

¹³² National Guard members are protected by the Servicemembers Civil Relief Act when serving pursuant to a call to active service authorized by the President or the Secretary of Defense for a period of more than thirty consecutive days under 32 U.S.C. 502(f) for purposes of responding to a national emergency declared by the President and supported by Federal funds. 50 U.S.C. app. § 101(2)(A)(ii) (LexisNexis 2008).

¹³³ 38 U.S.C. § 4303(13) ("[S]ervice in the uniformed services' . . . includes active duty, active duty for training, . . . inactive duty training, full-time National Guard duty . . .").

to federal medical and dental care if they incur or aggravate an injury, illness, or disease in the line of duty.¹³⁴ Although the states provide comparable protections for their National Guard members when serving a SAD status as state employees, the extent and application of these protections within the various states are inconsistent. Consequently, the application of federal benefits and protections provides a consistent protective umbrella over National Guard personnel responding domestically.

VI. Conclusion

Following the attacks of September 11, the United States recognized it must prepare for the constant threat of large scale attacks on the homeland. Since that fateful day, Congress, recognizing the National Guard's historic and current domestic operational capabilities, has twice made significant amendments to Title 32. These amendments allow for the expanded, domestic operational use of the National Guard in that federally funded, state controlled Title 32 status. The addition of Chapter Nine to Title 32 in 2004 was a significant shift in the history of the funding of the National Guard to perform the domestic operational mission under state control; however, the chapter authorization requirements were somewhat cumbersome and seemingly went unused. In 2006, Congress simplified and broadened the authority mechanisms for the use of National Guard in a Title 32 status to perform the domestic operational mission under state control.

Most importantly, these amendments have changed the way the nation and the states can use the National Guard in an operational Title 32 status. Consequently, Congress has provided even greater ability for the use of the National Guard to serve in its historical status as the first line of defense of America's homeland.

¹³⁴ 10 U.S.C. § 1074(a); *see also* U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS para. 2-2e (15 Apr. 2005).