

# Avoiding the Rush to Failure: The Judge Advocate's Role in the Emergency Operations Center

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*"By failing to prepare, you are preparing to fail."*<sup>1</sup>

## I. Introduction

"Extreme weather disasters have hammered the United States with increasing frequency [and cost] in recent years."<sup>2</sup> In the years 2011 and 2012, natural disasters cost the federal government almost \$25 billion.<sup>3</sup> Military installations are not immune to the impact of weather-related events. Examples of such incidents include the High Park and Waldo Canyon Wildfires near Fort Carson, Colorado, in the summer of 2012,<sup>4</sup> and the super tornado near Tinker Air Force Base (AFB), Oklahoma, in the spring of 2013.<sup>5</sup> The potential impact of these natural and man-made disasters upon nearby military installations is significant in terms of both potential and actual loss of life and damage to property. As installation commanders become aware of a possible weather-related event, such as a tornado, wildfire, or hurricane, the use of an emergency operations center (EOC) to coordinate and manage the installation's response to these events becomes necessary.

The role of the judge advocate (JA) as a member of the EOC staff requires a broad spectrum of knowledge.<sup>6</sup> Waiting until an emergency arises to train, develop, and integrate into the EOC staff is too late. The JA's early and continuous involvement throughout the emergency response process is essential to the successful development and execution of the response plan. This primer discusses the

role of the JA as a member of the EOC staff during a natural or man-made disaster; addresses the common legal and ethical issues the JA faces during that response; and presents the best practices a JA can employ if called upon to serve in an EOC.

This primer is not designed to be all-inclusive as to every legal issue that could arise during an emergency response operation. Rather, it delves into several of the more common issues encountered during an emergency response and outlines the steps that should be followed to resolve them and the resources available to assist JAs. Part III specifically identifies areas of importance and surveys issues the JA will encounter during an emergency response. In particular, it focuses on those issues that appear frequently and regularly during the initial emergency response and follow-on recovery support efforts. Throughout, the primer will also address best practices, with an emphasis on ensuring that the JA is an integral member of the EOC staff during the planning, response, and recovery processes.

Before integrating into the EOC staff, JAs must have a basic understanding of the authorities and limitations that apply to domestic support missions when weather-related events occur on or near a military installation. Therefore, this primer begins with an overview of the federal emergency response authorities and a brief discussion of the Defense Support to Civil Authorities (DSCA) mission within the National Response Framework (NRF). This is followed by a review of the Federal Emergency Management Agency's (FEMA) history, its authorities under the Stafford Act, and its responsibilities as the lead federal agency during an emergency response and recovery operation. Finally, this primer provides an overview of the EOC, its function during the response and recovery effort, and a discussion of the common issues encountered by JAs during previous emergencies.

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<sup>1</sup> BRAINY QUOTE, <http://www.brainyquote.com/quotes/quotes/b/benjaminfr138217.html> (last visited Mar. 15, 2014) (quote attributed to Benjamin Franklin).

<sup>2</sup> Katherine Bagley, *FEMA: Caught Between Climate Change and Congress*, INSIDE CLIMATE NEWS (Jan. 27, 2014), <http://insideclimatenews.org/news/20140127/fema-caught-between-climate-change-and-congress?page=show>.

<sup>3</sup> *Id.*

<sup>4</sup> *Disaster Declarations for 2012*, FEMA.GOV, [http://www.fema.gov/disasters/grid/year/2012?field\\_disaster\\_type\\_term\\_tid\\_1=All](http://www.fema.gov/disasters/grid/year/2012?field_disaster_type_term_tid_1=All) (last visited Mar. 15, 2014).

<sup>5</sup> *Disaster Declarations for 2013*, FEMA.GOV, [http://www.fema.gov/disasters/grid/year/2013?field\\_disaster\\_type\\_term\\_tid\\_1=All](http://www.fema.gov/disasters/grid/year/2013?field_disaster_type_term_tid_1=All) (last visited Mar. 15, 2014).

<sup>6</sup> Judge advocates (JAs) assigned as operational or administrative law attorneys might be better suited to support the emergency response mission since they are familiar with the issues, they are integrated into the staff sections, and they are involved in the mission planning. Further discussion can be found in Part II.C.

## II. Overview of Emergency Response

### A. Background

The Department of Defense (DoD) recognizes two priority missions for its activities in the homeland from 2012 to 2020: (1) to defend U.S. territory from direct attack by state and non-state actors; and (2) to provide assistance to domestic civil authorities in the event of natural or man-

made disasters.<sup>7</sup> While the DoD's Homeland Defense (HD) function is outside the scope of this primer, it is important to note that the HD mission often directly impacts the DoD's DSCA mission; likewise, DSCA actions may contribute to ongoing HD activities.<sup>8</sup> However, for the purpose of this primer, discussion is limited to the DSCA mission as it relates to the DoD's response to a natural or man-made disaster on or near a military installation.

## B. Emergency Response Authorities

When a disaster strikes on or near a military installation, commanders will frequently seek out ways to provide assistance not only to their own Soldiers living on-post, but also to those who live in the immediate vicinity of the installation. Judge advocates must be involved from the very beginning so they can give relevant, accurate, and timely advice about the commander's authority to act and provide such assistance. While there are many sources from which command authority is derived, every commander has the inherent authority to provide for the safety and welfare of people under his command.<sup>9</sup> However, when responding to a weather-related event beyond the installation's gates, commanders must operate within the applicable authorities. Commanders may provide emergency support in accordance with their immediate response authority (IRA), usually lasting no more than seventy-two hours after receiving and reviewing the request for assistance from local authorities.<sup>10</sup> A commander's IRA is designed to fill a gap left by local first responders until that aid can be provided by other agencies. Judge advocates can better serve their commanders by having a basic understanding of their commanders' limited authorities and how federal agencies operate within the DSCA framework and under the Stafford Act.

<sup>7</sup> U.S. DEP'T OF DEF., STRATEGY FOR HOMELAND DEFENSE AND DEFENSE IN SUPPORT OF CIVIL AUTHORITIES 1 (Feb. 2013), available at <http://www.defense.gov/news/Homelanddefensestrategy.pdf>.

<sup>8</sup> CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, THE DOMESTIC OPERATIONAL LAW 2013 HANDBOOK FOR JUDGE ADVOCATES 2 (Oct. 2013) [hereinafter DOMOPS HANDBOOK].

<sup>9</sup> See U.S. CONST. art. I, § 8 (granting Congress the power to defend the United States and declare war); Art. II, § 2 ("The President shall be the Commander in Chief of the Army and Navy of the United States."). While some statutes grant authority, e.g., 10 U.S.C. §§ 331–334 (2012) (insurrection statutes), others limit that authority, such as the Posse Comitatus Act, 10 U.S.C. § 1385 (2011), which restricts the Army and Air Force from engaging in law enforcement activities. When a grant or limitation on authority cannot be found, case law recognizes inherent command authority. See *Cafeteria and Rest. Workers Union v. McElroy*, 367 U.S. 886 (1961) (explaining that a commander's power over an installation is "necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand").

<sup>10</sup> U.S. DEP'T OF DEF., DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) para. 4.g–4.g.2 (29 Dec. 2010) (C1, 21 Sept. 2012) [hereinafter DSCA].

## 1. The DSCA Framework

The DoD's DSCA mission is not new; in fact, the Army played a direct role in several historically significant events, including the Great Chicago Fire in 1871; the Charleston, South Carolina, earthquake in 1886; and the Johnstown Flood in 1889.<sup>11</sup> While the active component military is uniquely trained and prepared to support such actions, its response is governed by very specific guidance outlined in statutes, executive orders, DoD regulations, and policy matters.<sup>12</sup> Judge advocates must understand the framework through which the active component can provide support to civil authorities, as well as the legal, fiscal, and policy constraints in place that limit the DoD's involvement in a domestic support operation.<sup>13</sup>

The primary reference for DoD support to civil authorities is DoD Directive (DoDD) 3025.18.<sup>14</sup> This directive "authorizes immediate response authority for providing DSCA, when requested."<sup>15</sup> As previously mentioned, IRA allows DoD commanders to provide assistance to civil authorities for a period of no more than seventy-two hours upon request from civil authorities.<sup>16</sup> Other forms of DSCA support must be authorized by the Secretary of Defense, unless approval authority is otherwise delegated, before providing assistance.<sup>17</sup> For JAs, this is an opportunity to be proactive in reviewing and determining whether the request complies with the law, conforms to fiscal restraints, and remains within the ethics guidelines. Additionally, JAs must know under which authorities the commander will operate and how that commander will work within the Federal Response Structure throughout the emergency response.<sup>18</sup>

<sup>11</sup> DOMOPS HANDBOOK, *supra* note 8, at 3.

<sup>12</sup> *Id.* While not within the scope of this primer, the National Guard, under the control of their respective states' governor and adjutant general, is usually the first military component capable of responding to emergencies occurring within their state. National Guard personnel responding to such emergencies operate under a different command and control structure, while active component personnel continue to operate under their normal chain of command, but in a supportive role to the civilian authorities responding to the emergency event. *Id.*

<sup>13</sup> *Id.* at 4.

<sup>14</sup> DSCA, *supra* note 10.

<sup>15</sup> *Id.* para. 1.e.

<sup>16</sup> *Id.* para. 4.g.2. The commander's Immediate Response Authority (IRA) is discussed in further detail in Part II.B.4. See Appendix C (Request for Assistance Flowchart) (illustrating the process used to request assistance and the necessary approval authority).

<sup>17</sup> *Id.* para. 4.d.

<sup>18</sup> THE FED. EMERGENCY MGMT. AGENCY PUB. 1, THE FED. EMERGENCY MANAGEMENT AGENCY 30 (Nov. 2010) (providing an overview of the federal response mission and an explanation of how "the Federal Government has become increasingly involved in supporting State, Tribal, and local governments in responding to major disasters and emergencies" *Id.*).

## 2. The Federal Response Structure

The current Federal Response Structure, with FEMA as the federal government's single agency dedicated to emergency management, is a relatively new creation.<sup>19</sup> The federal government's role in emergency management and response grew dramatically from its initial involvement in the 1802 fire in Portsmouth, Massachusetts.<sup>20</sup> Since that event, over 100 different federal departments and agencies were created to assist in the coordination of disaster response and recovery, with similar agencies working at the state, local, and tribal level.<sup>21</sup> Coordinating the response effort among the numerous agencies became so complicated that often the requested and necessary help would arrive either unprepared or too late to assist.<sup>22</sup> As a result, President Carter eventually created FEMA through executive order after being pressed by state governments to streamline the process and to centralize federal emergency management functions.<sup>23</sup>

During its first years, FEMA faced considerable challenges and added responsibilities from Congress.<sup>24</sup> Both Congress and the President soon realized that even with a centralized agency, responsibility for emergency preparedness and response needed to be formally assigned.<sup>25</sup> Further, they recognized that a plan for continuity of government in the event of a national security emergency was necessary.<sup>26</sup> On November 18, 1988, President Ronald Reagan promulgated Executive Order (EO) 12,656, which not only addressed these issues, but also became the foundation for what is now known as the NRF.<sup>27</sup> After its establishment in 2002, EO 12,656 and its amendments gave the Department of Homeland Security the responsibility of coordinating the efforts of federal emergency response.<sup>28</sup>

Pursuant to the Homeland Security Act of 2002, President George W. Bush issued Homeland Security Presidential Directive 5 (HSPD-5) in 2003.<sup>29</sup> This directive tasked the Secretary of Homeland Security to create a unified approach to the management of domestic incidents, as well as "consolidating existing Federal Government emergency response plans into a single, coordinated" National Response Plan (NRP).<sup>30</sup> The NRP was eventually superseded by the NRF in 2008.

The NRF organizes governmental response to natural and man-made disasters and incidents occurring in the United States, the District of Columbia, and U.S. territories and possessions . . . . [It] is designed to be used by the whole community, since engaging the whole community is essential for the Nation's success in maintaining resilience and preparedness.<sup>31</sup>

Then in 2011, President Barack Obama issued Presidential Policy Directive 8 (PPD-8), specifically directing the Secretary of Homeland Security to develop the National Preparedness Goal (NPG), as well as to develop a National Preparedness System (NPS) to assist the Nation in achieving the NPG.<sup>32</sup> The NRF was updated in 2013 to reflect the intent of PPD-8 by creating a "whole community" concept in the development and implementation of a response plan to national disaster events and is now part of the NPS.<sup>33</sup> The NRF organizes governmental response to disasters and describes the roles and responsibilities for the responding agencies.<sup>34</sup> The NRF is always in effect and can be implemented at any time in whole or in part, allowing for

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 3 (providing a succinct history of the creation and development of FEMA, as well as identifying FEMA's ethos, core values, principles).

<sup>21</sup> *Id.* at 6. Examples include the National Weather Service Community Preparedness Program, the Federal Disaster Assistance Administration, and the Federal Insurance Administration of Housing and Urban Development. *Id.* at 7.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 8.

<sup>25</sup> *Id.*

<sup>26</sup> Exec. Order No. 12,656, 3 C.F.R. 585 (1988).

<sup>27</sup> *Id.*

<sup>28</sup> DOMOPS HANDBOOK, *supra* note 8, at 9–10 (referencing The Homeland Security Act of 2002, Pub. L. No. 107-29, 116 Stat. 2135 (2002) (as amended) This legislation established the Department of Homeland Security (DHS), as well as reorganized and consolidated incident management functions, assets, and personnel under a single Department.

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*Id.* Note that Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 10, 2001) establishing the Office of Homeland Security and the Homeland Security Council preceded the Homeland Security Act of 2002, later inheriting key functions of FEMA pursuant to Exec. Order No. 13,286, 68 Fed. Reg. 10,619 (Mar. 5, 2003).

<sup>29</sup> HOMELAND SECURITY PRESIDENTIAL DIR. 5, MANAGEMENT OF DOMESTIC INCIDENTS 229 (Feb. 28, 2003), *available at* <http://www.gpo.gov/fdsys/pkg/PPP-2003-book1/pdf/PPP-2003-book1-doc-pg229.pdf>.

<sup>30</sup> The Homeland Security Act of 2002 § 502, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (as amended).

<sup>31</sup> U.S. DEP'T HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK (2d ed. May 2013) [hereinafter NRF], *available at* <http://www.fema.gov/national-response-framework>. The National Response Framework (NRF) consists of a base document, the Emergency Support Function document (organizes federal and state governments by their response resources and capabilities), support annexes, and incident annexes. *Id.*

<sup>32</sup> PRESIDENTIAL POL'Y DIR. 8, NATIONAL PREPAREDNESS (Mar. 30, 2011), *available at* <http://www.dhs.gov/presidential-policy-directive-8-national-preparedness>.

<sup>33</sup> NRF, *supra* note 31.

<sup>34</sup> *Id.*

the appropriate-sized response for each incident.<sup>35</sup> Despite being a robust document that establishes the roles and responsibilities of all the agencies involved throughout the response and recovery processes, the NRF contains no specific legal authority by which to grant federal assistance to state and local governments. However, one source of such authority is found in the Robert T. Stafford Disaster Relief and Emergency Assistance Act (The Stafford Act).<sup>36</sup>

### 3. The Stafford Act

The Stafford Act aims “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters.”<sup>37</sup> This assistance is extended upon request, usually from a state governor, when the consequences of a disaster are such that the state or local government cannot adequately respond.<sup>38</sup> The Stafford Act defines emergency<sup>39</sup> differently from major disaster,<sup>40</sup> and depending on the type of declaration, the President’s powers can differ greatly.<sup>41</sup> Upon issuance of a declaration, DHS may request other federal agencies to deploy to the affected area to assess, monitor, and coordinate the response until the need for assistance is scaled back and transitioned into recovery operations.<sup>42</sup> During operations, the Stafford Act provides for immunity from liability for “any claim based upon the exercise or performance of or the failure to exercise

or perform a discretionary function or duty on the part of a federal agency or an employee of the federal government in carrying out” its duties, as defined within the Act.<sup>43</sup>

Generally, assistance under the Stafford Act will not occur until local officials determine that their own resources are not sufficient to address the emergency situation.<sup>44</sup> After coordination between State, Federal and local officials, a formal request for a declaration of a major disaster or emergency is made.<sup>45</sup> Once that request is received and approved, then the NPS is activated and the necessary response requirements are assigned to the respective federal agencies with FEMA in the lead.<sup>46</sup> When circumstances are such that time is of the essence and state or local governments require a more immediate response, a request for support can be made to local military commanders under their IRA.

### 4. Immediate Response Authority

As noted above, DoDD 3025.18 generally allows DoD commanders to provide assistance to civil authorities only upon request from state or local officials. Often, however, emergencies or major disasters will require an installation commander to respond to a request before approval from higher authority can be obtained. When such conditions arise, commanders may use their IRA to “temporarily [employ] the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States.”<sup>47</sup> Requests for IRA must still be evaluated by the commander, often with the servicing JA’s advice, using the CARRLL factors: cost, appropriateness, risk, readiness, legality, and lethality.<sup>48</sup> Upon making the decision to provide support, the commander is responsible for notifying the National Joint Operations and Intelligence Center, through the chain of command.<sup>49</sup>

<sup>35</sup> *Id.*

<sup>36</sup> The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (1974) (as amended by the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, 120 Stat. 1355 (2007), and the Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, 127 Stat. 4 (2013)) [hereinafter Stafford Act].

<sup>37</sup> *See id.* § 5121.

<sup>38</sup> *Id.*

<sup>39</sup> An emergency declaration by the President means that “[f]ederal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.” *Id.* § 5122(1).

<sup>40</sup> A major disaster is defined as “any natural catastrophe, . . . or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance.” *Id.* § 5122(2).

<sup>41</sup> Unlike a major disaster declaration, “emergency assistance is more limited . . . and total assistance may not exceed \$5 million for a single emergency, unless the President determines there is a continuing and immediate risk . . . and necessary assistance will not otherwise be provided on a timely basis.” DOMOPS HANDBOOK, *supra* note 8, at 33 (citing The Stafford Act § 5193 (2011)).

<sup>42</sup> *Overview of Stafford Act Support to States*, FEMA.GOV, available at <http://www.fema.gov/pdf/emergency/nrf/nrf-stafford.pdf> (last visited Mar. 15, 2014) [hereinafter *Overview*].

<sup>43</sup> Stafford Act, *supra* note 36. *See* Appendix A (Stafford Act Process) (illustrating the process used to request and provide support in accordance with The Stafford Act).

<sup>44</sup> *Overview*, *supra* note 42.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> DSCA, *supra* note 10, para. 4.g.

<sup>48</sup> *Id.* para. 4.e. Judge advocates should evaluate the request using the factors: cost, appropriateness, risk, readiness, legality, and lethality, to determine whether the request fits within the guidance found in DoDD 3025.18, stating that the plan “shall be compatible with . . . the National Incident Management System . . . or Department of Defense (DoD) issuances governing DSCA operations.” *Id.* para. 4.f. *See* DSCA, *supra* note 10 (providing complete guidance on the full request procedures and approval authorities for each type of domestic support operation).

<sup>49</sup> *Id.* para. 4.g.1.

The type of support the commander may provide will vary based on the situation. However, any support provided must not put the commander or his command at risk of subjecting civilians to the use of military power in violation of law, such as the Posse Comitatus Act (PCA).<sup>50</sup> The PCA, as implemented through statute and DoD directives, restricts military personnel in federal status from being directly involved in civilian law enforcement activities, unless authorized by the Constitution or an act of Congress.<sup>51</sup> When commanders operate within the confines of domestic authorities, the PCA will limit their ability to support local law enforcement agencies.<sup>52</sup> These limitations also affect which resources commanders can provide to local first responders during an emergency. Additionally, they will greatly limit the involvement that military personnel in federal status will have with the local populace in support of civil law enforcement.

Despite its limitations, requests by local authorities are commonly made to use military personnel in ways that may violate the PCA. For example, when a massive tornado hit Moore, Oklahoma, in 2013, the local police requested military personnel from Tinker AFB to perform sentry duty.<sup>53</sup> Similarly, local authorities requested that military personnel from Fort Carson, Colorado perform traffic control duties if a massive evacuation became necessary due to nearby wildfires.<sup>54</sup> In both cases, astute JAs recognized the potential PCA violations and took immediate action to deny the requests.<sup>55</sup>

Once the commander's IRA has expired and the NRF is in place, any further requests from local authorities should be routed through the Defense Coordinating Officer

(DCO).<sup>56</sup> "The DCO serves as the FEMA's single point of contact for the DoD's support within the Regions."<sup>57</sup> Judge advocates should become familiar with their FEMA Region and develop a professional relationship with the assigned DCO before an emergency happens. Things move very quickly once a crisis occurs, making it difficult to determine what stage the response is in and what authorities are available at any given moment.<sup>58</sup> The DCO can be a great resource for that information and can provide a rundown of the DoD and federal agencies participating in the response. Having this information will help to ensure that the installation's response is synchronized with that of the overall federal response, which is usually achieved through combined coordination in the EOC.

### C. The Emergency Operations Center

To maintain situational awareness on day-to-day operations for the installation or senior commander, major military installations will have an established operations or command center. Often these command centers (commonly referred to as Installation Operations Centers (IOCs)) are minimally manned and only become fully operational during a training exercise or in response to an event on the installation. The installation's Office of the Staff Judge Advocate (OSJA) will typically have a permanent seat inside the IOC, a position frequently filled by an operational law attorney. The JA's role within the IOC will vary based upon its current mission and who the command center is supporting.

During an emergency response and recovery mission, the IOC will establish a temporary EOC for the duration of the mission. While the IOC is a flexible organization, setting up a separate command center should be considered when an emergency arises; allows the staff working within the EOC to focus their efforts on the emergency response and recovery effort, while the IOC continues its normal operations.<sup>59</sup> In that case, a decision as to which commander will be in charge of each operations center should be determined well in advance to avoid confusion once the response effort is under way.<sup>60</sup>

<sup>50</sup> The Posse Comitatus Act, 18 U.S.C. § 1385 (2011).

<sup>51</sup> *Id.* The Posse Comitatus Act (PCA) only restricts the Army and Air Force from direct participation in civilian law enforcement activities. However, through operation of law, Congress extended that restriction to both the Navy and Marine Corps. See 10 U.S.C. § 375 (2012); see also U.S. DEP'T OF DEF., DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) (4 Feb. 1994) (superseded by U.S. DEP'T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (27 Feb. 2013)); see also DOMOPS HANDBOOK, *supra* note 8, ch. 4 (discussing the history behind the PCA, its application to the military, as well as limitations and exceptions).

<sup>52</sup> See Appendix B (PCA Applicability) (providing an overview of the applicable statutory and regulatory exceptions to the PCA).

<sup>53</sup> CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, TINKER AIR FORCE BASE (AFB), 72ND AIR BASE WING, RESPONSE TO MOORE, OKLAHOMA TORNADES AFTER ACTION REPORT (AAR) 7 (31 July 2013) [hereinafter TINKER AFB TORNADES AAR].

<sup>54</sup> CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FORT CARSON OSJA/U.S. AIR FORCE ACADEMY/NORTHCOM COLORADO WILDFIRES AAR JUNE 2012–JULY 2012, at 10 (10–11 Oct. 2012) [hereinafter FORT CARSON WILDFIRES AAR].

<sup>55</sup> *Id.* at 11; TINKER AFB TORNADES AAR, *supra* note 53, at 7.

<sup>56</sup> DOMOPS HANDBOOK, *supra* note 8, at 21.

<sup>57</sup> *Role of the Federal Coordinating Officer in Disaster Operations*, available at <http://www.fema.gov/region-ii-federal-coordinating-officers-and-defense-coordinating-officers> (last visited Mar. 15, 2014).

<sup>58</sup> FORT CARSON WILDFIRES AAR, *supra* note 54, at 8.

<sup>59</sup> *Id.* at 15–16.

<sup>60</sup> *Id.* (discussing how during the response to the 2012 Colorado Wildfires, Fort Carson initially ran two separate command centers in response to the emergency). The IOC was manned by installation personnel and commanded by the installation commander and the EOC manned by the 4th Infantry Division staff and commanded by the 4th Infantry Division commander. At times, each command center was performing the same functions, resulting in duplication of efforts. In the end, the EOC became

Installation IOCs will establish their own battle rhythm, with the staff participating in the working groups are responsible for planning, writing, and disseminating the orders the installation depends upon to operate. The JAs working in the IOC often attend these working groups and participate in the Military Decision Making Process (MDMP).<sup>61</sup> Judge advocates can provide valuable input by “preparing legal estimates . . . writing legal annexes . . . and reviewing plans and orders.”<sup>62</sup> Ultimately though, the JA’s “primary responsibility is to identify legal considerations (authorities, restraints, and constraints) . . . early in the planning process” to avoid developing a plan that is not legally feasible.<sup>63</sup> Judge advocates who remain engaged in these working groups can work proactively with the staff to prevent potential legal issues early in the planning process. Collaborating early and often in the MDMP and providing sound legal advice and alternatives will go far in building a JA’s credibility with the IOC staff and the commander.

When an emergency does occur, the JA who can “work proactively to promote the mission” and is knowledgeable as both a Soldier and a lawyer<sup>64</sup> will be sought out to support the response and recovery operation. The primary mission of the EOC is to provide a centralized location for the coordinating effort during emergency response and to promote efficient and effective management of the current situation.<sup>65</sup> The EOC receives information from within the operational area to create a common operating picture for those responding to the event.<sup>66</sup> This allows for the collaborative effort of the staff sections to successfully and efficiently address issues as they arise, while coordinating the flow of information and resources to those in the field.<sup>67</sup> However, before the EOC’s staff can respond to any emergency, a plan must exist, and the staff must be trained and prepared to execute that plan.

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the primary command center, but it was obvious that the mostly civilian IOC staff was better trained to handle domestic response issues than the military personnel manning the EOC. *Id.*

<sup>61</sup> U.S. DEP’T OF ARMY, DOCTRINE PUB. 5–0, THE OPERATIONS PROCESS para. 32 (17 May 2012) (describing the military decision making process (MDMP) as an iterative planning methodology to understand the situation and mission, develop a course of action, and produce an operation plan or order; consisting of seven steps meant to encourage input and continual assessment of the plan as it is developed into an operation plan or order).

<sup>62</sup> U.S. DEP’T OF ARMY, DOCTRINE PUB. 1–04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 5–20 (18 Mar. 2013).

<sup>63</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1–04, LEGAL SUPPORT TO MILITARY OPERATIONS, at II-11 (17 Aug. 2011).

<sup>64</sup> *Id.* at vi.

<sup>65</sup> *Fusion Centers and Emergency Operations Centers*, U.S. DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/fusion-centers-and-emergency-operations-centers> (last visited Mar. 15, 2014).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

### III. Emergency Response and the Judge Advocate

#### A. Preparation is Key

Failing to prepare is preparing to fail<sup>68</sup> and this is no less true than when an installation is faced with responding to a crisis without having developed a sufficient response plan. Certainly, no one expects to be affected by a wildfire, tornado, or other disaster, but facing an emergency without a plan can result in higher losses of life, limb, or property. “A successful organizational preparedness program needs: a clear vision; actionable objectives and goals; defined deliverables and timelines; regular reviews; [and] identify potential obstacle [sic] and challenges.”<sup>69</sup> These plans are developed by the working groups using the MDMP and require buy-in from the commander.

Once the commander approves the plan, it must be continually reviewed, practiced, and reassessed to ensure that the risks are identified, contingencies are considered, and potential pitfalls are discovered and remedied. Judge advocates play a crucial part in this process by reviewing the plan for completeness and legality. However, to reach that level of expertise, credibility, and flexibility, JAs must be provided the opportunity to receive proper training and given access to the necessary resources and support.

##### 1. Training for the Operational Law Attorney

The OSJA is responsible for training its JAs and ensuring that they are properly resourced. Judge advocates assigned to an IOC as operational law attorneys would benefit from a training program that focuses on “[S]oldier skill proficiency, familiarity with the core legal disciplines for military operations, and an understanding of the judge advocate’s role in the [operational law] mission.”<sup>70</sup> Specifically, training should focus on the MDMP and domestic operations. Training can be obtained from on-the-job experience and reaching out to colleagues, as well as, attending office or installation-level professional development programs.

Additionally, JAs can receive formalized continuing legal education at a military legal institution, such as the Army’s The Judge Advocate General’s Legal Center and School (TJAGLCS). Currently, TJAGLCS offers a number of specialized courses, including courses focused on administrative law for military organizations, fiscal law, and

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<sup>68</sup> BRAINY QUOTE, *supra* note 1.

<sup>69</sup> *Ready Responder*, READY.GOV, available at <http://www.ready.gov/responder> (last visited Mar. 15, 2014).

<sup>70</sup> Major Edward K. Lawson IV, CLAMO Note, *OPLAW Attorney Training: A Program for Non-Deployable Legal Offices*, ARMY LAW., July 2000, at 44.

domestic operational law.<sup>71</sup> These courses provide JAs with an overview of the current law and issues that are being addressed in the field and allow JAs to network with their peers. Judge advocates should never underestimate the value of building a network of peers from whom they can seek out for assistance and guidance, or someone they can turn to for support. While formalized training is always preferred, JAs can benefit just as much from reaching out to their peers, seeking on-the-job training, and accessing the number of written materials available both on-line and at OSJAs across the force.<sup>72</sup> However, planning, training and research can only go so far; the true value of both the plans developed during the MDMP and the JA's effectiveness can best be realized during an installation training exercise.

## 2. *Exercising the Plan*

Training exercises allow the staff to practice operational standards, to test and refine plans, and to identify lessons learned in a controlled environment. Exercises also allow commanders to determine whether their intent was met and to evaluate overall force readiness and mobilization preparedness.<sup>73</sup> Participating in these exercises provides JAs a chance to see the plan in action and to discover any potential shortfalls that must be fixed before execution. It is also an opportunity for JAs to test their knowledge and assess their level of preparation. Further, the exercise will give them a chance to discover any gaps in support that may cause significant issues during an actual emergency and determine whether drafting certain documents or agreements beforehand could fill those gaps.<sup>74</sup>

## 3. *Getting All Your "Docs" in a Row*

The Center for Law and Military Operations (CLAMO), located at TJAGLCS, is charged with collecting data and producing after action reviews (AARs) relating to legal

issues arising in military operations.<sup>75</sup> The Center for Law and Military Operations's recent efforts include compiling the observations and comments of legal professionals involved in the military's responses to natural and man-made disasters. While not necessarily meant to be transferable or applicable to all legal operations, AARs do provide JAs with a checklist of sorts regarding possible issues that should be addressed during the planning and exercise phases of orders development. For example, one common theme throughout these AARs was a failure to create new or review existing Memoranda of Agreement (MOAs) and Mutual Aid or Assistance Agreements (MAAs) between the military installation and local organizations.<sup>76</sup> These agreements are generally made among agencies, organizations, and jurisdictions and they provide a mechanism to obtain emergency assistance in the form of personnel, equipment, materials, and other associated services.<sup>77</sup> Further, these agreements should discuss which services require reimbursement and the method by which to receive such reimbursement.

It is always good practice for newly assigned JAs to review the existing plan and any existing MOAs. Taking the time before an emergency to determine whether the existing MOAs are adequate for the response required or whether there is a gap in needed support is crucial in avoiding unnecessary stress and a delay in response during an emergency event. One document to consider updating or, if absent, drafting, is a Mutual Aid or Assistance Agreement. As authorized by statute, MAAs allow agency heads (e.g., installation or division commanders) with the duty to provide fire protection for any property of the United States to enter into reciprocal agreements with local fire-fighting organizations to provide mutual aid in providing fire protection.<sup>78</sup> These agreements will often include the authority to provide local fire-fighting organizations with the use of military equipment and personnel for fire-fighting purposes. An important aspect of these agreements is that they would allow the local commander to provide emergency fire-fighting support over an extended period of time, as opposed to the limited time allowed for similar assistance using IRA.<sup>79</sup>

Another recommendation is to create an MOA between

<sup>71</sup> THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, COURSE CATALOG (FY 2014), at 17-18, available at [https://www.jagcnet.army.mil/8525736A005BD5DA/0/D5835B60BE18C5CC85257BCD0074CC6B/\\$file/FY14%20TJAGLCS%20Course%20Catalog%20-%20Approved.pdf](https://www.jagcnet.army.mil/8525736A005BD5DA/0/D5835B60BE18C5CC85257BCD0074CC6B/$file/FY14%20TJAGLCS%20Course%20Catalog%20-%20Approved.pdf) (last visited Mar. 15, 2014). Some of the relevant courses offered include the Domestic Operational Law Course, Administrative Law for Military Organizations Course, and Fiscal Law Course. *Id.*

<sup>72</sup> Two helpful resources for JAs with access to a CAC-enabled computer are MilSuite's and the Center for Law and Military Operations' (CLAMO's) document library. Milsuite, <https://www.milsuite.mil/book/community/spaces/armyjag> (last visited Mar. 15, 2014) (requiring the user to set up an account); CLAMO, <https://www.jagcnet.army.mil/CLAMO> (last visited Mar. 15, 2014) (requiring the user to log into the website).

<sup>73</sup> U.S. DEP'T OF ARMY, REG. 350-28, ARMY EXERCISES para. 2-1 (9 Dec. 1997).

<sup>74</sup> *Id.* para. 4-11.

<sup>75</sup> CLAMO, <https://www.jagcnet.army.mil/CLAMO> (last visited Mar. 17, 2014).

<sup>76</sup> FORT CARSON WILDFIRES AAR, *supra* note 54, at 3, 13. See also TINKER AFB TORNADOES AAR, *supra* note 53, at 7.

<sup>77</sup> *Preparedness*, FEMA.GOV, available at <http://www.fema.gov/preparedness-0> (last visited Mar. 15, 2014). Examples of memoranda of agreement (MOAs) and mutual aid agreements (MAAs) can be found at FEMA.gov and at most state government websites.

<sup>78</sup> 42 U.S.C.A. § 1856a (West, Westlaw through Pub. L. No. 113-72 (excluding Pub. L. Nos. 113-66 and 113-67)).

<sup>79</sup> *Id.*

the installation and local facilities for use as shelters-in-place. This may quickly become necessary when an emergency requires the installation commander to issue evacuation orders for individuals residing on the installation. To save time and to avoid missing a crucial element in drafting the MOA, JAs should consider introducing this course of action early in the planning phase of the MDMP. Taking the time to develop the MOA to ensure that it addresses specific needs (e.g., size of population that may be displaced, proximity to installation, contingency locations, etc.) will pay dividends in the event the need arises.<sup>80</sup>

In the summer of 2012, encroaching wildfires threatened Fort Carson, Colorado, forcing the installation commander to issue evacuation orders for non-essential personnel working and living on the base. However, the large exodus of individuals from the installation into the local community quickly began to take its toll on the availability of lodging facilities, making additional shelter options an essential requirement. In this instance, the JA working in the EOC assisted in drafting the MOAs between the installation and local area schools to utilize their gymnasiums as temporary shelters for personnel evacuating from Fort Carson.<sup>81</sup>

Judge advocates should also consider drafting a template for evacuation orders that can be used, should the need arise, during the course of the emergency response. While evacuation orders may initially be given verbally by the commander, they will need to be reduced into written orders as soon as practicable. At a minimum, the written evacuation orders should include the basis for the order, the effective date, how long it will remain in effect, who is being evacuated and from what location, maximum safe haven distances, and funding cites.<sup>82</sup> Having a template prepared beforehand will help avoid the potential omission of critical information and ensure timely dissemination of the orders to facilitate efficient submission of travel vouchers.<sup>83</sup> When the emergency has passed and evacuation is no longer required, the commander must terminate the order to effectively stop the entitlements afforded to the evacuees. Judge advocates can assist in this process by tracking the issued orders and reminding the commander to terminate them when appropriate. Finally, JAs should consider creating a quick reference guide, which could include sample MOAs, claims cards for personal property damages,

<sup>80</sup> FORT CARSON WILDFIRES AAR, *supra* note 54, at 4, 12.

<sup>81</sup> E-mail from Captain Connor J. Bidwill, Chief, Operational and Int'l Law, Office of the Staff Judge Advocate, 4th Infantry Div., to author (Nov. 9, 2013, 12:14 EST) (on file with author).

<sup>82</sup> FORT CARSON WILDFIRES AAR, *supra* note 54, at 12–13.

<sup>83</sup> Evacuation entitlements for all military and civilian personnel and their dependants can be found in the JOINT FED. TRAVEL REG., vol. 1, (Uniformed Personnel) (C297) (2012) and the JOINT TRAVEL REG., vol. 2 (Dep't of Def. Civ. Personnel) (C551) (2012).

and information papers discussing common issues or lessons learned.<sup>84</sup>

## B. Common Issues

While each installation's response to an emergency is unique, the issues encountered will often be similar. Therefore, it is critical for the EOC staff, including the JA, to keep an on-going log of issues and recommended solutions throughout any event, whether it is a training exercise or a real event. Taking the time to capture these issues<sup>85</sup> and compiling them into an AAR will pay significant dividends during the planning and execution of future emergency response missions. These AARs are an excellent source for spotting potential issues during the planning phase and can be a quick resource for addressing any issues during an emergency response. A review of the most recent AARs covering the military's response to natural and man-made disasters reveals similar issues across the spectrum of disciplines. In general, the most common issues involved interagency coordination, ethics and administrative law concerns, and questions relating to intelligence oversight.

### 1. Interagency Coordination

Most emergency responses require the assistance of the local first responders, utility companies, and local and state emergency management agencies. If a national emergency or disaster is declared, then federal agencies deploy as well, with DHS/FEMA in the lead.<sup>86</sup> While not all emergency responses mandate a Presidential declaration, most response operations do require the installation EOC to coordinate and work alongside these agencies. Ensuring that the installation's response does not impede the lead agencies from responding appropriately requires continuous communication with the right people. Determining who that is and developing those relationships beforehand is critical to ultimate mission success.

During the recent responses to the Fort Carson wildfires and the Tinker AFB tornado near Moore, Oklahoma, prior

<sup>84</sup> This list is not all inclusive of the documents that could be drafted in support of an emergency preparedness plan. Instead, it is meant to act as a starting point for JAs who are reviewing the existing agreements or who are supporting the planning process for their installations' emergency preparedness plan. An overview of Disaster Claims Preparedness and links to helpful claims resources can be found at JAGCNET, <https://www.jagcnet.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=A2ACB9CDEA393C69852579CF004FDA7D> (last visited Mar. 17, 2014).

<sup>85</sup> Often, staff judge advocate offices will incorporate these lessons learned into quick reference guides and information papers. Additionally, CLAMO will develop an AAR, which can found in its document repository. Finally, JAs can reach out to their peers at other installations as well as within their own offices.

<sup>86</sup> DOMOPS HANDBOOK, *supra* note 8, at 34–35.

interagency coordination played a vital role in the success of the missions. In particular, the EOC staff at Tinker AFB commented in its AAR that having an excellent relationship with the local first responders greatly aided the DSCA effort.<sup>87</sup> They developed MAAs in advance and participated on the Local Emergency Planning Committee, as well as invited the local responders to their installation exercises.<sup>88</sup> However, one shortfall noted was the failure to reach out beyond the agencies within the immediate vicinity of the installation, making both their response and interaction with such agencies more difficult.<sup>89</sup> Significant weather-related events often affect more than one community at a time. Therefore, developing a working relationship with non-DoD counterparts within the surrounding communities beforehand can positively aid in the response and recovery efforts.

Similarly, the JAs working the Fort Carson wildfires found that staying linked into the EOC to review incoming requests for assistance was crucial to success of the mission.<sup>90</sup> They were integral to the review process and were able to explain the commander's authority to assist the local community.<sup>91</sup> Further, the JAs would maintain the lines of communication with their counterparts at higher headquarters to ensure that any support provided by their commander would fit into the overall DoD response.<sup>92</sup> Ensuring that they were not duplicating the effort was crucial to developing a unified DoD response and it allowed the local and federal authorities to take the lead.<sup>93</sup> Having open lines of communication and strong interagency relationships in place during the response is especially important when addressing the common fiscal and ethics issues that routinely arise.

## 2. Accepting Donations

Emergencies always seem to bring the best out of people, and while the outpouring of support is appreciated, JAs will have to address the issues associated with donations of goods, money, and services. Gift offers will raise many ethical concerns, including appearance issues, gift value limits, and proper disposal of surplus donations.<sup>94</sup> But no matter the type of gift or donation, JAs must remain mindful that the emergency situation does not change the gift

<sup>87</sup> TINKER AFB TORNADOES AAR, *supra* note 53, at 6–7.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> FORT CARSON WILDFIRES AAR, *supra* note 54, at 7.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> TINKER AFB TORNADOES AAR, *supra* note 53, at 9.

acceptance analysis.<sup>95</sup>

Developing a plan to address these issues and having it in place in advance will free up the JA to focus on more pressing issues during the response. One possible solution is to develop an MOA with the installation's Morale, Welfare, and Recreation (MWR) or local non-federal entities such as the Red Cross. Once an emergency arises, the Public Affairs Office can advise the public to provide donations to those entities instead of donating items to on-post units.<sup>96</sup> Working proactively to reduce the amount of donations to on-post units reduces the JA's workload significantly, while building goodwill within the local community by diverting the donations to the community at large.

## 3. Collecting Intelligence and Intelligence Oversight

While a full analysis of intelligence oversight is beyond the scope of this paper, JAs must at least be able to spot the potential issues involved with using intelligence assets during domestic operations. "Judge advocates must recognize that collecting domestic intelligence by necessity entails collecting information on U.S. persons."<sup>97</sup> Due to its complexity, intelligence oversight questions should not be answered without full consideration of the existing authorities. At a minimum, JAs should carefully review all requests by local authorities or their commanders which include (or which may include) the use of intelligence assets and components to gain situational awareness of the space in which they will be operating.<sup>98</sup> Obtaining this information may result in the collection of information on U.S. persons, which could violate the intelligence oversight rules.<sup>99</sup> Judge advocates should familiarize themselves with these rules and the framework for reviewing requests.<sup>100</sup> Having a grasp of the basic framework of intelligence collection law and procedures will provide a starting point from which to analyze the issue, and help JAs recognize the request should

<sup>95</sup> A great resource for ethics and administrative legal issues is the *General Administrative Law Deskbook*, which can be found online at [https://www.jagcnet2.army.mil/Sites%5C%5Cadministrativelaw.nsf/0/C2881C97920E63AF85257B2E0071458C/%24File/General%20Administrative%20Law%20\(GAL\)%20Deskbook.pdf](https://www.jagcnet2.army.mil/Sites%5C%5Cadministrativelaw.nsf/0/C2881C97920E63AF85257B2E0071458C/%24File/General%20Administrative%20Law%20(GAL)%20Deskbook.pdf) (last visited Mar. 15, 2014) (log-in required).

<sup>96</sup> FORT CARSON WILDFIRES AAR, *supra* note 54, at 4.

<sup>97</sup> DOMOPS HANDBOOK, *supra* note 8, at 164.

<sup>98</sup> *Id.*

<sup>99</sup> See Exec. Order No. 12,333, 3 C.F.R. 1981 Comp. 200 (1981) (as amended by Executive Orders 13,284 (2003), 13,355 (2004), and 13,470(2008)); see also U.S. DEP'T OF DEF., REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DoD INTELLIGENCE COMPONENTS THAT AFFECT U.S. PERSONS (Dec. 1982); U.S. DEP'T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (3 May 2007).

<sup>100</sup> See DOMOPS HANDBOOK, *supra* note 8, ch. 9 (providing an overview of the Intelligence Oversight rules).

be forwarded to a higher or outside authority for review and approval.<sup>101</sup>

#### IV. Conclusion

The EOC can be a formidable place for any JA unfamiliar with its dynamic mission and shifting requirements. While intimidating at first, JAs can quickly integrate into the EOC staff with a well-stocked tool kit and a general understanding of the common issues that may develop. The middle of an emergency is not the time for on-the-job training; early involvement and preparation are critical to successful integration with the Plans and Operations staff. While not always practicable or available, formal DOMOPs and DSCA training is the best means of receiving the most current information in this area of law. Additionally, JAs should familiarize themselves with the operations center and its staff, as well as participate in the planning process and installation training exercises whenever practicable. Maintaining that presence will allow the JA to recognize, address, and confidently resolve legal concerns before they become significant issues during an emergency.

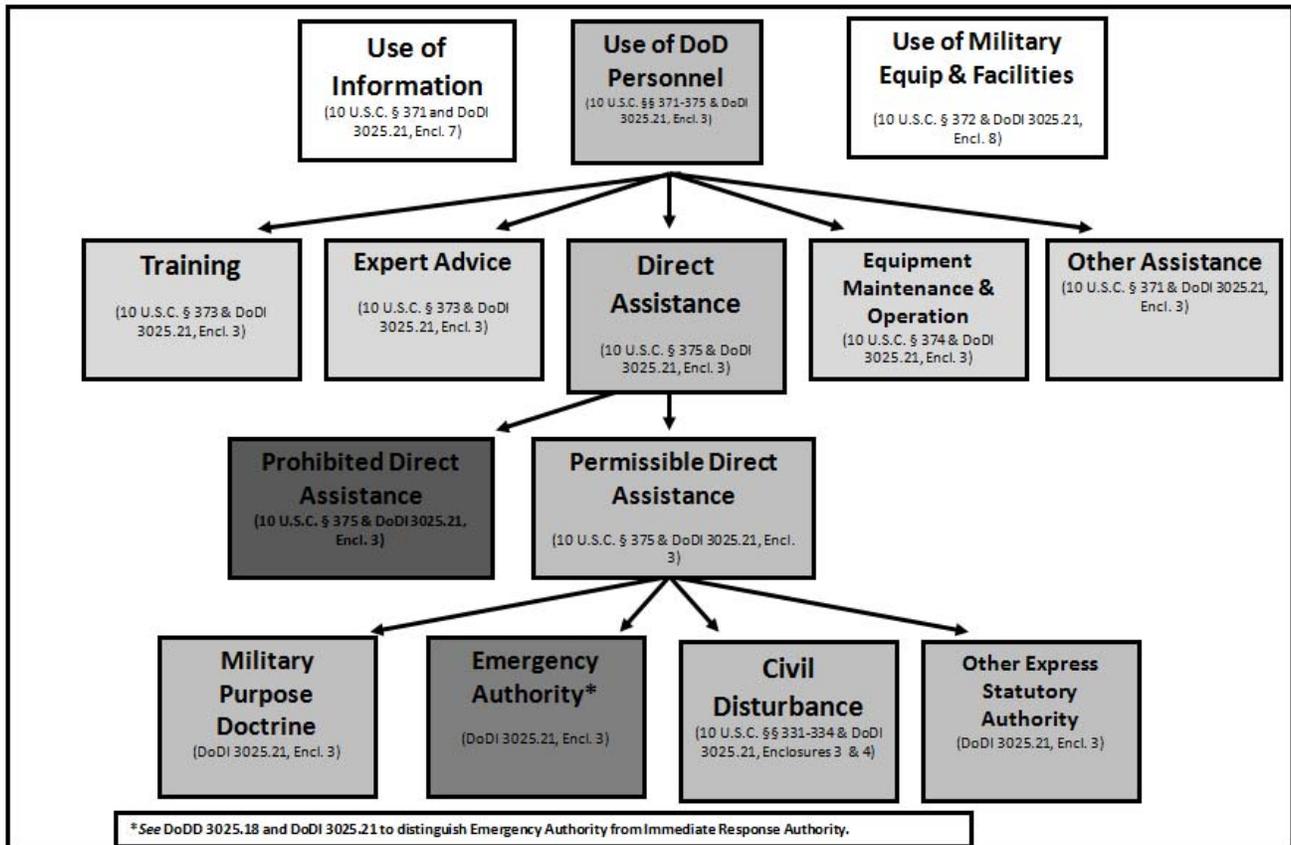
Judge advocates have proven to be crucial members of the EOC staff, as evidenced during past events. Judge advocates assisted with the development of evacuation orders and dealt competently with the potential fiscal issues, oftentimes coordinating with interagency counterparts. Their advice ensured a smooth transition from the initial DoD assistance to a fully developed federal response. Looking to the lessons learned from past events further allows JAs to quickly identify potential areas of dispute and give timely relevant advice. So next time you are called upon to serve in the EOC, take advantage of those lessons learned and available training, insert yourself early and often in the day-to-day operations of the IOC, and engage the IOC staff during the planning process to avoid potential legal pitfalls. Do not rush to failure by failing to prepare.

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<sup>101</sup> See CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, U.S. ARMY NORTH, OFFICE OF THE STAFF JUDGE ADVOCATE, SUPER STORM SANDY RESPONSE AAR OCTOBER–NOVEMBER 2012, at 11 (20–21 Feb. 2013) (providing a brief discussion on the request for the use of DoD intelligence assets during the Hurricane Super Storm Sandy response and recovery efforts).



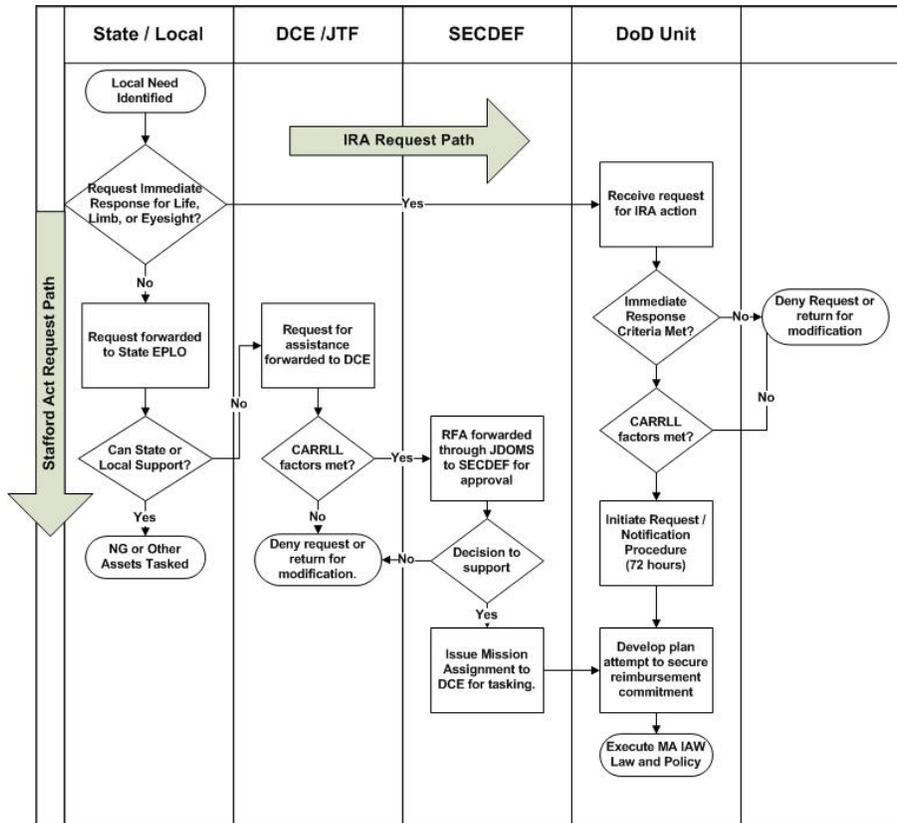
**Appendix B**  
**PCA Applicability<sup>103</sup>**



<sup>103</sup> PowerPoint Presentation of Major Owen Bishop, Int'l and Operational Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, on Defense Support of Civil Authorities, at slide 18 (Mar. 6, 2014) (on file with author).

## Appendix C

### Request for Assistance Flowchart<sup>104</sup>



<sup>104</sup> DOMOPS HANDBOOK, *supra* note 8, at 37.