



# The Role of the Department of Defense During A Flu Pandemic

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## Summary

A flu pandemic is a worldwide epidemic of an influenza virus. As such, the United States' response to a flu pandemic would have both international and domestic components. Additionally, the domestic response effort would include contributions from every governmental level (local, state, tribal, and federal), non-governmental organizations, and the private sector. This report will focus largely on the role of the Department of Defense (DOD) in supporting the nation's domestic response effort, although it will also touch on DOD's international role.

The Department of State would lead the federal government's international response efforts, while the Department of Homeland Security and the Department of Health and Human Services would lead the federal government's domestic response. The Department of Defense would likely be called upon to support both the international and domestic efforts. An analysis of the tasks assigned by the *National Strategy for Pandemic Influenza Implementation Plan* indicates that DOD's role during a flu pandemic would center on the following objectives: assisting in disease surveillance; assisting partner nations, particularly through military-to-military assistance; protecting and treating US forces and dependents; and providing support to civil authorities in the United States

With respect to providing support to civil authorities in the United States, the types of defense support which would likely be in greatest demand during a flu pandemic include: providing disease surveillance and laboratory diagnostics; transporting response teams, vaccines, medical equipment, supplies, diagnostic devices, pharmaceuticals and blood products; treating patients; evacuating the ill and injured; processing and tracking patients; providing base and installation support to federal, state, local, and tribal agencies; controlling movement into and out of areas, or across borders, with affected populations; supporting law enforcement; supporting quarantine enforcement; restoring damaged public utilities; and providing mortuary services. Note, however, that DOD's ability to support these requests would be limited by its national defense and force protection responsibilities. The two principal ways in which defense support could be provided to civil authorities are by way of an "immediate response," or in response to a formal "request for assistance" (RFA). Additionally, in extreme circumstances the federal government may expedite or suspend the RFA process and initiate a "proactive federal response."

National Guard personnel would almost certainly be involved in domestic response efforts as members of their state militia under the control of their governor. Current DOD plans do not anticipate federal mobilization of the National Guard or Reserves to respond to a flu pandemic. However, these plans could be modified if circumstances warranted it (for example, if the severity of the pandemic significantly exceeded DOD's planning assumptions). In the event such a federal mobilization is contemplated, an important consideration would be the impact it would have on any response efforts that were already occurring at the state and local levels. For example, the activation of Reserve and National Guard medical personnel may pull them out of local hospitals where they are already engaged in the response effort, thereby undermining state and local response efforts.

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## The Federal Response to a Flu Pandemic

A flu pandemic is a worldwide epidemic of an influenza virus. As such, the United States' response to a flu pandemic would have both international and domestic components. Additionally, the domestic response effort would depend upon contributions from every governmental level (local, state, tribal, and federal), non-governmental organizations, and the private sector. This report will focus largely on the role of the Department of Defense (DOD) in supporting the nation's domestic response effort, although it will also touch on DOD's international role.

### The National Response Framework

The federal response to a flu pandemic would be broadly shaped by statute and executive branch plans and policies. Statutes such as the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act), the Public Health Service Act, and other public health emergency authorities<sup>1</sup> permit the federal government to provide various forms of assistance<sup>2</sup> to eligible applicants, including state and local governments, non-profit organizations and individuals. While these statutes authorize the federal government to provide assistance, the manner in which the array of federal agencies provide that assistance in coordination with other levels of government, non-governmental organizations, and the private sector is guided by an executive branch planning document known as the National Response Framework (NRF).<sup>3</sup>

The NRF "is a guide to how the Nation conducts all-hazards response."<sup>4</sup> Among other things, it establishes broad lines of authority for federal government agencies to prepare for and respond to any terrorist attack, major disaster, or other emergency (i.e., "all-hazards"). Under the NRF, the Secretary of State is responsible for "managing international preparedness, response and recovery activities relating to domestic incidents and the protection of U.S. citizens and U.S. interests overseas."<sup>5</sup> The Secretary of Homeland Security is "the principal Federal official for domestic incident management...[and is] responsible for coordination of Federal resources utilized in the prevention of, preparation for, response to, and recovery from terrorist attacks, major disasters, and other emergencies."<sup>6</sup> However, the Secretary of Health and Human Services (HHS) "leads all Federal public health and medical response to public health emergencies and incidents covered by

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<sup>1</sup> For more information on the statutory authorities which might be used during a flu pandemic, see CRS Report RL33579, *The Public Health and Medical Response to Disasters: Federal Authority and Funding*, by Sarah A. Lister.

<sup>2</sup> For a description of the types of assistance which can be provided under the Stafford Act, see CRS Report RL33053, *Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding*, by Keith Bea, especially pp. 11-14. For a description of the types of assistance which can be provided under the Public Health Emergency Act and other federal public health emergency authorities, see CRS Report RL33579, *The Public Health and Medical Response to Disasters: Federal Authority and Funding*, by Sarah A. Lister, especially pp. 27-34.

<sup>3</sup> Department of Homeland Security, *National Response Framework*, Washington, DC, January 2008, <http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf>. For more information on the NRF, see CRS Report RL34758, *The National Response Framework: Overview and Possible Issues for Congress*, by Bruce R. Lindsay. Note that the NRF itself is derived from multiple statutes, regulations, executive orders and presidential directives. See the NRF List of Authorities and References, available at <http://www.fema.gov/pdf/emergency/nrf/nrf-authorities.pdf>.

<sup>4</sup> *National Response Framework*, 1.

<sup>5</sup> *National Response Framework*, 26.

<sup>6</sup> *National Response Framework*, 25.

the NRF.”<sup>7</sup> Given the centrality of public health and medical response during a flu pandemic, HHS would be the primary response agency for the domestic response, even while DHS coordinates the overall domestic response effort.

The role of the Department of Defense (DoD) in supporting domestic response efforts under the NRF is potentially significant, while recognizing certain limits due to the Department’s principal mission of national defense:

The primary mission of the Department of Defense (DOD) and its components is national defense. Because of this critical role, resources are committed after approval by the Secretary of Defense or at the direction of the President. Many DOD components and agencies are authorized to respond to save lives, protect property and the environment, and mitigate human suffering under imminently serious conditions, as well as to provide support under their separate established authorities, as appropriate. The provision of defense support is evaluated by its legality, lethality, risk, cost, appropriateness, and impact on readiness. When Federal military and civilian personnel and resources are authorized to support civil authorities, command of those forces will remain with the Secretary of Defense. DOD elements in the incident area of operations and National Guard forces under the command of a Governor will coordinate closely with response organizations at all levels.<sup>8</sup>

A more thorough discussion of the types of support DoD might be called upon to provide to civil authorities, and the process whereby such support can be requested, occurs later in this report.

## **The National Strategy for Pandemic Influenza**

While the NRF provides an “all-hazards” response framework, the federal government also has a strategic plan which specifies in more detail precisely how it will prepare for and respond to a flu pandemic within the context of the NRF. The *National Strategy for Pandemic Influenza* (hereafter *National Strategy*) provides an overarching outline of how the federal government will prepare for, detect and respond to a such an event. It is based on three “pillars”: preparedness and communications; surveillance and detection; and response and containment. A related document, the *National Strategy for Pandemic Influenza Implementation Plan* (hereafter *Implementation Plan*), details the specific actions and policy decisions which will be needed to execute this strategy and bring all the resources of the federal government to bear in a coordinated manner. Like the NRF, it affirms that the Secretary of State would be responsible for the coordination of the international response, the Secretary of Homeland Security would have overall responsibility for the federal government’s response to a pandemic, and the Secretary of Health and Human Services would be responsible for the “overall coordination of the public health and medical emergency response during a pandemic....”<sup>9</sup> It describes the role to the Secretary of Defense as follows:

The Secretary of Defense will be responsible for protecting American interests at home and abroad. The Secretary of Defense may assist in the support of domestic infrastructure and essential government services or, at the direction of the President and in coordination with

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<sup>7</sup>Department of Homeland Security, *Emergency Support Function #8 – Public Health and Medical Services Annex*, Washington, DC, January 2008, ESF 8-2, <http://www.fema.gov/pdf/emergency/nrf/nrf-esf-08.pdf>.

<sup>8</sup> *National Response Framework*, p. 26.

<sup>9</sup> Homeland Security Council, *National Strategy for Pandemic Influenza Implementation Plan*, Washington, DC, May 2006, p. 50, <http://www.pandemicflu.gov/plan/federal/pandemic-influenza-implementation.pdf>.

the Attorney General, the maintenance of civil order or law enforcement, in accordance with applicable law. The Secretary of Defense will retain command of military forces providing support.<sup>10</sup>

Subsequently, the *Implementation Plan* assigns some 300 tasks to various federal agencies. For each of these tasks, a lead federal agency is identified and, if need be, supporting agencies as well.

## The Role of the Department of Defense

A DoD analysis of the *Implementation Plan* identified 31 tasks which were assigned primarily to DoD and 83 which were assigned to other agencies with DoD in a supporting role.<sup>11</sup> Of the tasks assigned primarily to DoD, most were related to one of these four objectives:

- Assisting in disease surveillance
- Assisting partner nations, particularly through military-to-military assistance
- Protecting and treating US forces and dependents
- Providing support to civil authorities in the United States

Each of these general objectives is discussed in more detail below.<sup>12</sup>

### Disease Surveillance

The Department of Defense plays an important role in detecting and tracking diseases. Given the wide dispersal of U.S. military forces around the globe,<sup>13</sup> the Department of Defense has long

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<sup>10</sup> *National Response Framework*, p. 29.

<sup>11</sup> Office of the Assistance Secretary of Defense, Homeland Defense, *Department of Defense Implementation Plan for Pandemic Influenza*, Washington, DC, August 2006, p. 20, [http://fhp.osd.mil/aiWatchboard/pdf/DoD\\_PL\\_Implementation\\_Plan\\_August\\_2006\\_Public\\_Release.pdf](http://fhp.osd.mil/aiWatchboard/pdf/DoD_PL_Implementation_Plan_August_2006_Public_Release.pdf). Note that this document is distinct from the *National Strategy for Pandemic Influenza Implementation Plan*. The *Department of Defense Implementation Plan for Pandemic Influenza* is based on the tasks contained in the *National Strategy for Pandemic Influenza Implementation Plan*.

<sup>12</sup>The Department of Defense's plans to meet these objectives are contained in several other documents: *Department of Defense Implementation Plan for Pandemic Influenza*, *CONPLAN 3351: DOD Global Response to Pandemic Influenza*, and *USNORTHCOM CONPLAN 3591: USNORTHCOM Response to Pandemic Influenza*. The *Department of Defense Implementation Plan* "sets forth [DOD] guidance and addresses key policy issues for pandemic influenza planning." *CONPLAN 3351* directs "planning and synchronization of DOD's global response to a potential pandemic." *USNORTHCOM CONPLAN 3591*, a supporting plan to *CONPLAN 3351*, focuses on support to the "national effort in response to a potential pandemic resulting from human-to-human transmission of an influenza virus. The two CONPLANS are not classified, but according to the NORTHCOM legislative liaison office, DOD policy does not permit the public release of operational plans. Nonetheless, the broad outlines of the DOD response effort can be ascertained by reference to the higher level documents discussed previously, to the unclassified *Department of Defense Implementation Plan for Pandemic Influenza*, and to an unclassified summary of the CONPLANS prepared by USNORTHCOM.

<sup>13</sup> DoD has personnel deployed to at least 147 countries around the world, and has a presence of over 200 personnel in at least 21 of them. Countries which have over 200 U.S. active duty military personnel in them include: Afghanistan, Bahrain, Belgium, Cuba (Guantanamo), Djibouti, Egypt, Germany, Greece, Honduras, Iraq, Italy, Japan, Netherlands, Portugal, Qatar, Saudi Arabia, Serbia (includes Kosovo), South Korea, Spain, Turkey, and the United Kingdom. Figures do not include mobilized reservists, DOD civilians, DOD contractors, or family members. Defense Manpower Data Center, Statistical Information Analysis Division, *Active Duty Military Personnel Strength by Regional Area and* (continued...)

maintained a system for detecting infectious diseases in order to maintain intelligence on possible threats to force readiness. DoD conducts continuous worldwide influenza surveillance at domestic laboratories as well as at military installations around the world. More than a dozen different DOD entities cooperate with each other, foreign militaries, and some nonmilitary organizations in a complex arrangement that allows global surveillance of emerging infections.<sup>14</sup> International cooperation is important due to the rapid transmission of disease made possible by high levels of global travel. DOD policy is designed to provide for detection capabilities at the lowest possible organizational level. The Institute of Medicine reviewed DOD's global influenza surveillance network in 2007 and issued a mainly favorable assessment,<sup>15</sup> although the *Implementation Plan* required the Department of Defense to improve its capacity to detect and monitor new influenza strains, and to enhance its ability to share information with international organizations and agencies.<sup>16</sup> DOD's influenza surveillance programs actively coordinate with the Centers for Disease Control and Prevention, Food and Drug Administration, and World Health Organization.

## **Partner Nation Assistance**

Under the *Implementation Plan*, the Secretary of State is responsible for

the coordination of the international response, including ensuring that other nations join us in our efforts to contain or slow the spread of a pandemic virus, helping to limit the adverse impacts on trade and commerce, and coordinating our efforts to assist other nations that are impacted by the pandemic.<sup>17</sup>

However, DoD has well-developed relationships with key leaders in many nations -- particularly with respect to foreign military officers and defense officials -- and it also has expertise and capabilities that could be useful to the efforts of foreign governments to detect and contain a pandemic. As such, the *Implementation Plan* directed DoD to conduct a number of actions, in coordination with the Department of State and other appropriate agencies, to assist partner nation militaries in preparing for a pandemic. Examples of this type of assistance include assessing the preparedness and response plans of foreign militaries, validating these response plans with military-to-military exercises, conducting training programs to improve military infection control and case management, and assessing the capacity of foreign military labs and response teams.<sup>18</sup> The *Implementation Plan* also directed DoD to support the Department of State in providing U.S. response capabilities to international response efforts. Examples of this type of support would include participating in investigative or technical assistance teams, or delivering countermeasures to affected countries.<sup>19</sup> Additionally, if the Secretary of Defense approves a request from another

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Country, December 31, 2008, <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst0812.pdf>.

<sup>14</sup> For additional information, please see Department of Defense, Armed Forces Health Surveillance Center, *Global Emerging Infections Surveillance & Response System, Fiscal Year 2008 Annual Report*, 2008, <http://www.geis.fhp.osd.mil/GEIS/aboutGEIS/annualreports/GEISAR08.pdf>.

<sup>15</sup> Institute of Medicine, *Review of the DoD-GEIS Influenza Programs: Strengthening Global Surveillance and Response*, National Academies Press, Washington, DC, 2008.

<sup>16</sup> See *National Strategy for Pandemic Influenza Implementation Plan*, actions 4.1.8.4, 4.2.2.5, 4.2.2.6, 4.2.2.7, 4.2.3.8, 4.2.3.9, 6.2.3.4, 6.2.4.3, and 6.3.4.7.

<sup>17</sup> *National Strategy for Pandemic Influenza Implementation Plan*, p. 29.

<sup>18</sup> See *National Strategy for Pandemic Influenza Implementation Plan*, actions 4.1.1.3, 4.1.2.6, 4.2.3.10.

<sup>19</sup> See *National Strategy for Pandemic Influenza Implementation Plan*, actions 4.3.1.3, 4.3.1.5, 4.3.3.1.

federal agency for such support or if the President so directs, DoD may support containment operations or stability operations in another nation.<sup>20</sup>

## **Protecting and Treating U.S. Forces and Dependents**

In responding to an influenza pandemic, the Department of Defense would place a very high priority on protecting DoD personnel, including uniformed military servicemembers, DoD civilian employees, and contractors performing critical roles.<sup>21</sup> The rationale for this is based on the national security implications of a virus disabling a sizable proportion of the DoD workforce. For example, an influenza pandemic could conceivably render naval ships unable to perform missions, shut down training and support activities on major bases, seriously degrade security at critical sites, and break the supply chain that sustains forward deployed forces. The *Implementation Plan* states:

The primary responsibility of DOD is to preserve national security by protecting American forces, maintaining operational readiness, and sustaining critical military missions. DOD's first priority with respect to protecting human health will be to ensure sufficient capability to provide medical care to DOD forces and beneficiaries. DOD can provide medical, public health, transportation, logistical, communications, and other support [to non-DOD beneficiaries] consistent with existing legal authorities and to the extent that DOD's National Security preparedness is not compromised.<sup>22</sup>

In addition to conducting world-wide surveillance of potential disease threats (discussed previously), DoD protects its workforce through preparedness, communication, and medical response.

## **Preparedness**

Preparedness includes acquisition and prepositioning of vaccines, medicines, and other supplies. For example, DOD reports having 8.2 million treatment courses of Tamiflu on hand. With respect to the current H1N1 flu outbreak, testing to date shows the virus is susceptible to the antivirals<sup>23</sup> Tamiflu and Relenza. However, over time, increasing resistance is a possibility. DOD also reports that it has an 80-day supply of personal protective equipment (gowns, masks, and gloves) for medical providers. Although at this time there is no vaccine<sup>24</sup> available for H1N1, DOD has policies and organizations, such the Army's Military Vaccine Agency (MILVAX), in place to issue vaccination policies and guidance and to coordinate with the Department of Health and Human Services in acquiring vaccines when they are available. In general, it is DOD policy to follow the

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<sup>20</sup> *Department of Defense Implementation Plan for Pandemic Influenza*, p. 17

<sup>21</sup>“DOD's first priority, in the event of a flu pandemic, will be to ensure sufficient personnel, equipment, facilities, materials and pharmaceuticals to provide the highest possible level of health support to DOD forces, civilian personnel, and beneficiaries as well as to protect and preserve DOD's worldwide operational effectiveness.” *Department of Defense Implementation Plan for Pandemic Influenza*, Annex C: Force Health and Protection, p. 62. The Department of Defense workforce is made up of approximately 1.4 million active duty personnel, one million members of the Ready Reserve, 700,000 civilians and contractors who perform an estimated 1.5 million work year equivalents. Additionally, there are roughly 2.3 million active duty family members who are eligible for access to military medical care, along with 5.3 million retirees and retiree family members.

<sup>22</sup> *National Strategy for Pandemic Influenza Implementation Plan*, p. 115.

<sup>23</sup> Antiviral drugs are a class of medication used specifically for treating infections caused by viruses.

<sup>24</sup> A vaccine is a biological preparation that improves immunity to a particular disease.



immunization recommendations of the Centers for Disease Control and Prevention and its Advisory Committee for Immunization Practices consistent with requirements and guidance of the Food and Drug Administration and consideration for the unique needs of military settings and exposure risks.

## **Communications**

With respect to communications, DOD has developed both passive and active channels for disseminating relevant guidance and information. DOD established a medical “watch board” web site (<http://fhp.osd.mil/aiWatchboard/dodleadership.jsp>) to provide the up-to-date information and links to other sources of information. The Assistant Secretary of Defense for Health Affairs maintains three other websites tailored to different audiences with the DOD community.

DOD’s influenza pandemic policies anticipate the need for flexibility as circumstances change, such that, for example, if a shortage of antiviral medications were encountered, treatment priority categories could be identified and implemented.<sup>25</sup> On April 24, 2009, NORTHCOM issued a force health protection advisory including guidance for North America that included general influenza risk reduction measures.<sup>26</sup>

## **Medical Response**

If a servicemember or other eligible person becomes infected, the military health system operates both direct care and purchased care systems through which he or she may receive treatment. The direct care system’s primary objectives are first, to support the national security mission and second, to provide beneficiaries enrolled in the Tricare Prime and Tricare Plus programs with primary care at military treatment facilities. The purchased care system, consisting of three regional Tricare contract providers, allows beneficiaries using the Tricare Standard program to access care from civilian providers.

## **Defense Support of Civil Authorities**

During a serious flu pandemic, there is a strong possibility that local, state, and federal responders will request assistance from the Department of Defense. DoD has a broad range of capabilities that could be useful to civil authorities in emergency situations, including transportation assets, medical personnel and supplies, security forces, and communications equipment. The NRF and the *Implementation Plan* refer to this type of assistance as Defense Support of Civil Authorities (DSCA), while DoD often refers to it as Civil Support (CS) or Military Assistance to Civil Authorities (MACA).<sup>27</sup> This report will follow the NRF terminology unless otherwise specified.

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<sup>25</sup> S. Ward Casscells, MD, *Department of Defense Policy for Prioritizing Delivery of Medical Care during Pandemics and Other Public Health Emergencies of National Significance*, Assistant Secretary of Defense (Health Affairs), HA Policy 08-010, September 1, 2008, <http://www.health.mil/Content/docs/pdfs/policies/2008/08-010.pdf>.

<sup>26</sup> USNORTHCOM Joint Operations Center, *USNORTHCOM Force Health Protection 09-114 Swine Influenza*, April 24, 2009, <http://fhp.osd.mil/aiWatchboard/pdf/NORTHCOM%20Force%20Health%20Protection%20MSG%20-%20Swine%20Influenza.pdf>.

<sup>27</sup> There are technical distinctions between these terms as used by DoD. See the entries for “Defense Support of Civil Authorities,” “Military Support to Civil Authorities,” and “Civil Support” in Department of Defense, *JP 1-02, Department of Defense Dictionary of Military and Associated Terms*, Washington, DC, as amended through March 17, (continued...)

## **Examples of Defense Support Which Civil Authorities Might Request During a Flu Pandemic**

The types of defense support which would likely be in greatest demand during a flu pandemic are contained in the *Implementation Plan* and the NRF's *Emergency Support Function (ESF) # 8, Public Health and Medical Response Annex*.<sup>28</sup> A review of these documents indicates an anticipated demand for the types of support from DOD listed below. Note, however, that DOD's ability to support these requests would be limited by its national defense and force protection responsibilities.

- providing disease surveillance and laboratory diagnostics
- transporting response teams, vaccines, medical equipment, supplies, diagnostic devices, pharmaceuticals and blood products
- treating patients
- evacuating the ill and injured
- processing and tracking patients
- providing base and installation support to federal, state, local, and tribal agencies
- controlling movement into and out of areas, or across borders, with affected populations
- supporting law enforcement
- supporting quarantine enforcement
- restoring damaged public utilities
- providing mortuary services

## **Mechanisms for Providing DSCA**

The two principal ways in which such support could be provided are by way of an "immediate response," or in response to a formal "request for assistance" (RFA). Additionally, in extreme circumstances the federal government may expedite or suspend the RFA process and initiate a "proactive federal response."

### ***Immediate Response***

Certain defense officials can provide DSCA in a limited manner using "immediate response" authority. Immediate response authority enables local military commanders and certain DOD civilians to act immediately "to save lives, prevent human suffering, or mitigate great property

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2009, [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf).

<sup>28</sup> ESF #8 "provides the mechanism for coordinated Federal assistance to supplement State, tribal, and local resources in response to a public health and medical disaster, potential or actual incidents requiring a coordinated Federal response, and/or during a developing potential health and medical emergency." *Emergency Support Function #8 – Public Health and Medical Services Annex*, ESF#8-1

damage” when they receive a request from a civil authority and “[w]hen such conditions exist and time does not permit prior approval from higher headquarters.”<sup>29</sup> Assistance provided under this authority might include providing medical care, restoring critical public services, distributing food and other supplies, and disposing of the dead. However, commanders using this authority are obligated to seek approval or authorization through their chain of command as soon as possible. It is therefore likely that this authority would only be used if the onset of a flu pandemic were abrupt and unanticipated. Providing DSCA in this manner would typically be limited to the fairly short period of time, until a more systematic federal response could be undertaken within the context of the NRF and the *Implementation Plan*. Once that occurred, support would normally be provided in response to an RFA.

### *Responding to a Request for Assistance*

One of the tenets of the NRF is “tiered response.” Tiered response means that the response to any emergency should be “managed at the lowest possible jurisdictional level and supported by additional capabilities when needed.”<sup>30</sup> This means that response efforts typically begin at the local level and, if the need arises, support is requested from neighboring jurisdictions, the state, or the federal government. The federal government has a number of broad statutory authorities it can use to assist state, local, and tribal governments in responding to such requests.<sup>31</sup> This assistance typically takes the form of funding, personnel, equipment, supplies, services, facilities, information and technical assistance.

In the event of a flu pandemic, the federal government would establish one or more operational response centers to coordinate the federal response.<sup>32</sup> State, local, or tribal entities would submit their RFAs to the designated response center. The lead federal agency – either HHS for public health and medical response requests or DHS for all other requests -- would receive these requests and attempt to fill them by drawing on the full range of assets and capabilities available throughout all the federal agencies. Those RFAs which needed DoD assets would be forwarded to the Defense Coordinating Officer (DCO), who serves as the single point of contact for DOD resources for other government agencies in the center. The DCO would be responsible for “processing requirements for military support, forwarding mission assignments to the appropriate military organizations through DOD-designated channels, and assigning military liaisons, as appropriate, to activated [Emergency Support Functions].”<sup>33</sup>

The DCO would submit any such requests to the Office of the Secretary of Defense, where they would be evaluated by the Assistant Secretary of Defense for Homeland Defense and Americas’ Security Affairs (ASD/HD & ASA) according to the following criteria: legality, readiness, lethality, risk, cost, and appropriateness.<sup>34</sup> This would be done on an expedited basis and then

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<sup>29</sup> Department of Defense, *Department of Defense Directive 3025.1*, “Military Support to Civil Authorities,” Washington, DC, January 15, 1993, para. 4.5, <http://www.dtic.mil/whs/directives/corres/pdf/302501p.pdf>.

<sup>30</sup> *National Response Framework*, 10.

<sup>31</sup> See discussion in previous section entitled “The National Response Framework”.

<sup>32</sup> Examples of these response elements include National Response Coordination Centers (NRCC), Regional Response Coordination Centers (RRCC), Joint Field Offices (JFO), and Disaster Recovery Centers (DRCs). See “Overview of Stafford Act Support to the States,” available at <http://www.fema.gov/pdf/emergency/nrf/nrf-stafford.pdf>.

<sup>33</sup> *National Response Framework*, 68.

<sup>34</sup> Department of Defense, *Joint Publication 3-28, Civil Support*, Washington, DC, September 2007, pp. II-3 to II-4, [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_28.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_28.pdf).

forwarded to the Secretary of Defense for approval. The Secretary of Defense has the principal authority for approving DSCA requests. His office retains approval authority for all requests for assistance from civilian agencies and retains control of all DOD assets provided.<sup>35</sup> Once the Secretary of Defense approved the requests, they would be forwarded to the Joint Director of Military Support within the Joint Staff, who in turn would provide the appropriate orders to NORTHCOM. (See **Figure 1**).

U.S. Northern Command (NORTHCOM) has the *operational* responsibility for providing DSCA for most of the United States. It carries out the DSCA missions approved by the Secretary of Defense with forces assigned as required from all the armed services, typically through the creation of a joint task force.<sup>36</sup> Although NORTHCOM has had an Army brigade assigned to it since October 1, 2008, it probably would not be used to conduct DSCA missions in support of a pandemic flu response.<sup>37</sup> Rather, additional forces would be assigned to NORTHCOM to conduct approved DSCA missions. These additional forces could include units from multiple military services and could include activated members of the National Guard and Reserve. Note, however, that National Guard forces remain under the control of their respective governors unless ordered into federal service. *Current DOD plans do not anticipate the mobilization of Reserve or National Guard personnel.*<sup>38</sup> This topic is discussed in more detail later in the report.

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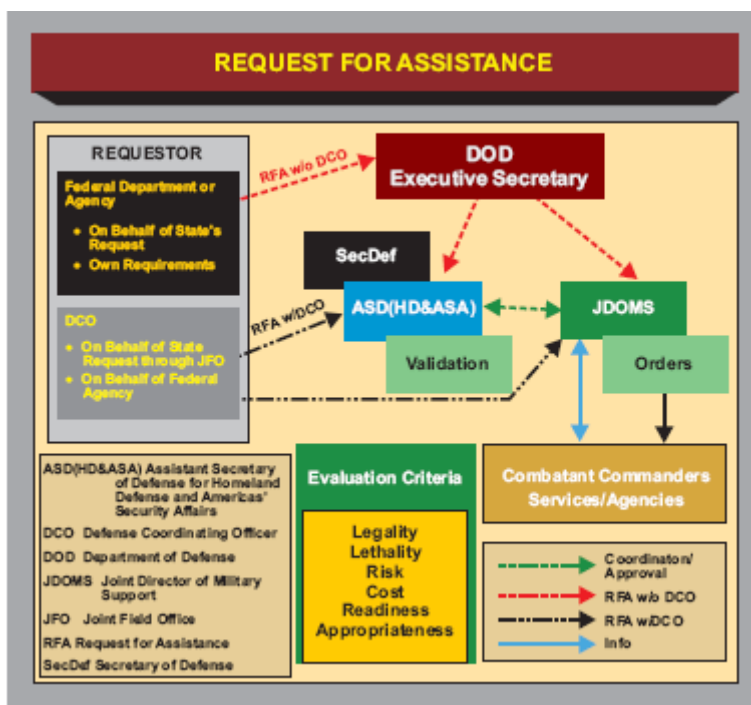
<sup>35</sup> In practice, the Office of the Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD/HD & ASA) is delegated supervisory responsibility of the DSCA mission area and coordination with the Department of Homeland Security. Within the DOD Joint Staff, DSCA responsibilities reside with the Joint Director of Military Support.

<sup>36</sup> DSCA for incidents in Hawaii and the Pacific territories is provided by U.S. Pacific Command.

<sup>37</sup> The brigade assigned to NORTHCOM is part of a specially trained force for responding to chemical, biological, radiological, nuclear, and high yield explosive [CBRNE] incidents. According to one NORTHCOM official, it probably would not be used to support DSCA missions during a flu pandemic as its capabilities likely would not match up well with the expected requests for assistance. Additionally, its use for this purpose might negatively impact the unit's ability to respond to a terrorist attack.

<sup>38</sup> Author's conversations with NORTHCOM and National Guard Bureau officials. With respect to the National Guard, this only refers to *federal* mobilization. In the event of a flu pandemic, National Guard personnel will very likely be called to duty by their state governors. See "Activating the National Guard for Pandemic Flu Response" later in this report.

Figure I. Assistance Request Procedures



Source: Department of Defense, Joint Publication 3-28, *Civil Support*, September 2007, II-4

### Proactive Federal Response

The NRF provides for a proactive federal response to a “catastrophic incident.”<sup>39</sup> If a flu pandemic were severe enough – that is, if it caused extraordinary levels of death or illness which had severe societal impacts -- it could qualify as a catastrophic incident. A proactive response would allow for the prepositioning of federal assets in anticipation of state, local, or tribal requests for assistance; it would also permit the federal government<sup>40</sup> to take charge of coordinating the response if the affected state, local, or tribal governments were unable to do so.<sup>41</sup> Key guidelines for a proactive federal response are quoted below:

<sup>39</sup>“A catastrophic incident, as defined by the NRF, is any natural or manmade incident, including terrorism, that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, national morale, and/or government functions. A catastrophic incident could result in sustained nationwide impacts over a prolonged period of time; almost immediately exceeds resources normally available to State, tribal, local, and private-sector authorities in the impacted area; and significantly interrupts governmental operations and emergency services to such an extent that national security could be threatened.” Department of Homeland Security, National Response Framework – Catastrophic Incident Annex, November 2008, p. CAT-1, [http://www.fema.gov/pdf/emergency/nrf/nrf\\_CatastrophicIncidentAnnex.pdf](http://www.fema.gov/pdf/emergency/nrf/nrf_CatastrophicIncidentAnnex.pdf) .

<sup>40</sup> As discussed previously, the overall federal effort would be led by the Secretary of Homeland Security with the Secretary of Health and Human Services leading the public health and medical response.

<sup>41</sup> “Where State, tribal, or local governments are unable to establish or maintain an effective incident command structure due to catastrophic conditions, the Federal Government, at the direction of the Secretary of Homeland Security, may establish a unified command structure, led by the Unified Coordination Group (UCG), to save lives, protect property, maintain operation of critical infrastructure/key resources (CIKR), contain the event, and protect national security. The Federal Government shall transition to its role of coordinating and supporting the State, tribal, or local government when they are capable of reestablishing their incident command.” *Catastrophic Incident Annex* , CAT-1.

- The primary mission is to save lives, protect property and critical infrastructure, contain the event, and protect the national security.
- Standard procedures outlined in the NRF regarding requests for assistance may be expedited or, under extreme circumstances, temporarily suspended in the immediate aftermath of an incident of catastrophic magnitude, pursuant to existing law.
- Pre-identified Federal response resources are mobilized and deployed, and, if required, begin emergency operations to commence life-safety [sic] activities.
- Notification and full coordination with States occur, but the coordination process should not delay or impede the rapid mobilization and deployment of critical Federal resources.<sup>42</sup>

As indicated by the above, if a flu pandemic were severe enough to qualify as a catastrophic incident, the DoD response could be anticipatory in nature. This anticipatory response would likely conform to the general requirements contained in the NRF Catastrophic Incident Annex, which specifies that DoD would be expected to “provide capabilities in the following support categories: aviation, communication, defense coordinating officer/defense coordinating element, medical treatment, patient evacuation, decontamination, and logistics.”<sup>43</sup> If possible, the standard RFA process would be used with DHS or HHS submitting requests to DoD. However, this process could be expedited or even temporarily suspended in certain circumstances.<sup>44</sup>

## **The Role of the Reserves and National Guard**

### **The Difference Between the Reserves and the National Guard**

Although the term “reserves” is often used as a generic term to refer to all members of the seven individual reserve components, there is an important distinction between the five reserve components which are purely federal entities (the Army Reserve, Navy Reserve, Marine Corps Reserve, Air Force Reserve, and Coast Guard Reserve) and the two reserve components which are both federal and state entities (the Army National Guard and the Air National Guard). In this context, the purely federal reserve components are sometimes referred to collectively as the Reserves, while the dual federal/state reserve components are referred to collectively as the National Guard.

The Reserves are of comparatively recent origin, having all been established in the 20<sup>th</sup> century. They were organized under Congress’ constitutional authority “to raise and support Armies” and “to provide and maintain a Navy.”<sup>45</sup> The National Guard has a much longer historical pedigree. It is descended from the colonial era militia<sup>46</sup> which existed prior to the adoption of the

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<sup>42</sup> *Catastrophic Incident Annex*, CAT-6.

<sup>43</sup> *Catastrophic Incident Annex*, CAT 6-7. Note that these are the types of support that have been anticipated in response to a catastrophic incident, generally speaking. The previous section entitled “Examples of Defense Assets Which Civil Authorities Might Request During a Flu Pandemic” addresses the types of support that might specifically be needed during a flu pandemic.

<sup>44</sup> *Catastrophic Incident Annex*, CAT 6.

<sup>45</sup> U.S. Constitution, Article 1, Section 8, clauses 12 and 13.

<sup>46</sup> The colonial militia, which was derived from a longstanding English tradition and which required every able bodied free male (though Native Americans and free blacks were frequently excluded) to participate in the common defense of (continued...)

Constitution. The Constitution does, however, contain provisions that recognize the existence of the militia and that give the federal government a certain amount of control over it.<sup>47</sup>

Unlike the Reserves, which are exclusively federal organizations, the National Guard is usually both a state and a federal organization. The National Guard of the United States is made up of 54 separate National Guard organizations: one for each state, and one each for Puerto Rico, Guam, the U.S. Virgin Islands, and the District of Columbia. While the District of Columbia National Guard is an exclusively federal organization and operates under federal control at all times, the other 53 National Guards operate as state or territorial organizations most of the time. In this capacity, each of these 53 organizations is identified by its state or territorial name (e.g., the California National Guard or the Puerto Rico National Guard), and is controlled by its respective governor. Due to their dual federal and state role, National Guardsmen can be called to duty in several different ways, which will be discussed later in this report.

### **Activating the Reserves for Pandemic Flu Response**

Current DOD plans do not anticipate mobilizing the Reserves to respond to a flu pandemic.<sup>48</sup> However, these plans could be modified if circumstances warranted (for example, if the severity of the pandemic significantly exceeded DOD's planning assumptions).

Members of the federal reserves are always activated under Title 10 of the U.S. Code. Therefore, they always operate under the control of the President, receive federal pay and benefits, and are subject to the Posse Comitatus Act<sup>49</sup> in the same way that active duty military personnel are. There are a number of statutory authorities that can be used to activate members of the reserves, but the one most likely to be used in a flu pandemic would be 10 USC 12302.<sup>50</sup> This authority

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(...continued)

his town or locality, was the backbone of colonial military power. Gradually, as the colonial population grew and military threats waned, a distinction arose between the unorganized militia (those members of the militia who were potentially liable for military service but who did not actively participate in military training) and the organized militia (those members of the militia who regularly trained for war and who responded first to military threats). Today, the U.S. Code still recognizes the militia as consisting of "all able-bodied males at least 17 years of age and...under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard." (10 U.S.C. § 311.) This provision of the law further divides the militia into the organized militia and the unorganized militia, and declares the National Guard and the Naval Militia to be the organized militia. At present New York, New Jersey, Ohio and Alaska have active Naval Militias.

<sup>47</sup> See U.S. Constitution, Article I, Section 8, clauses 15 and 16, and Article II, Section 2, clause 1.

<sup>48</sup> See footnote 38

<sup>49</sup> The Posse Comitatus Act (18 USC § 1385), along with other related laws and administrative provisions, prohibits the use of the military to execute civilian laws unless expressly authorized by the Constitution or an act of Congress. Congress has made a number of exceptions to the act which permit military involvement in law enforcement. For example, Congress has enacted a number of statutes which authorize the President to use military forces to suppress insurrections and domestic violence (10 USC § 331-335). If these statutes were to be invoked, the President could use active or reserve components to put down a rebellion or to control domestic violence. Another important exception relates to the Coast Guard, which Congress has vested with broad law enforcement authority. Under these statutory provisions, the Coast Guard and Coast Guard Reserve can participate in the enforcement of maritime, customs, and certain other federal laws. For more information on the Posse Comitatus Act, see CRS Report RS20590, *The Posse Comitatus Act and Related Matters: A Sketch*, by Jennifer K. Elsea, and CRS Report RS22266, *The Use of Federal Troops for Disaster Assistance: Legal Issues*, by Jennifer K. Elsea and R. Chuck Mason.

<sup>50</sup> The principal statutes for activating members of the reserve component are 10 USC § 12301(a), 12301(b), 12301(d), 12302, and 12304. 10 U.S.C. § 12301(a) could be used if the Congress declared a national emergency; however, the (continued...)

may be used “in time of national emergency declared by the President...or when otherwise authorized by law,” and permits the President to involuntarily activate up to one million members of the Ready Reserve for up to 24 consecutive months.

## **Activating the National Guard for Pandemic Flu Response**

National Guard personnel would almost certainly be involved in state efforts to respond to a flu pandemic as members of their state militia under the control of their governor. Current DOD plans do not anticipate calling the National Guard into federal service to respond to a flu pandemic.<sup>51</sup> However, as with the case of the federal reserves, these plans could be modified if circumstances warranted it. DOD policy guidelines currently specify that, if Reserve Component medical personnel are required to respond to a flu pandemic, the military services are to “use [federal] Reserve forces first, leaving National Guard forces to be available to meet their state-based missions.”<sup>52</sup>

Members of the National Guard can be activated under state law, under Title 32 of the U.S. Code, and under Title 10 of the U.S. Code. Depending on which authority it used, the duty status of National Guard members is characterized as State Active Duty, Title 32 status, and Title 10 status. A brief discussion of each status is provided below.

### ***State Active Duty***

Normally, the National Guard operates under the control of state and territorial governors. As part of a state-level response to a flu pandemic, governors could order their National Guard personnel to perform full-time duty under state law. This is commonly referred to as “state active duty.”<sup>53</sup> In this state capacity, National Guard personnel operate under the control of their governor, are paid

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(...continued)

benefit of using this authority as opposed to 10 USC § 12302 is limited given that the latter authority is broad enough to permit the activation of nearly the entire Ready Reserve force structure continuously for a period of two years; although 12301(a) would provide access to the Retired Reserve where 12302 would not. Other authorities would likely be of limited utility or not applicable in the event of a flu pandemic. Activations under 10 U.S.C. § 12301(b) are limited to 15 days and, for National Guard personnel, require the consent of the affected governor. 10 U.S.C. § 12301(d) permits voluntary activation of reserve component personnel, but not involuntary activation, and also requires the consent of the affected governor for National Guard personnel. Finally, the President may activate reserve component personnel under 10 U.S.C. § 12304 if he determines it necessary “to augment active forces for any operational mission”; however the statute prohibits the President from calling units or members to active duty to perform duties related to repelling invasion, suppressing insurrection, enforcing laws or “providing assistance to either the Federal Government or a State in time of a serious natural or manmade disaster, accident, or catastrophe.” While the statute makes an exception to this latter prohibition for certain emergencies related to terrorist attacks and weapons of mass destruction, it appears that responding to a flu pandemic would fall within the prohibition.

<sup>51</sup> See footnote 38.

<sup>52</sup> David S.C. Chu, Under Secretary of Defense for Personnel and Readiness, *Memorandum for Secretary of the Army, Secretary of the Navy, and Secretary of the Air Force*, Department of Defense, “Mobilization of Reserve Component Medical Support Personnel Supporting the Local Medical Infrastructure during an Influenza Pandemic,” Washington, DC, November 18, 2008, p. 1, [http://fhp.osd.mil/aiWatchboard/pdf/RC\\_MED\\_PI\\_Policy\(1108\).pdf](http://fhp.osd.mil/aiWatchboard/pdf/RC_MED_PI_Policy(1108).pdf).

<sup>53</sup> Historically, this authority has been used most frequently in response to natural disasters such as hurricanes, earthquakes, forest fires, floods, etc. It has also been used to quell domestic violence and to control or disperse crowds. Additionally, in the aftermath of the September 11 terrorist attacks, a number of governors called up members of the National Guard to protect critical infrastructure in their states, such as nuclear power plants, water treatment facilities, and bridges from potential terrorist attacks.



according to state law, can assist civil authorities in a wide variety of tasks,<sup>54</sup> and are not subject to the restrictions of the Posse Comitatus Act (that is, they can perform law enforcement functions).

### ***“Title 32” Status***

Another way in which National Guard personnel can be activated and remain under the control of their governor is under the authority of 32 U.S.C. 502(f). This provision of federal law provides that “a member of the National Guard may...without his consent, but with the pay and allowances provided by law...be ordered to perform training or other duty in addition to [inactive duty for training or annual training].” The advantage of using this authority is that the National Guard personnel called will receive federal pay and benefits and are entitled to certain legal protections<sup>55</sup> as though they were in federal service, but they remain under the control of their governor and are therefore not subject to the restrictions of the Posse Comitatus Act. This is the provision of law which was used to provide federal pay and benefits to the National Guard personnel who provided security at many of the nation’s airports in the aftermath of the terrorist attacks of September 11, 2001. It has also been used to respond to major disasters such as Hurricane Katrina in 2005.

### ***Federal Status***

National Guard personnel can also be activated in a purely federal status. The authorities used to do this include all of the Title 10 authorities discussed in footnote 50. When in this federal status, National Guard personnel serve under the control of the President, receive federal pay and benefits, and are subject to the Posse Comitatus Act in the same way that active duty military personnel are. National Guard personnel can also be called into federal service under 10 USC 331-335 and 12406.<sup>56</sup> If called up under one of these authorities, National Guard personnel would operate under the control of the President, receive federal pay and benefits, and could perform law enforcement duties.

### **Considerations**

When considering the federal activation of the Reserves and National Guard, one important consideration is the impact this would have on state, local, or tribal response efforts that are already ongoing. For example, the activation of Reserve and National Guard medical personnel may pull them out of local hospitals where they are already engaged in the response effort,

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<sup>54</sup> For example, delivering supplies, providing medical assistance, restoring public utilities, and providing security.

<sup>55</sup> See CRS Report RL30802, *Reserve Component Personnel Issues: Questions and Answers*, by Lawrence Kapp, pp. 17-20.

<sup>56</sup> 10 USC § 331-335 (The Insurrection Act) allows the President to call the militia (which includes the National Guard) into federal service for certain purposes, including the suppression of insurrection against a state government, at the request of that government (10 U.S.C. § 331), the enforcement of federal laws and suppression of rebellion against the authority of the United States (10 U.S.C. § 332), and the prevention of interference with state and federal laws, if that interference deprives a class of people of rights, privileges, immunities, or protections named in the Constitution (10 U.S.C. § 333). 10 U.S.C. § 12406 permits the President to call members and units of the National Guard into federal service to repel invasion, suppress rebellion, or execute the laws of the United States; orders for this latter type of call up must be transmitted through the appropriate governor.

thereby undermining state and local response efforts.<sup>57</sup> Such activations are a particular concern with respect to National Guard personnel, who often constitute a large portion of a state's emergency response force. Another important factor to consider when federalizing National Guard forces is the impact of the Posse Comitatus Act. While they remain in a state status (either state active duty or Title 32 status), National Guard personnel are not covered by the Act and therefore are a valuable tool for state governors in maintaining public order. Federalization of the National Guard generally brings them under the restrictions of the Act and thereby limits their utility for law enforcement purposes.<sup>58</sup>

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<sup>57</sup> DOD has taken this into account with a policy memorandum entitled "Mobilization of Reserve Component Medical Personnel Supporting Local Medical Infrastructure during an Influenza Pandemic." See footnote 52.

<sup>58</sup> See, however, the discussion of 10 USC 333-335 and 10 USC 12406 in footnote 56.