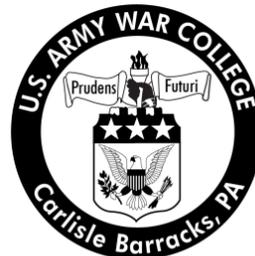


The Role of Military Forces in Disaster Response: Remove the Impediments

by

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United States Army War College
Class of 2012

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**THE ROLE OF MILITARY FORCES IN DISASTER RESPONSE: REMOVE THE
IMPEDIMENTS**

by

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Hurricane Katrina and the events that unfolded on 11 September 2001 continue to raise the issue of timely responses to disasters by the state and federal government. Two recent natural disasters—the devastating tornadoes that struck multiple states in April 2011 and the recent earthquake and subsequent tsunami in Japan affirm that catastrophes strike unexpectedly and can quickly overwhelm the capabilities of local and state authorities to respond. Since 2005 Congress has passed and amended laws to improve the military’s responsiveness to disasters, including better structures for command and control. However, some restrictions and command and control issues still impede defense support to civil authorities (DSCA). This SRP recommends two further changes that will facilitate better military responses to domestic crisis: amend the Posse Comitatus (PCA), and allow federal forces to serve in a tactical control (TACON) relationship under the governor of a state while supporting civil support operations inside of the United States.

THE ROLE OF MILITARY FORCES IN DISASTER RESPONSE: REMOVE THE IMPEDIMENTS

A lot of ink was shed cataloguing lessons from Katrina, 9-11, and other disasters in reports by the House, Senate, White House, countless think tanks, and Commissions, including the Commission on the National Guard and Reserves. So it is fair to ask here today, did we learn the lessons of 9-11 and those other tragedies: Are we ready? Or maybe more precisely, are we as ready as we need to be for the next “big one”...? Either you are ready, or you are not. Unfortunately, the answer is—we are not ready. The yardstick here is not how far we have come and the progress we have made. It is how far we have to go.¹

—Major General Arnold L. Punaro
U. S. Marine Corps (Ret.)

In March 2011 an earthquake registering a 9.0 on the Richter scale struck off the coast of Japan. It was one of the four most powerful earthquakes in the world since earthquake data has been recorded.² This earthquake and the resultant massive tsunamis led to enormous loss of life and property in the impacted zone. The Japanese government’s response was tremendously complicated as this natural disaster quickly overwhelmed first responders and developed into a nuclear and radiological event that required follow-on responders to cope with the meltdown of three of Japan’s nuclear reactors. Although this catastrophe occurred thousands of miles from the shores of the United States, our nation is not immune to this type of event. An earthquake with a magnitude 7.0 or higher on the Richter scale along the New Madrid seismic zone in the Midwest United States would be catastrophic. It would require a response far greater than that mounted for Hurricane Katrina.

In his testimony before the Senate Committee on Homeland Security, William Carwile III, Associate Administrator for Response and Recovery for the Federal

Emergency Management Agency (FEMA), described the potential impacts of an earthquake along the New Madrid fault line:

A rough estimate of the damage would include...nearly 715,000 buildings damaged in the eight-state study region. Damage to critical infrastructure...could be substantial in the 140 impacted counties; including 3,500 damaged bridges...2.6 million households could be without power. Nearly 86,000 injuries and fatalities could result and nearly 130 hospitals may be damaged. Three days after the earthquake, 7.2 million people could be displaced, with 2 million seeking shelter.³

This fault line is among the most active in the United States; it is the site of more than 200 measured events per year.⁴ Although many of these events can be felt across the seismic zone, most are nuisances that require no responses. However, a future major earthquake along this zone would be catastrophic, with the potential for flooding, structural damage, and radiological complications, like those that recently struck Japan. There are 15 nuclear power plants located in the New Madrid Seismic Zone,⁵ and a severe earthquake could severely damage any of these plants and release radiation into the surrounding area, as in Japan. Since the 9-11 terrorist events and the Hurricane Katrina disaster, this nation's disaster response capabilities have improved. However, some restrictions and command issues still impede Defense Support to Civil Authorities (DSCA). It is not a matter of when the next disaster will strike; it is only a matter of how prepared are we are to respond to it.

The circumstances of how, when, and where a disaster strikes and the quality of the response do not allow for lengthy discussions and legal reviews during the incident. Disasters strike anytime, anywhere. They take "many forms -- a hurricane, an earthquake, a tornado, a flood, a fire or a hazardous spill, an act of nature or an act of terrorism. [They build] over days or weeks, or [hit] suddenly, without warning."⁶ If history is a good predictor of the future, then the United States will be struck by many man-

made or natural disasters that will require federal assistance. “The American people fully expect that all military forces that are available and can respond to a disaster will do so without unnecessary delays.”⁷ Even with the addition of recent changes in policy and law, further changes are needed to ensure that our nation receives the best possible support during the next disaster.

Background

On 29 August 2005 Hurricane Katrina made landfall for the second time as a Category 3 storm along the coast of Louisiana. The aftermath and the response to this natural disaster made it the costliest natural disaster to strike the United States. Its 1,349⁸ deaths make it the deadliest hurricane in the United States since 1928.⁹ Much has been written about the response by the state and federal government to this catastrophic event. Much of the literature lauds the heroism at the tactical level of many of the first responders from the National Guard and the federal forces responding to the disaster. In his testimony to Congress, Assistant Secretary of Defense for Homeland Defense, Paul McHale praised, “the ability of military forces—active duty, Reserves, and the National Guard.” He cited their capabilities to “respond quickly and effectively to an event of this magnitude [as] a testament to their readiness, agility and professionalism.”¹⁰ Despite these heroics, many critics have lamented about the inept response at the strategic level by both the state of Louisiana, where 90% of the fatalities from the storm occurred, and the federal government.¹¹ According to the Katrina Lessons Learned report and in spite of the tactical and operational heroics, “the response to Hurricane Katrina fell far short of the seamless, coordinated effort that had been envisioned by President Bush when he ordered the creation of the National Response Plan.”¹² This strategic failure was evident in the needless squabbling

between the leadership of the state of Louisiana and the executive branch over who would be in charge of the relief effort. Further, because of antiquated legislation, federal forces could not effectively respond until law and order had been restored. Former New Orleans's emergency operations chief, Terry Ebbert, sums it up this way: "We can send massive amounts of aid to tsunami victims, but we can't bail out the city of New Orleans."¹³ A late and haphazard response to a domestic disaster from a country that provides timely financial aid, manpower, and equipment to disaster response around the world is incomprehensible.

The thoroughly documented state and federal response to Hurricane Katrina before, during, and after its landfall was appalling. A plethora of information in libraries, journals, books and newspaper archives analyzes this failure. This SRP does not purport to be another analysis of the DoD response to Hurricane Katrina. Rather, it argues for what needs to be accomplished to be better prepared for the next disaster. As Major General (ret.) Punaro concluded in his response to members of the House and Senate Armed Services Committee:

When it comes to disaster response, the American people don't care whether it is an active duty, Guard, or reserve helicopter who rescues them from a rooftop. They believe that protecting American lives and property here at home is as important—or more important—than putting a bayonet in the heart of a terrorist in the Khyber Pass, as important as that is.¹⁴

A thorough discussion of DSCA must begin with an understanding of how military forces are formed within the Department of Defense (DoD) and the way they currently respond to domestic disasters. The following discussion cites relevant Constitutional and legal issues to clarify problems in the uses of the military to respond to domestic disasters. The way military forces responded to Hurricane Katrina in 2005, absent

further changes, is the way they will respond to future disasters inside of the United States. This way is based on the Constitution and federal law.

As they crafted the Constitution, the founding fathers took extreme care not to place all governmental power at the federal level. Instead they developed a federalist system whereby “states share powers with a central national government.”¹⁵

Additionally, they had an aversion to the large standing British Army that occupied the original colonies and answered only to the King of England. They saw this hegemonic relationship as a threat to civil liberties, and so were wary of a militarized executive authority as they developed the Constitution.¹⁶ Accordingly, they granted the states the authority to form militias—the precursor to the National Guard—to defend the states, and to provide, when needed a federal military force. Although the founding fathers despised a standing army, they also realized that a professional full-time Army would be required to protect the nation and advance national interests because the militias would be ill prepared for this. Therefore the Constitution authorized the Congress to form this Army. But in order to avoid maintaining a long-term standing army, they stipulated that, “no appropriations of money to that use shall be for longer term than two years.”¹⁷ In this way, they attempted to avoid forming a permanent federal military force. The

Constitution states:

The Congress shall have power...To raise and support Armies,..To provide and maintain a navy...To provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel Invasion; To provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States.¹⁸

In the matter of command and control, the Constitution declares:

The President shall be Commander in chief of the Army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States ¹⁹

The Constitution clearly indicates who can form and command these different military forces. The states have the right to form and maintain militias under the command of the governor; the Congress has the authority to form land and naval forces that are commanded by the President.

Military Forces

There are two primary types of military forces that can be called on to support civil relief operations inside the United States—State National Guard forces, and Federal Military forces.

Federal military forces: Regular Army, Navy, Marine and Air Force personnel and units; mobilized Army, Navy, Air Force and Marine Reserve forces and personnel, and any National Guard forces and personnel mobilized for federal service in accordance with Title 10 USC. The President of the United States is their Commander in Chief.

State National Guard forces: Air and Army National Guard personnel and units that are serving under state control, in accordance with Title 32 USC. The governor of their each respective state has overall command responsibility for the National Guard in that state and is their Commander in Chief. state National Guard forces do not include state defense forces organized outside of the National Guard.

Figure 1: Military Force structure²⁰

The National Response Framework and DoD policy recognize that the primary responsibility for protecting life and property and maintaining law and order in civilian communities is vested in state and local governments.²¹ DoD policy also recognizes the responsibility of the federal government, including DoD, to assist the states in

maintaining order during a crisis. In certain instances, DoD assets may be available to support civil authorities for routine and catastrophic incidents. Under our current system, the first military asset that is usually called on to provide this support is the National Guard. National Guard forces provide their governors with a crucial first military response to disasters. National Guard units located in every state across the country may conduct support in one of three ways:

- State command or state active duty status (SAD) under control of the governor as the commander-in-chief: Forces mobilized in this status receive mission orders and direction from the governor. They are paid by the state.
- Title 32 status under the control of the governor: Much like in SAD status, troops mobilized under Title 32 receive mission orders and direction from the governor. But the federal government pays them. States prefer using the Guard under Title 32 because the federal government pays the bill and the governor retains control. National Guard forces responding to the disaster during Hurricane Katrina ultimately were placed under this status by the Louisiana governor with agreement from the President.
- Title 10 federal status under control of the President: National Guard forces mobilized under Title 10, or moved to Title 10 status become federalized and are now under the command and control of the President of the United States. The federal government pays title 10 forces.

Controlled by their governors in either SAD or Title 32 status, National Guard units may perform a wide variety of missions, to include law enforcement. State forces mobilized under the governor “normally operate as part of a state National Guard joint

task force”²² under command and control of the governor; states adjutant generals (TAG) usually assume operational command of a task force. The National Guard forces responding to Hurricane Katrina in New Orleans were primarily from the state’s Air and Army units. But because of federal deployments to Iraq, many of the state’s units were not available when Hurricane Katrina struck. However, under the Emergency Management Assistance Compact (EMAC), “a legal framework established in the wake of Hurricane Andrew in 1992, to flow National Guard soldiers and other first responders into the region from states across the country,”²³ Governor Blanco was able to obtain National Guard forces from across the United States to supplement her own units. National Guard forces responding from another state remain under “command and control of their regular leaders, but the organizational units will come under the operational control of the state receiving assistance.”²⁴

Federal Forces—excluding reserve forces, which will be addressed separately—are commonly referred to as the Title 10 Regular Army and are “organized into operational forces intended for deployment and ground combat operations, and the generating force.”²⁵ The Regular Army provides numerous advantages to civilian leaders during disaster relief operations. Already on active duty, they can immediately contribute to these operations without getting their employers’ leaves of absence or without getting them on an appropriate payroll. In many cases National Guardsmen are civilian policeman, fireman and emergency management technicians (EMTs)—both the civilian first responders and the military first responders. The civilian employers of these personnel can ill afford to release them when a disaster strikes. Their dual roles, coupled with deployments of Louisiana National Guard and Reserve forces on

operational missions, hampered responses to Hurricane Katrina. Similar circumstances may arise in the future. Federal forces trained and legally able to conduct law enforcement in the future can relieve this situation. Additionally, “the ability of the Regular Army to generate large forces rapidly and sustain them for long periods in an emergency is one of the component’s primary attributes for civil support.”²⁶ However, most Regular Army forces are not located in local communities across the country. Rather they are centrally located on federal bases within the United States. If the base happens to be located in the vicinity of the disaster and all the protocols are followed for the uses of federal forces then the communities that surround the base are in luck. Mobilizing and deploying full-time federal forces to more distant locations can take precious time, even if the force is a global response force on a recall timeline. However, a different type of force, albeit a federal and therefore a Title 10 force, that is more readily available to the DoD and civilian leaders is the Reserve force.

If the National Guard is the nation’s first military responder, then the Army Reserve is normally the “first Title 10 responder”²⁷ to support disaster relief. Army Reserve forces are similar in nature to National Guard forces in that they are located in almost every state or territory and are able to provide time-sensitive assistance in a crisis environment. However, due to their status as federal forces, activated Reserve forces fall under the command of the President, not a governor. Reserve forces, which are usually activated only temporarily, often contain key support assets that are in demand in response to disasters. By design, Reserve forces consist of a large proportion of the combat support and combat service support assets in the United States Army—such as Aviation, Medical, Engineers, and Military Police personnel.

They serve as Title 10 forces when activated, so they are subject to the same regulations and rule of law that Regular Army forces fall under. Nevertheless, the recent presidentially signed 2012 National Defense Authorization Act (NDAA) includes recommendations from the presidentially formed Council of Governors that would allow the “Secretary of Defense the authority to mobilize Title 10 Reserve forces at a governor’s request to assist in the federal response to a domestic emergency for not more than 120 days.”²⁸ Although this recent positive change will allow for a quicker response from Reserve forces that are located across the country, until all federal forces are allowed to be placed under the command of a governor the response will continue to be inefficient. Regardless of the type of force that is available for support, several federal laws stipulate the DoD’s roles and responsibilities in DSCA within the United States.

Authority/Legislation

The Posse Comitatus Act of 1878 (PCA) along with its two primary statutory exceptions, the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and the Insurrection Act, constitute the three primary legal authorities that regulate the use of DoD assets to support disaster relief inside the United States. Restrictions in the PCA and its two statutory exceptions have caused problems during federal efforts to respond to Hurricane Katrina.

Federal forces and their accompanying equipment are always available to provide support to the governors of the states. However, there are legal restrictions on what these forces are allowed to do when responding. Federal forces conducting DSCA are governed primarily by the Posse Comitatus Act. Specifically, federal forces are restricted in their conduct of law enforcement operations within the United States and its

territories. Although the Congress has amended the PCA on numerous occasions to permit the President under certain situations to use federal forces in this manner, the limitations imposed— either actual or perceived —on federal military forces hindered support during Hurricane Katrina. According to a Rand Study commissioned by the DoD to provide findings and recommendations on the military response to Hurricane Katrina, “Civilian and military officials were also hesitant to deploy federal land forces in the deteriorating law-enforcement environment...there were concerns about deploying active-duty federal forces to the area given the constraints of Posse Comitatus.”²⁹ As the situation in New Orleans continued to deteriorate federal leaders hesitated to deploy federal forces in a support role because of the possibility that these forces would be forced into a law enforcement role—in a possible violation to the PCA.³⁰

The PCA is set forth in only a brief, short sentence. But this succinct law, which is often liberally interpreted, has had a huge impact on the domestic uses of U.S military assets. These liberal interpretations and amendments by Congress have turned this succinct Act into an impediment to support inside the United States. The Act, as amended in 1956 declares,

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse Comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.³¹

Although not included in the original law, the DoD felt obligated to subject the Navy and the Marine Corps to PCA in subsequent directives. The PCA was initially passed into law on 18 June 1878 in response to complaints about the Army’s involvement in supporting the Reconstruction governments in the southern states after the Civil War.³² But over time it has turned into a quagmire that prevents well-

intentioned individuals at all levels of government to use our military forces in the homeland. Nowhere was this more evident than the days and weeks following the landfall of Katrina along the coast of Louisiana and New Orleans. As the first responders were either overwhelmed or unable to secure the environment, lawlessness overtook New Orleans. Looting took a nefarious turn³³ as roaming gangs' pilfered cars, electronics, and clothing. Snipers terrified the staff and patients of the New Orleans Charity Hospital as they attempted to evacuate,³⁴ New Orleans began to resemble the streets of Baghdad after the fall of Saddam Hussein. "The inability of the local and state officials to stop rampant looting in and around New Orleans created a security vacuum"³⁵ that went unfilled. Only limited National Guard troops were initially available. Local police officers were exhausted from conducting search and recovery operations and were largely unable to maintain law and order for a variety of reasons. Federal forces could have filled this law enforcement gap, but they were not employed in this manner. The restrictions of the PCA prevented a readily available asset from being deployed to save lives within the United States. This situation has yet to be corrected.

In a country where the military has an approval rating of 76%, 65% higher than last-place Congress,³⁶ the citizens of our country should not be concerned about a fulltime military takeover of the law enforcement mission or the ceding of rights that are guaranteed by the Constitution. Federal forces will be needed to support domestic law enforcement in the future. The use of federal forces in this role should be addressed now, rather than during another multistate disaster such as a New Madrid earthquake rupture.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act was originally enacted in 1988 and more recently amended in 2000.³⁷ Considered to be the “centerpiece of federal disaster policy”³⁸ this Act authorizes the President to make a wide range of federal aid available to states that are hit by disasters. The Act authorizes the President to declare an incident either a major disaster or an emergency. This declaration has different implications for relief operations. This Act also establishes cost-sharing guidelines between state and federal governments.

Emergency vs. Major Disaster: Under the Stafford Act, the President can designate an incident either as an “emergency” or a “major disaster.” Both authorize the Federal government to provide essential assistance to meet immediate threats to life and property, as well as additional disaster relief assistance. The President may, in certain circumstances, declare an “emergency” unilaterally, but may only declare a “major disaster” at the request of a Governor that certifies the State and affected local governments are overwhelmed. Under an “emergency,” assistance is limited in scope and may not exceed \$5 million without Presidential approval and notification to Congress. In contrast, for a major disaster, the full complement of Stafford Act programs can be authorized, including long term public infrastructure recovery assistance and consequence management.

Figure 2: The Robert T. Stafford Act³⁹

The Stafford Act also provides statutory authority for employing military forces in disaster relief.⁴⁰ It allows the President, through the DoD, to provide military assistance to states requesting assistance. Specifically the Act allows DoD to make available “personnel, equipment, supplies, facilities, and managerial, technical and advisory services”⁴¹ for use after the President makes a declaration of emergency of disaster. The Act does not, however, authorize the use of federal military forces that are responding under the auspices of the act to maintain law and order and military forces are prohibited from performing law enforcement functions while federalized.⁴²

Legislative attorney, Jennifer Elsea emphasizes that federal military resources can be utilized under the Act under three conditions,⁴³ all of which occur after a disaster strikes and only following a governor's request for assistance:

- Essential Assistance (10 day authority): Upon request of the governor, the President may task the DoD to provide emergency work the President deems essential for the preservation of life and property in the aftermath of an incident. Assistance is available for up to 10 days prior to a presidential declaration of an emergency or a major disaster.
- Emergency declaration: Unless the President determines that a disaster threatens preeminently federal interests, such as a seaport or federal military base, the governor must show that the state is unable to respond without the federal assistance. Additionally, the governor must first use all of the state's available assets, to include the National Guard, before requesting assistance.
- Major disaster declaration: The prerequisites for a major disaster declaration are similar to those for the emergency declaration. In his or her request for assistance, the governor must follow the same steps to show the state cannot handle the incident. Until the governor requests assistance, the president will not declare a major disaster.

The Stafford Act and the Constitution both vest power to maintain the well being of the state exactly where it should be—on the state. However, as was witnessed following Hurricane Katrina there are times when a state cannot handle the overwhelming impacts of the disaster. Then additional help is required.

The last piece of the puzzle guiding the way that DoD provides support within the United States is the National Response Framework (NRF) and the concept of tiered response. “The NRF is a guide to how the nation conducts all-hazards response.”⁴⁴ This capstone document provides “operational direction for incident management to ensure timely and effective Federal support to State, tribal and local related activities.”⁴⁵ Additionally, from a federal to state level, “the framework defines the key principles, roles, and structures that organize the way we respond as a nation.”⁴⁶ As part of the broader National Strategy for Homeland Security Strategy, the NRF focuses on the ability of the nation to “respond to and recover from incidents”⁴⁷ in a timely and effective manner. Much like the Constitution, the NRF “places significant trust and responsibility in the capabilities of state and local governments to help protect the American people.”⁴⁸ This framework assumes that in certain circumstances states will seek federal assistance in responding to disasters. Central to this doctrine is the premise of tiered response.

Tiered response is based on support that “originates at the local level and is progressively supported by additional response capability when needed.”⁴⁹ Tiered response acknowledges that “state, local and tribal governments, which best understand their communities and the unique requirements of their citizens”⁵⁰ are better able to provide effective first-response capabilities. As the situation escalates and civil first responders such as “law enforcement, fire, public health, and emergency medical services”⁵¹ become overwhelmed, a graduated response from higher agencies and authorities occurs from within the state, including use of the state’s National Guard. Upon exhaustion of local, state and inter-state assets, the governor may seek federal

support. The most frequent type of support under this request—other than financial— is for additional personnel, either emergency or law enforcement personnel, and equipment from FEMA or DoD. Although not discussed in the NRF, but embedded in federal law as a statutory exception to the PCA, is the Insurrection Act of 1807. Not part of any published response, the Insurrection Act authorizes a legal response that can be provided by the President to address a deteriorating situation, a situation much like in post-Katrina New Orleans.

This Act grants the President the authority to use federal armed forces in a law enforcement role when state governments fail, refuse, or neglect to protect the rights of its people.⁵² This federal support is usually delivered at the request of a governor. For example, consider the support provided to Los Angeles in 1992 when President George H. W. Bush deployed federal forces to California to help quell the riots that broke out following the Rodney King trial verdict. However, a common misconception, which prevailed during the Hurricane Katrina crisis, is that the President must have a governor's request in order to take action under the Insurrection Act. That is not the case. Section 322 of this Act empowers the President to use federal troops autonomously to address a variety of civil disturbances.⁵³ However, the last time a President utilized the powers vested in this Act without the request of a governor was in the 1950s and 1960s when southern states were not implementing the civil right laws enacted by Congress.⁵⁴ President Bush and Governor Blanco both considered using the Insurrection Act to authorize using federal troops to restore law and order in New Orleans. Perhaps they declined to do so for political reasons. One occasion on 2 September 2005 illustrates their situation.

Several times after the hurricane made landfall, while New Orleans was becoming a war zone, the President, instead of using the Act to employ federal troops in a law enforcement capacity, continued to “press Governor Blanco to request a federal takeover of the relief effort so that federal troops could be deployed to restore law and order.”⁵⁵ President Bush and his cabinet were concerned that such a unilateral action would have been viewed as federal bullying of a Southern Democratic governor.⁵⁶ So they refused to use the Insurrection Act without Governor Blanco’s request. Moreover, the administration was worried about the political message that would have been sent by “a president ousting a Southern Governor of another party from command of her National Guard.”⁵⁷ In the meantime the citizens of New Orleans continued to suffer needlessly.

Governor Blanco was unwilling to request assistance under the Insurrection Act for fear of having her National Guard federalized.⁵⁸ She did not want to lose control of the support effort, even as mayhem was taking over New Orleans. Needless political wrangling and numerous attempts to skirt the PCA persisted after Hurricane Katrina made landfall. Sadly, this politicized indecision undermined what first and second responders were able to do at all levels. Even so, many of the systems and procedures in place today have evolved from the dismal performance at the state and federal level during the Katrina response. However, these political challenges have yet to be appropriately addressed. They will inevitably resurface in future responses.

There are primarily two opposing views that are argued with regard to the PCA and the use of the military in civil support. First, repeal the law—and stand back from the political repercussions. Or keep the law as is—even though it has proven to be

troublesome and in recent times an actual impediment to proper civil support. In reality, this law has outlived its usefulness, despite recent amendments. As Michael Spak, a former Army Judge Advocate General (JAG) Colonel, concludes: “The exceptions made in the name of national security in recent decades have left Posse Comitatus a hollow shell of its original self.”⁵⁹ Absent a full repeal of the Act—which would not be agreeable to everyone, there is a third option. The Act should be further amended to authorize all military forces to conduct law enforcement without relying on the authority of another Act—The Insurrection Act. The amendment should allow the president to deploy federal forces to places where local first responders have been unable or overwhelmed until such time as the first responders are able to restore law and order. At that point the federal forces would be removed from the law enforcement situation and the sanctity of federalism would be returned. In this amendment, the Congress could require the President to provide presidential updates to the legislative branch on the status of forces providing support. Congress could also place a time restriction, such as a 120-day maximum, on federal forces providing law enforcement. If the time limit is reached, the President must either remove the federal military forces from that location or request an extension from Congress.

The tiered response framework resides on the premise that local or state officials must ask for assistance from either another state or the federal government once the state has exceeded their ability to respond to a crisis. The challenge, as witnessed during Hurricane Katrina and what would most likely be seen in the New Madrid scenario, is what happens when first—and even second—level responders are overcome or unavailable and basic services such as emergency care and security are

not being provided. During the flooding that followed from Hurricane Katrina, “many state and local public safety agencies suffered extensive damage”⁶⁰ and were immediately unable to perform. For example, the fire departments in Grand Isle and Slidell had to close due to building and vehicle damage.⁶¹ Some 147 New Orleans police officers abandoned their positions and the Emergency Operations Center in Orleans Parish was forced to close due to flooding.⁶² Furthermore, the Infantry Brigade from Louisiana, a brigade that contained many first responders for the state, was returning from a deployment to Iraq as Katrina made landfall in New Orleans. It was largely unavailable to provide support.

Hurricane Katrina exposed a serious flaw in national disaster response plans. These plans fail to recognize that local police, fire and medical personnel might be incapacitated and unable to provide support.⁶³ These challenges are rarely discussed or stressed in drills and command post exercises between state and federal agencies. Yet they remain as relevant today as they were in 2005. Hurricane Katrina provides only a prelude to what happens when first and second responders are overwhelmed and unable to provide a safe and secure environment for rescuer workers. Without an amendment to the PCA, when federal forces once again are deployed to support a response, they will continue to be hindered in what they can provide. The same questions and issues that arose in September 2005 have yet to be addressed in 2012.

Most disasters that strike the United States will be handled at the local and state level. They will not require the use of federal forces, either reserve or active duty. However, when the governor of a state requests additional military forces through the President, National Guard and federal forces could operate together. The 2012 National

Defense Authorization Act (NDAA) raises the possibility that reserve forces will be among the first federal forces to provide assistance after a disaster. It is also inevitable that federal forces and National Guard forces will operate together in the United States to provide DSCA. So command and control of military forces within the United States should not be a contentious issue, either culturally or politically. These two types of forces have been operating successfully together in combat zones around the world for the past ten years. Nevertheless, no issue is more controversial or polarizing at the state and federal level than who should command military forces that are conducting civil support operations.

Currently, under the federal laws described earlier, there is a “constitutional basis for distinct and separate chains of command for state and federal military forces.”⁶⁴ These separate chains of command have worked well in a single-state crisis such as the April 2011 National Guard response to the devastating tornadoes that struck in Alabama, or to preplanned events such as the 2009 Presidential inauguration.⁶⁵ However, they have not worked well when federal and state forces are working together in unplanned disasters such as the response to Hurricane Katrina. The response by both state National Guard forces and federal forces during Hurricane Katrina was disjointed at the strategic level, which then “significantly degraded the integration and synchronization” of responding National Guard and federal forces.⁶⁶

Command and Control of Military Forces in Disaster Response

Two command options are available when federal and state forces are deployed together in the same operating area inside of the United States—Parallel Command and Dual Status Command.

Parallel command has been used frequently in the past “in many large-scale civil support operations.”⁶⁷ Under this arrangement, state and federal forces operate in the same area of operations under separate chains of command. The response to Hurricane Katrina was eventually conducted under the parallel command structure. The military federal task force—Joint Task Force Katrina fell under the command of NORTHCOM, led by LTG Russell Honore. The state task force fell under the command of the governor of Louisiana, led by the Adjutant General, MG Bennett Landreneau. Although this type of command structure has worked effectively during past pre-planned events, including the 2009 Presidential inauguration, the fact is that this command structure was only effective because of extensive pre-planning, because close working relationships were developed, and because the established coordination occurred before the event took place.

Certainly good working relationships can be developed among interagency leaders. But at the operational and tactical levels such relationships are not feasible because of the wide array of forces that are involved and the broad range of situations in which they may become involved. Interestingly, Army Field Manual 3-28, *Civil Support Operations*, recommends using this parallel command only when close coordination is possible; further, “its effectiveness depends on a close working relationship between commanders.”⁶⁸ Such relationships cannot be developed in the 10 days before a hurricane strikes, to say nothing of their prospects in responses to unplanned events. Among other factors, the parallel command structure used in response to Hurricane Katrina contributed significantly to the debacle of that response.

As noted in the Federal Response to Hurricane Katrina lessons learned, “a lack of an integrated command structure for both active duty and National Guard forces exacerbated...coordination issues during the initial response.”⁶⁹ Colonel Ludwig Schumacher concluded, “The separate chains of command employed during Hurricane Katrina significantly degraded the integration and synchronization...from different commands.”⁷⁰ LTC (ret) Jeffrey Burkett concurs: “Parallel command military operations can be problematic in the chaotic environment of a disaster recovery because of control of information, timely decision-making,...and situational awareness...when command and control are divided.”⁷¹

In *The Utility of Force*, Rupert Smith although commenting on North Atlantic Treaty Organization (NATO) and United Nations (UN) command structures reinforces the limitations of a parallel command structure, “If a student at any military staff college ...produced a plan that had forces operating in the same space answering to two different chains of command...he would have his cards marked fail”⁷²—and quite possibly be run out of town.

It is easy to see the many disadvantages of relying on a parallel command structure to respond to a sudden disaster. Extensive coordination would be required at every level. Disjointed relief efforts would be unavoidable. Many tasks would be wastefully duplicated. Whether it was due to President Bush’s legal restrictions on placing federal forces under command of the governor, or his refusal to invoke the Insurrection Act for fear of the political repercussions, or Governor Blanco’s refusal to cede control of state National Guard forces to a federalized response for her own

political reasons—the parallel structure was chosen as a last resort to reverse a grossly deteriorating situation in New Orleans.

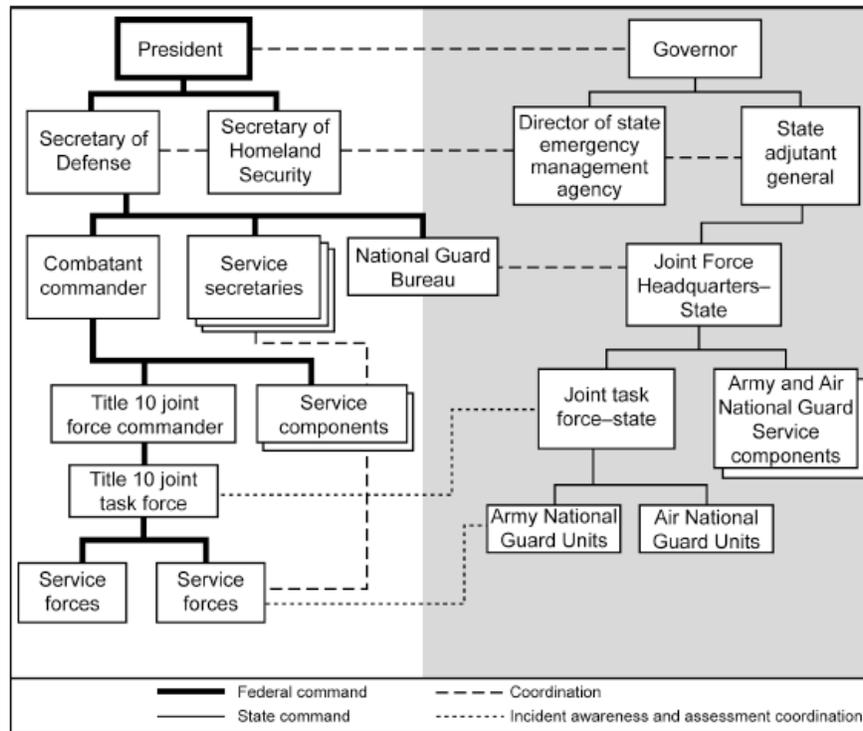


Figure 3: Example parallel command structure.⁷³

In February 2010, the presidentially formed Council of Governors met for the first time under President Obama’s guidance to “strengthen the partnership between federal and state governments in protecting the nation against all manner of threats, including...natural disasters.”⁷⁴ One of the Council’s five working groups, the Unity of Effort Working group was charged with addressing the proper integration of military forces during domestic operations.⁷⁵ During the first meeting Secretary Gates, in an attempt to thaw a frozen relationship that had developed since Hurricane Katrina between DoD and the states, acknowledged the responsibilities of governors to provide for the welfare of their states. By August 2011, the Council of Governors and DoD had agreed that the Dual Status Command (DSC) structure would be the usual and

customary command and control arrangement when state and federal forces are employed simultaneously.⁷⁶

The dual status command structure is not a new command structure within DoD. However, until 2011 this type of command structure has been used only in pre-planned, single-state operations. The National Guard's support in 2004 for Operation Winter Freeze was a multi-state, and pre-planned effort. This structure was used to provide logistical support for the 2004 and 2008 Republican and Democratic conventions, for the 2004 G8 summit conference, and most recently during Operation Winter Freeze, when the Guard supported the Border Patrol along the Canadian border.⁷⁷ But the dual status command concept has yet to be challenged in an unplanned disaster. The first opportunity to test this command structure on something besides a preplanned event would have occurred during the response in August 2011 to Hurricane Irene. This storm was bearing down on the East Coast as predictions of widespread flooding, power outages and infrastructure damage were dramatically broadcast to an anxious public. Capitalizing on lessons learned discussions and agreements between the leadership of the states and the federal government, DoD and the state governors decided upon the dual status command structure for the projected federal and state response to this incident. "The Hurricane Irene recovery activities marked the first time that dual-status commanders were used to provide command and control over both active-duty and reserve-component (National Guard and Army Reserve) forces."⁷⁸ However, this response went no further than Army North deploying Defense Coordinating Elements (DCE) to FEMA regions in the areas projected to be affected and the assignment of the dual status commanders by the governors and DoD in the four states projected to be

hit. But Hurricane Irene mainly steered clear of the coast and required no federal response.⁷⁹

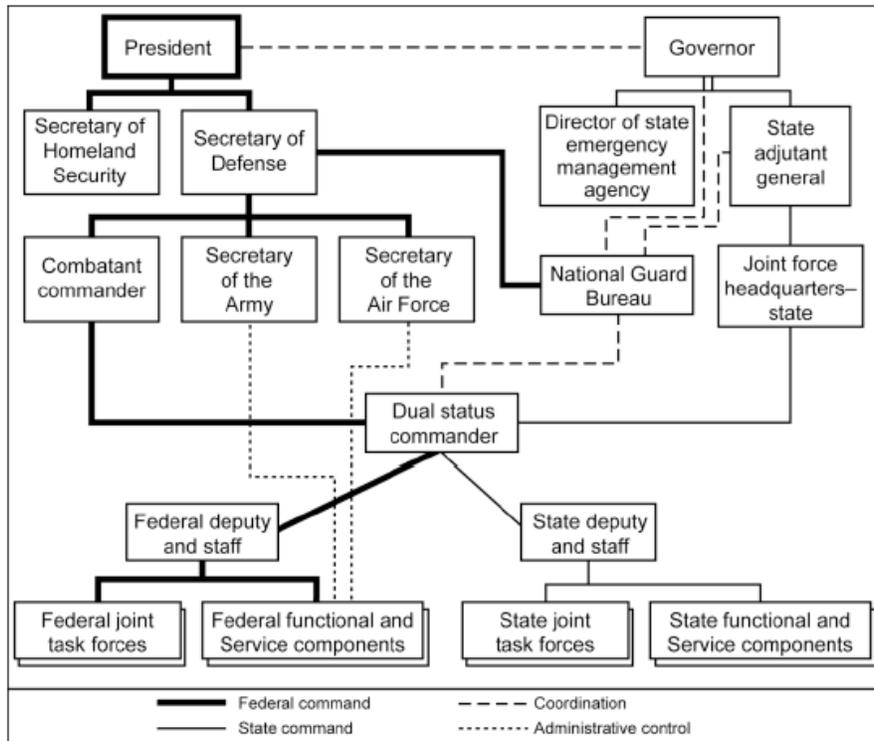


Figure 4: Example Dual Status Command structure

The dual status commander will normally be a National Guard officer at the Brigadier General level or higher. This commander will be nominated by the governor and agreed upon by the President through a memorandum of agreement (MOA). This MOA must be signed before the selected officer can perform his or her duties to avoid future complicating liability determinations and confusion over the PCA issues. The previously discussed work around of PCA is embedded in the dual status command structure as well. National Guard officers have precisely the correct legal status to serve as dual status commanders. Further, they are familiar with the area of operations; they are aware of their states' capabilities; they have established relationships that will

facilitate disaster responses; and they have working relationships with local, state, and federal officials in their states.

Unlike the parallel command structure the dual status command structure does not require extensive pre-planning and coordination prior to its implementation. Most of the pre-planning at the command level comes during the dual status commander's experiences with NORTHCOM and ARNORTH prior to his or her assignment to that position. The DSC construct acknowledges that the president commands federal forces and that the governor commands state forces. So the designated DSC is able to command federal forces and state forces. But some issues remain.

The separate chains of command of the parallel command structure remain, but there is only one dual status commander. However, this commander must command two different forces with different rules for employment for as long as federal forces are subject to the PCA. Additionally, contrary to common perception, the DSC must execute orders from multiple bosses, namely the governor and the president. If these bosses have conflicting political views, this conflict could jeopardize the response equation.

Federal forces responding inside the United States are hampered by a culturally and politically supported command system. Governors do not want federal forces operating inside of their state without some sort of control over them. Presumably, dual status commanders will provide that control. But neither the President nor DoD want to cede control of federal forces operating in states without retaining the command line that runs through NORTHCOM. Federal officials cite the Constitution to support their rights to control the federal responding force. In November 2009, this author was deployed as an active duty Aviation Battalion Commander task organized under a

National Guard Brigade Headquarters for a year. He received no special training or orientation for this assignment. He simply responded to a routine order that enabled U.S. forces to conduct multinational combat operations outside the United States. Our active, reserve and guard forces should be able to work as closely and smoothly in performing domestic operations, especially in response to disasters in our own country.

Joint Publication 3-0 defines tactical control (TACON) as “command authority over assigned or attached forces or commands,...made available for tasking, that is limited to the detailed direction and control of movements or maneuvers within the operational area necessary to accomplish missions or tasks assigned.”⁸⁰ This command relationship would solve many, if not all, of the challenges that the parallel command structure presented during Hurricane Katrina. It designates a limited command relationship that maintains the command authority and integrity of the unit. The obvious change would be the authorization for a federal force to operate under control of the governor. Recognizing this in 2008 and 2009 Senators Leahy and Bond, then co-chairs of the U.S. Senate National Guard Caucus, introduced legislation that would give state governors the ability to exercise TACON of federal forces responding to disasters in their states. The DoD opposed this proposal, citing the Constitution in its response to the Senate. In a letter from DoD to the Senate and House Armed Services Committee, DoD resorted to Article II, Section 2 of the Constitution, which designates the President as the Commander in Chief of the Army of the United States.⁸¹ The President would have to relinquish his command of federal forces to a state governor under this legislation. But DoD’s selective use of the Constitutional argument is all too obvious. Why is it possible for active duty units to work side-by-side with National Guard forces in

a foreign country yet inside the U.S. DoD objects? Seven years after Hurricane Katrina made landfall DoD has shown little if any desire to cede control of federal forces to a governor inside the United States. Likewise, governors have shown little interest in allowing federal forces to operate in their states without oversight of a National Guard commander. The TACON relationship that allows federal forces to carry out a specific task under a governor's control addresses the command and control issues that ran amok during the response to Hurricane Katrina. Senators Leahy and Bond have forged the way ahead for military forces operating inside the United States to conduct effective disaster support operations. But DoD apparently wants none of this.

Conclusion

Steve Abbot, Chairman of the Advisory Panel on DoD Capabilities for Support of Civil Authorities, an advisory panel chartered to provide DoD and Congress with information on the readiness of the country for disaster response, delivered the Panel's findings to Congress on 15 September 2010. This report cited factors that "complicate effective response to major incidents."⁸² Among these factors was our federalist system of government presented by the Constitution and the "guarding of prerogatives"⁸³ by agencies at all levels of state and federal government. These issues persist seven years after Hurricane Katrina made landfall. Nonetheless, there have been numerous changes to facilitate the support that DoD provides to the states during disasters. But the recency of this report to Congress shows that some issues must still be addressed as we prepare for the next incident. The time for political and military diddling has long passed. The citizens of this nation demand their leaders to secure and support the country. They expect unhindered responses to inevitable disasters—natural and man-made. As the panel concludes, "It is an obligation of all those in positions of

responsibility to immediately search for, discover and implement solutions to overcome the barriers to response,” regardless of political party or military service culture.

Congress should amend the Posse Comitatus Act to allow federal forces to conduct law enforcement during situations where first and second responders are unable to do so. Additionally, Congress should amend federal statutes to allow federal forces to serve in a TACON relationship under the governor of a state while supporting civil support operations inside of the United States. Both of these suggestions would enable the nation’s leaders to employ our entire military force to support beleaguered civil leaders. If our leaders fail to provide these legislative changes, the debacle of our response to the Hurricane Katrina disaster is likely to repeat itself, perhaps on a much larger scale.

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