

Who's in Charge? How the Law Impacts Chain of Command in Regional Disaster Situations

By Tammi K. Franke

Hurricane Katrina on the Gulf Coast of the United States raised many disaster response issues. The coordination of federal, state and local governments' response was a major issue in the days and weeks following the disaster. At best, government officials seemed confused about their roles and responsibilities, which quickly disintegrated into finger pointing and blame-passing.

Private businesses trying to recover quickly from a regional disaster can be adversely impacted if the governmental chain of command is not clear in a post-disaster environment. Issues such as looting, debris removal, access to restricted areas and restoration of critical infrastructure services are real issues when resuming normal business operations at a company's home location. Understanding which governmental entity has authority for a particular operation during emergency management and recovery efforts can aid businesses in getting back to normal operations as soon as possible. This paper outlines how the law impacts the operating authority of federal, state and local governmental agencies operating in a regional disaster area.

Introduction

The whole country witnessed the leadership gap that occurred during the days following hurricane Katrina. Reviews by Congress, the GAO and other federal agencies have examined the issue. Mike Brown resigned over the slow federal response.

State and local officials looked to the Federal Emergency Management Agency (FEMA) to lead the effort. We all remember Ray Nagin's tearful and expletive filled request for help. The media quickly jumped on FEMA as the scapegoat. Was FEMA legally responsible? How much can the federal government do? Can they call in the military to stop looting? Could more have been done under the current Constitutional and legislative framework?

Current legislation and legislative history is not as clear-cut in this situation as the portrayal by the media in the days following Katrina. While FEMA, now part of the Department of Homeland Security (DHS), has in the past been a leader in providing funding for regional disaster recovery efforts, its actions were based primarily on a long-standing tradition of providing assistance and not a legal obligation of the federal government. Disaster legislation protects the state's autonomy and actually prohibits the federal government, especially the military, from taking action without state approval. It does not obligate the federal government to respond to a natural disaster. A terrorist attack is a different matter, especially if it constitutes an "Incident of National Significance" and is deemed to be an invasion or an insurrection, then it is clearly a federal matter.

After the Congressional inquiries and investigations into what went wrong with the response to hurricane Katrina, there is already call for change. The majority

opinion at the federal level is that FEMA needs to be strengthened with many parties advocating a broader role for the federal government and the military in regional disaster response. The role of the DHS and the government response to a natural disaster versus terrorism are also adding complexity since the World Trade Center attack in 2001. A business recovering during a regional disaster may increasingly find itself dealing with not just with FEMA or the National Guard, but other branches of the military.

Change often causes confusion and, when time is of the essence, business executives need to know who is in charge and has the authority to solve critical public infrastructure problems.

Constitutional Background

The structure of the U.S. Constitution provides checks and balances between the various branches of government. This balance or tension presents itself in many of the powers of the executive branch in emergency situations. The executive branch has some authority to act, but the authority is normally limited either by statute passed by the Congress or by the ability of Congress to fund any special emergency action taken by the executive branch.

The same balance or tension exists between the state and federal governments. The Constitution restricts the authority of the federal government and federal agencies in state and local municipalities. The Tenth Amendment to the Constitution states that powers not specifically granted to the federal government in the Constitution are reserved to state government. It reserves to state government all powers not specifically granted to the federal government by the Constitution. This limits federal government activities in an individual state to matters that are federal issues. States have the primary responsibility to provide for civil order and protection of their citizen's life and property. This power is reserved to the states and disaster response falls to the state government under this mandate of protection of life and property.

However, the restriction on federal activity at the state level has been relaxed over the years. First, the Supreme Court and Congress have broadly interpreted both the commerce and the necessary and proper clause of the Constitution to allow federal regulation over anything that affects business that is conducted in more than one state. Many large federal agencies, such as the SEC and the EPA, were created based on this broad reading of the Constitution. Second, dating back to George Washington's calling out of the militia to suppress the "Whiskey Rebellion" in 1794, there has been a long-standing tradition of congressional delegation of extraordinary powers to the President in the time of a national emergency. Over the years, Congress has passed hundreds of statutes delegating extraordinary and emergency powers to the President.

Disaster Relief by the federal government to the states followed a parallel course. Even though protection of life and property falls to state government, there has been a long-standing tradition of the federal government offering aid to states that experience a major natural disaster. In 1803, Congress provided the first disaster aid to a New Hampshire town following an extensive fire. This type of disaster relief, through an act of Congress, occurred over 100 times before Congress, in 1974, working with President Carter, established FEMA and the process of presidential disaster declarations.

To sum up, the Founding Fathers told Congress in the Constitution "Don't Mess with Texas" or any other state unless you have a good, federal reason to do so.

Under the Constitution, disaster relief and aid would fall to state and local governments. Over the years, the Supreme Court interpreted the Constitution broadly and allowed Congress to expand federal powers. Through this expansion and specific acts of Congress, the federal government has taken increasingly active role disaster relief efforts.

Federal Legislation

There are several pieces of federal legislation that address that support or limit federal activity, including military activity, during an emergency or disaster. In particular, the following pieces of legislation address the issue of chain of command during disaster and emergency response: the Posse Comitatus Act, the National Emergencies Act, the Insurrection Act, Department of Defense regulations, the Stafford Act and the Homeland Security Act.

I. Posse Comitatus Act

Under the Constitution, states retain the primary responsibility to provide for civil order and protect citizens and their property. Hence, the majority of police officers operate on a state and local level. Congress has the constitutional authority to raise, support, organize and regulate the armed forces. There is no constitutional limit on these powers or how they are used. However, there is a legislative limit, the Posse Comitatus Act.

The term *Posse Comitatus* means “the power of the county” and dates back to the days of the Old West sheriff calling up a posse of able-bodied men to assist with law enforcement. In the Reconstruction Era following the Civil War, the Army was called up throughout the South to man polling booths and enforce the law. Congress became concerned that the Army was distracted from its primary task of protecting the borders and, in 1878, passed the Posse Comitatus Act to protect the Army from being called by local authorities to perform law enforcement activities. Under the Act, using the military to execute civilian laws is a crime, unless expressly authorized by Congress or the Constitution.

The full text of the Act is as follows:

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.¹

By its terms, the Posse Comitatus Act only applies to the Army and the Air Force, which was formed out of the Army in 1947. Department of Defense regulations extended the Act to the Navy and Marine Corps. It does not apply to the Coast Guard due to an express authorization by Congress to give the Coast Guard an additional designation as a law enforcement agency with police powers. It does not apply to the National Guard, if the National Guard is under the command of a Governor.²

¹ 18 U.S.C. 1385. Those were the days! Congress wrote an Act with only one paragraph. By contrast, the Homeland Security Act, passed in 2002, is over 100 pages long.

² A brief note on the National Guard: It has a unique dual mission that consists of both Federal and State roles. For state missions, a governor commands the National Guard forces. The governor can call the National Guard into action during local or statewide emergencies, such as storms, earthquakes or civil disturbances. In addition, the President can activate the National Guard for federal missions. Examples of federal activations include National Guard units deployed in Bosnia and Kosovo for stabilization operations and units deployed in Iraq. If the National Guard is acting under state command, the Posse Comitatus act does not apply and they can perform civil law enforcement. If they are under Federal Command, then the

Under the Posse Comitatus Act, the U.S. military could not be called into New Orleans or any other area affected by Hurricane Katrina to restore order unless specifically authorized by Congress. The military could only support the recovery efforts. The National Guard, under Governor Blanco and Major General Landreneau (of the Louisiana National Guard), were responsible for the restoration of order in the area.

Three-star General Russel Honoré led the military's support efforts after Hurricane Katrina³. He often had to navigate the fine line between providing relief and the potential of federal troops using force against American citizens. In interviews, Honore said he wanted his troops' profile in New Orleans to be that of humanitarian relief operations, and not the law enforcement role of the local police. Hundreds of active duty troops carried weapons during relief efforts. The way they carried those guns was a concern to General Honoré and he ordered all the troops he encountered to point their weapons down. CNN Pentagon Correspondent Barbara Starr said Honore went up to military vehicles, National Guardsmen, and to New Orleans police officers, telling them to point their weapons down and reminding them that they were not in Iraq.

There is much controversy surrounding the Posse Comitatus Act. After the military's success in executing relief efforts after Katrina, the White House administration has stated it supports relaxing the restrictions and increasing the military's role in domestic emergency and post-disaster situations. Recently, the White House has also advocated using National Guard troops, under federal command, to police the U.S. borders. Opponents, including many within the Department of Defense, claim that relaxing the Act will distract the military from its primary duty and lead the U.S. closer to a domestic "police state". To date, no legislature modifying the Act has reached the floor of Congress.

II. The Insurrection Act

Under the Insurrection Act⁴, Congress delegated authority to the President to call forth the military during an insurrection or civil disturbance. It is an exception to the Posse Comitatus Act because it provides express congressional authority to the President to use the military if local government is unable to protect the citizens.

The President may use the military, including the federalized National Guard, to quell: (1) civil disturbances in a state (upon the Governor's request), (2) rebellions that make it difficult to enforce Federal law, or (3) any insurrection that impedes a state's ability to protect citizens' constitutional rights and that state is unable to unwilling to protect these rights.

Before committing U.S. troops, the President must issue a proclamation for rebellious citizens to disperse, cease, and desist. The President generally acts at the recommendation of the U.S. Attorney General and at the request of the Governor (not required). If the military is called in, even at the request of the Governor, the President is clearly in charge as the Commander in Chief.

Could the Insurrection Act have been used to "call in the troops" after Hurricane Katrina? Did the looting amount to: "a riot or rebellion where local

act applies.

³ General Honoré was a true leader in the relief efforts. Many considered him one of the few heroic figures in the weeks following the Hurricane. His brusque style earned him the moniker of "John Wayne Dude" from New Orleans' Mayor, Ray Nagin. The press, also enamored with General Honore, frequently quoted him. See http://www.brainyquote.com/quotes/authors/r/russel_honore.html

⁴ 10 U.S.C 331

government is unable to protect the citizens?" Some legal commentators have said that the Insurrection Act could have been invoked to send in the military to restore order.⁵ *The Washington Post* reported that the White House did attempt to invoke the Insurrection Act and "unify the chains of command that are split among the President, the Louisiana governor and the New Orleans mayor."⁶ However, Louisiana Governor Blanco and Louisiana officials rejected the request due to concerns that it would be comparable to a federal declaration of martial law. In this situation, the federal government was not ready to take control of the entire operation without support from the state government. According the *New York Times*, the order to send in additional military was delayed until September 2 to give the National Guard units time to restore order. The federal government did not want to send troops into an area where they might be forced into a conflict with local citizens.

Historically, the Insurrection Act has never been used during a domestic disaster. It was used after Hurricane Hugo, but in the U.S. Virgin Islands. It was also used during the L.A. Riots to quell looting, but the riots were not the result of a disaster and the governor of California specifically requested the deployment of federal troops.

III. The National Emergencies Act

The National Emergencies Act⁷ is an example of Congress placing a check on a power of the executive branch. Prior to 1976, when the Act was passed, the President had the ability under the Constitution to declare a state of national emergency and act in his own discretion to address it. After the controversy surrounding the use of these "emergency powers" to conduct the war in Vietnam, Congress consolidated and limited the executive branch's emergency powers in the National Emergencies Act.

The Act gives broad, but specific, powers to the President. There are a total of 160 provisions of law that can be activated by the President as a part of the declaration process. However, the President must specifically state in the emergency declaration which of the 160 provisions is being enacted. Because there is an emergency, these provisions allow the President to take action without normal checks and balances inherent in our form of government.

The Act was first used in 1979 in response to the Iran hostage situation at the U.S. Embassy. More recently President Bush declared an emergency after the World Trade Center attacks. It was reported that he was invoking broad powers under the Act, but he actually activated only 12 provisions that primarily gave him the ability to call branches of the military to active duty. President Bush declared a state of emergency after Hurricane Katrina. One of the provisions activated by the President provided for the suspension of the Davis-Bacon Act allowing federal contractors to pay less than minimum wage during reconstruction. This created political controversy and the President rescinded the proclamation in November of 2005 and reinstated minimum wage for all workers under federal contracts.

If a state of national emergency is declared, it is a federal matter the President is in charge. However, the Act provides that Congress, through a joint

⁵ American Bar Association, "Hurricane Katrina Task Force Subcommittee Report", February 2006.

⁶ Manuel Roig-Franzia and Spencer Hsu, "Many Evacuated, but Thousands Still Waiting," *The Washington Post*, Sunday, September 4, 2005. See also, Lipton, Schmidt and Shanker: "Political Issues Snarled Plans for Troop Aid," *The New York Times*, September 9, 2005

⁷ 50 U.S.C. 1601

resolution of the House and Senate, can terminate the emergency declaration and the associated executive branch powers at any time.

During regional domestic disasters, a national state of emergency is often declared by the President as another way to quickly marshal the substantial resources of the federal government without the normal bureaucracy. The military may be involved if the President activates those specific powers as a part of the declaration.

IV. Department of Defense Regulations

The Department of Defense regulations provide for an "inherent emergency power" that allows the military to take action domestically.⁸ This is asserted by the Department of Defense in very limited circumstances and in order to; 1) protect federal property and functions, 2) restore government functions and public order, and 3) prevent loss of life and destruction of property. These regulations are invoked by executive order (or in extreme situations without one if no executive is available to give an order) in the case where the local government is no longer constituted.

V. The Robert T. Stafford Disaster Relief and Emergency Assistance Act

In 1988, Congress passed the Stafford Disaster Relief and Emergency Assistance Act as a follow up to President Carter's creation of FEMA in 1974.⁹ The Stafford Act is the primary legislation for assistance by the federal government to state and local governments during a disaster. The Act also created the procedure for a Presidential Disaster Declaration that triggers assistance from FEMA. The Act gave FEMA the responsibility for coordinating the relief efforts of the federal government and non-governmental agencies, such as the Red Cross. It also broadened FEMA's scope to include disaster preparation and avoidance.

The Act is extensive and several provisions address the chain of command during a declared disaster or emergency including the definitions in the act for "emergency" and for "major disaster". A disaster is limited to any natural catastrophe, while the definition for emergency is broader (and includes terrorist activity).¹⁰ It leaves the more discretion with the executive branch. Both definitions specifically state that the role of the federal response is to supplement the state and local efforts.

The declaration procedure for a disaster clearly provides that the affected state is in charge of requesting resources and assistance from the federal government and that states are in control of the federal presence in their state after a disaster declaration. However, emergency declarations are slightly different.

The President can act without the request of the governor of the affected state if it is determined to be a federal matter. With terrorist activity and the executive branch's position that terrorism is an act of war, there is clear federal authority for such a declaration.

⁸ Jennifer Elsea, "The Use of Federal Troops for Disaster Assistance: Legal Issues". CRS Report for Congress, CRS Web, September 16, 2005.

⁹ 42 U.S.C. 5121

¹⁰ An "Emergency" is defined as "any occasion for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts to save lives and to protect property and public health and safety, or to avert the threat of a catastrophe.

However, in the case of Katrina or any other natural disaster, even if there is looting or civil disorder, a state request for assistance must to be made and include a detailed definition of the type and amount of federal aid required. The governor must also implement the state's emergency response plan and activate, if required, the state's National Guard units under state control (in which case the Posse Comitatus Act does not apply) and provide information regarding the state resources that have been committed.

Under the Act, once a disaster is declared, a federal coordinator is appointed to coordinate the activities of all federal, state, local and non-profit assistance. The Stafford Act also requires the state governor to appoint a state coordinator to work with the federal coordinator.

After Hurricane Katrina, William Lokey, of FEMA was appointed to act as the Federal Coordinating Officer for Louisiana and William L. Carwile, III, of FEMA was appointed to act as the Federal Coordinating Officer for Mississippi. After the resignation of Mike Brown, Vice Admiral Thad Allen of the United States Coast Guard was appointed to replace them as the Federal Coordinating Officer for both states.

The Stafford Act also contains several provisions regarding the use of the military during a declared disaster. According to a congressional report:¹¹

"Permitted operations include debris removal and road clearance, search and rescue, emergency medical care and shelter, provision of food, water, and other essential needs, dissemination of public information and assistance regarding health and safety measures, and the provision of technical advice to state and local governments on disaster management and control. The authority does not constitute an exception to the Posse Comitatus Act. In the event of a disaster that results in the wide-scale deterioration of civil law and order, the authority to employ active duty troops to perform law enforcement functions must be found elsewhere. The Stafford Act does not authorize the use of federal military forces to maintain law and order. Federal forces would have no authority, for example, to act as traffic controllers or provide security for facilities used in the relief efforts, unless such activities serve a valid military purpose. Patrolling in civilian neighborhoods for the purpose of providing security from looting and other activities, would not be permissible, although patrolling for humanitarian relief missions, such as rescue operations and food delivery (which may have the incidental benefit of deterring crime) would not violate the Posse Comitatus Act."

The Stafford Act provides support for federal financial relief at the request of the governor of the affected state. The federal relief is coordinated with the state and local governments through a group of coordinating officers appointed for the duration of the relief efforts. The military is a resource that the federal government can deploy to support the recovery efforts. There is no directive under the Stafford Act for the military to take anything more than a support role to FEMA and state disaster officials.

¹¹ Jennifer Elsea, "The Use of Federal Troops for Disaster Assistance: Legal Issues". CRS Report for Congress, CRS Web, September 16, 2005.

VI. The Homeland Security Act

The Homeland Security Act of 2002¹² was passed after the September 11 terrorist attacks. Under the Act, FEMA received additional duties relating to recovery from a disaster due terrorism. As a result, in March of 2003, FEMA was incorporated into the new Department of Homeland Security, which was approved by Congress after much debate. The head of FEMA reports to the Secretary of Homeland Security, a cabinet level position.

Over 100 pages long, the Homeland Security Act does not change any of the provisions in the Stafford Act regarding state and federal coordination and chain of command following a disaster. It reaffirms that the Secretary of Homeland Security has no authority to engage the military – such authority continues to reside with the President. The Act also reaffirms and clarifies the Posse Comitatus Act.

In Section 886 of the Homeland Security Act, Congress, in essence, comments on the role of the Posse Comitatus Act as it applies to the domestic use of the military:

“Section 1385 of title 18, United States Code (commonly known as the “Posse Comitatus Act”), prohibits the use of the Armed Forces as a posse comitatus to execute the laws except in cases and under circumstances expressly authorized by the Constitution or Act of Congress. (2) Enacted in 1878, the Posse Comitatus Act was expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing Federal law. (3) The Posse Comitatus Act has served the Nation well in limiting the use of the Armed Forces to enforce the law. (4) Nevertheless, by its express terms, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President’s obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency. (5) Existing laws, including chapter 15 of title 10, United States Code (commonly known as the “Insurrection Act”), and the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), grant the President broad powers that may be invoked in the event of domestic emergencies, including an attack against the Nation using weapons of mass destruction, and these laws specifically authorize the President to use the Armed Forces to help restore public order. (b) SENSE OF CONGRESS.—Congress reaffirms the continued importance of section 1385 of title 18, United States Code, and it is the sense of Congress that nothing in this Act should be construed to alter the applicability of such section to any use of the Armed Forces as a posse comitatus to execute the laws.”

In this Section, Congress confirms the President’s use of the military during a “war, insurrection or other serious emergency.” They do not specifically address a domestic natural disaster and it would be difficult to argue, based on this Section, that the military can be brought in for any reason other than to support FEMA during a natural disaster. However, the inclusion of the broad term “other serious

¹² 6 U.S.C. 101

emergency” could open the doors for the use of the military to restore order during a natural disaster in the future.

The Future After Katrina

There is a lot of controversy regarding the role of the federal government and the military in responding to disasters. The success of Russel Honore in leading the military support mission in the days and weeks following Hurricane Katrina has led to a call for an increased role by the military in disaster response. The failure of FEMA to provide leadership in the coordination and response added the call for change.

However, the National Governor’s Association, including Governor Jeb Bush, has strongly stated that disaster response should not be “federalized” and that state and local government remain firmly in charge. Recent legislative activity by Congress is focusing on restructuring FEMA, yet again, to strengthen the department refocus its efforts on natural disaster preparation and response, rather than homeland security.

In the past, the response by FEMA has been conservative and viewed its role as a support coordination agency for the state and local governments. Any military presence was a last resort and, if deployed, it was for support only. The Constitution and current legislation support this approach. However, after Katrina there is a strong possibility for change and an increased role for the military in future disaster response.

Further Reading

CRS Report RS22266, *The Use of Federal Troops for Disaster Assistance: Some Legal Issues*, by Jennifer K. Elsea.

CRS Report RL33095, *Hurricane Katrina: DOD Disaster Response*, by S. Bowman, L. Kapp and A. Belasco

The Myth of Posse Comitatus, by Major Craig T. Trebilcock,
www.homelandsecurity.org

CRS Report RS21017, *Terrorist Attacks and National Emergencies Act*, by Harold Relyea

Hurricane Katrina Task Force Subcommittee Report, American Bar Association,
February, 2006

Contact Information

Tammi Franke,
Fitzgerald & Hewes LLP
550 West Van Buren Street
Suite 1450
Chicago, IL 60607
312-447-2903
tfranke@fitzhewlaw.com
www.fitzhewlaw.com