

1-1-2007

## The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?

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### Recommended Citation

Joshua M. Samek, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U. Miami L. Rev. 441 (2007)

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# The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?

JOSHUA M. SAMEK\*

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## I. INTRODUCTION

On the morning of August 29, 2005, Hurricane Katrina ravaged the Gulf Coast states of Louisiana, Mississippi, and Alabama, forever changing one of America's most venerable cities, New Orleans. Though it made landfall as only a Category 3 hurricane on the Saffir-Simpson Hurricane Scale, Hurricane Katrina left over 1,300 people dead and caused an estimated \$75 billion in damage, making it the deadliest hurricane in 77 years and the costliest hurricane in United States history.<sup>1</sup> These statistics, while sobering, pale in comparison to the painful images from New Orleans that showed families desperately searching for lost loved ones, children helplessly waiting to be rescued from the roofs of their homes, and corpses floating through the flooded streets.

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\* J.D. Candidate 2007, University of Miami School of Law. I dedicate this Note to the memory of my father, Jeffrey Samek. He was a remarkable man and an extraordinary lawyer, and his memory has always been a source of inspiration for me. I would also like to thank my fiancé, Rachel Klastorin, my parents, Fern and Ron Rosen, and my sister, Allison Samek, for their unconditional love and support. Additionally, I am grateful to Professor Stephen Vladeck for his insight and assistance in the preparation of this Note.

1. RICHARD D. KNABB, JAMIE R. RHOME & DANIEL P. BROWN, NAT'L HURRICANE CTR., NAT'L OCEANIC & ATMOSPHERIC ADMIN., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 10-12 (2005).

These painful images of a natural disaster were compounded by painful images of a manmade disaster: the failed response of the local, state, and federal governments. The images of this manmade disaster depicted elderly citizens slowly dying while waiting for transportation from area hospitals, people living for days on an interstate highway while waiting to be evacuated, and thousands of others desperate for food and water in a convention center with no semblance of authority.

Beyond its physical damage, Hurricane Katrina destroyed the notion that, four years after the terrorist attacks of September 11, 2001, the United States was prepared to respond to a major disaster within its borders.<sup>2</sup> Images of the tragic aftermath of Hurricane Katrina left many Americans wondering how such a failed government response could happen in the United States, who was responsible, and how such a failure could be prevented in the future. By most accounts, local, state, and civilian federal officials were overwhelmed in their efforts to respond to Hurricane Katrina and were unable to maintain order, prevent looting, or effectively evacuate residents.<sup>3</sup> For example, numerous members of the New Orleans Police Department deserted their posts after the storm, and others reportedly engaged in the looting that they were supposed to prevent.<sup>4</sup> The failed government response is well represented by former Federal Emergency Management Agency ("FEMA") Director Michael Brown, who admitted that the government did "not know that thousands of survivors without food or water had taken shelter at the [New Orleans] convention center, despite a day of news reports" that identified the dire conditions.<sup>5</sup> Order in the Gulf Coast region did not begin to return until a week after Hurricane Katrina made landfall, following the arrival of a military force that would grow to include over 70,000 troops, 400 aircraft, and 20 ships.<sup>6</sup>

The botched response to Hurricane Katrina threatens to forever change one of America's most venerable doctrines: that without express

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2. See, e.g., Editorial, *Unprepared*, WASH. POST, Sept. 5, 2005, at A30 ("[C]oming four years and tens of billions of dollars in preparedness spending after the Sept. 11 attacks, it suggests that the country's readiness to cope with a major disaster remains woefully lacking.").

3. See, e.g., Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, § 1, at 1 ("[FEMA] officials expected the state and city to direct their own efforts . . . Leaders in Louisiana and New Orleans, though, were so overwhelmed . . . that they were . . . unable to manage the crisis . . . While local officials assumed that Washington would provide rapid and considerable aid, federal officials . . . proceeded at a deliberate pace.").

4. Ann M. Simmons, *51 Police Fired in New Orleans*, L.A. TIMES, Oct. 29, 2005, at A8.

5. Spencer S. Hsu & Susan B. Glasser, *FEMA Director Singled Out by Response Critics*, WASH. POST, Sept. 6, 2005, at A1.

6. See 151 CONG. REC. S9945 (daily ed. Sept. 13, 2005) (statement of Sen. Warner); Press Release, U.S. Northern Command, U.S. Northern Command Support to Hurricane Katrina Disaster Relief (Sept. 12, 2005), available at [http://www.northcom.mil/newsroom/news\\_release/2005/091205.htm](http://www.northcom.mil/newsroom/news_release/2005/091205.htm).

authorization by Congress, the United States military may not directly participate in domestic law enforcement activities. This doctrine is commonly linked to, and was codified by, the Posse Comitatus Act of 1878.<sup>7</sup> In the weeks immediately following Hurricane Katrina, many politicians called for reform or repeal of the Posse Comitatus Act, arguing that it prevented the military from rapidly deploying forces into New Orleans to restore order and conduct humanitarian missions<sup>8</sup> This proposition received its most vocal support from President George W. Bush who, in a national address from New Orleans just three weeks after the destruction, stated that “[i]t is now clear that a challenge on this scale requires greater federal authority and a broader role for the armed forces – the institution of our government most capable of massive logistical operations on a moment’s notice.”<sup>9</sup> Senator John Warner, chairman of the United States Senate Committee on Armed Services, endorsed the President’s position when he recommended to Secretary of Defense Donald Rumsfeld that the Defense Department “conduct a thorough review of the entire legal framework governing a President’s power to use the regular armed forces to restore public order in those limited situations involving a large-scale, protracted emergency like the present one [Hurricane Katrina]. This review should include the Posse Comitatus Act itself.”<sup>10</sup>

The appeals of President Bush and others to reform the laws governing the domestic use of the armed forces, including the Posse Comitatus Act, seem based on an understanding that Hurricane Katrina exposed statutory problems with the federal government’s ability to use the military to respond to domestic natural disasters. The legal authority of the President, as commander in chief of the armed forces, to use the military to respond to, and provide relief from, domestic natural disasters is rooted in two areas of law. The first is the constitutional, statutory, and regulatory law that governs domestic military use. This area includes the Posse Comitatus Act, its statutory exceptions, and extensive

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7. Posse Comitatus Act, 18 U.S.C. § 1385 (2000).

8. See, e.g., David E. Sanger, *Bush Wants to Consider Broadening of Military’s Powers During Natural Disasters*, N.Y. TIMES, Sept. 27, 2005, at A18 (“President Bush said . . . Congress should immediately begin discussing whether to amend federal law so the military could take responsibility right away in natural disasters like Hurricane Katrina . . . apparently referring to the Posse Comitatus Act of 1878.”); Eric Schmitt & Thom Shanker, *Military May Propose an Active-Duty Force for Relief Efforts*, N.Y. TIMES, Oct. 11, 2005, at A15 (“Pentagon and military officials say that federal troops could not have been sent into the chaos of New Orleans without breaking the Posse Comitatus law.”).

9. President George W. Bush, Address to the Nation on Hurricane Relief from Jackson Square, New Orleans, La. (Sept. 15, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html>.

10. Letter from Sen. John Warner (R-Va.), Chairman, U. S. Senate Comm. on Armed Servs., to Donald Rumsfeld, Sec’y of Def. (Sept. 14, 2005) (on file with author).

Department of Defense (“DoD”) regulations. The second area is the law governing the federal government’s response to domestic natural disasters, primarily the Robert T. Stafford Disaster Relief and Emergency Assistance Act.<sup>11</sup>

This Note will examine the validity of these concerns. Did Hurricane Katrina’s aftermath expose statutory problems with the federal government’s ability to use the military for domestic natural disaster relief? Or did it, instead, expose a failure to properly deploy the military under existing disaster relief statutes? Part I of this Note will analyze the statutes and regulations that govern the domestic use of the military and the military’s role in disaster response, including the Posse Comitatus Act. Part II will examine the statutes and regulations, primarily the Robert T. Stafford Disaster Relief and Emergency Assistance Act, that govern the federal government’s response to domestic natural disasters. Part III will examine the federal government’s use of the military in its response to Hurricane Katrina, including the particular statutes invoked by civilian authorities.

Part III concludes that Hurricane Katrina did not reveal either a need to broaden the federal government’s ability to use the military for domestic natural disaster relief or a need to reform or repeal the Posse Comitatus Act. Instead, existing laws, if properly executed, would have provided adequate authority for the military to respond to, and provide relief from, Hurricane Katrina and other domestic natural disasters. Although this Note focuses on the use of the military in response to domestic natural disasters, as opposed to manmade disasters such as acts of terrorism, many of the statutes addressed do not distinguish between these different types of disasters and, thus, would apply to both.

## II. THE LAWS GOVERNING DOMESTIC USE OF THE UNITED STATES MILITARY AND THE MILITARY’S ROLE IN DOMESTIC DISASTER RESPONSE

A complex framework of statutes and regulations governs the domestic use of the military. This framework is comprised of constitutional provisions, federal statutes, and detailed directives and regulations promulgated by the DoD to implement and abide by such provisions and statutes. The President’s general authority to use the military is rooted in his constitutional position as “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.”<sup>12</sup> The Constitution,

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11. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5204 (2000).

12. U.S. CONST. art. II, § 2.

in its very next section, also requires that the President “take care that the laws be faithfully executed.”<sup>13</sup> While a literal reading of these two sections together could lead to the conclusion that the President, as commander in chief, could use the Army and Navy to execute laws, such a reading would threaten two important American principles: the “traditional and strong resistance of Americans to any military intrusion into civilian affairs”<sup>14</sup> and Congress’s power “[t]o make rules for the government and regulation of the land and naval forces [and] [t]o provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions.”<sup>15</sup> These two principles were solidified in 1878 when, following the use of federal troops to execute the law in states that had been part of the Confederacy during the Civil War, Congress passed and the President signed the Posse Comitatus Act.<sup>16</sup>

#### A. *The Posse Comitatus Act*

The Posse Comitatus Act generally prohibits United States military personnel from direct participation in civilian law enforcement activities.<sup>17</sup> The Act has its roots in the Anglo-American tradition of military subordination to civilian authority.<sup>18</sup> In Latin, the term “posse comitatus” literally means “power of the county.” In modern terms, however, it is more aptly described as “[a] group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations.”<sup>19</sup> Today, the Posse Comitatus Act is a criminal statute that states:

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

13. U.S. CONST. art. II, § 3.

14. *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

15. U.S. CONST. art. I, § 8.

16. CHARLES DOYLE, CONG. RESEARCH SERV., *THE POSSE COMITATUS ACT & RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 9-10* (2000) (CRS Report 95-964 S).

17. U.S. Northern Command, *The Posse Comitatus Act*, [http://www.northcom.mil/about\\_us/posse\\_comitatus.htm](http://www.northcom.mil/about_us/posse_comitatus.htm) (“Some of those law enforcement activities would include interdicting vehicles, vessels, and aircraft; conducting surveillance, searches, pursuit and seizures; or making arrests on behalf of civilian law enforcement authorities. Prohibiting direct military involvement in law enforcement is in keeping with long-standing U.S. law and policy limiting the military’s role in domestic affairs.”).

18. *Id.* For a brief history of the Posse Comitatus Act, see Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 *YALE L. & POL’Y REV.* 383, 389-405 (2003).

19. BLACK’S LAW DICTIONARY 1200 (8th ed. 2004).

two years, or both.<sup>20</sup>

Although the Posse Comitatus Act itself applies only to the Army and Air Force, its substantive prohibitions have been extended to both the Navy and the Marines by statute and DoD regulation.<sup>21</sup> The United States Coast Guard is exempt from the restrictions of the Posse Comitatus Act because the Coast Guard is statutorily authorized to perform law enforcement functions.<sup>22</sup> While the Act does not specifically address whether its restrictions apply to the National Guard, “[t]here seems every reason to consider the National Guard part of the Army or Air Force, for purposes of the . . . Act, when in federal service.”<sup>23</sup> The Posse Comitatus Act, however, does not apply to members of the National Guard when they are in state service, leaving them free to conduct law enforcement activities.<sup>24</sup>

The Posse Comitatus Act does not apply when the Constitution or Congress has expressly authorized the use of the military to execute the law,<sup>25</sup> and Congress has done so on numerous occasions.<sup>26</sup> For instance, under the Insurrection Act, Congress has authorized the President to use

20. 18 U.S.C. § 1385 (2000). *See also*, DOYLE, *supra* note 16, at 48 (“The Posse Comitatus Act is a criminal statute under which there has apparently never been a prosecution.”).

21. *See* 10 U.S.C. § 375 (2000) (directing the Secretary of Defense to prescribe regulations to ensure that military support for civilian law enforcement agencies does not “include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law”); DEPARTMENT OF DEFENSE, DIRECTIVE 5525.5, DoD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS art. E2.1.8 (Dec. 20, 1989) [hereinafter DoD DIRECTIVE 5525.5] (precluding members of the Army, Navy, Air Force, or Marine Corps from direct participation in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law).

22. 14 U.S.C. § 2 (2000) (“The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States.”).

23. DOYLE, *supra* note 16, at 41.

24. *See* *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999) (“The [Posse Comitatus] Act does not apply to members of the National Guard unless they have been called into ‘federal service.’”).

25. *See* 18 U.S.C. § 1385 (2000).

26. For a listing of many of the lesser known statutory exceptions to the Posse Comitatus, see DOYLE, *supra* note 16, at 21–22 n.48. Among the exceptions cited by Doyle are:

16 U.S.C. § 23 (Secretary of the Army may detail troops to protect Yellowstone National Park upon the request of the Secretary of the Interior);

16 U.S.C. § 78 (Secretary of the Army may detail troops to protect Sequoia and Yosemite National Parks upon the request of the Secretary of the Interior);

16 U.S.C. § 593 (President may use the land and naval forces of the United States to prevent destruction of federal timber in Florida);

. . . ;

18 U.S.C. §§ 112, 1116 (Attorney General may request the assistance of federal or state agencies – including the Army, Navy and Air Force – to protect foreign dignitaries from assault, manslaughter and murder);

18 U.S.C. § 351 (FBI may request the assistance of any federal or state agency –

the armed forces to suppress an insurrection “in any State against its government.”<sup>27</sup> The Act also authorizes the President to use the armed forces to suppress a rebellion in a state when such a rebellion “make[s] it impracticable to enforce the laws of the United States.”<sup>28</sup> Under the guise of “Military Support for Civilian Law Enforcement Agencies,” Congress has expressly authorized the armed forces to share information and equipment with civilian law enforcement agencies (primarily for the purpose of counter-drug assistance) and to assist in “emergency situation[s] involving chemical or biological weapons of mass destruction.”<sup>29</sup> Even while providing the above assistance, however, military personnel are not permitted to participate “in a search, seizure, arrest, or other similar activity.”<sup>30</sup>

### B. *Department of Defense Directive 3025.1*

The DoD divides its civil support roles into three categories: “Military Support to Civil Authorities,” “Military Assistance for Civil Disturbances,” and “Department of Defense Cooperation with Civilian Law Enforcement Officials.” These three categories are collectively referred to as “Military Assistance to Civilian Authorities.”<sup>31</sup> Each category is the subject of a detailed DoD directive that delineates the Department’s policy with respect to that category of assistance. The primary concern

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including the Army, Navy and Air Force – in its investigations of the assassination, kidnapping or assault of a Member of Congress);

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18 U.S.C. § 3056 (Director of the Secret Service may request assistance from the Department of Defense and other federal agencies to protect the President);

...

25 U.S.C. § 180 (President may use military force to remove trespassers from Indian treaty lands); 42 U.S.C. § 98 (Secretary of the Navy at the request of the Public Health Service may make vessels or hulks available to quarantine authority at various U.S. ports);

42 U.S.C. § 1989 (magistrates issuing arrest warrants for civil rights violations may authorize those serving the warrants to call for assistance from bystanders, the posse comitatus, or the land or naval forces or militia of the United States).

*Id.*

27. 10 U.S.C. § 331 (2000). See also JENNIFER K. ELSEA, CONG. RESEARCH SERV., THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES 3 (2006) (CRS Report RS22266). (“The Insurrection Act has been used to send the armed forces to quell civil disturbances a number of times during U.S. history, most recently during the 1992 Los Angeles riots and during Hurricane Hugo in 1989, during which wide-spread looting was reported in St. Croix, Virgin Islands.”); Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 164-65 (2004) (tracing the origins of the Insurrection Act).

28. 10 U.S.C. § 332 (2000).

29. 10 U.S.C. §§ 371, 382 (2000).

30. 10 U.S.C. § 375 (2000).

31. DEPARTMENT OF DEFENSE, DIRECTIVE 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES art. E2.1.8 (Feb. 18, 1997).



of this Note, the DoD's response to domestic, disaster-related civil emergencies such as hurricanes, is categorized as Military Support to Civil Authorities and is governed by DoD Directive 3025.1.<sup>32</sup>

DoD Directive 3025.1 provides for a single, centralized system by which the different DoD components can plan for, and respond to, requests for Military Support to Civilian Authorities that arise from the actual or anticipated consequences of civil emergencies.<sup>33</sup> The Directive defines Military Support to Civil Authorities as “[t]hose activities and measures taken by the DoD Components to foster mutual assistance and support between the [DoD] and any civil government agency in planning or preparedness for, or in the application of resources for response to, the consequences of civil emergencies or attacks.”<sup>34</sup> Civil emergencies are further defined as “[a]ny natural or manmade disaster or emergency that causes or could cause substantial harm to the population or infrastructure,” including “a ‘major disaster’ or ‘emergency,’ as those terms are defined in the Stafford Act.”<sup>35</sup>

In order to successfully undertake the missions and tasks that may be assigned to the DoD following a presidential declaration of either a major disaster or emergency under the Stafford Act, DoD Directive 3025.1 details the specific powers and responsibilities that have been delegated by the Secretary of Defense to the various combatant commanders and service secretaries.<sup>36</sup> Among those delegations is the designation of the Secretary of the Army as the DoD Executive Agent, with the corresponding authority to act for the Secretary of Defense.<sup>37</sup> The

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32. See DEPARTMENT OF DEFENSE, DIRECTIVE 3025.1, MILITARY SUPPORT FOR CIVIL AUTHORITIES (Jan. 15, 1993) [hereinafter DoD DIRECTIVE 3025.1]. Military Assistance for Civil Disturbances, defined as “[g]roup acts of violence and disorders prejudicial to public law and order in the 50 States,” including terrorism, is beyond the scope of this Note. DEPARTMENT OF DEFENSE, DIRECTIVE 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES arts. E2.1.4, E2.1.12 (Feb. 4, 1994). Although this Note does not focus on military cooperation with civilian law enforcement officials, as those activities are not primarily concerned with disaster relief, the DoD Directive concerning military cooperation with civilian law enforcement officials is important with respect to disaster relief because it provides a detailed review of permissible and non-permissible actions under the Posse Comitatus Act. See DoD DIRECTIVE 5525.5, *supra* note 21, art. E4 (“Restrictions on Participation of DoD Personnel in Civilian Law Enforcement Activities”).

33. DoD DIRECTIVE 3025.1, *supra* note 32, art. 1.3.

34. *Id.* art. E2.1.21. See also *id.* art. 4.4.1 (specifically excluding military assistance for civil law enforcement operations from the definition of Military Support for Civilian Authorities).

35. *Id.* art. E2.1.4 (“Under [the Stafford Act], the terms ‘major disaster’ and ‘emergency’ are defined substantially by action of the President in declaring that extant circumstances and risks justify his implementation of the legal powers provided by those statutes.”).

36. *Id.* arts. 4.3, 5.

37. *Id.* art. 4.3.1. See also *id.* art. E2.1.11 (defining DoD Executive Agent as “[t]he individual designated by position to have and to exercise the assigned responsibility and delegated authority of the Secretary of Defense”).

DoD Executive Agent may further designate, or delegate the responsibility for designating, a Defense Coordinating Officer (“DCO”) who “is the DoD interface with FEMA, other Federal providers, and the State Coordinating Officer.”<sup>38</sup> The DCO is also “responsible for validating and coordinating mission assignments from the [Federal Coordinating Officer]” appointed by the FEMA Director after a Stafford Act declaration.<sup>39</sup> These delegations provide a clear delineation of which DoD personnel are responsible for and can authorize specific DoD actions in response to presidential declarations under the Stafford Act. The Directive also acknowledges that “*all* DoD resources are potentially available for [Military Support to Civilian Authorities].”<sup>40</sup> Lastly, the Directive authorizes the publication of the DoD Manual for Civil Emergencies to provide “guidance for the preparation, coordination and execution of military support to civil authorities during civil emergencies within the United States” and to “serve[ ] as a reference for other Federal, State, and local agencies on how the Department of Defense supports civil authorities . . . in returning their communities to a state of ‘normalcy.’”<sup>41</sup>

### C. Immediate Response Authority

The DoD’s Immediate Response Authority, contained in DoD Directive 3025.1, authorizes “immediate action by military commanders . . . to save lives, prevent human suffering, or mitigate great property damage” following a civil emergency or attack.<sup>42</sup> Such assistance by military commanders may be provided only in response to requests by civil authorities and only “where there has not been any declaration of major disaster or emergency by the President [under the Stafford Act] or [an] attack.”<sup>43</sup> Once there has been a declaration under the Stafford Act, Military Support to Civilian Authorities should be coordinated with the Federal and Defense Coordinating Officers, as directed by DoD Directive 3025.1 and the DoD Manual for Civil Emergencies.<sup>44</sup> The assis-

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38. DEPARTMENT OF DEFENSE, DoD 3025.1-M, MANUAL FOR CIVIL EMERGENCIES I (1994) [hereinafter DoD MANUAL FOR CIVIL EMERGENCIES].

39. *Id.* See also *infra* Part III.A: Major Disaster Declarations (discussing the Federal Coordinating Officer).

40. DoD DIRECTIVE 3025.1, *supra* note 32, art. 4.4.4 (emphasis supplied).

41. DoD MANUAL FOR CIVIL EMERGENCIES, *supra* note 38, at 2.

42. DoD DIRECTIVE 3025.1, *supra* note 32, art. 4.5.1. For a more detailed review of Immediate Response Authority, see Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, 1997 ARMY LAW. 3 (1997).

43. DoD DIRECTIVE 3025.1, *supra* note 32, arts. 4.5.1, E2.1.18.

44. See DoD DIRECTIVE 3025.1, *supra* note 32; DoD MANUAL FOR CIVIL EMERGENCIES, *supra* note 38.

tance that military commanders are authorized to provide under the Immediate Response Authority is similar to that authorized under the Stafford Act and includes: rescue, evacuation, and emergency medical treatment of casualties; safeguarding the public health; emergency restoration of essential public services; emergency clearance of debris; roadway movement control and planning; safeguarding, collecting, and distributing food, essential supplies, and materiel; damage assessment; interim emergency communications; and facilitating the reestablishment of civil government functions.<sup>45</sup> Unlike military assistance provided under the Stafford Act, assistance provided by military commanders under the Immediate Response Authority “may also include law enforcement activities that would ordinarily be prohibited by the Posse Comitatus Act.”<sup>46</sup> However, military commanders “shall not perform any function of civil government unless absolutely necessary on a temporary basis” and “shall facilitate the reestablishment of civil responsibility at the earliest time possible.”<sup>47</sup>

### III. THE STAFFORD ACT: THE LAW GOVERNING THE FEDERAL GOVERNMENT’S RESPONSE TO DOMESTIC NATURAL DISASTERS

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”) is the principle statute that governs the federal government’s response to domestic disasters. The Stafford Act is intended “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters.”<sup>48</sup> To accomplish this, section 401 of the Stafford Act authorizes the President to declare major disasters, and section 501 of the Act authorizes the President to declare emergencies.<sup>49</sup> These respective sections of the Act also provide a framework that governs the procedures for obtaining such declarations, as well as which federal resources may be utilized pursuant to each type of presidential declaration. Additionally, the Stafford Act provides for the utilization of DoD resources, in certain circumstances, absent either a major disaster or emergency declaration.

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45. See DoD DIRECTIVE 3025.1, *supra* note 32, art. 4.5.4.

46. See ELSEA, *supra* note 27, at 6.

47. DoD DIRECTIVE 3025.1, *supra* note 32, art. 4.4.10.

48. Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 § 101, 42 U.S.C. § 5121 (2000).

49. 42 U.S.C. §§ 5170, 5191 (2000).

### A. Major Disaster Declarations

Section 102 of the Stafford Act defines a major disaster as:

[A]ny natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.<sup>50</sup>

The governor of the affected state must begin the process for obtaining a major disaster declaration. Under section 401 of the Stafford Act, “[a]ll requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State” through the appropriate FEMA Regional Director.<sup>51</sup> The governor must base a major disaster declaration request “on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.”<sup>52</sup> According to the Bush Administration, the principle that response efforts should first utilize state and local resources reflects the layered approach of the American system of federalism.<sup>53</sup> As a prerequisite to major disaster assistance under the Stafford Act, the governor of a state must also “take appropriate response action under State law and direct execution of the State’s emergency plan” and “furnish information on the nature and amount of State and local resources which have been or will be committed to alleviating the results of the disaster.”<sup>54</sup> However, the governor of an affected state “need not specify which forms of [Stafford Act major disaster] assistance are

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50. 42 U.S.C. § 5122(2) (2000). In 2005, President Bush issued forty-eight major disaster declarations under the Stafford Act, including four for Hurricane Katrina (one each for Florida, Alabama, Mississippi, and Louisiana). See Federal Emergency Management Agency, *Annual Major Disaster Declarations Totals*, [http://www.fema.gov/news/disaster\\_totals\\_annual.fema](http://www.fema.gov/news/disaster_totals_annual.fema) (last visited Mar. 15, 2006).

51. 42 U.S.C. § 5170. See also 44 C.F.R. § 206.36(a) (2006) (“The Governor should submit the request to the President through the appropriate [FEMA] Regional Director to ensure prompt acknowledgment and processing.”).

52. 42 U.S.C. § 5170. See also 44 C.F.R. § 206.36(b).

53. FRANCES FRAGOS TOWNSEND, *THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED* 12, 17 (2006).

54. 42 U.S.C. § 5170 (a governor must also “certify that, for the current disaster, State and local government obligations and expenditures (of which State commitments must be a significant proportion) will comply with all applicable cost-sharing requirements of this Act”). See also 44 C.F.R. § 206.36(c).

needed.”<sup>55</sup>

The process described above for obtaining a major disaster declaration may be relaxed “[f]or those catastrophes of unusual severity and magnitude when field damage assessments are not necessary to determine the requirement for supplemental Federal assistance.”<sup>56</sup> In such a situation, the governor of the affected state “may send an abbreviated written request through the [FEMA] Regional Director for a declaration of a major disaster.”<sup>57</sup> An abbreviated request for a major disaster declaration “may be transmitted in the most expeditious manner available” and may be addressed to the Director of FEMA if “the FEMA Regional Office is severely impacted by the catastrophe.”<sup>58</sup> The governor’s major disaster declaration request must still be based on a finding that “[t]he situation is of such severity and magnitude that effective response is beyond the capabilities of the State and affected local governments” and that “Federal assistance under the [Stafford] Act is necessary to supplement the efforts and available resources of the State.”<sup>59</sup> At a minimum, an abbreviated request for a major disaster declaration must contain: (1) confirmation that the governor has taken appropriate action under state law and directed the execution of the state emergency plan; (2) information describing the nature and amount of state and local resources which have been or will be committed to alleviate the results of the disaster; and (3) certification by the governor that state and local government obligations and expenditures for the current disaster will comply with all applicable cost sharing requirements of the Stafford Act.<sup>60</sup>

After a request for a major disaster declaration is made by the governor of an affected state, the request is evaluated by the FEMA Regional Director for that state, who must submit a recommendation to the FEMA Director on whether to grant the declaration.<sup>61</sup> The Regional Director’s recommendation must be “[b]ased on information obtained by FEMA/State preliminary damage assessments of the affected area(s) and consultations with appropriate State and Federal officials” and “include a discussion of State and local resources and capabilities, and other assistance available to meet the major disaster or emergency-related needs.”<sup>62</sup> Once the FEMA Regional Director’s recommendation on the major disaster declaration request is received by the FEMA Director, the

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55. ELSEA, *supra* note 27, at 5.

56. 44 C.F.R. § 206.36(d).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* See also 44 C.F.R. § 206.36(c).

61. 44 C.F.R. § 206.37(b) (2006).

62. *Id.*

Director must formulate a recommendation on the request.<sup>63</sup> The FEMA Director's recommendation on the major disaster declaration request must "be based on a finding that the situation is or is not of such severity and magnitude as to be beyond the capabilities of the State and its local governments" and must "contain a determination of whether or not supplemental Federal assistance under the Stafford Act is necessary and appropriate."<sup>64</sup> In developing this recommendation, the FEMA Director must consider such factors as:

[T]he amount and type of damages; the impact of damages on affected individuals, the State, and local governments; the available resources of the State and local governments, and other disaster relief organizations; the extent and type of insurance in effect to cover losses; assistance available from other Federal programs and other sources; imminent threats to public health and safety; recent disaster history in the State; hazard mitigation measures taken by the State or local governments, especially implementation of measures required as a result of previous major disaster declarations; and other factors pertinent to a given incident.<sup>65</sup>

The FEMA Director's recommendation is forwarded to the President with the affected state's governor's request for a major disaster declaration.<sup>66</sup> It is then within the President's discretion to grant the governor's request and declare that a major disaster exists under the Stafford Act.<sup>67</sup>

"Immediately upon" the declaration of either a major disaster or an emergency, the President must appoint a Federal Coordinating Officer ("FCO") for the affected area.<sup>68</sup> The President has delegated the responsibility for the appointment of an FCO to the FEMA Director, who in turn may delegate the responsibility to either the FEMA Deputy Director or the FEMA Associate Director.<sup>69</sup> The FCO must immediately initiate action to assure that federal assistance is provided in accordance with the major disaster declaration or the emergency declaration.<sup>70</sup> As part of that responsibility, the FCO must: "(1) make an initial appraisal of the types of relief most urgently needed; (2) establish such field offices as he deems necessary and as are authorized by the President; (3) coordinate the administration of relief, including activities of the State and local governments [and other relief or disaster assistance organiza-

63. 44 C.F.R. § 206.37(c).

64. 44 C.F.R. § 206.37(c)(1).

65. *Id.* See also 44 C.F.R. § 206.48 (2006) (listing the factors considered by FEMA when evaluating a governor's request for a major disaster declaration).

66. 44 C.F.R. § 206.37(c).

67. 42 U.S.C. § 5170 (2000).

68. 42 U.S.C. § 5143 (2000).

69. 44 C.F.R. § 206.41(a) (2006).

70. *Id.*

tions].”<sup>71</sup> The FCO generally undertakes these responsibilities in conjunction with the State Coordinating Officer (“SCO”), who is appointed by the affected state’s governor “for the purpose of coordinating State and local disaster assistance efforts with those of the Federal Government,” and the DCO.<sup>72</sup> The FCO also receives all requests for federal assistance under the Stafford Act and tasks the requests to the appropriate federal agency for support.<sup>73</sup> In the case of requests for military assistance, the request is tasked to the DoD via the DCO.<sup>74</sup>

A presidential declaration of a major disaster under the Stafford Act authorizes two primary types of federal assistance to the affected state or states: general federal assistance and essential federal assistance. General federal assistance allows the President, or his designee, to:

- (1) direct *any* Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of State and local assistance efforts;
- (2) coordinate all disaster relief assistance (including voluntary assistance) provided by Federal agencies, private organizations, and State and local governments;
- (3) provide technical and advisory assistance to affected State and local governments for-
  - (A) the performance of essential community services;
  - (B) issuance of warnings of risks and hazards;
  - (C) public health and safety information, including dissemination of such information;
  - (D) provision of health and safety measures; and
  - (E) management, control, and reduction of immediate threats to public health and safety; and
- (4) assist State and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance.<sup>75</sup>

The President, or his or her designee, has the extremely broad power “to direct *any* Federal agency to utilize . . . personnel, equipment, supplies, [and] facilities . . . in support of State and local assistance efforts.”<sup>76</sup> Virtually the only restrictions on this broad power are that the federal agencies must only utilize authorities and resources that are granted to them under federal law and must only utilize them in support of state

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71. 42 U.S.C. § 5143(b) (2000). *See also* 44 C.F.R. § 206.42 (2006).

72. 42 U.S.C. § 5143(c). *See also* 44 C.F.R. § 206.41(c); *supra* Part II.B: Department of Defense Directive 3025.1 (discussing the Defense Coordinating Officer).

73. DoD MANUAL FOR CIVIL EMERGENCIES, *supra* note 38, art. C3.2.1.3.

74. *Id.*

75. 42 U.S.C. § 5170a (2000) (emphasis supplied).

76. *Id.*

and local assistance efforts.<sup>77</sup> Thus, under the guise of general federal assistance, the President, or his or her designee, has the entire resources of the federal government, *including the military*, with which to support state and local assistance efforts.<sup>78</sup>

The doctrine of essential federal assistance provides additional federal support to affected states beyond the assistance provided by the federal government under the doctrine of general federal assistance. Under essential federal assistance, the President, or his or her designee, may direct federal agencies to “provide assistance essential to meeting immediate threats to life and property resulting from a major disaster.”<sup>79</sup> Essential federal assistance is divided into four categories: (1) federal resources; (2) medicine, food, and other consumables; (3) work and services to save lives and protect property; and (4) contributions.<sup>80</sup> Essential federal assistance with regards to federal resources entails “[u]tilizing, lending, or donating to State and local governments Federal equipment, supplies, facilities, personnel, and other resources . . . for use or distribution . . . in accordance with the purposes of [the Stafford] Act.”<sup>81</sup> The President, or his or her designee, may provide essential federal assistance in the form of medicine, food, and other consumables by “[d]istributing or rendering through State and local governments . . . and other relief and disaster assistance organizations medicine, food, and other consumable supplies, and other services and assistance to disaster victims.”<sup>82</sup> The President, or his or her designee, may direct federal agencies to perform a variety of essential work and services on public or private lands or waters in order to save lives and protect and preserve property or public health and safety.<sup>83</sup> These services include:

- (A) debris removal;
- (B) search and rescue, emergency medical care, emergency mass care, emergency shelter, and provision of food, water, medicine, and other essential needs, including movement of supplies or persons;
- (C) clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services;

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77. *Id.*

78. See DoD DIRECTIVE 3025.1, *supra* note 32, art. 4.1.2 (acknowledging that, “[u]pon declaring a major disaster or emergency under [the Stafford Act], the President may direct any Agency of the Federal Government to undertake missions and tasks . . . to provide assistance to State and local agencies”).

79. 42 U.S.C. § 5170b (2002).

80. *Id.*

81. 42 U.S.C. § 5170b(a)(1).

82. 42 U.S.C. § 5170b(a)(2).

83. 42 U.S.C. § 5170b(a)(3).



- (D) provision of temporary facilities for schools and other essential community services;
- (E) demolition of unsafe structures which endanger the public;
- (F) warning of further risks and hazards;
- (G) dissemination of public information and assistance regarding health and safety measures;
- (H) provision of technical advice to State and local governments on disaster management and control; and
- (I) reduction of immediate threats to life, property, and public health and safety.<sup>84</sup>

Lastly, following a major disaster declaration the President, or his or her designee, may direct federal agencies to make “contributions to State or local governments or owners or operators of private nonprofit facilities for the purpose of carrying out the” above essential federal assistance.<sup>85</sup>

In addition to the abovementioned general and essential federal assistance, the Stafford Act authorizes a variety of other forms of federal assistance that do not concern the United States Armed Forces. Section 404 of the Act provides for hazard mitigation grants to “reduce the risk of future damage, hardship, loss, or suffering in any area affected by a major disaster,” and sections 405 and 406 authorize funding for the repair, restoration, and reconstruction of federal, state, and local government facilities.<sup>86</sup> Section 406 also authorizes funding for the repair, restoration, and reconstruction of private nonprofit facilities that “provide[ ] critical services . . . in the event of a major disaster.”<sup>87</sup> The Act also provides for extensive assistance to individuals and households.<sup>88</sup>

### B. *Emergency Declarations*

Section 102 of the Stafford Act defines an emergency as:

[A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.<sup>89</sup>

The Stafford Act provides the President with two procedures by which to declare an emergency. The first of those procedures requires the gov-

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84. *Id.*

85. 42 U.S.C. § 5170b(a)(4).

86. 42 U.S.C. §§ 5170c, 5171, 5172 (2000).

87. 42 U.S.C. § 5172(a)(3)(A)(i).

88. *See, e.g.*, 42 U.S.C. §§ 5174, 5177, 5179-83 (2000).

89. 42 U.S.C. § 5122(1) (2000). In 2005, President Bush issued sixty-eight emergency declarations under the Stafford Act, including forty-eight related to Hurricane Katrina. *See* Federal Emergency Management Agency, 2005 *Federal Disaster Declarations*, <http://www.fema.gov/news/disasters.fema?year=2005#em> (last visited Mar. 15, 2006).

error of the affected state to make a request for an emergency declaration.<sup>90</sup> The requirements and processes for the President to grant an emergency declaration at the request of the governor of the affected state are very similar to those described above for a major disaster declaration.<sup>91</sup> However, in addition to the requirements for a major disaster declaration request, the governor's request for an emergency declaration must also be based on a finding that the situation "[r]equires supplementary Federal emergency assistance to save lives and to protect property, public health and safety, or to lessen or avert the threat of a disaster."<sup>92</sup>

The second procedure by which the President may declare an emergency under the Stafford Act allows the President to do so without the request of the governor of the affected state. Section 501(b) of the Stafford Act authorizes the President to provide federal emergency assistance without a gubernatorial request "when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority."<sup>93</sup> Section 501(b) also authorizes the FEMA Regional Director, or another federal agency through the FEMA Regional Director, to recommend "a Presidential declaration of emergency in the absence of a Governor's request."<sup>94</sup>

A presidential declaration of an emergency under the Stafford Act authorizes the President to provide both specified and general federal emergency assistance. The specified assistance which the President, or his or her designees in the FEMA, may provide following an emergency declaration are similar to, yet narrower in scope than, the assistance which may be provided following a major disaster declaration. For instance, in the case of an emergency declaration, the President may still "direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of State and local assistance efforts," but only when those State and local assistance efforts are "to save lives, protect property and public health and safety, and lessen or avert the

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90. See 42 U.S.C. § 5191 (2000); 44 C.F.R. § 206.35 (2006).

91. Compare 42 U.S.C. § 5191, and 44 C.F.R. § 206.35, with 42 U.S.C. § 5170 (2000), and 44 C.F.R. § 206.36 (2006).

92. 44 C.F.R. § 206.35(b)(2).

93. 42 U.S.C. § 5191(b).

94. 44 C.F.R. § 206.35(d).

threat of a catastrophe.”<sup>95</sup> Following an emergency declaration, the President may also: coordinate all disaster relief assistance,<sup>96</sup> provide technical and advisory assistance to affected State and local governments,<sup>97</sup> remove debris,<sup>98</sup> and assist State and local governments in the distribution of medicine, food, and other consumable supplies.<sup>99</sup> Additionally, whenever the above-specified methods of federal emergency assistance are inadequate, the President may provide general assistance “with respect to efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe.”<sup>100</sup>

### C. *Utilization of Department of Defense Resources Under the Stafford Act*

In addition to authorizing the President to utilize federal resources upon the declaration of a major disaster or an emergency, the Stafford Act specifically authorizes the President to utilize DoD resources to perform emergency work in “the immediate aftermath of an incident which may ultimately qualify” as an emergency or a major disaster under the Stafford Act.<sup>101</sup> In the aftermath of such an event, the governor of the affected state may request that the President “direct the Secretary of Defense to utilize the resources of the Department of Defense for the purpose of performing on public and private lands *any* emergency work which is made necessary by such incident[,] which is essential for the preservation of life and property” and which cannot be effectively dealt with by state and local governments.<sup>102</sup>

The governor’s request must be submitted through the FEMA Regional Director in the same manner as requests for major disaster and emergency declarations and must include “[i]nformation describing the types and amount of DoD emergency assistance being requested.”<sup>103</sup> This request must be submitted within forty-eight hours of the occurrence of the incident.<sup>104</sup> The President shall grant a governor’s request and authorize the emergency utilization of DoD resources, to the extent practicable, if the President determines that such work is essential for the

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95. 42 U.S.C. § 5192(a) (2000). *See also* 42 U.S.C. § 5170(a)(1) (general federal assistance following a major disaster declaration).

96. 42 U.S.C. § 5192(a)(2).

97. 42 U.S.C. § 5192(a)(3).

98. 42 U.S.C. § 5192(a)(5).

99. 42 U.S.C. § 5192(a)(7).

100. 42 U.S.C. § 5192(b).

101. 42 U.S.C. § 5170b(c)(1) (2000).

102. 42 U.S.C. § 5170b(c)(1) (emphasis supplied); 44 C.F.R. § 206.34(a) (2006).

103. 44 C.F.R. § 206.34(b).

104. *Id.*

preservation of life and property.<sup>105</sup> DoD emergency assistance that is authorized in this manner “may only be carried out for a period not to exceed [ten] days.”<sup>106</sup> Thus, the Stafford Act provides the President with the flexibility to respond to an incident by authorizing the use of DoD resources to save lives and property even before formal emergency or major disaster declarations are issued under the Act.

#### D. *The Stafford Act and the Posse Comitatus Act*

Although the Stafford Act authorizes the use of the military to respond to both major disasters and emergencies even before they may be declared, the Stafford Act does not constitute an exception to the Posse Comitatus Act.<sup>107</sup> Consequently, federal troops that are deployed pursuant to the Stafford Act may not engage in civilian law enforcement activities, such as preventing looting and conducting traffic control.<sup>108</sup> However, federal troops deployed under the Stafford Act would be permitted to engage in activities that serve a valid military purpose, yet have the incidental benefit of enforcing civilian law.<sup>109</sup> Such activities might include humanitarian and search-and-rescue patrols that have the incidental benefit of deterring looting or providing traffic control on military supply routes.<sup>110</sup>

### IV. THE USE OF THE MILITARY IN THE FEDERAL GOVERNMENT’S DISASTER RESPONSE TO HURRICANE KATRINA

Given a basic understanding of the laws that govern the role for, and dictate the use of, the United States military in the federal government’s domestic disaster response, this section addresses the actual use of the military in the federal government’s response to Hurricane Katrina. Does the federal government’s response to Hurricane Katrina illustrate a case for the repeal of the Posse Comitatus Act, as some have argued, or does it indicate a failure to properly utilize authority already granted under existing law? An analysis of the existing disaster relief statutes invoked in preparation for, and in response to, Hurricane Katrina

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105. 42 U.S.C. § 5170b(c)(1).

106. 42 U.S.C. § 5170b(c)(1); 44 C.F.R. § 206.34(d).

107. Winthrop, *supra* note 42, at 13 (“Noticeably absent as an exception to the Posse Comitatus Act is the Stafford Act; thus, [Military Support to Civilian Authorities] operations do not permit DoD units to perform any law enforcement functions in support of civilian law enforcement authorities under the authority of the Stafford Act.”); ELSEA, *supra* note 27, at 4 (“The authority [to employ the U.S. armed forces for domestic disaster relief] does not constitute an exception to the [Posse Comitatus Act]. . . . The Stafford Act does not authorize the use of federal military forces to maintain law and order.”).

108. *See* Posse Comitatus Act, 18 U.S.C. § 1385 (2000).

109. ELSEA, *supra* note 27, at 4.

110. *Id.* at 4.

indicates that civilian authorities possessed the broad ability to ask *any* federal agency, including the DoD, to assist in disaster relief. As such, Hurricane Katrina revealed neither a need to broaden the federal government's ability to use the military for domestic natural disaster relief, nor a need to reform or repeal the Posse Comitatus Act, because existing laws, if properly executed, provide adequate authority for the military to respond to domestic natural disasters.

#### A. *Pre-Katrina Stafford Act Declarations*

In the days leading up to Hurricane Katrina's Gulf Coast landfall, state and federal leaders followed the proper Stafford Act protocols to obtain emergency and major disaster declarations from President Bush. On August 27, 2005, Louisiana Governor Kathleen Babineaux Blanco submitted a request to President Bush for a presidential declaration of emergency under the Stafford Act, as well as for \$9 million in assistance for emergency protective measures.<sup>111</sup> Governor Blanco's letter contained the necessary determinations for an emergency declaration, including her determination "that this incident is of such severity and magnitude that effective response is beyond the capabilities of the State and affected local governments, and that supplementary Federal assistance is necessary to save lives, protect property, public health, and safety, or to lessen or avert the threat of a disaster."<sup>112</sup> On the same day, President Bush granted Governor Blanco's request and issued an emergency declaration under the Stafford Act.<sup>113</sup> In addition to granting Governor Blanco's request for "debris removal and emergency protective measures," President Bush authorized the Director of FEMA "to provide such other forms of assistance under [the Emergency Assistance provisions] of the Stafford Act" as deemed appropriate.<sup>114</sup> Following Stafford Act procedures, the Director of FEMA appointed an FCO for the State of Louisiana in his publication of the President's Emergency Declaration.<sup>115</sup> Similar presidential declarations of emergency were issued the following day for Mississippi and Alabama.<sup>116</sup>

The day after a Stafford Act emergency was requested and declared

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111. See Letter from Kathleen Babineaux Blanco, Governor, State of Louisiana, to George W. Bush, President of the United States (Aug. 27, 2005), available at <http://www.gov.state.la.us> (search "Governor Blanco's letter to President Bush, August 27, 2005"). See also 42 U.S.C. § 5191 (2000) (Stafford Act procedure for emergency declaration).

112. Blanco, *supra* note 111.

113. Notice of Presidential Declaration of Emergency for the State of Louisiana, 70 Fed. Reg. 53,238 (Sept. 7, 2005) (effective Aug. 27, 2005, but retroactive to Aug. 26, 2005).

114. *Id.*

115. *Id.* (appointing William Lokey of FEMA as the FCO for the declared emergency).

116. See Notice of Presidential Declaration of Emergency for the State of Mississippi, 70 Fed. Reg. 53,239 (Sept. 7, 2005) (effective Aug. 28, 2005); Notice of Presidential Declaration of

for the State of Louisiana, Hurricane Katrina rapidly expanded, attained its peak intensity, and became a Category 5 storm on the Saffir-Simpson Hurricane Scale.<sup>117</sup> As the danger to the Gulf Coast increased, Governor Blanco requested that the President “declare an expedited major disaster for the State of Louisiana” and estimated that the state would require \$130 million in Stafford Act assistance.<sup>118</sup> Governor Blanco’s letter complied with the Stafford Act’s requirements for a major disaster declaration request, as the Governor determined that Hurricane Katrina would “be of such severity and magnitude that effective response will be beyond the capabilities of the State and affected local governments and that supplementary Federal assistance will be necessary.” Furthermore, Governor Blanco certified that Louisiana had implemented its State Evacuation and Sheltering Plan and “furnished [information] on the nature and amount of State and local resources that have been or will be used to alleviate the conditions of this disaster.”<sup>119</sup>

President Bush granted Governor Blanco’s request the next day, August 29, 2005, after Hurricane Katrina made landfall, and issued a major disaster declaration under the Stafford Act for the State of Louisiana.<sup>120</sup> The President’s major disaster declaration for Louisiana authorized the FEMA Director to provide “debris removal and emergency protective measures . . . Hazard Mitigation . . . and any other forms of assistance under the Stafford Act” that he deemed appropriate.<sup>121</sup> Following Stafford Act procedures, the Director of FEMA appointed an FCO for the State of Louisiana in his publication of the President’s Major Disaster Declaration.<sup>122</sup> Major disaster declarations were also issued after Katrina’s landfall on August 29, 2005, for the States of Mississippi and Alabama.<sup>123</sup>

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Emergency for the State of Alabama, 70 Fed. Reg. 54,061 (Sept. 13, 2005) (effective Aug. 28, 2005).

117. See KNABB, *supra* note 1, at 3.

118. Letter from Kathleen Babineaux Blanco, Governor, State of Louisiana, to George W. Bush, President of the United States (Aug. 28, 2005) (on file with the University of Miami Law Review).

119. *Id.* See also 42 U.S.C. § 5170 (2000) (Stafford Act procedure for a major disaster declaration).

120. Notice of Presidential Declaration of a Major Disaster for the State of Louisiana, 70 Fed. Reg. 53,803 (Sept. 12, 2005) (effective Aug. 29, 2005).

121. *Id.*

122. *Id.* (appointing William Lokey of FEMA as the Federal Coordinating Officer for the declared major disaster).

123. See Notice of Presidential Declaration of a Major Disaster for the State of Alabama, 70 Fed. Reg. 53,801 (Sept. 12, 2005) (effective Aug. 29, 2005); Notice of Presidential Declaration of a Major Disaster for the State of Mississippi, 70 Fed. Reg. 53,804 (Sept. 12, 2005) (effective Aug. 29, 2005).

### B. *Authorized Versus Actual Responses*

The formal federal response to Hurricane Katrina's Gulf Coast landfall began on August 27, 2005, when President Bush granted Governor Blanco's request that an emergency be declared under the Stafford Act for the State of Louisiana.<sup>124</sup> The President's emergency declaration authorized the federal government to provide the State of Louisiana with specific types of emergency assistance, as governed by the Stafford Act.<sup>125</sup> As part of the emergency assistance that is authorized by an emergency declaration, the President may "[d]irect *any* Federal agency . . . to utilize . . . personnel, equipment, supplies, facilities, and managerial, technical and advisory services[ ] in support of State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe."<sup>126</sup> Among the federal agencies that the President was authorized to direct to support emergency assistance efforts was the DoD.<sup>127</sup> Thus, prior to Hurricane Katrina's landfall on the Gulf Coast, the President had the statutory authority to direct "*all* DoD resources" to support emergency assistance efforts in Louisiana "to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe."<sup>128</sup>

The methods that the President could have instructed the military to use in supporting these efforts to save lives and property were virtually limitless. While any active duty military personnel performing emergency assistance under the Stafford Act would have been subject to the restrictions of the Posse Comitatus Act, and thus unable to perform civilian law enforcement duties, they would have been permitted to engage in activities that served a valid military purpose, yet had the incidental benefit of enforcing civilian law.<sup>129</sup> Although President Bush had the statutory authority under the Stafford Act to deploy active duty federal military personnel to Louisiana on August 27, 2005, and although the military began to plan for such a supporting role in hurricane relief as early as August 24, 2005,<sup>130</sup> no active duty federal military personnel were deployed to the Gulf Coast to support Hurricane Katrina relief

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124. Notice of Presidential Declaration of Emergency for the State of Louisiana, *supra* note 120.

125. *See supra* pp. 27-30.

126. 42 U.S.C. § 5192(a)(1) (2002) (emphasis supplied).

127. *See* 42 U.S.C. § 5122(7) (2000) (defining "federal agency" as "any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government").

128. DoD DIRECTIVE 3025.1, *supra* note 32, art. 4.4.4 (emphasis supplied) (stating that "all DoD resources are potentially available for [Military Support to Civilian Authorities]"); 42 U.S.C. § 5192(a)(1).

129. *See* ELSEA, *supra* note 27, at 4.

130. *See* TOWNSEND, *supra* note 53, at 22 (On August 24, 2005, USNORTHCOM "issued a

before the storm's landfall on August 29, 2005.<sup>131</sup>

The pre-landfall emergency declarations President Bush issued under the Stafford Act for Alabama, Louisiana, and Mississippi were ongoing in nature.<sup>132</sup> Consequently, the pre-landfall emergency assistance, described above, could have continued in the form of post-landfall emergency assistance during the storm's immediate aftermath. Nevertheless, even if President Bush had not declared emergencies under the Stafford Act for the Gulf Coast before Hurricane Katrina's landfall, he still possessed the statutory authority to use the military for disaster relief during the interim period between the storm's landfall and post-landfall declarations of either an emergency or a major disaster. Such authority is found in section 403 of the Stafford Act, which specifically authorizes the President to utilize DoD resources to perform emergency work in "the immediate aftermath of an incident which may ultimately qualify" as an emergency or a major disaster under the Act, contingent on a request for assistance to the President from the governor of the affected state.<sup>133</sup> Lastly, if President Bush had not issued a Stafford Act declaration prior to Hurricane Katrina's landfall, and if Governor Blanco did not request military assistance under section 403 of the Stafford Act prior to a Stafford Act declaration, extensive military assistance could still have been provided to the civil authorities in Louisiana and the Gulf Coast under the guise of the Immediate Response Authority.<sup>134</sup> Military assistance under the Immediate Response Authority is even broader than that authorized by the Stafford Act, as it is not restricted by the Posse Comitatus Act.<sup>135</sup> Therefore, with or without a Stafford Act declaration, statutory authorization existed prior to Hurricane Katrina for the military to provide emergency assistance to civilian authorities in the immediate aftermath of the storm's landfall.

President Bush's major disaster declarations for the States of Alabama, Louisiana, and Mississippi on the day of Hurricane Katrina's landfall, at the requests of the states' respective governors, authorized the full extent of federal disaster relief and assistance available under the

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Warning Order for supporting commands to prepare for requests for Department of Defense . . . assets should the need arise.").

131. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H.R. REP. NO. 109-377, at 202 (2006) [hereinafter SELECT COMM. REP.].

132. *See, e.g.*, Notice of Presidential Declaration of Emergency for the State of Louisiana, *supra* note 120 (noting that the Stafford Act emergency for the State of Louisiana began on August 26, 2005, and was continuing in nature).

133. 42 U.S.C. § 5170b(c)(1) (2000). *See also supra* Part III.B.

134. *See supra* notes 42-47 and accompanying text.

135. *See ELSEA, supra* note 27, at 6.



Stafford Act.<sup>136</sup> The Stafford Act vests the authority to direct this response in the President.<sup>137</sup> As part of the relief and assistance that was authorized by the major disaster declarations, President Bush had the statutory authority under the Stafford Act – on the day of Hurricane Katrina’s landfall – to “direct any Federal agency [including the DoD] . . . to utilize its authorities and . . . resources . . . including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services [to] State and local assistance efforts.”<sup>138</sup> Additionally, President Bush’s major disaster declarations provided him with the statutory authority – again, on the day of Hurricane Katrina’s landfall – to “coordinate all disaster relief assistance (including voluntary assistance) provided by Federal agencies, private organizations, and State and local governments.”<sup>139</sup> Yet, the President did not execute his role as “the commander in chief of federal disaster response.”<sup>140</sup> Most of the President’s authority and responsibility under the Stafford Act was assigned to Homeland Security Secretary Michael Chertoff, who “executed these responsibilities late, ineffectively, or not at all.”<sup>141</sup> In sum, the statutory authority for substantial federal action was present from the day of the storm forward, but concomitant federal action was conspicuously absent.

## V. CONCLUSION

On August 29, 2005, the day Hurricane Katrina made landfall on the Gulf Coast, there were no active duty federal military personnel deployed in Alabama, Louisiana, or Mississippi to support federal relief and recovery efforts.<sup>142</sup> By September 12, 2005 – two weeks later – over 22,600 active duty federal military personnel were deployed in Alabama, Louisiana, and Mississippi to support federal hurricane relief and recovery efforts.<sup>143</sup> That deployment constituted “the largest military deployment within the United States since the Civil War.”<sup>144</sup> The Presi-

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136. See Notices of Presidential Declaration of Major Disasters for the States of Louisiana, Alabama, and Mississippi, *supra* notes 120, 123 (authorizing the FEMA Director to provide “debris removal and emergency protective measures . . . Hazard Mitigation . . . and any other forms of assistance under the Stafford Act you may deem appropriate”) (emphasis supplied).

137. SELECT COMM. REP., *supra* note 131, at 132.

138. 42 U.S.C. § 5170a(1) (2000). See also notes 75-88 and accompanying text (detailing the relief and assistance authorized under the Stafford Act as the result of a major disaster declaration).

139. 42 U.S.C. § 5170a(2). See also notes 75-88 and accompanying text (detailing the relief and assistance authorized under the Stafford Act as the result of a major disaster declaration).

140. SELECT COMM. REP., *supra* note 131, at 132.

141. *Id.* at 131.

142. *Id.* at 202.

143. *Id.*

144. *Id.* at 201 (citing *Hearing on Hurricane Katrina: Preparedness and Response by the Department of Defense, the Coast Guard, and the National Guard of Louisiana, Mississippi, and*

dent of the United States possessed no greater statutory authority to deploy active duty federal troops to the Gulf Coast on September 12, 2005, when over 22,600 active duty federal troops were deployed, than he did on August 29, 2005, when no active duty federal troops were deployed. The President's authority for this deployment was established by his emergency and major disaster declarations under the Stafford Act, the first of which was issued on August 27, 2005 – *three days* before any active duty federal troops were deployed to the Gulf Coast.<sup>145</sup> Once deployment orders were finally issued for them, “it took just eight hours for 3,600 troops from the 82nd Airborne Division at Fort Bragg, N.C., to be on the ground in Louisiana and Mississippi with vital search-and-rescue helicopters.”<sup>146</sup>

President Bush had the statutory authority under the Stafford Act to deploy active duty federal military personnel to the Gulf Coast for disaster relief and assistance on the day that Hurricane Katrina made landfall. This same statutory authority provided the basis for the deployment of over 22,600 active duty federal military personnel in the weeks following the storm. Absent the Posse Comitatus Act, President Bush could have deployed the same number of active duty federal military personnel to the Gulf Coast on August 29, 2005, as he could have under the Stafford Act. Consequently, the federal government's response to Hurricane Katrina does not establish a case for repealing the Posse Comitatus Act. Given a proper understanding of the laws that govern the role for, and dictate the use of, the United States military in the federal government's domestic disaster response, Hurricane Katrina revealed neither a need to broaden the federal government's ability to use the military for domestic natural disaster relief nor a need to reform or repeal the Posse Comitatus Act. To the contrary, Hurricane Katrina revealed a need for those vested with the responsibility and authority to execute federal disaster relief efforts to learn the relevant law.

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*Alabama Before Select Comm.*, 109th Cong. (Oct. 27, 2005) (written statement of Honorable Paul McHale, Assistant Secretary of Defense for Homeland Defense, at 4)).

145. See Notice of Presidential Declaration of Emergency for the State of Louisiana, *supra* note 120; SELECT COMM. REP., *supra* note 131, at 202.

146. Drew Brown, Seth Borenstein & Alison Young, *Delayed Military Response Critical*, PITTSBURGH POST-GAZETTE, Sept. 17, 2005, at A-4.