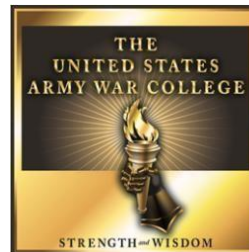


Delicate Balance: Title X Forces in DSCA Absent State Request

by

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Abstract

This paper examines the conflict of Constitutionally established state sovereignty and disaster response primacy with the broad federal authority to respond proactively to disasters. This paper examines the legal framework and historical examples that undergird this conflict for Title X forces in disaster response. The author suggests a decision-making framework to guide the federal government in determining when to respond proactively to disasters with Title X forces. This framework consists of three principles to inform a proactive federal response and eight disaster characteristics that support a proactive federal response. The author concludes with four additional state implications that the federal government should consider.

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One could imagine a...catastrophic event [that] would require a...greater role for the Department of Defense...we should define the circumstances under which we will push resources to State[s]...absent a request.

—Frances Townsend¹

On August 29, 2005, the most destructive natural disaster in U.S. history, Hurricane Katrina, struck the U.S. Gulf Coast, affecting nearly 93,000 square miles across multiple states in the process of claiming 1,330 lives, destroying 300,000 homes, and causing almost \$100 billion in property damage.² Over the following months and years, both the White House and U.S. Congress critically examined the federal response to Katrina, finding many instances of heroic efforts as well as abject failures to respond to the storm. One often repeated criticism was the reactive nature of the federal response that waited upon a state request for support before initiating federal action. “When all else fails, the federal government must do something, whether it’s formally requested or not.”³ However, Congress’ frustration with the Katrina response highlights the conflict between the states’ sovereignty and the federal government’s capabilities.

We agreed that Incidents of National Significance require a response on a national scale. But we also agreed the devil is in the details...When can or should the Stafford Act’s assumption that states will be able to “pull” needed federal resources to meet their needs give way to the operational imperative that federal agencies “push” assets to those who need them?⁴

The Congressional investigation recognized that the federal government must be able to act in response to significant disasters, whether requested by the state or not. While seemingly intuitive that the federal government should be proactive, possibly even taking the lead in responding to some disasters, why is this not readily accepted as the proper way to respond to disasters? What about U.S. law and/or history leads the United States to favor state primacy in disaster response? Is there a place for the

federal government to act absent a state request in response to a disaster, whether natural or manmade?

In October 2006, to address the above shortcomings of the federal response to Hurricane Katrina, Congress passed Public Law 109-295, the Post-Katrina Emergency Reform Act. This law granted the President the authority to “provide accelerated Federal assistance and Federal support where necessary to save lives, prevent human suffering, or mitigate severe damage, which may be provided in the absence of a specific request.”⁵ While this language does address the need expressed by the House Select Bipartisan Committee and the White House investigations, the Post-Katrina Emergency Reform Act language does not contain guidance for implementing federal assistance without state request. As Congress asked in its investigation, “What would spur the kind of enhanced or heightened military role that some have been promoting in the aftermath of Katrina? When would we pull that trigger?”⁶ Under what conditions should the federal government use federal active duty military forces in disaster response missions without state consent?

This paper will examine the historical and foundational basis for state primacy over disaster response. Historical examples of instances of federal government proactive response to disasters/incidents, as well as after action reviews of national disaster exercises, provide guidelines for how the federal government should employ federal active duty military (hereafter, “Title X”) forces to support disaster response operations absent a state request for federal assistance.⁷ Specifically, the President should employ Title X forces without state request after careful consideration according

to a decision-making framework of eight disaster characteristics and three principles for Title X force employment in disaster response.

Foundational Basis

The foundational basis for the use of Title X forces in the United States for disaster response is rooted in the U.S. Constitution, as well as U.S. law, regulations, and guidance. These documents establish both state sovereignty (with accompanying primacy in disaster response) as well as the instances in which the federal government has the authority to act without state consent. These documents grew out of a history replete with examples of Title X forces responding to domestic incidents.

State Sovereignty

Several documents provide general provisions for the use of federal armed forces in states. These include the U.S. Constitution, the National Response Framework, and various Department of Defense publications. Each of these describes state sovereignty and the resulting primacy of states in responding to disasters. These documents form the basis for the long-standing U.S. tradition of the federal government waiting for states to request federal assistance in disaster response.

Constitutional Authority

The U.S. Constitution provides the basis for federal forces' role in American society. The Constitution originally charged Congress "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."⁸ Later, fearing that Congress would not be able to respond quickly enough to incidents, the Militia Act of 1792 provided the President the authority to direct the militia to suppress rebellions, as well as call upon militias of other states for the same purpose. The U.S. Constitution further directs the federal government "to protect [the states]

against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”⁹ Finally, the U.S. Constitution’s X Amendment empowers the states in all areas not specifically directed to the federal government.¹⁰ President George Washington used the Militia Act authority in 1793 to call upon several state militias to suppress the Whiskey Rebellion.¹¹

Thus, the U.S. Constitution forms three main conditions for Title X forces in disaster response. First, the federal government may use federal forces in limited instances within the United States. Second, the federal government must wait upon the request of states (through either their legislatures or governors) before engaging in certain operations within the United States. Third, disaster response is a state-lead effort, since the Constitution does not specifically provide that power to the federal government. These three aspects of the U.S. Constitution form the basic underlying assumptions for all subsequent American thinking about disaster response.

National Response Framework

The National Response Framework (NRF), while not having the same authority as law, incorporates the foundations of the U.S. Constitution and U.S. laws to provide a doctrine for how the United States will respond to disasters of all types. Three main concepts are central to American response culture as described in the NRF: Tiered Response, Engaged Partnership, and Readiness to Act. With Tiered Response, the NRF defines the American response culture as designed to handle all disasters at the lowest level possible. The NRF expects that the lowest levels of government best understand local requirements and unique aspects of each community. This concept was on display in 2012 following Hurricane Isaac, when local Louisiana parishes led the recovery efforts for their citizens.¹² Engaged Partnership describes the concept that the

federal government is a partner with local and state governments to respond to disasters, rather than being an authority over local or state governments. Finally, Readiness to Act stresses that governments are “proactive...forward leaning” in their response to disasters.¹³ This American response culture, and these three main concepts in particular, permeate all of disaster response efforts throughout the United States.

Department of Defense Publications

Department of Defense Directive (DoDD) 3025.18, Defense Support of Civil Authorities (DSCA), is the capstone authority document for disaster response for the Department of Defense (DoD). DoDD 3025.18 confirms the primacy of states in disaster response and the requirement for the federal government to await support requests from states prior to acting; “DSCA is initiated by a request for DoD assistance from civil authorities or qualifying entities.”¹⁴ DoDD 3025.18 serves as the authority and basis for all other DoD publications regarding disaster response, including Joint Publication 3-28, *Defense Support to Civil Authorities*. JP 3-28 reinforces state primacy and DoD responsive support directed in DoDD 3025.18, stating:

[Department of Defense] resources are provided only when response or recovery requirements are beyond the capabilities of local, state, and federal civil authorities, and when they are requested by a federal agency with lead responsibility and approved by [the Secretary of Defense].¹⁵

Further DoD publications covering disaster response operations abide by the same concept of state primacy and federal reactive response directed in DoDD 3025.18.

As with DoDD 3025.18, the U.S Constitution and the National Response Framework proscribe state sovereignty and states’ primacy in disaster response. Together, these documents describe the American tradition and culture of the federal

government only responding to states' requests for federal disaster response assistance.

Federal Authority

Despite the above requirements that the federal government only respond to state requests for support, the federal government may act without a state request in incident response in some limited circumstances. Several documents provide the authority for this proactive federal assistance, which the federal government has used to respond to a range of incidents throughout history. Early public law, the more recent Stafford Act, the John Warner National Defense Authorization Act for Fiscal Year 2007, and the NRF's Catastrophic Incident Annex all describe limited circumstances for proactive federal assistance.

Early Public Law

Congress passed several laws very early in American history to define the President's authorities to use armed forces within the United States. U.S. Code best summarizes the Militia Acts of 1792, the Militia Act of 1795, and the Insurrection Act of 1807.

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.¹⁶

Thus, the President may call upon the militia or federal armed forces to suppress insurrection or enforce U.S. laws without first obtaining state consent or request.

Although rare in its application, Presidents have used this provision throughout U.S. history. Two specific instances illustrate the President's authority in these

circumstances. President Grover Cleveland directed the U.S. Army to Chicago ostensibly to restore U.S. mail service and protect interstate commerce during the Chicago Rail Strike of 1894. Despite objections of Illinois Governor John Altgeld, President Cleveland did not need state consent before dispatching federal forces to enforce U.S. laws.¹⁷ More recently, President John Kennedy issued an executive order in 1962 to federalize the Mississippi National Guard to join 12,000 U.S. Army Soldiers to enroll James Meredith at the University of Mississippi against the wishes of Mississippi Governor Ross Barnett and thousands of rioting Mississippi citizens. While the Chicago Rail Strike example was an instance of enforcing laws and suppressing rebellion, the Mississippi example includes the added dimension of the President enforcing a federal court order. Both examples point to the President's authority for the expressed purposes of enforcing laws and suppressing rebellion without state consent as authorized by Congress since 1792.

The Stafford Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (hereafter, the "Stafford Act") addresses the President's authority during disasters, whether natural or manmade. As passed and later amended in 1988, the Stafford Act authorized the President to use DoD resources only in response to a state request for assistance. Further, the Stafford Act authorized the use of DoD resources for incident response for a short duration only: "Such emergency work may only be carried out for a period not to exceed 10 days."¹⁸ Not until 2006, following Hurricane Katrina, would Congress pass the Post-Katrina Emergency Reform Act to amend the Stafford Act and grant authority for the President to employ federal resources absent a state request for federal disaster response assistance.¹⁹

The Stafford Act, even with amendment, only authorizes Presidential action absent a state request for support in very carefully defined circumstances. The federal government may proactively respond to disasters for specific purposes only (“save lives, prevent human suffering, or mitigate severe damage”).²⁰ Further, when responding with DoD assets without a state request, the federal government may only do so for a limited duration (ten days). Thus, the Stafford Act does not grant unlimited authority to the President to execute disaster response operations without a state request for support.

John Warner National Defense Authorization Act for Fiscal Year 2007

In addition to revisions to the Stafford Act, Congress developed legislative changes to resolve a perceived conflict between the President’s and the state governors’ authorities to employ the National Guard following Hurricane Katrina.²¹ With the John Warner National Defense Authorization Act for Fiscal year 2007, Congress changed the Insurrection Act of 1807 to provide the President the authority to mobilize National Guard forces to suppress insurrection and respond to national emergencies without the state governors’ consent. Specifically, the President was authorized to mobilize the National Guard when “authorities of the State are incapable of maintaining public order...[or] unable, fail, or refuse to protect [citizens’ Constitutional rights].”²² However, despite Congress’ intention to support governors with this legislation, the Council of State Governments issued a 2007 resolution calling for the repeal of this new Presidential authority. The governors opposed this change due to their perceived loss of control of the National Guard and the subsequent fear of not being able to provide for the safety of their citizens.²³ Congress eventually recognized the governors’ concerns and repealed the statutory changes the following year.²⁴ While the back and forth nature of this legislation left the original language of the Insurrection Act intact, this episode

does highlight the states' passion in maintaining their primacy for emergency response and public safety.

National Response Framework-Catastrophic Incident Annex

Issued in November 2008, the National Response Framework-Catastrophic Incident Annex (NRF-CIA) provides an “overarching strategy for implementing and coordinating an accelerated, proactive national response to a catastrophic incident,” expecting federal agencies to respond “immediately...without any request from state or local authorities.”²⁵ While the NRF-CIA directs that federal agencies may begin mobilizing and deploying to a disaster response without a state request for support, federal resources must remain at a staging area and not begin conducting response operations until the state submits a support request.²⁶ Further, federal agencies deployed without a state request may only begin conducting “life-safety” response activities.²⁷

While this proactive deployment is a new approach to some federal agencies, the DoD has purposefully adopted this policy in preparation for significant events and ahead of state requests for support. For instance, before the 1968 Democratic National Convention, the federal government pre-positioned 6,200 Soldiers in Chicago, without a request from the Illinois governor, in preparation for expected riots; the riots never materialized. Similarly, from 1968-1973, the DoD would employ federal forces preemptively on several occasions, to include a 1970 Yale University demonstration, the 1972 Republican and Democratic National Conventions in Miami, and the 1973 Presidential Inauguration.²⁸

Special Circumstances

While laws and the NRF-CIA provide general circumstances for federal action absent a state request, the federal government retains authority to provide disaster response assistance without state request in two very special circumstances. The federal government may proactively respond to hazardous substance events, and federal commanders may invoke immediate response authority within their local areas.

U.S. Code Title 42, Section 9604 provides direction for the response to hazardous substance, pollutants, or contaminant releases within the United States. Using this authority, the President may respond to either the release or the “substantial threat” of a release into the environment. Under this authority, the President may not only assist local authorities, but may also conduct the actual removal or remediation of the hazardous substance.²⁹ Responding to hazardous substances could easily involve the resources of several federal agencies, including the DoD.

As described in both the NRF and DoD documents, DoD installation commanders do have limited immediate response authority to conduct DSCA operations at the request of local communities without additional approval.³⁰ Commanders throughout U.S. history have responded to local requests for assistance, but these proactive federal responses have been limited in scope (only encompassing the resources which are readily at hand at the time of the disaster) and duration (only for 72 hours after the initial response request).³¹ The best example of the immediate response authority may be that of Major General Frederick Funston in 1906. Prior to even receiving a request for military support from the mayor of San Francisco, Major General Funston directed all U.S. military forces in the San Francisco region to respond to the catastrophic earthquake of April 18, 1906. Forces under Major General Funston’s

direction fought fires, guarded buildings, and attempted to maintain order as part of the overall response; for his immediate response efforts, Major General Funston still appears on landmarks in San Francisco.³² Thus, while technically a federal proactive response, the nature of immediate response authority does not conflict with the spirit of the foundational basis for state primacy in disaster response.

U.S. law, regulations, and policy guidance all form the foundational and legal basis for the use of Title X forces in the United States for disaster response. U.S. history is full of examples of military forces responding to events within this foundation. These foundational documents attempt to balance state sovereignty and primacy in disaster response with the federal government's authority to act without state request. However, the above discussion clearly shows a friction regarding when and how Title X forces may be used for disaster response in the United States without a state request.

Considerations for Title X Employment Absent State Request

With state sovereignty and primacy in disaster response outlined in the legal foundation, the President's proactive response authority under the Post-Katrina Emergency Reform Act bears review. Under what circumstances should the federal government take the lead with Title X forces in responding to a disaster?³³ This question merits examination in several aspects. The federal government should follow three principles to guide the employment of Title X forces without state request. In addition, a disaster should exhibit eight characteristics for Title X forces to respond without state request. Finally, the federal government should consider the possible future consequences and implications of employing Title X forces without state request. Taken together, these three response principles and eight disaster characteristics form a decision-making framework to guide the federal government's decision to employ Title X

forces in DSCA operations absent a state request. Where possible, U.S. historical examples will highlight the origin of these characteristics, principles, and consequences.

Principles

The federal government should consider three principles to guide the intended federal response with Title X forces. The federal response should be without political motive, the result of a deliberate decision-making process, and subjugated to state primacy as soon as practicable.

The federal government should employ Title X forces in DSCA missions without political motive or any vindictive purpose. The President's authority to declare a major disaster, with the associated financial benefits, is a powerful tool. A Presidential administration may be tempted to use such a great tool for political ends, rather than the altruistic ends originally intended in the framework documents. While data shows an increase of disaster declarations (and reduced turndowns of requests for disaster declarations) during Presidential election years, evidence does not support that disaster declarations are a "political tool."³⁴

However, despite the evidence, popular perception may suspect a political motive for declaring a major disaster. For instance, during the 1967 Detroit riots, Michigan Governor George W. Romney, a potential Republican Presidential nominee, requested Title X forces from Democratic President Lyndon B. Johnson. Before approving Governor Romney's request, President Johnson gave a midnight television address, citing 12 times the failure of Governor Romney to ensure order. While not conclusive, a political motive explains this unusual announcement.³⁵

As the Detroit riot example illustrates, an emergency response, whether for a disaster or civil disturbance, should not be a political decision nor should it be a

vindictive decision. The American public will see through attempts to use Presidential authority for political gain. The American public will not benefit from any political advantage achieved through such a decision. Instead, the federal government should employ Title X forces in DSCA missions without any political motive.

The federal government should employ Title X forces in DSCA missions only after adhering to a deliberate decision-making process. While seemingly intuitive, U.S. history contains examples when federal forces responded domestically without even the consent of the President. With repeated requests for Title X forces to settle the 1917-1918 Labor Disputes, War Department civilians and military officers made policy in dispatching federal forces to support state requests.³⁶ For instance, “in not one instance between April 1917 and November 1918 did federal civil or military authorities follow statutory procedures for summoning troops to aid civil authorities.”³⁷ To combat this tendency in the face of repeated disaster response assistance requests, the federal government should maintain the current practice of the Secretary of Homeland Security making a recommendation for a federal response to an emergency or disaster, with the President personally making the decision to employ a proactive federal response, including with Title X forces.³⁸

The federal government should employ Title X forces in DSCA missions only until the state(s) may resume primacy for the disaster response. The federal government has immense resources that can greatly assist states in disaster response; however, as per the legal foundation of the X Amendment, the state(s) retain primacy for disaster response. The state primacy is important because the American disaster response culture holds that local governments best know the requirements and intricacies of

disaster response in their jurisdictions. Thus, in the rare instances when the federal government proactively responds to disasters with Title X forces, the federal government should seek to respond only “until State and local authorities are reconstituted.”³⁹

For example, after President Kennedy federalized the Alabama National Guard in 1963 to enforce integration at the University of Alabama, the United States returned control of the Alabama National Guard when the state reached two key milestones. Governor George Wallace acceded support to U.S. laws (the original impetus for the confrontation with U.S. authorities), and the local police demonstrated they were able to provide security to the population. In other words, the state and local civilian institutions were able to operate as intended and as the American public requires. The United States returned the Alabama National Guard forces to state control slowly over time as the situation stabilized, rather than in a single instance.⁴⁰ This example demonstrates that the federal government should employ Title X forces in DSCA missions until the state may resume primacy for the disaster response.

These three principles should inform any federal decision to employ Title X forces in DSCA missions. The federal response should be without political motive, the result of a deliberate decision-making process, and returned to state primacy as soon as practicable. Additionally, the federal government should consider the characteristics of the disaster.

Characteristics

Popular culture and Hollywood are full of storylines that involve the military taking the lead in responding to a near cataclysmic disaster. The average American could easily think of a most dire disaster (e.g., “...a nuclear incident or multiple simultaneous

terrorist attacks causing a breakdown in civil society...”) when the American public would expect the military to respond proactively to a disaster.⁴¹ However, acknowledging the possible need for a federal proactive response is different from identifying the exact circumstances meriting this proactive response. In the interest of heeding the intent of state sovereignty and response primacy, the federal government should confine any proactive response with Title X forces to unique disasters fitting eight specific characteristics. While all of these eight disaster characteristics apply to the decision-making framework for the employment of Title X forces in DSCA operations, several of these disaster characteristics would be generally applicable to all federal government agencies.

First, to merit a proactive federal response with Title X forces, a disaster should be natural or manmade, but not a civil disturbance. Current public law defines major disasters as a natural catastrophe or manmade event that causes severe damage.⁴² When Title X forces respond to a natural or manmade disaster, this presents a mental image of the military protecting the Nation or fighting against the disaster; the overall effect is reassuring. In contrast, when Title X forces respond to civil disturbances, this may generate emotions associated with oppression and martial law. This is consistent with the lingering fear of some Americans that the military may assume power within the United States, particularly in a time of crisis or distress.⁴³ While the U.S. military has responded (even proactively) in riots or civil disturbances in the past, these incidents were usually at the request of state or local authorities, after the local and state resources had been exhausted.⁴⁴ Thus, a natural or man-made disaster, but not a civil disturbance, should typify a federal proactive response with Title X forces.

Second, only disasters rising to the level of what the Department of Defense refers to as a “complex catastrophe” should warrant a federal proactive response with Title X forces. Regardless of the original source of a disaster (storm, flood, disease, cyberattack, etc.), a complex catastrophe does not affect a single dimension of society. Rather, a complex catastrophe “causes cascading failures of multiple, interdependent, critical life-sustaining infrastructure, in which disruption of one infrastructure component (such as the electric power grid) disrupts other infrastructure components (such as transportation and communications).”⁴⁵ A complex catastrophe can: result in myriad casualties, evacuees, and homeless; and affect the “infrastructure, environment, economy, national morale, or government functions.”⁴⁶ Clearly, a disaster of this scope and character requires incredible resources, organizational structures, and responsiveness. Only the U.S. military has the combination of these capabilities to respond to complex catastrophes. As President George W. Bush summarized for the Nation shortly after Hurricane Katrina, “It 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.”⁴⁷ Thus, a disaster should be a complex catastrophe to merit a federal proactive response with Title X forces.

Third, multi-state disasters or disasters that cross, or could be expected to cross a national border, should merit a federal proactive response. A disaster reaching across state or national borders would require a larger response and coordination of resources across states. Recent experience during the 2016 Cascadia Rising exercise, a national-level emergency response exercise involving three states and Canada, (and

corroborated by experience from Hurricane Katrina in 2005) highlighted the challenges of disasters striking across state lines. “A massive response will be required. The scale of damage to critical infrastructure that would be caused by a full rip of the entire fault line would be massive and affect millions of people from the coast through the I-5 corridor to the Cascades from British Columbia to Northern California.”⁴⁸ The 2016 Cascadia Rising exercise, a similar 2011 New Madrid Seismic Zone exercise, and Hurricane Katrina in 2005, all multi-state disasters, came to the same conclusion that the federal government should proactively respond.⁴⁹ Thus, a multi-state or cross-border disaster should merit consideration for a proactive federal response.

Fourth, the immediacy of the response required may merit a proactive federal response to a disaster. As the United States learned from Hurricane Katrina, the federal government cannot always wait for a state request for support to respond. “Federal support must be provided in a timely manner to save lives, prevent human suffering, and mitigate severe damage. This may require mobilizing and deploying assets before they are requested via normal [NRF] protocols.”⁵⁰ The chaos, uncertainty, and communications challenges following a disaster could complicate obtaining a timely assessment of conditions to determine whether the state(s) requires federal assistance. Thus, the President, balancing the immediacy and lack of assessment, will likely feel obligated to make a decision to commit the federal government to a proactive response.⁵¹

Fifth, the nature of the disaster may be such that the state does not have the capability to respond. The disaster response may require unique capabilities, whether technology, expertise, equipment, organizations, etc., which the state does not possess

or is not able to obtain from neighboring states. Further, a disaster may involve “a subject area for which...the United States can exercise exclusive or preeminent responsibility and authority.”⁵² For example, in a possible chemical, biological, radiological, nuclear, or high-yield explosive (CBRNE)-related event, the federal government has unique capabilities that are not resident within states. The President may act in the Nation’s best interest, given that the state likely does not retain the same CBRNE capabilities as the federal government.⁵³ In another example, the 2016 Cascadia Rising exercise demonstrated this state and local government capability gap in responding to an earthquake. “The emergency management community lacked the capabilities and resources to respond to the [Cascadia Subduction Zone] scenario.”⁵⁴ Thus, the federal government may be required to respond proactively when states do not have the capability to respond.

Sixth, even when a state does have the capability to respond, a disaster may exceed the state’s capacity to respond, requiring the federal government to respond. When a state does have the capability to respond to a disaster, the state is likely to request federal assistance to increase response capacity, so that the federal government is not undertaking a proactive response. However, the President may be required to make a determination that the state capacity is clearly overwhelmed and initiate a federal response independent of a state request. During Hurricane Katrina, while the State of Louisiana possessed the capability to deliver supplies and evacuate people, the Federal Emergency Management Agency (FEMA) delivered food & water as well as evacuated hospitals. These tasks were “not requested by the state, but FEMA responded proactively because the situation demanded immediate action.”⁵⁵ Both of

these FEMA actions in Katrina represented immediate action taken, but not with life-saving urgency. In the instance of a disaster of significant magnitude, the federal government may see the ability to meet a need and the absence of state capacity to meet the need, thus leading to a proactive federal response.

Seventh, a state may be incapable of requesting federal assistance, thus requiring a federal proactive response to a disaster. While not common, state leadership may be unable to issue a support request due to being involved in the disaster or effectively out of communication.⁵⁶ In both Hurricane Katrina and the 2016 Cascadia Rising exercise, state and local authorities were physically unable to communicate with each other or effectively coordinate a response.⁵⁷ When a state is “incapacitated, the federal government must be prepared to respond proactively...or even help reconstitute critical state and local emergency management and response structures.”⁵⁸

Finally, a disaster may place national interests or security at risk, requiring the federal government to undertake a proactive federal response.⁵⁹ A disaster may have “significant nationwide impacts over a prolonged period of time” or “significantly interrupt government operations and emergency services to such an extent that national security could be threatened.”⁶⁰ While not routine in U.S. history, it is not difficult to imagine a disaster affecting the Nation’s ability to deploy a military force outside the United States or causing protracted impacts to a particular sector of the U.S. economy. In such instances that threaten national interests or security, the federal government would likely undertake proactive disaster response operations, likely including Title X forces.

Disasters of many types and scales will continue to strike the United States. In determining the need for a federal response, the federal government should evaluate

the anticipated response in light of these eight characteristics of disasters meriting a proactive federal response with Title X forces. These eight characteristics, taken together with the preceding three principles, form a decision-making framework for the federal government when considering the employment Title X forces in DSCA missions absent a state request for federal assistance.

Implications for States

Even by employing the above decision-making framework, states will experience several effects from federal decisions to employ Title X forces in DSCA missions without a state request. The federal government should consider and prepare for these additional implications now before the next disaster strikes.

If the federal government employs Title X forces absent a state request, states may feel this an infringement upon their sovereignty established in the U.S. Constitution, as previously described by the Council of State Governments above.⁶¹ States could come to assume that federal proactive disaster response could become a regular occurrence, with state primacy either ignored or countermanded. Accordingly, the federal government should seek to reassure states of their disaster response primacy. Three mechanisms provide that reassurance to states. The above decision-making framework helps establish those instances where federal government would be better suited to respond to a disaster, but still assumes that states should have primacy for disaster response as a default policy. In addition, both the U.S. Congress (for example, with the House Select Bipartisan Committee's Hurricane Katrina investigation) and the U.S. Courts (e.g., *McWaters v. FEMA*) have proven willing and able to hold the federal executive branch accountable for actions involving disaster response.⁶² Further, governors should not doubt their influence upon Congress to effect legislative change,

as illustrated above with the National Defense Authorization Act for Fiscal Year 2008 example.⁶³ Thus, if the federal government abides by an established decision-making process (using the above suggested framework, for instance), states need not fear the erosion of their general sovereignty or their primacy in disaster response.

While disasters are never occasions for counting pennies, states are very aware of the requirement to cost-share most federal assistance in disaster response. Under the Stafford Act, states are liable to pay up to 25% of federal essential assistance, repair, restoration, and replacement of damaged facilities, and debris removal after a Presidential disaster declaration. The President may adjust the cost share, with FEMA typically recommending 100% federal funding for the initial (often 72 hours) response following a disaster.⁶⁴ However, the above cost shares assume that a state requests federal disaster response assistance. In the instance where the federal government provides a proactive response, whether with Title X forces or other agencies, the state should not be financially liable for federal operations that the state does not request. Thus, the federal government should consider 100% federal funding for those proactive disaster response actions until the state is able to resume primacy in disaster response. However, with the contentious nature of disaster assistance funding burdens and Congress' recent increased propensity for adjusting those funding responsibilities, the topic of cost shares for federal proactive disaster response merits a further, separate analysis.⁶⁵

Even when a state is incapable of requesting federal disaster response support, states remain sovereign, with their governors retaining executive power within the states. However, retaining executive power is almost meaningless when a governor is

not even aware of major federal operations within his or her state. To acknowledge state sovereignty, the federal government should notify the state, Congress, and the American public of any federal proactive disaster response assistance. The President should make this notification without delaying the federal response, but should not omit the notification in the interest of expediency.⁶⁶ Clearly communicating federal intent for a proactive disaster response will assist in affirming state sovereignty.

Finally, when the federal government does pursue a proactive Title X disaster response, the federal and state responses must still maintain unity of effort to reduce redundancy and ensure efficient resource allocation. Two possible organizational concepts may assist in achieving unity of command. The U.S. Northern Command may establish a joint task force for Title X forces, as during Hurricane Katrina response.⁶⁷ In addition, the DoD and state(s) may consider employing a dual status commander, as during the 2011 New Madrid Seismic Zone national-level exercise.⁶⁸ The DoD may even consider employing these two organization concepts in conjunction in the future. However, the best organizational construct to ensure unity of effort is a very complex issue and merits separate evaluation and analysis.

Conclusion

As described in the legal foundational review, the U.S. Constitution describes state sovereignty and primacy in responding to disasters. However, the 2006 Post-Katrina Emergency Reform Act grants the federal government broad authority to respond to disasters. Balancing state sovereignty with the new federal authority granted in the 2006 Post-Katrina Emergency Reform Act is neither simple nor easy, as many historical examples described here suggest. However, the proposed decision-making framework allows the federal government to evaluate disasters for when to provide

proactively federal disaster response assistance with Title X forces. The decision-making framework's three principles (respond without political motive; respond after a deliberate decision-making process; and return to state primacy as soon as possible), combined with the eight disaster characteristics (a natural or manmade disaster, not a civil disturbance; a complex catastrophe; multi-state or cross border disasters; response immediacy; lack of state capability; lack of state capacity; state incapable of requesting support; and national interests or security at risk) will allow the federal government to appropriately respond to disasters proactively with Title X forces.

Using the described decision-making framework, the federal government would have assessed that Hurricane Katrina was indeed a multi-state, complex catastrophe, with the state's capacity to respond quickly overwhelmed and with impacts to the national economy (prolonged disruption to New Orleans would constrict commerce on the entire Mississippi River). Thus, the federal government may have more quickly employed Title X forces without awaiting state requests for support. This would not have changed the overall level of devastation and property loss, the preparedness of local and state authorities, or the failure of the population to evacuate. However, Title X forces arriving earlier could have reduced the human suffering experienced on a broad scale and quite possibly reduced the loss of American lives from Hurricane Katrina. Had the federal government employed the proposed decision-making framework following Hurricane Katrina, the United States may have better balanced the states' sovereignty and primacy in disaster response with the federal ability to respond.

Endnotes

¹ Frances F. Townsend, *The Federal Response to Hurricane Katrina: Lessons Learned* (Washington, DC: The White House, February 23, 2006), 54.

² *Ibid.*, 5-8.

³ U.S. Congress, House Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, *A Failure of Initiative: Final Report of the House Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong., 2nd sess., H. Rept. 109-377 (Washington, DC: Government Printing Office, 2006), x.

⁴ This paper will address the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (the “Stafford Act”) in detail later. *Ibid.*, 15.

⁵ *The Post-Katrina Emergency Reform Act*, Public Law 109-295, Title I, 42 U.S. Code, Sec 5170a(5) (October 4, 2006).

⁶ U.S. Congress, *A Failure of Initiative*, 15.

⁷ For simplicity, “federal active duty military forces” will be referred to as “Title X forces,” after the U.S. Code Title which addresses the active duty military.

⁸ U.S. Constitution, art. 1, sec 8. The Militia Act of 1792 is now codified as U.S. Code, Title 10, Sec 331.

⁹ U.S. Constitution, art. 4, sec 4. The U.S Code Title 42, Sec 5191 further clarifies the governor’s role in declaring an emergency, “All requests for a declaration by the President that an emergency exists shall be made by the Governor of the affected State.”

¹⁰ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. Constitution, X amend.

¹¹ President Washington would ultimately use federal forces and state militias in the Whiskey Rebellion against the wishes of Pennsylvania Governor Thomas Mifflin and the Pennsylvania legislature. William Hogeland, *The Whiskey Rebellion: George Washington, Alexander Hamilton, and the Frontier Rebels Who Challenged America’s Newfound Sovereignty* (New York: Simon & Schuster, 2006), 185-187.

¹² U.S. Federal Emergency Management Agency, “Louisiana Hurricane Isaac (DR-4080),” <https://www.fema.gov/disaster/4080> (accessed December 28, 2016).

¹³ U.S. Federal Emergency Management Agency, *National Response Framework*, 3rd ed. (Washington, DC: U.S. Department of Homeland Security, June 2016), 5-7.

¹⁴ U.S. Department of Defense, *Defense Support of Civil Authorities*, DoDD 3025.18 (Washington, DC: U.S. Department of Defense, December 29, 2010), 3.

¹⁵ JP 3-28 only addresses disasters that are beyond the “capability” of civil authorities, without mention of the “capacity” of civil authorities, to respond to disasters. Written in July 2013, this is likely an oversight in the drafting of the Joint Publication. Historical examples abound where the DoD supported civil authorities to increase capacity, not just capability. DoD support in fighting forest fires, clearing hurricane debris, and evacuating personnel from floods (all DSCA missions recurring on a regular basis within the United States) are examples of DoD providing additional capacity to an existing civil authority capability. U.S. Joint Chiefs of Staff, *Defense Support to Civil Authorities*, Joint Publication 3-28 (Washington, DC: U.S. Department of Defense, July 31, 2013), viii-ix.

¹⁶ U.S. Code, Title 10, Sec 332.

¹⁷ Jerry M. Cooper, “Federal Military Intervention in Domestic Disorders,” in Richard H. Kohn, ed., *The United States Military under the Constitution of the United States, 1789-1989* (New York: New York University Press, 1991), 125.

¹⁸ *Robert T. Stafford Disaster Relief and Emergency Assistance Act*, Public Law 93-288, as amended, U.S. Code, Title 42, Sec 5170b (c)(1), May 22, 1974.

¹⁹ *The Post-Katrina Emergency Reform Act*, Public Law 109-295, Title I, 42 U.S. Code, Sec 5170a(5) (October 4, 2006).

²⁰ *Ibid.*

²¹ U.S. Congress, *A Failure of Initiative*, 206-207.

²² *The John Warner Defense Authorization Act for Fiscal Year 2007*, Public Law 109-364, Title X, 10 U.S. Code, Sec 333 (October 17, 2006).

²³ The Council of State Governments, “Resolution in Support of the Governors’ Power to Control the National Guard,” Puerto Rico, June 13, 2007.

²⁴ *National Defense Authorization Act for Fiscal Year 2008*, Public Law 110-181, Title X, 10 U.S. Code, Sec 333 (January 28, 2008).

²⁵ U.S. Federal Emergency Management Agency, *National Response Framework-Catastrophic Incident Annex* (Washington, DC: U.S. Department of Homeland Security, November 2008), 1; U.S. Federal Emergency Management Agency, *National Level Exercise 2011 (NLE 2011) Functional Exercise Final After Action Report (AAR)* (Washington, DC: U.S. Federal Emergency Management Agency, October 28, 2011), 27.

²⁶ U.S. Federal Emergency Management Agency, *National Response Framework-Catastrophic Incident Annex*, 2.

²⁷ *Ibid.*, 6.

²⁸ Cooper, “Federal Military Intervention in Domestic Disorders,” 142.

²⁹ U.S. Code, Title 42, Sec 9604 (a)(1).

³⁰ U.S. Federal Emergency Management Agency, *National Response Framework-Catastrophic Incident Annex*, 18; U.S. Department of Defense, *Defense Support of Civil Authorities*, DoDD 3025.18, 4.

³¹ U.S. Department of Defense, *Defense Support of Civil Authorities*, DoDD 3025.18, 5.

³² “I realized then that a great conflagration was inevitable, and that the city police force would not be able to maintain the fire-lines and protect public and private property over the great area affected. It was at once determined to order out all available troops not only for the purpose of guarding federal buildings, but to aid the police- and fire-departments of the city.” Frederick Funston, “How the Army Worked to Save San Francisco,” *Cosmopolitan Magazine*, XLI, no. 3 (July 1906): <http://www.sfmuseum.net/1906/cosmo.html> (accessed December 16, 2016)

³³ The White House post-Katrina review identified this very question. “DoD and DHS should develop recommendations for revision of the [NRF] to delineate the circumstances, objectives, and limitations of when DoD might temporarily assume the lead for the Federal response to a catastrophic incident.” Townsend, *Federal Response to Hurricane Katrina*, 94.

³⁴ Bruce R. Lindsay and Francis X. McCarthy, *Stafford Act Declarations, 1953-2011: Trends and Analyses, and Implications for Congress* (Washington, DC: Congressional Research Service, 2012), I, 17.

³⁵ President Johnson would not announce his decision to not seek re-election until March 1968, so in July 1967, Governor Romney was still a potential competitor for the 1968 presidential election. Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005), 190.

³⁶ Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1997), 253.

³⁷ Laurie, *The Role of Federal Military Forces*, 252.

³⁸ George W. Bush, *Management of Domestic Incidents*, Homeland Security Presidential Directive-5 (Washington, DC: The White House, February 28, 2003).

³⁹ Townsend, *Federal Response to Hurricane Katrina*, 81.

⁴⁰ Scheips, *The Role of Federal Military Forces*, 145-151.

⁴¹ Townsend, *Federal Response to Hurricane Katrina*, 94.

⁴² “‘Major disaster’ means any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven 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 chapter 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.” U.S. Code, Title 42, Sec 5122(2).

⁴³ For a protracted discussion of the concerns of military power and doubts of military subservience to civil authorities, see William C. Banks and Stephen Dycus, *Soldiers on the Home Front: The Domestic Role of the American Military* (Cambridge, MA: Harvard University Press, 2016).

⁴⁴ The 1992 Los Angeles, California riots are a notable recent example of Title X forces responding to civil disturbances at the request of local and state authorities.

⁴⁵ U.S. Joint Chiefs of Staff, *Joint Publication 3-28*, II-1.

⁴⁶ U.S. Congress, *A Failure of Initiative*, 137. U.S. Code, Title 6, Sec 701(4).

⁴⁷ George W. Bush, “Hurricane Katrina: We Will Do What It Takes,” public speech, Jackson Square, New Orleans, LA, September 15, 2005.

⁴⁸ Washington State, *2016 Cascadia Rising Exercise after Action Report: Catastrophic Earthquake and Tsunami Scenario* (Olympia, WA: Washington Military Department, October 21, 2016), 4.

⁴⁹ *Ibid.*, 3-4; U.S. FEMA, *National Level Exercise 2011 After Action Report*, 19-20; Bush, “Hurricane Katrina: We Will Do What It Takes.”

⁵⁰ U.S. Congress, *A Failure of Initiative*, 137.

⁵¹ “A credible operating picture may not be achievable for 24 to 48 hours or longer. As a result, response activities must begin without the benefit of a complete needs assessment.” *Ibid.*

⁵² U.S. Code, Title 42, Sec 5191(b).

⁵³ See U.S. Code, Title 42, Sec 5191 and U.S. Department of Defense, *Defense Support of Civil Authorities*, DoDD 3025.18, 2.

⁵⁴ Local and state governments were organized and experienced in responding to certain types of disasters. The complex catastrophe of the Cascadia Rising scenario, while completely plausible for the region, represented challenges well beyond the capabilities and experience of the local and state governments. “Response process and procedures—such as information sharing, resource ordering and tracking, and logistics management—throughout the Pacific Northwest were designed to address incidents common in this area, including flooding, wind and snow storms, and wild fires. Often, these incidents impact several counties and do not require federal assistance.” U.S. Federal Emergency Management Agency, *Cascadia Rising 2016 Exercise, Joint Multi-State After-Action Report* (Washington, DC: U.S. Federal Emergency Management Agency, September 6, 2016), 5-7.

⁵⁵ U.S. Congress, *A Failure of Initiative*, 139.

⁵⁶ In a related instance, a state may not be willing to submit a request for federal assistance following a disaster. While infrequent in U.S. history, critics have speculated that political party affiliation of elected officials may influence their desire to make requests of elected officials from another political party. Congress’ Bipartisan Committee hints at this in their analysis of Hurricane Katrina: “...a dysfunctional system in which [the federal government] simply wait[s] for

requests for aid that state and local officials may be...unwilling to convey.” U.S. Congress, *A Failure of Initiative*, x.

⁵⁷ Townsend, *Federal Response to Hurricane Katrina*, 52; Washington State, 2016 *Cascadia Rising Exercise After Action Report*, 3-4.

⁵⁸ U.S. Congress, *A Failure of Initiative*, 132.

⁵⁹ U.S. Federal Emergency Management Agency, *National Response Framework*, 15-16.

⁶⁰ U.S. Joint Chiefs of Staff, *Joint Publication 3-28*, ix.

⁶¹ Council of State Governments, “Resolution in Support of the Governors’ Power.”

⁶² *McWaters v. FEMA*, 436 F.Supp.2d 802 (2006).

⁶³ *National Defense Authorization Act for Fiscal Year 2008*, Public Law 110-181.

⁶⁴ U.S. Code Title 42, Sec 5170b, Sec 5172-5173.

⁶⁵ Francis X. McCarthy, *FEMA Disaster Cost-Shares: Evolution and Analysis* (Washington, DC: Congressional Research Service, 2013).

⁶⁶ “...in which case the President—(A) shall, to the fullest extent practicable, promptly notify and coordinate with officials in a State in which such assistance or support is provided; and (B) shall not, in notifying and coordinating with a State under subparagraph (A), delay or impede the rapid deployment, use, and distribution of critical resources to victims of a major disaster.” U.S. Code Title 42, Sec 5170a(5).

⁶⁷ Townsend, *Federal Response to Hurricane Katrina*, 52; Washington State, 2016 *Cascadia Rising Exercise After Action Report*, 42.

⁶⁸ U.S. Code Title 32, Sec 315 & 325(a)(2) establish the authority for establishing a dual status commander, who has the authority to command both Title X forces and Title 32 (national guard) forces. For a brief discussion of the use of the dual status commander in a FEMA national-level exercise, see U.S. FEMA, *National Level Exercise 2011 Final after Action Report*, 23.