The Department of Defense as Lead Federal Agency

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Hurricane Katrina has forced us, as it should, to look with an unflinching eye at what the requirements may be, not in response to a major disaster – we’re pretty well prepared in that case – but a catastrophic event where tens of thousands of Americans may lose their lives where the first responder community is maybe taken out by the event and where a prompt response requires something bigger and faster than anything we’ve done before.¹

–Secretary Paul McHale, Assistant Secretary of Defense Homeland Security

None of us believed that the best lesson to be learned from Katrina was that all answers can be found in Washington. On the other hand, the call for increasing the military’s role in domestic affairs is easy to grasp. Who else can respond the way the military can? Who else can stand up when others have fallen? ²

–The House Select Bipartisan Committee Report, “A Failure of Initiative”

INTRODUCTION

As the first anniversary of Hurricane Katrina has come and gone, images from the disaster are indelibly burned in our American psyche. During the height of the catastrophe, Americans stood by helplessly watching fellow citizens suffer and yet were powerless to hasten the pace of the government’s response. Hurricane Katrina was, inarguably, the most destructive storm in U.S. history. Katrina destroyed over 200,000 homes in New Orleans alone, and could ultimately cost as much as $200 billion.³ The government’s slow response to Katrina makes us cringe with concern that, unless there is some radical “shake up” in the federal government, history is doomed to repeat itself.

The federal government’s performance during Katrina calls into question whether we will truly be ready when the next large-scale catastrophe strikes. Although history will ultimately be the judge, contemporary accounting of the federal government’s Katrina response presents a sobering reminder of the complexities of a system of government that was tested under fire. By the president’s own admission, our government, at all levels, failed that test.⁴ While navigating through the crisis with the best of intentions, government leaders and agencies involved in the response effort seemed to talk past one another, or did not understand basic tenets of the National Response Plan (NRP) and the National Incident Management System (NIMS). Both the NRP and NIMS were designed to guide federal response efforts during catastrophic incidents like Katrina. Together, the two plans seek to define responsibilities and outline certain “triggers” where federal response actions would supplement but not supplant state emergency management actions.

Reflection upon some of the key lessons learned from Katrina points to the need for an “all hazards” approach to all levels and types of catastrophic incident response planning – whether the crisis is natural or manmade. Along with a certain level of technical expertise and knowledge of federal emergency response protocols, government leaders must possess innate leadership abilities to reaffirm public confidence in
government, especially during times of crisis. The next large-scale catastrophe could indeed paralyze our nation if our elected local, state, and national leaders do not grasp this simple fact and start training for it now. During a crisis we, as a nation, need not only a functioning and competent system of national incident response; we will require leaders who know the intricate inner workings of that response system and who are able to confidently communicate that knowledge to the public throughout the crisis.5

During times of extreme national vulnerability, frightened Americans look for leadership and direction. Because of its unique culture and training to demonstrate authority, the U.S. military is often looked to as a solution in bringing order out of chaos during times of national crisis.6

Some will argue it is the military, with its unique culture of discipline and professionalism, that stands out as the only institution that can really inspire the public’s confidence during crisis events like Katrina or a large-scale terrorist attack. Few could argue that the images of Joint Task Force-Katrina commander Lt. Gen. Russel L. Honoré and his “take charge,” John Wayne style ultimately restored calm and confidence among a frustrated and fearful public in the early days of the disaster.

Perhaps out of sheer frustration or even fear the current federal civilian leaders responsible for overseeing the next catastrophic response effort lack the requisite leadership and training to get the job done, many are now looking to the military to fill that void. The U.S. military indeed has the resources, the training, the command and control, and the discipline to take on an expanded lead role in any future catastrophic federal response effort. The question remains, however, whether assigning this role to the military is compatible with American federalism and the constitutional foundations of our government. Congressional criticism of former Federal Emergency Management Agency (FEMA) Secretary Mike Brown and Secretary Michael Chertoff’s actions during Katrina point to civilian leaders who were either hesitant, incapable, or simply too unfamiliar with the existing National Response Plan and its attendant Catastrophic Incident Annex to contain the unfolding crisis in New Orleans.7 Does this mean that only the military can be looked to in times of true national crisis? When asked this question, one U.S. Northern Command general shoots back, rhetorically, “Were we, as a nation, any less inspired by Mayor Rudy Giuliani’s commanding leadership style during 9-11?” His point is well taken, and the debate over which federal agency is best suited to take on this lead role rages on.8

Scope and Methodology

This article examines President Bush’s request, in September 2005, that Congress consider whether the U.S. military should be granted broader responsibility and authority during catastrophic incident response, perhaps even shifting Lead Federal Agency (LFA) responsibility from the Department of Homeland Security to the Department of Defense (DOD).9 This article is not intended to be an official legal paper, but an analysis that discusses many of the legal and policy implications surrounding this possible transfer of government responsibility and accountability. The objective of this article is to analyze some of the principal issues that surface when contemplating such an historic shift of roles and responsibilities from civilian agencies (such as DHS and FEMA) to the DOD. These issues challenge the concepts of federalism, state sovereignty, and gubernatorial authority, as well as the constitutional underpinnings of our government. This article calls in to question the public’s ultimate willingness to accept
an expanded use of federal military forces on U.S. soil. The author suggests that perhaps President Bush may have been premature in contemplating shifting LFA responsibility for catastrophic response from DHS to the DOD and recommends that our national leaders strive to work within the existing mechanisms of our civilian-controlled system of government to build a stronger, more viable national response capability.

The author reviewed current open-source government documents and press reports available from August 2005 through March 10, 2006, as well as Congressional testimony from senior DOD and DHS officials before the Senate Armed Services Committee in November 2005, February 2006, and March 2006. In addition, the author interviewed officials from the U.S. Northern Command in Colorado Springs, Colorado, as well as one National Guard state adjutant general in order to gain further insight into both lessons learned from the military’s review and areas for future research. The U.S. Northern Command J–7 Education and Training Division provided oversight for the article and facilitated access to key command leaders.

**LFA TRANSFER TO DOD: MORE QUESTIONS THAN ANSWERS**

*Four years after the frightening experience of September the 11th, Americans have every right to expect a more effective response in a time of emergency. When the federal government fails to meet such an obligation, I, as President, am responsible for the problem, and for the solution.*

– President George W. Bush, September 15, 2005, Jackson Square, New Orleans.

After candid admission that the federal response to Katrina was “unacceptable,” President Bush called on Congress in September 2005 to consider a larger federal response role for the U.S. Armed Forces, perhaps even putting the military in charge of all recovery efforts during a catastrophic natural disaster or terrorist attack. Contemplating such a historic shift in the military’s role in domestic affairs is proving to be controversial. In response to the president’s request, Congress is currently examining all the complex dimensions of this issue, and conducted numerous hearings with top military and DHS officials in November 2005 and in February and March 2006.

President Bush, in turning to the military for answers, suggested to Congress in September 2005 that there may be certain types of natural disasters or terrorist attacks “so vast and so destructive” that the military may be the only institution equipped and trained to respond. The president believes perhaps greater federal authority and a broader role for U.S. Armed Forces is warranted, given the military’s unique ability to surge massive logistical and operational support quickly during times of major national crisis.

A detailed legal analysis of this proposal raises many questions regarding the sufficiency of existing presidential legal authorities available to the commander-in-chief to protect and defend in support of his national security responsibilities. For example, should there be certain automatic “triggers” guiding presidential intervention into state matters, including the power to usurp a state governor’s sovereign power as commander-in-chief of his or her state National Guard forces? Should legislation be required to bring about changes in how the president can use Title 10 (federal) military forces within U.S. borders? These are just a sampling of the many complex legal questions currently under review by Congress, the administration, the DOD, and U.S. Northern Command in Colorado Springs, Colorado.
AN EXAMINATION OF PREVALENT LEGAL ISSUES AND AUTHORITIES

Transitioning the role of the U.S. Armed Forces from one of support to one of “lead” for federal catastrophic response presents a very complicated and profound shift in public policy, perhaps requiring significant changes to existing laws governing the use of Title 10 military forces for domestic purposes. Shifting the DOD into a more prominent decision-making role during times of catastrophic domestic crisis presents profound challenges to the philosophical underpinnings of our civilian-controlled government. The foundational principles of federalism come into play, as does the issue of state sovereignty. It would seem that any federal usurpation of state authority, regardless of the federal agency involved, presents the same fundamental questions or challenges to federalism and states’ rights. As one senior U.S. Northern Command attorney points out, whether it is FEMA, DHS, or the DOD, the challenges to federalism and to a governor’s right to refuse federal intervention in state matters are really the same.

But when one considers assigning a more prominent role to DOD in any future catastrophic response effort, a more fundamental public policy question comes into focus: are Americans psychologically ready and willing to allow federal military forces into their local communities without permission of their state elected leaders? What are some of the significant state/federal balance of power issues that crystallize when National Guard forces are federalized against the will of state governors? Does putting the DOD in charge during domestic crises change the fundamental tenets of the concept of federalism as the delicate state/federal balance of power shifts toward allowing the president of the United States more discretion as to when, and to what levels, he can intervene in state/local matters? Would the DOD be required to define clear limits on the use of federal military forces on U.S. soil, or will laws like the Posse Comitatus Act (PCA) need to be revised? Or, in cases of local or state government’s perceived malfeasance, would the president now have unilateral authority to take control of a local emergency response effort and deploy federal military forces in order to contain the situation?

According to one U.S. Northern Command senior attorney studying these issues, it is psychologically one thing for Americans to give way to civilians from FEMA or DHS during times of crisis, but it is quite another for the citizenry to cede authority to the U.S. military. Expanding DOD authority during catastrophic response and perhaps broadening what is today a carefully proscribed and purposefully limited role for U.S. military forces within our borders should be scrutinized carefully. In its published report, Hurricane Katrina Task Force Subcommittee Report, the American Bar Association (ABA) evaluated these and other legal issues to clarify the sufficiency of existing legal authorities available to the president and state and local officials during Katrina. The ABA report examines whether these authorities, during Hurricane Katrina, were and are today sufficient to deal with any future natural disaster of Katrina’s magnitude. As of April 2006, the ABA report is the only published non-government source examining in detail the complexities of the various legal authorities available to the president during the Katrina crisis. The ABA Task Force Subcommittee looked at the laws and regulations at federal, state, and local levels to determine the authorities under existing laws and how these authorities work together during all stages of emergency management. The report concluded that laws limiting use of the military in domestic society, such as the 128-year old Posse Comitatus Act (PCA), did not impede...
the military from performing important support missions to state and local officials during Katrina and that the PCA should not be changed.

An important concept in the American democratic system is that of the ultimate control of military power resting in civilian hands. With the Stafford Act, and subject to Posse Comitatus, that structure is retained without sacrificing the capabilities held by the military that can be of great assistance in a catastrophe. It is appropriate for those skills, funded by U.S. taxpayers, to be used in a time of great need by the citizens of this country. 21

U.S. Northern Command lawyers generally agree with the major ABA report findings, echoing that the current laws available to the president (including the Insurrection Act and the Stafford Act, as well as his Article II authorities under the U.S. Constitution) provide the president with the requisite authority necessary to take control of a situation should the local or state leadership become unable to contain a quickly escalating national crisis. 22 U.S. Northern Command’s attorneys are the first to note the sheer gravity of the president invoking the Insurrection Act. Doing so should never be taken lightly as the very word “insurrection” conjures up images of anarchy and lawlessness beyond a local government’s control. 23 In fact, the ABA report theorizes that, in the case of Katrina, our national leaders may have quickly backed away from invoking the Insurrection Act (as a viable option for quickly restoring order in New Orleans) for political rather than practical reasons. 24

To resolve certain political sensitivities, the ABA report suggests possibly changing the wording and applications of the Insurrection Act statute, perhaps even renaming it and clarifying its use under very specific circumstances (i.e. looting and other lawless behavior in the aftermath of a major catastrophe). Changing the name of the legislation from “Insurrection Act” to something like “The Domestic Disaster Relief Act,” or “The Domestic Disaster Relief and Insurrection Act,” is one way, the report suggests, to help remove any stigma involved in state and local governments requesting federal assistance. 25 It might also help to address any political concerns local or state leaders may have of being perceived by their constituencies as somehow “failing” their citizenry.

Although the Insurrection Act was a legal tool available to the president during Katrina, the report concurs with the administration’s decision not to employ such a drastic measure. Rather, the report supports the ultimate decision to keep National Guard forces under state control because it allowed the governor key access to resources that could be used for domestic law enforcement and other functions otherwise prohibited by the PCA. 26

National Guard forces under gubernatorial control provide flexibility to use the state military for law enforcement and other security functions while staying within the legal confines of the Posse Comitatus Act. The PCA was passed in 1878 in response to federal military presence in the southern states during the Reconstruction Era. The PCA prohibits federal (Title 10) military forces from performing any civilian law enforcement functions in order to maintain a strong dividing line between civilian and military authority. 27 Although there are exceptions to the law, the PCA remains the principal deterrent to any misuse of the U.S. military in our civil society. In situations where national security is imperiled, U.S. Northern Command attorneys believe the current authority available to the president during domestic crisis or catastrophe provides an adequate legal framework within which the president can make decisions to use federal forces, if necessary, to provide for the nation’s defense. 28 Retired Major General Walter
Huffman, the former judge advocate general (TJAG) for the U.S. Army and currently serving as Dean, Texas Tech University School of Law, agrees that the presidential authorities available through the Insurrection Act and under Article II of the U.S. Constitution are sufficient to allow the president to contain a crisis in which the nation’s security could be imperiled. Therefore, it could be concluded that the legal framework available to the president during Hurricane Katrina was adequate to federalize military forces should the situation in New Orleans have escalated to one of national crisis. Lawmakers and policymakers should consider this when proposing any radical changes in policy or legislation that would monumentally shift the DOD’s current support role to civilian authorities to one of lead federal agency.

Unity of Command and the Dual-Status Commander Concept

*We in the military, in looking at the goal of maximum operational effectiveness, routinely try to achieve at least two things: unity of command and unity of effort. The Constitution of the United States was not written to support maximum effectiveness in military operations. The Constitution was written to establish a federal system of government under that document, and that means that inevitably, at the beginning of a domestic military mission, the governors, pursuant to their authorities under the Constitution, will have command and control of their state National Guard forces. The President and the Secretary of Defense, under Article II of the Constitution will command the federal forces. So we start any domestic mission with a breach in that principle of unity of command.*

—Secretary Paul McHale, Assistant Secretary of Defense, Homeland Defense

Secretary McHale addressed some of the challenges of dual-command military structures during the early days of the Katrina response in his February 9, 2006 testimony before the Senate Homeland Security and Governmental Affairs Committee. He testified that during Katrina, many options were initially considered by the DOD and the Bush Administration to help achieve unity of effort, including the suggestion of establishing a “dual-status” commander who would direct the efforts of both federal and state National Guard forces. The Katrina review process is currently evaluating the feasibility of creating a dual-status chain-of-command structure during catastrophic incident response in order to help sustain unity of effort during national catastrophes like Katrina. As of this writing, the Dual-Status Commander (DSC) concept is being reviewed by both lawmakers and policymakers within the Department of Defense as to its feasibility and effectiveness.

Catastrophic national events, whether natural or man-made, will involve all levels of government, with political and administrative leaders vying for decision-making authority in what will likely be a highly-charged, dynamic crisis environment. This scenario ultimately played out in the early hours of Katrina; Governor Kathleen Blanco testified in February 2006 to the pressure she felt – from the White House – to federalize the Louisiana National Guard as a way to achieve unity of effort. The governor ultimately resisted any attempts to federalize Louisiana National Guard troops under a single commander who, in this case, was an active duty three-star U.S. Army general officer. After briefly considering federalizing Louisiana National Guard forces, the president offered Governor Blanco a “Memorandum of Agreement Concerning Authorization, Consent and Use of Dual-Status Commander” for joint task force (JTF) Katrina: making Lieutenant General Russ Honoré a member of the Louisiana National Guard. The proposal by the administration offered an alternative to federalizing the
Guard, and would have essentially placed Honoré under the governor’s command in the chain-of-command for National Guard troops in Louisiana.33 Honoré, in theory, would have served in two capacities: commanding both federal and state troops while serving two commanders, the president and the governor.

The objective of the dual-status commander proposal was to establish a single commander for all military operations in Louisiana. Governor Blanco wrote President Bush on September 3, 2006 declining the proposal while agreeing to the importance of creating a single military commander for federal forces that “could enhance the contribution of over twenty-five National Guard states currently being commanded by the Louisiana state adjutant general.” 34 As a result, federal troops supporting Katrina operations remained under U.S. Northern Command and the president, and the 38,831 state National Guard troops operating in the region stayed under the separate command of the Louisiana state adjutant general and Governor Blanco.35 History will ultimately judge the political motivations behind the governor’s decision not to utilize the dual-status commander; many people agree in hindsight it was certainly a practical decision at the time.

The dual-status commander concept was introduced in 2004 as a means of improving “unity of effort” between Title 10 (federal) forces and Title 32 (state) National Guard forces during non-crisis, pre-planned national events such as the G-8 Summit, the Olympics, and the Democratic and Republican National Conventions.36 Until Katrina, the dual-status commander concept had not been tested in a crisis environment. Although senior DOD leaders initially recommended the dual-status commander concept to the secretary of defense and the White House as a way to achieve unity of effort among disparate military forces operating in the Katrina Area of Operations, they quickly came face-to-face with the political obstacles to putting an active-duty military officer in command over state National Guard forces.37 When Governor Blanco rejected the dual-status commander concept, the administration was faced with two options: it could either invoke the Insurrection Act or attempt to manage the response effort within two very distinct command structures. Secretary Paul McHale intimated in his February 9, 2006 testimony that in a crisis environment the dual-status commander concept is simply unworkable given the frictions existing between two designated commanders-in-chief, with two perspectives and possibly two different political ideologies. Secretary McHale went on to explain that in such an environment there will inevitably be differences of opinion between the president and the governor, who bring two different perspectives and serve two separate constituencies. These differences can put the dual-status commander in the cross-fire between two chief executives. And although Secretary McHale concedes that the dual-status commander concept can and does work well in pre-planned national security events requiring state and federal military support, the concept is simply not viable in a crisis environment. 38

Like Governor Blanco, many experts believe that when disaster strikes, no governor in America will openly or willingly cede authority of his or her National Guard to the federal government. 39 According to one poll, only two of thirty-eight governors questioned supported the president’s idea of more federal involvement during catastrophic incidents like Katrina. The president’s own brother, Florida Governor Jeb Bush, strongly opposes the idea and was quoted in October 2005 as having said:
Just as all politics are local, so too are disasters. Federalizing emergency response to catastrophic events would be a disaster as bad as Katrina. The most effective response is one that starts at the local level and grows with the support of surrounding communities, the state and then the federal government. 40

This same article notes, interestingly, that many of the nation’s mayors would like to see the military take on a more active role in emergency response and have expressed a desire to tap into military help without the state’s approval. 41 One state National Guard adjutant general estimates that perhaps ninety-five percent of his fellow state adjutants general would support keeping the state chain-of-command structure during a major catastrophe unless there was an extreme circumstance where the state leadership was incapacitated.42 This issue again crystallizes a fundamental public policy issue that surfaces when considering shifting or expanding DOD’s role in catastrophic response: state sovereignty and local sensitivities to the use of federal military forces within a state’s sovereign borders. It also highlights some of the difficulties that will surface when federal forces are dispatched into local communities where they may be unwanted or unwelcome by the local citizenry.

DOD as Lead Federal Agency and the Constitution

The 10th Amendment reserves those powers not delegated to the United States, to the states:

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.43

Perhaps the most significant of the powers reserved to the states is that of police power. The states, not the federal government, have the primary responsibility to provide for the health and welfare of their citizens. If the federal government wishes to compel states to prepare for catastrophic incidents, or wishes to intercede during such an incident, it must do so by way of a constitutionally-delegated federal authority. Three legal avenues are generally available: the Commerce Clause, the National Defense Power, or exercise of the power to tax and spend. Legal experts concede that even with the 10th Amendment “check” on federal power, there remains sufficient legal authority for a federal response in a truly catastrophic incident.44 Although the federal government can respond, even with DOD personnel in the lead, the more difficult questions are (1) when should the federal government intervene, and (2) under what circumstances should DOD lead the federal response?

Recognizing the risk that a large standing army poses to individual civil liberties, the Constitution incorporates a system of checks and balances to separate control of the military between the executive and legislative branches of government and to share control of the militia (National Guard) with the states.45 Our nation’s founders created a constitutional framework in which each state ceded some of its power to the federal government in order to create one central, yet limited, government. The framers envisioned a national government that could perform those functions the individual states could not or should not do, such as provide for the national defense, conduct foreign relations, or regulate interstate commerce.46

Over time, the role of the federal government in disaster response has evolved to become more proactive; states may request assistance through the John T. Stafford
Act, which some describe as “centerpiece legislation” for providing federal aid to states during times of major disaster. The Stafford Act defines the process by which governors can request assistance from the federal government when local or state resources are overwhelmed. Generally, under the Stafford Act the president must first receive a request from the affected state and cannot unilaterally deploy federal forces into a state or region without the full consent of the state governor. (Exceptions to this general limitation on presidential authority would include cases of exclusive federal jurisdiction. President Clinton exercised this unique authority in response to the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City).

One central issue surrounding the question of the appropriateness of shifting the DOD role from one of support to that of lead during times of major national catastrophe is the receptivity of Americans to having federal military forces working within their state borders when they are not under the state governor’s control. As was briefly contemplated in the early hours of the Katrina crisis, the president considered federalizing all military forces within the state of Louisiana, to include National Guard forces, but determined that Guard response was being implemented effectively.

One senior civilian attorney at U.S. Northern Command notes that when policymakers consider putting Title 10 federal military forces in charge of all catastrophic response activities they should exercise caution, especially during times of extreme national vulnerability. He points out that it is our civilian-controlled military that distinguishes ours from all other styles of government. Subordination of the military to civilian leadership is the envy of fledgling democracies throughout the world. It has provided stability to our nation and has kept the citizenry free of military usurpation of power, even during the most catastrophic of incidents. When considering a “doomsday” scenario where public fear is rampant and our vulnerabilities as a nation exposed, this Northern Command attorney posits that based upon our nation’s deeply rooted fears of a large standing army, we should ask “Is this really the time to put military forces in charge?”

The policy of putting the military in charge during such extremely volatile times should be considered carefully in the long-term context of our civil-military traditions. When considering such a profound shift in control, accountability, and policy, our national leaders should again consider just why very these distinct lines were drawn between civilian and military authority in our society. Our nation’s founding fathers constructed a system of government that has withstood periods of national conflict and turmoil. Any decision by policymakers to reshape these underlying foundational principles should not be taken lightly. The House Select Committee echoed this sentiment when it concluded that when it comes to the issue of state/federal integration there are no easy answers:

> These are principles “rooted in the nation’s birth that cannot be discarded merely to achieve more efficient joint military operations on American soil.”

**Defense Support to Civilian Authorities—Larger Role or Smarter?**

One’s perception of government failure often depends on where one sits – at the local, state, or federal level. Unfortunately, extensive problems of communication, interagency coordination and simple lack of understanding of the National Response Plan and its attendant Catastrophic Incident Annex, as well as insufficient working knowledge of
NIMS and the Incident Command System (ICS) are cited as major contributors to the seemingly glacial pace of the federal government’s response during Katrina.53

Defense Department officials vehemently defend their department’s pace of response. Assistant Secretary of Defense for Homeland Defense Paul McHale responded to one senator’s scathing criticism that DOD’s preparation and initial response during Katrina was passive and “cobbled together”54 by testifying that DOD acted with an extreme sense of urgency. Secretary McHale testified in February 2006 that the DOD felt a sense of urgency before, during, and after landfall, coordinating the support of 72,000 service members, 293 medium and heavy-lift helicopters, sixty-eight airplanes, twenty-three U.S. Navy ships, thirteen mortuary affairs teams, and two standing joint headquarters to support FEMA’s planning efforts. He also noted in direct response to the senator that the DOD response was the largest, fastest deployment of military forces for a civil support mission in our nation’s history, processing Requests for Assistance (RFAs) as quickly as it received them from FEMA.55

Major General Richard J. Rowe, Jr., director of operations for U.S. Northern Command, testified in November 2005 that even before Hurricane Katrina’s landfall in Louisiana and Mississippi, U.S. Northern Command established staging bases and deployed defense coordinating officers and defense coordinating element teams to Louisiana, Mississippi, Alabama, and Florida to help manage DOD response efforts in coordination with state and federal officials.56 In a major catastrophe, the U.S. military can play a critical role in bringing unique resources such as airlift capability, communications, and medical support units to assist local first responders in their ongoing rescue and recovery efforts.

By many accounts, the U.S. Armed Forces – National Guard, Active Duty, and U.S. Coast Guard – were the only federal agencies with the operational capabilities necessary to get movement on the ground for true crisis response and recovery during the early hours and days of Katrina. The military was able to quickly get communications infrastructure, logistics, search and rescue, and planning capabilities into the operational area to begin some kind of effective response to save lives and ease human suffering.57 There is a unique opportunity for DOD, through U.S. Northern Command, to play a crucial leadership role in catastrophic response planning without having to serve as the federal lead. In determining the wisdom of shifting the role of DOD in catastrophic response to one of lead rather than support, the administration should consider the political realities and Constitutional difficulties presented by this historic policy change. Instead, the administration should direct its attention and resources to melding the strengths of the U.S. military into the established structure and framework of its existing civilian response agencies.

SHIFT FOCUS NOT ROLES: BUILD CAPABILITIES INTO CIVILIAN RESPONSE AGENCIES

In his role as a principal advisor to the president, the secretary of defense should recommend that the civilian agencies responsible for national response be strengthened through proper and mandatory training, participation by top DHS, FEMA, and DOD principals in joint-interagency exercises (not just their staffers or principal undersecretaries), and accountability through implementation of a stronger results-based civilian personnel rating system. Participation in large-scale interagency training
exercises like TOPOFF\textsuperscript{58} should be mandatory for federal civilian agency representatives and evaluated as part of the civilian performance appraisal process.

The importance of training was emphasized by the White House Katrina Lessons Learned report, which noted that one of the main factors contributing to the failed government response during Katrina was that key decision-makers, at all levels of government, were not familiar with the NRP and NIMS, two critical base plans that delineate government roles and responsibilities and define “triggers” for initiating federal response mechanisms. According to the Lessons Learned findings, it was a lack of understanding of basic Incident Command System (ICS) principles and real-world practice in the Joint Field Office (JFO) that led to ineffective coordination between federal, state and local response efforts.\textsuperscript{59}

**Institutional Reform within DHS and FEMA: Civilian Training/Planning and Accountability is Key**

*In my opinion, our investigation has shown a gross lack of planning and preparation by both the Department of Homeland Security and FEMA. And that guaranteed that the response to Hurricane Katrina – or, for that matter, any other catastrophe that might have happened – was doomed to be uncoordinated, inadequate and, therefore, more damaging than it should have been.*\textsuperscript{60}

–Senator Joseph Lieberman (D-Conn), Ranking member, Homeland Security and Governmental Affairs Committee

Institutional cultural reform in both the DHS and FEMA will be necessary if these civilian agencies are to continue serving as lead agencies for federal catastrophic response. The administration should use the lessons learned from Katrina and begin reviewing DHS and FEMA’s existing federal employee and contractor accountability systems to identify weaknesses in the personnel management system that may have contributed to the agencies’ performance during Katrina. Where DHS and FEMA officials refuse to demonstrate competencies in these basic federal response plans, department leaders or principals should be held accountable. According to the House Select Committees’ Report, the “single biggest failure” of the federal response was that it failed to recognize the likely consequences of the approaching storm and mobilize federal assets for a post-storm evacuation of the flooded city.

Within the emergency management community, there are a handful of potential catastrophes that keep disaster professionals awake at night. Perhaps the most troubling has been a category 3 or larger storm striking New Orleans because of its high likelihood of occurrence, the extreme vulnerability of the city to long term flooding and the difficulty of evacuating a large urban population over limited evacuation routes. As a result, this scenario has been studied, planned and exercised perhaps more than any other potential catastrophic disaster in the country. A senior disaster professional would be well aware of the consequence of such a storm, recognize the challenges of responding to such a disaster, and appreciate the need for timely and proactive federal assistance.... [T]wo days before landfall the National Weather Service predicted Katrina would strike New Orleans as a category 4 or 5 hurricane. The governors of Louisiana and Mississippi declared state emergencies and the President issued an emergency declaration for Louisiana. At this point in time, it was extremely likely FEMA’s worst case hurricane scenario was about to unfold. Chertoff should have declared...
an INS (Incident of National Significance) in recognition of the severity of the situation and to allow for the immediate convening of the Interagency Incident Management Group (IIMG), designation of the PFO, and invocation of the NRP-CIA (National Response Plan-Catastrophic Incident Annex).  

In other words, the civilian federal officials entrusted with invoking the National Response Plan and its Catastrophic Incident Annex (NRP-CIA) should have intuitively known what do and, for all intents and purposes, they did not. They simply did not understand their role in igniting the match that would have “set the fire” to engage federal military support under the guidelines of the NRP-CIA. According to the Select Bipartisan Committee’s findings, there was confusion within DHS and FEMA as to the specific roles and responsibilities these civilian agencies had in the incident response process. In addition, the report cites as critical Secretary Chertoff’s failure to invoke the NRP-CIA, which would have quickly switched the federal effort from a “reactive to proactive mode of operations.”  

Civilian response agencies within the federal government must be required to participate in joint-interagency planning exercises, and top leadership should be held accountable for training civilian personnel in the intricacies of the NRP, its Catastrophic Incident Annex, NIMS, and the overall ICS structure.

**Strengthen Interagency Partnerships between DHS and DOD**

According to the House Select Committee’s Katrina Report, it was unclear how much DOD support was in place before the storm arrived. DOD leaders including U.S. Northern Command Commander Admiral Timothy Keating, Homeland Defense Secretary Paul McHale, and Chief of the National Guard Bureau Lieutenant General H Steven Blum all testified to the readiness and professionalism of all the military players – Active Component, National Guard, Coast Guard, and U.S. Northern Command – and that all shared a sense of urgency in responding to requests for assistance by FEMA as quickly as they came into U.S. Northern Command. As an example, Secretary McHale testified that DOD did all that was asked of it under the existing guidelines of the NRP. In fact, DOD was asked to take over all logistical operations for Katrina on September 1, 2005 and processed a FEMA request for an unprecedented one billion dollars of assistance within twenty-four hours of receiving the request.

DOD leaders willingly admitted that there were problems getting DOD resources where and when they were needed. Lack of situational awareness, because of the extensive damage to critical communication infrastructure, hindered U.S. Northern Command’s ability to get up-to-date information about rapidly changing conditions and further contributed to its inability to get the appropriate resources to the target site precisely when they were needed. Lack of situational awareness also contributed to communications difficulties between National Guard forces on the ground and both the JTF-Katrina commander and U.S. Northern Command military planners. Without an ability to communicate with those physically located in the Area of Operational Responsibility (AOR), it is virtually impossible for military operators to know what is needed, how much, and where. Vague requests from FEMA and DHS on logistical requirements also contributed to confusion over the extent of what was needed in the early hours and days of the crisis.
Although DOD leaders testified in March 2006 that they work daily and in close coordination with DHS, the liaison between these two agencies must be strengthened through increased DOD staffing and support to federal civilian homeland security agencies during non-surge periods. Often referred to throughout U.S. Northern Command as “right of the semi-colon missions,” it is recommended that DOD, however hesitatingly, accept certain aspects of the homeland security mission as a critical bridge to its more outwardly-focused, “primary” homeland defense mission. In the past, DOD has seemed reluctant to fully accept homeland security as a key aspect of its mission to protect and defend the United States. Rather, DOD, through U.S. Northern Command, functions as a supporting partner to homeland security lead agencies like DHS and FEMA and only fully engages upon receiving an official request from those agencies. As played out during Katrina, DOD followed the construct of the NRP-CIA and pre-positioned many assets in anticipation of Katrina. But by its own admission, DOD performance could have been improved upon with better attention “pre-Katrina” to interoperable communications difficulties with first responders and more integrated planning with the National Guard and the DOD Joint Staff.

The After Action Reports still being compiled by the military will most certainly address whether there was “hesitancy” on the part of the military, awaiting more guidance by civilian authorities as to what resources were needed where. According to the Bipartisan Committee’s Failure of Initiative Report, the NRP “creates confusion” about federal military involvement due to “unresolved tension” between the possible need for active-duty military assistance when state and local officials are overwhelmed, and a presumption that a governor will know how and when to request active-duty military support. By some accounts, civilian response agencies within the federal and state government lacked the experience to identify what they needed, when, and the logistics “tail” required to get relief to needy victims quickly. The lessons of Katrina should help DOD to accept that there is indeed a critical nexus between the missions of homeland security and homeland defense and that in many ways these two missions are inseparably intertwined. The nexus is anchored by the concern that a failed reaction to a catastrophic incident (like Katrina) could openly expose our nation to terrorist vulnerabilities, assuming our enemies have the capability to inflict harm on an adjustable timetable. Policymakers should reexamine whether new legislation is needed to allow DOD, in certain prescribed “scenarios,” to preemptively place limited military forces into a state or region when there is a looming threat that could diminish our national security posture. Additionally, DOD should provide immediate funding authority for dedicated staff positions to strengthen the cooperative liaison between DOD and DHS; this would ultimately strengthen both agencies’ pre-disaster planning functions.

INTERAGENCY COORDINATION: A KEY TO FUTURE SUCCESS

As the months pass, a variety of Katrina’s lessons learned will be assembled, reviewed, staffed, and published as part of a complex administrative policy process review. One area that could be improved upon immediately is interagency cooperation between DOD and DHS. DOD can step in to help lead the federal government’s effort to build better interagency cooperation between and among all the disparate players at all levels involved in catastrophic emergency response planning. As an alternative to putting DOD
in the official federal “lead,” the administration should build upon the civilian assets it already has in place by melding DOD’s military leadership, culture, and operational and planning capabilities into the FEMA regional staff offices throughout the U.S. and at DHS headquarters in Washington, D.C. To do this, DOD should dedicate full-time military positions to help build up a “non-surge” staffing structure at both DHS and FEMA in order to thoroughly integrate military operational planning throughout the federal civilian response process. These full-time DOD positions are necessary for military leaders to have experience working side-by-side with these civilian agencies before the next large-scale disaster strikes. By creating full-time senior staff positions at the field grade officer level, these military staff officers would work with the civilian planning functions of FEMA and DHS responsible for catastrophic emergency response. Integrating military staff into these civilian agencies will allow the departments to understand completely the operational requirements for requesting large-scale military support under the NRP-CIA and know how to fully integrate that support during national emergency situations where time will be critical in pre-positioning military personnel, equipment and other logistical support.

The DOD should also consider creating full-time Defense Coordinating Officers (DCOs) and integrating these positions into existing FEMA regional response staff offices (or position several at U.S. Northern Command headquarters in Colorado Springs). These full-time DOD assets would be working on interagency issues full-time at the strategic planning level and would be extremely valuable to any future federal response effort. Having senior military officers dealing with interagency issues full-time is preferable to having them designated to “surge” only immediately before or after a crisis strikes.

The National Guard, which prides itself on strong historic ties to local communities, is ideally suited to take on such a role. These DCOs could be Title 10 National Guard Active Guard Reserve (AGR) officers, who could provide the requisite leadership necessary to build FEMA response teams into capable operational assets that can respond quickly and effectively during the next catastrophe. The dual-mission National Guard brings a unique dimension to the civil-military relationships that played out during Katrina. The Guard’s ability to navigate within the local communities won the praise and admiration of the American people, the DOD leadership, the media, and Congress. Because the Guard is a grassroots, community-based military organization, it is well suited to serving among the first military responders when disaster strikes. The Guard’s membership is often comprised of soldiers and airmen who own the local businesses, serve in municipal or state government, or are first responders in the communities where they live and work. The Guard leadership knows the political “lay of the land” and can often bring innovation and experience to solving problems at the local level.

Admiral Timothy Keating, the commander of Northern Command, has acknowledged that there are many advantages to using the National Guard during a Katrina-like disaster: in the majority of circumstances, it will be the Guard who is first on the scene in a state active-duty status even before DOD is asked to respond. In addition, the admiral was quoted in the Select Bipartisan Committee’s Katrina Report A Failure of Initiative, as saying he believed the Guard’s close ties with first responders, such as local and state law enforcement and firefighters, can enable the military to capitalize on pre-existing relationships built over time.70 By identifying senior National Guard officers
who could serve as full-time Defense Coordinating Officers, the DOD and the administration would be strengthening the often-strained relationship between DOD and DHS by building ongoing working relationships solidified over time and trust. By tapping into the military’s leadership and operational expertise, the administration could bolster operational response capabilities within FEMA and DHS and direct these civilian agencies toward better understanding of the incident response system.

The U.S. Coast Guard provides another model the Bush Administration could look to in order to capitalize on the unique operational capabilities of military forces while helping to bridge the civil-military divide between American citizens and any lingering concerns about military overreach. The U.S. Coast Guard, whose very culture historically embraces interoperability and interagency mission tasking, could also be looked to as a key resource as the DOD navigates the thorny process of building interagency constituencies in a support, rather than lead, policy-making role.71

Another concept suggested by a former chief of staff of U.S. Northern Command currently serving as the adjutant general for the state of Oregon, is building up a joint interagency capability regionally throughout the country based upon the Joint Interagency Task Force (JIATF) concept. Members would include representatives from FEMA, DHS, U.S. Northern Command, the U.S. Coast Guard, and the state National Guard to improve and facilitate training and exercises and promote the National Incident Management System (NIMS) as a model for coordinated federal interagency response. These JIATF teams could be placed regionally throughout the country, working closely with respective state agencies, and perhaps located within the ten existing FEMA regions or within the military’s regional Joint Task Force headquarters offices.72 It is important that these teams be spearheaded by either a U.S. Coast Guard officer, senior executive service federal manager, or a senior state National Guard official serving in a Title 10/federal status, to ensure balance in the civilian-military policy formulation process as it affects future national homeland security initiatives. (Assigning an active component Title 10 federal military officer could give the subtle impression to fellow team members that DOD is too heavily influencing the scope and direction of its policy initiatives and could undermine the civilian-military spirit of cooperation necessary to formulate a credible interagency process.73)

At the national level, the White House should seek to establish a subordinate council or branch of its existing Homeland Security Council. This committee should be comprised of key stakeholders responsible for policy planning and coordination in preparing for the nation’s next catastrophic response.74 This Homeland Security Council subcommittee, or sub-council, could be created by either presidential executive order or by statute, and should seek representation of agency principals from DOD, DHS, FEMA, U.S. Coast Guard, the National Guard Bureau, and U.S. Northern Command, meeting quarterly to work through strategic level issues of catastrophic incident planning. This sub-council would, in turn, advise senior members of the Homeland Security Council on all unresolved matters requiring DOD and DHS cooperation. This interagency approach is called for in the White House Lessons Learned report. A lack of regional planning and coordination was identified in the report as a “final structural flaw in our current system for national preparedness.”75 A homeland security interagency team, based upon a regional JIATF concept as well as establishment of a sub-council of the existing Homeland Security Council, would support the White House’s recommendation for better coordination within government while providing a more strategic approach to
catastrophic incident response planning and policy formulation between the federal, state, and local levels.

“Reviving” FEMA

*Its mission had been marginalized. Its response capability had been diminished. There’s the whole clash of cultures between DHS’s mission to prevent terrorism and FEMA’s mission to respond to and to prepare for responding to disasters of whatever nature.*

— Former FEMA Secretary Michael Brown on why FEMA failed during Katrina.76

When FEMA was officially transferred to DHS in March 2003, it lost its Cabinet-level status as the 2,500 person agency was absorbed into the 180,000 member umbrella organization.77 According to one Congressional document, eighty million dollars was transferred from FEMA in March 2003 to help pay for DHS overhead. Over the next two years, FEMA lost an additional $169 million to its parent agency to pay for other DHS agency expenses.78 FEMA officials in Louisiana and Mississippi testified before the House Select Committee as to what could be described as an agency’s bloodletting; the agency was left to atrophy with limited staffing, resources, and lack of funding. Officials also note that FEMA suffered from a “brain drain” of trained and qualified senior leaders and personnel who either left the agency for the private sector or retired from federal service.79 According to some experts, a new emphasis on terrorism rather than on an “all hazards” approach to emergency response only further marginalized FEMA, ultimately contributing to its failed response during Katrina.80

According to the Select Bipartisan Committee report, one of the most critical links in the federal response system is the team of FEMA personnel that deploys to a disaster site to coordinate and direct federal response operations. These teams, in theory, are intended to be on call and ready to deploy at a moment’s notice. FEMA officials have testified that the readiness of these teams was drastically reduced by 2004, due to funding that dried up after 2002. The Select Bipartisan Committee report notes that, in just a few short years, “FEMA’s emergency response teams had been reduced to ‘names on a roster’.”81 These FEMA teams, or a similar civilian rapid response capability within DHS, should be revived immediately, and DOD should consider dedicating staffing to augment these teams during all training exercises and during real-world “surge” response operations.

It is recommended that FEMA’s capabilities for disaster response be reestablished and that an “all hazards” emphasis be built into those capabilities. One author writes: “Currently, FEMA is like a patient in triage. The President and Congress must decide whether to treat it or let it die.”82 Giving up on FEMA and just turning to the military to solve the difficult problem of disaster response is admitting defeat. Rather, the administration should focus on reviving the organization, injecting the agency with the funding, resources, qualified personnel, and strict accountability measures necessary to bring life and purpose back to an agency diminished by lack of attention and loss of focus on the part of federal policymakers.

CONCLUSION

*If we are to be first responders – and in retrospect, we wish in this case someone had been a more effective first responder – but if we are to be the first responders, you have to change the character of the training and the equipment, as well as the legal authorities of the Department of Defense.*83

—Paul McHale, ASD-HD
There are very few advantages in the long run to the DOD being appointed lead federal agency role in Catastrophic Incident Response. Although unity of command would be achieved, and a quick and rapid response would most certainly occur during times of catastrophe, what would be the cost to our nation’s constitutional principles, our federalist traditions, and our way of life? Turning LFA status over to DOD would most assuredly detract from the military’s missions in the Global War on Terror, redirect resources and attention to missions more appropriately assigned to local and state first responders, and could result in Americans perceiving that their civil liberties are at risk.84

Our nation’s policy makers must not turn to the military just because it can accomplish the mission. Rather, turning over LFA to the DOD should be the right thing to do; given the legal and policy issues discussed throughout this paper, one must conclude it is not. Rather, our nation’s policy makers must make tough choices and devote the time, attention, resources, and care to resuscitate and, if need be, completely rebuild civilian agency response capabilities at the local, state, and federal level. Doing so will ultimately empower all stakeholders to more effectively manage the next crisis.

It certainly is not the easy path. But as Robert Frost once concluded in his famous and beloved poem “The Road Less Traveled,” the benefits that come with taking a different path often bring richness and reward to those courageous enough to try “...and it has made all the difference.”85

Taking the road less traveled will ultimately strengthen our government and our nation. Redirecting the current working relationships between DOD and DHS is another step toward ultimately strengthening our government and nation in times of crisis. Just as all politics are local, so too is disaster response. It is important for our nation’s leaders to provide the funding necessary to allow state and local leaders the ability to manage these crises and, when it becomes necessary, to know when and how to ask for federal help. Federal civilian agencies responsible for coordinating the response effort must get the training and resources to do their jobs and be held accountable when they do not.

The practical administrative issues associated with the implementation of these recommendations could take months or even years, yet they are certainly worthy of immediate, further study. Future research into the feasibility, potential cost, and identification of existing organizational cultural barriers could begin the list of topics for exploration.

The notion of expanding the military’s role to lead federal response efforts may one day be judged by historians as a well-meaning yet misguided reaction to mounting political pressure on our president to act more decisively in the immediate aftermath of a major national crisis. Ultimately, the DOD can play a critical leadership role in building civilian agency capabilities – without ever having to formally assume the federal lead agency role.

Author’s Note: On April 27, 2006 the Homeland Security and Governmental Affairs Committee delivered a statement calling for the dissolution of FEMA because of systemic problems of failed leadership and the lost confidence of the American people. The Committee recommended action to create, in FEMA’s place, the “National Preparedness and Response
Agency” which would be provided with the resources and training to “organize the extraordinary resources of the federal government of the United States to prepare for, mitigate and respond, and oversee the recovery from disasters, and particularly the catastrophes that are beyond the resources of the state and local government.” This recommendation is consistent with the premise of this article, drafted months before the publishing of the Committee’s report. The author’s recommendations are consistent with the Senate Committee’s latest findings: that leadership, resources, and training must be dedicated to rebuilding FEMA or a FEMA-like agency to revive the civilian response capabilities of our government. Ultimately, these agencies must be held accountable for their actions. Whether this capability is called FEMA or something else, the requirement to shelve the old FEMA and “begin anew” remains the same. In addition, since the initial drafting of this article, DOD has since fielded ten, full-time Defense Coordinating Officers (DCOs) at the military grade of Colonel (06) throughout the ten FEMA regions.

The conclusions and recommendations stated in this article are solely the author’s and do not reflect any agency or agency representative interviewed or consulted for background research.

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6 State Adjutant General, Oregon National Guard, in telephone interview by author, March 16, 2006.
7 Failure of Initiative, 3.
8 Chief of Staff, U.S. Northern Command, interview.
10 White House Press Release, “President Discusses Hurricane Relief,”
13 Ibid.
14 White House Fact Sheet, “President Bush Addresses the Nation on Recovery from Katrina,” September 9, 2005.
16 Deputy Staff Judge Advocate (SJA), U.S. Northern Command, in interview by author, March 14, 2006.
17 Posse Comitatus Act, section 1385, title 18 U.S. Code, as amended provides the following: “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 not more than $10,000 or imprisoned not more than two years or both.”
18 Deputy SJA, U.S. Northern Command, interview.
19 Albert C. Harvey, Vice-Chair, ABA Standing Committee on Law and National Security, interview response to author via e-mail 26 April 26, 2006.
21 Ibid, 28, 29.
23 Deputy SJA, U.S. Northern Command, interview.
24 ABA Report, 26
25 Ibid., 29, 30.
26 Ibid., 27.
28 Deputy SJA, U.S. Northern Command, interview.
29 Dean Walter Huffman, Texas Tech University School of Law, interview response to author via e-mail, April 27, 2006.
31 Ibid.
33 A Failure of Initiative, 206.
34 Ibid., 207.
35 Ibid.
36 Director, Operations Law, U.S. Northern Command, interview.
37 Note: When considering whether the outcome might have been different had the suggestion been a National Guard general officer versus active duty 3-star, we may never know whether the dual-status command concept would have proceeded in Louisiana without protest.
38 Defense Department Response, Testimony of ASD-HD Paul McHale.
39 Ibid., Remarks by Senator Joseph Lieberman (D-CT).

Ibid.

State Adjutant General, Oregon National Guard, interview.


Director, Operations Law, U.S. Northern Command, interview.


White House, Katrina: Lessons Learned, 12.

Director, Operations Law, U.S. Northern Command, interview.

A Failure of Initiative, 206.

Deputy SJA, U.S. Northern Command, interview.

A Failure of Initiative, 223.

White House, Katrina: Lessons Learned, 53.


The White House, Katrina: Lessons Learned, 54.

TOPOFF is a national-level, multi-agency, multi-jurisdictional, “real-time,” limited-notice WMD response exercise designed to prepare senior government officials to respond to catastrophic incidents such as a large-scale terrorist attack. TOPOFF stands for “Top Officials.”

White House, Katrina: Lessons Learned, 53.


A Failure of Initiative, 133-134.

Ibid., 137.


Chief of Staff, U.S. Northern Command, interview.

A Failure of Initiative, 224.

Defense Department Response, Testimony of Secretary Paul McHale.

“Right of the semi-colon missions” is U.S. Northern Command vernacular for the distinction between homeland security and homeland defense mission requirements and strategic objectives.

Defense Department Response, Testimony of Secretary Paul McHale.

Ibid., 202.

Ibid., 222, 223.

72 State Adjutant General, Oregon National Guard, interview.

73 Ibid.

74 Ibid.

75 White House, Katrina: Lessons Learned, 53.


79 A Failure of Initiative, 152.


81 A Failure of Initiative, 158.


83 Defense Department Response, Testimony of ASD-HD Secretary Paul McHale.

84 Interagency Coordination Division representative, U.S. Northern Command, in interview with author, via written response, April 17, 2006.