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14. ABSTRACT This paper discusses the issues of bifurcated command and control structures and demonstrate that command and control of military forces responding in support of a state during a natural or manmade disaster should be retained by the Governor of each state and executed through the authority of the state's National Guard forces. Governors through their National Guard should gain operational or tactical control of federal forces deployed in support of civil authorities. The National Guard will be the first military force to respond to a domestic incident and federal military forces will only be dispatched in response to a Governor's request for additional support. The Governor, as the chief executive of a state should be allowed to receive operational or tactical control of federal military forces deployed in support of civil authorities. Allowing a governor operational or tactical control through the resources of his National Guard creates better unity of effort and unity of command.					
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MASTER OF MILITARY STUDIES

**WHO'S IN CHARGE: COMMAND AND CONTROL OF MILITARY FORCES
DURING DOMESTIC EMERGENCIES**

SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF MILITARY STUDIES

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Executive Summary

Title: Who's in Charge, Command and Control of Military Forces During Domestic Emergencies

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Thesis: This paper will discuss the issues of bifurcated command and control structures and demonstrate that command and control of military forces responding in support of a state during a natural or manmade disaster should be retained by the Governor of each state and executed through the authority of the state's National Guard forces.

Discussion: Domestic emergencies begin within local communities. The larger the scope and scale of a domestic emergency, the larger the need for response forces, including those of the military. The National Guard is the military force of a state, under the command and control of the Governor, unless ordered to federal active duty, and is normally called into the service of the state when large-scale domestic emergencies occur. Depending on the size of the incident, a Governor may submit a request for additional assets from the federal government, including those of the federal military. Since the terrorist attacks of September 11, 2001, and Hurricane Katrina in 2005, a lot of consideration has been given to who should be in charge of federal assets during domestic emergencies. The primary documents that have been written by the federal agencies agree that the states are sovereign and the job of the federal government is to respect the rights of states by allowing them to command the response with one exception, response by federal military forces. Federal military forces are to remain under the command and control of the President, through the Department of Defense. This creates bifurcated command and control structures that do not enable unity of command or unity of effort.

Conclusion: Control of military forces should be provided to Governors during domestic emergencies. This can be accomplished through a variety of means that allow the President as Commander in Chief to retain overall control of the military while providing Governors the power to direct the response at the lowest level.

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Preface

I transitioned to the Rhode Island Army National Guard in 2003 after serving over three years on active duty. Since my transition to the National Guard, I have served in various command and staff positions. I first learned of the command and control issues associated with domestic response during my last assignment as Aide de Camp to the Adjutant General of Rhode Island and Commander, Headquarters and Headquarters Detachment, Joint Force Headquarters Rhode Island. During this time, I had the opportunity to hear senior civilian and military leaders debate this issue, but never understood the background of the issue leading me to seek more information. The question of who should be in control during domestic emergencies continues to be debated. Currently, the traditional military chain of command provides that control, but given the arguments of state's rights and the autonomous authority of a Governor within his state, shouldn't the Governor have the authority to direct federal military forces when they are deployed in support of a domestic emergency?

I would like to thank my wife Amy and my daughters Jaeden and Cailin for their support during this project. I would also like to thank Dr. Jonathan Phillips for his mentorship and guidance.

Introduction:

The National Response Framework recognizes that emergency response begins and ends at the municipal level.¹ Local governments normally maintain organic assets to assist residents during common emergencies such as a fire, chemical spill, or the effects of a local storm. The size and scope of the incident may require resources beyond those organic to the impacted municipality, thereby requiring the assistance of another municipality or the state. When the resources of the state have been exhausted, a Governor may request a federal disaster declaration from the President and the federal resources that come with it, including federal military forces.

Since the events of September 11, 2001, Hurricane Katrina in August of 2005, and other noteworthy domestic events, the Federal Government has invested a significant amount of resources to improve the ability of the local, state, and federal government to respond to a natural or manmade disaster. Despite this significant investment, the military is often called upon to support civil authorities since the military maintains a vast amount of equipment and personnel that no other government agency is able to sustain. This paper will discuss the issues of bifurcated command and control structures and demonstrate that command and control of military forces responding in support of a state during a natural or manmade disaster should be retained by the Governor of each state and executed through the authority of the state's National Guard forces.

¹ The National Response Framework was published in 2008 by the Department of Homeland Security. The National Response Framework establishes authorities and methods to be used by responders responsible for mitigating the effects of domestic emergencies. The framework is written for use by the leadership of government at all levels and the supporting agencies, non-governmental organizations, emergency response personnel, and emergency management personnel. Department of Homeland Security. "*National Response Framework*." *United States Department of Homeland Security*. January 2008. <http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf> (accessed December 28, 2010), 1.

Intent:

This paper presents an analysis of the command and control structures used when federal military forces deploy in support of civilian authorities. It argues that Governors should retain their authority as chief executive of the state by receiving control of federal military forces deployed in support of civil authorities. The first section of this paper provides a basic background of the issue. The second section discusses the military doctrine used to support the different modes of command and control. It includes changes since September 11, 2001, such as the addition of United States Northern Command and the different Homeland Security Presidential Directives that influence how emergency response is coordinated within the United States. The third section discusses the federal laws that impact the formation of commands and provides a hybrid solution to domestic command and control issues. This structure is currently being explored by United States Northern Command and the Department of Defense (DOD). The next section addresses the current DOD Directives that attempt to clarify the roles and responsibilities of federal and state governments with regard to command and control of federal military forces deployed in support of a state. This section includes an argument in reference to qualifications to provide command and control of federal military forces executed by the Governor through the Adjutant General of the state short of insurrection. The conclusion provides a summation of the different sections of the paper.

Background

The terrorist attacks of September 11, 2001, and Hurricane Katrina demonstrated significant gaps in the preparedness of the military to respond to incidents of domestic emergency. Common among these two incidents are the parallel command and control structures that place the President as Commander in Chief of the federal military forces and the

Governor as Captain General of the militia forces (National Guard) of the state. Currently, three separate and distinct options exist to provide command and control of federal military forces and state National Guard forces. One option is for the President to utilize the authorities provided in the *Constitution of the United States* or the Insurrection Act to federalize the National Guard and place all forces under the authority of a federal commander and ultimately the President.²

Another option is to maintain the command and control structures authorized by the *Constitution*, Title 10 of the United States Code, and Title 32 of the United States Code, by keeping federal military forces under the command and control of the President and National Guard forces under the command and control of the Governor of the state.³ The final option, also authorized by the *Constitution*, Title 10, and Title 32, is to create a hybrid of the first two options by placing both federal military forces and National Guard forces of a state under one commander termed a dual-status commander.

The dual-status commander utilizes the authority of a federally recognized United States military officer subordinate to the President of the United States and the authorities of a National Guard officer of a state subordinate to the Governor of the state to command both forces. This

² Refers to the powers of the legislative branch “to provide for calling forth the militia” and the powers of the executive, the President of the United States, as “Commander in Chief.” Clinton Rossiter, introduction and notes by Charles R. Kessler, ed. *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*. New York: New American Library, 2003, 547, 551. The *Insurrection Act* refers to the authorities under Title 10 of the United States code. “Title 10-Armed Forces.” *Title 10*. June 9, 2010. <http://uscode.house.gov/pdf/2009/2009usc10.pdf> (accessed December 22, 2010), 196-199.

³ Refers to the powers of the legislative branch “to provide for calling forth the militia” and the powers of the executive, the President of the United States, as “Commander in Chief.” The Bill of Rights refers to article X where it is written that the powers not reserved by the Constitution are provided to the states “or to the people.” Clinton Rossiter, introduction and notes by Charles R. Kessler, ed. *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*. New York: New American Library, 2003, 547, 551, 560. Title 10 and Title 32 reserve the powers of the federal military forces and National Guard forces to the President and the Governor respectively with certain exceptions. In this case the exceptions are exercised and an officer of the National Guard is appointed as a dual-status commander pursuant to Title 32, section 325 or a federal officer is appointed as a dual-status commander pursuant to Title 32, section 315. “Title 10-Armed Forces.” *Title 10*. June 9, 2010. <http://uscode.house.gov/pdf/2009/2009usc10.pdf> (accessed December 22, 2010), 144-155 and “Title 32 National Guard.” August 6, 2010. <http://uscode.house.gov/pdf/2009/2009usc32.pdf> (accessed December 22, 2010), 21, 25 and 21.

option has been exercised during several recent high profile events with success and will be discussed further in section three. The use of a dual-status commander under the current construct does not, however, satisfy the need for Governors to retain authority over federal military forces deployed to a state in response to a domestic emergency.

The issue of which executive should retain command and control of military forces used for domestic response is further complicated by the formation of the Chemical, Biological, Radiological, Nuclear and Explosives Consequence Management Response Force or CCMRF. According to the 2009 Army Posture Statement, the Army is to dedicate three brigades to this Title 10 mission, one from the Active component and two from the Reserve component.¹ The Quadrennial Defense Review identified that the DOD needed to “field faster, more flexible consequence management response forces” and recognized that the National Guard should fulfill this need.² The result is a concept that provides each of the ten Federal Emergency Management Agency regions a National Guard “Homeland Response Force,” a military force composed of National Guard units from within the regions that are focused on support of civil authorities and provide a means of collaboration among federal, state, and local authorities.³

Supporting Policies and Doctrine

The attacks of September 11 forever changed the manner in which leaders of government at all levels view security in the United States. New organizations were founded that brought the functions of similar agencies together in order to provide a better response to the needs of the citizens during an emergency, protecting them from impending or further danger. Policies that delineate the responsibilities of different agencies were reviewed, and in some cases refined or even created, to ensure that processes of interagency coordination were streamlined. This

section will discuss how policies, organizations, and joint military doctrine impact a Governor's ability to gain command and control of federal military forces.

One major change after the September 11 attacks was the publication of Homeland Security Presidential Directive 5. This directive provides a consistent approach to emergency management that incorporates all levels of government from federal to municipal.⁴ Two publications were created to assist in the implementation of Homeland Security Presidential Directive 5. The first is the National Response Framework, which "is built upon scalable, flexible, and adaptable coordinating structures to align key roles and responsibilities across the Nation."⁵ At its core, The National Response Framework provides the way emergency situations are to be managed, from the local response roles and responsibilities through those of the Federal government. The second, The National Incident Management System reaffirms what is written in the National Response Framework; by stating that incidents are "managed on a daily basis at the lowest possible geographical, organizational, and jurisdictional level."⁶ The overarching goal of the framework is to ensure "interoperability and compatibility that will, in turn, enable a diverse set of public and private organizations to conduct well-integrated and effective emergency management and incident response operations."⁷

The National Incident Management System, like the National Response Framework, recognizes the need for governments and agencies at all levels to work together in order to provide a coordinated response to emergencies in a collaborative environment based on the recognition that emergencies begin and end locally, and that local officials bear the majority of the command responsibilities while the federal government coordinates additional assets as requested.⁸ The National Response Framework, however, maintains "military forces will always remain under the operational and administrative control of the military chain of command."⁹

This means that federal military forces and National Guard forces will remain under the control of different executives.

Another significant change following the September 11 attacks was the formation of United States Northern Command (NORTHCOM). The creation of NORTHCOM by President George W. Bush merged the homeland defense and civil support missions of several different DOD organizations under a single Combatant Commander.¹⁰ NORTHCOM's area of responsibility includes the continental United States, Alaska, Puerto Rico, and the United States Virgin Islands.¹¹ NORTHCOM provides command and control of federal forces responding to incidents of domestic emergency. This authority does not include the National Guard while in state active duty or Title 32 status. Those forces remain under the authority of the Governor of the state.

The issue over who should retain command and control of National Guard and Federal Forces is recognized in recent legislation. The fiscal year 2010 version of Title 10 included a requirement for the Secretary of Defense to prepare a plan for response to natural disasters and terrorist events that includes text describing how the efforts of the National Guard and the federal military forces will be coordinated.¹² This legislation also requires the National Guard Bureau to "provide to the Secretary information gathered from Governors, Adjutants General of States, and other State civil authorities responsible for homeland preparation and response to natural and manmade disasters."¹³ Under this statute, the Secretary of Defense is required to submit two options for response, one using only forces of the National Guard and another using both the National Guard and active duty federal forces.¹⁴ The options must include procedures that "ensure that Governors and local communities are properly informed and remain in control in their respective States and communities" and "an identification of operational procedures,

command structures, and lines of communication to ensure a coordinated, efficient response to contingencies.”¹⁵

Additionally, the National Defense Authorization Act for fiscal year 2011 included text requiring a report by the Secretary of Defense “to the congressional defense committees” on the “limitation on deactivation of existing consequence management response forces.”¹⁶ The bill requires that the report contain an analysis of “whether consideration was given to establishing Homeland Response Forces within the Reserves; and the reasons for not planning to establish any Homeland Response Forces within the Reserves.”¹⁷ The report must also contain a narrative that analyzes the command and control relationship of the Homeland Response Force with respect to the amount of authority asserted by the DOD verse that of the Governor of the state.¹⁸ Common among these two pieces of legislation is the need for an analysis of command and control structures and whether or not a Governor should be in control of federal forces responding to a domestic incident.

In order to analyze properly whether or not a Governor should receive control of federal military forces deployed to a state it is necessary to understand the doctrinal terms used by DOD to describe command relationships.⁴ The first command authority is Combatant Command. Combatant Command authorizes the Combatant Commander to exercise or delegate operational control and tactical control of military forces, organize and employ commands and forces, assign tasks, and designate objectives in order to accomplish assigned missions.¹⁹ Combatant Command authority for domestic incidents is delegated to the Commander, NORTHCOM, from the President through the Secretary of Defense. The next authority, operational control, can be delegated by a Combatant Commander.²⁰ Operational control entails “organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction

⁴ Diagrams depicting command relationships are provided in Appendices 1 and 2.

necessary to accomplish the mission.”²¹ The final authority, tactical control, is defined as “the command authority over assigned or attached forces or commands, or military capability or forces made available for tasking, that is limited to the detailed direction and control of movements or maneuvers within the operational area necessary to accomplish assigned missions or tasks.”²² Tactical control is a part of operational control; the two differ in that a commander with operational control has the ability to assign or suspend subordinate commanders and manages the day-to-day operations of the force while a commander with tactical control is limited to using forces allocated by a commander with operational control to accomplish a specific task.²³

The provision of control over all military forces to a Governor provides for better unity of command and unity of effort. Joint Publication 1 states that “some of the techniques, procedures, and systems of military command and control can facilitate unity of effort if they are adjusted to the dynamic world of interagency coordination and different organizational cultures.”²⁴ This statement provides evidence that analysis of current command and control structures needs to be conducted when federal forces are deployed in support of civil authorities.

DOD Directive 3025.18, named Defense Support to Civilian Authorities, “establishes policy and assigns responsibilities for DSCA.”²⁵ This document, published in December 2010, reflects changes in defense support to civil authorities by the DOD such as reference to the planning principles provided National Incident Management System.²⁶ This directive also affirms that federal military commanders will retain authority over federal troops.²⁷

The organizational, doctrinal, and policy changes that have occurred over the last decade generally demonstrate that emergency management functions are best controlled at the local level. The affirmation in the National Response Framework that the federal government’s role is

to support a state, not command the response, is contradicted when federal military forces respond. The operational and tactical control of federal military forces resides with the federal military chain of command, not the Governor or his Adjutant General.²⁸ An assumed counter argument is that the federal government is providing the resources, so the federal government should be in control of how the resources are utilized. This argument, while carrying some weight, should be dismissed given the limited period of support provided by federal agencies and the fact that state and local agencies bear the majority of the burden in domestic response efforts.

The argument for providing tactical control or even operational control of federal military forces to a Governor, through his Adjutant General, is strengthened by the fact that federal military forces can be placed under the operational control of a foreign commander.²⁹ Under this construct, the President still maintains his authority as the Commander in Chief, and United States military commanders are responsible for maintaining communications with their original commands, but are placed under the operational control of a foreign military commander.³⁰ Prior to making the decision to place United States military forces under the operational control of a foreign commander, the President must consider “the mission, size of the proposed United States force, risks involved, anticipated duration, and rules of engagement.”³¹

If United States military forces are allowed to be placed under the operational control of a foreign military commander, then measures should be enacted that place Governors in control of federal military forces during domestic emergencies. The recently published Department of Defense Directive 3025.18 prescribes that the military will follow the same guidance as provided in the National Incident Management System by utilizing unity of effort as a guiding principle, however it only authorizes “direct liaison if authorized by the Secretary of Defense.”³² Additionally, Joint Publication 1 provides that the DOD as a signatory to the National Response

Framework “agreed to modify existing interagency and agency incident management and emergency response plans to facilitate compliance with the National Response Framework.”³³

The bifurcation of command and control structures between federal military forces and the National Guard of the state does not promote unity of effort and coordination among these two forces. Tactical Control of federal military forces exercised by a Governor, through the Adjutant General of the State, would create an environment that forces the efforts of the federal military forces and the National Guard forces to be coordinated. Tactical control would allow a Governor to task federal military forces with specific tasks while the federal military chain of command would retain their original authority to manage the day-to-day operations, thereby creating a collaborative environment where each executive governmental body retains authority over their forces.

Enabling Legislation

As discussed earlier, there are three options that may be exercised to provide command and control of federal forces that are provided in the event of a domestic emergency. The first option utilizes the authority of the President granted in *The Constitution of the United States* or the Insurrection Act to federalize the National Guard, placing those units under the federal chain of command. The second option keeps federal military forces under the command and control of the President in accordance with the authorities granted in the *Constitution* and Title 10, and National Guard forces under the command and control of the Governor of the state in accordance with the *Constitution*, Title 32, and state law. The final option, a hybrid of the first two options, places both federal military forces and National Guard forces of a state under the authority of one commander termed a dual-status commander. A dual-status commander utilizes the authorities granted to a federal military officer and a National Guard officer. This section will evaluate the

laws and or legislation that govern military response in the homeland and demonstrate that Governors, through their Adjutants General, should receive tactical control of federal military forces responding to domestic incidents within their state.

The National Guard is generally the first military force to arrive at a domestic emergency since the National Guard is subject to the orders of the governor of a state. Federal assistance, including the use of federal military forces, may follow in response to a governor's request under the Stafford Act. The Stafford Act provides assistance from the "Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from ... disasters."³⁴ This is accomplished in a variety of ways including monetary support to governments or individuals, promotion of planning at the state and local level, and improvement of coordination and response activities.³⁵ The Stafford Act may be invoked once the capabilities of the state or local government have been exhausted and the Governor of the impacted state has certified in a request to the President that the conditions that warrant federal declaration of emergency exist.³⁶ The Stafford Act also allows a Governor to request that the President direct the Secretary of Defense to use "the resources of the Department of Defense" to perform "any emergency work...which is necessary for the preservation of life and property."³⁷

The traditional military chain of command, "the President as Commander in Chief, to the Secretary of Defense, to the commander of military forces, or military command and control procedures," creates two chains of command, each reporting to a separate executive.³⁸ That is, the federal military forces fall under the command and control of a federal commander under the direction of the President and the National Guard forces of the state remain under the command and control of a National Guard commander under the direction of the Governor.³⁹ This structure creates bifurcated command and control structures and the possibility of redundancy

with respect to unity of effort since there is no direct relationship between the National Guard of a state and the active federal forces. Title 10 of the United States Code provides that the command and control of active federal forces falls to one of the Geographical Combatant Commanders who exercises his Title 10 authority of Combatant Command.⁴⁰

While this responsibility falls upon NORTHCOM, the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina discovered that a “lack of integration of National Guard and active duty forces hampered the military response.”⁴¹ The report indicates that the parallel command and control structures were insufficient to provide the needed coordination between active federal military forces and the forces of each state’s National Guard.⁴² The obvious result of a lack of coordination is a duplication of effort.

In the aftermath of Hurricane Katrina, the issue of whether or not President Bush should have invoked his authority under the Insurrection Act to federalize the National Guard was debated in the press. The Insurrection Act authorizes the President to federalize the National Guard or use active Federal forces to quell “any insurrection, domestic violence, unlawful combination, or conspiracy.”⁴³ There are many reasons to retain the authorities of a state’s National Guard in a Title 32 status leaving those forces under the command and control of a Governor while simultaneously utilizing active duty federal military forces to respond to incidents of domestic emergency.

The Posse Comitatus Act provides that anyone who uses the “Army or Air Force as a posse comitatus or otherwise to execute the laws” is subject to the penalties provided in the act.⁴⁴ Presidents are hesitant to utilize the Insurrection Act to overcome the burdens of the Posse Comitatus Act since this creates a political and social quandary due to its historical uses. Lieutenant General Steven H. Blum, former Director of the National Guard and former Deputy

Commander, NORTHCOM, noted in his testimony before the Senate Committee on the Judiciary that “U.S. Presidents invoked the Insurrection Act when a Governor requested such a decree or when State authorities were clearly unable or unwilling to secure the Constitutional rights of their citizens.”⁴⁵ In his remarks, he qualified this statement by providing a list that contains ten instances since World War II when the National Guard has been federalized in accordance with the Insurrection Act.⁴⁶ The list includes federalizing National Guard troops originally deployed by Governors to stop desegregation in the South, the riots that occurred after the assassination of Martin Luther King, JR., and the Rodney King riots in Los Angeles.⁴⁷ A quote from a New York Times article published shortly after Hurricane Katrina demonstrates the intensity of the Insurrection Act debate in the aftermath of Hurricane Katrina:

“Can you imagine how it would have been perceived if a president of the United States ... [had] pre-emptively taken ... the command and control of her forces, unless the security situation made it completely clear that she was unable to effectively execute her command authority and that lawlessness was the inevitable result?” asked one senior administration official.”⁴⁸

It is entirely plausible that the invocation of the Insurrection Act following Hurricane Katrina would have had a negative impact on the political and social security of the populace in Louisiana due to the negative connotations associated with the historical uses of the act. The use of the Insurrection Act during domestic emergencies simply to streamline command and control under one commander is fraught with danger, both to the political leadership and the people alike, and requires extreme scrutiny.

The use of a dual-status commander is a better option for domestic incidents. The option of using a dual-status commander helps to achieve unity of command as it “allows one commander to command both federal (Title 10) and state forces (National Guard in Title 32 and/or State Active Duty status) with the consent of the Governor and the authorization of the

President.”⁴⁹ National security events such as “the G-8 Summit at Sea Island, Georgia, in 2004; Operation Winter Freeze in 2005; the Republican and Democratic National Conventions of 2004 and 2008; and the G-20 Summit in 2009” enabled this construct to be tested and evaluated.⁵⁰ The application of a dual-status command to domestic contingency operations has yet to be implemented and is still being explored by NORTHCOM and DOD.⁵¹

The concept of a dual-status commander finds its roots in a 1990 Supreme Court case titled *Perpich v. Department of Defense*. In this case, the Governor of Minnesota challenged the right of the Federal Government to call forth a unit of the Minnesota National Guard for training in a foreign country.⁵² The findings by the Supreme Court in this case confirm that “since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States.”⁵³ The National Guard of the United States is recognized in Title 10 as a reserve component of the Army or United States Air Force, whose members are subject to federal active duty.⁵⁴ Since all members of a state’s National Guard also enlist in the National Guard of the United States, then they are also eligible, given proper authority through legislation, to execute a dual-status command.

A 2004 change to Title 32 further facilitated the dual-status command construct by providing that “an officer of the Army National Guard of the United States or the Air National Guard of the United States is not relieved from duty in the National Guard of his State.”⁵⁵ In the *Perpich* case, the Supreme Court also maintained that “in a sense, all of them [the National Guard] now must keep three hats in their closets - a civilian hat, a state militia hat, and an army hat - only one of which is worn at any particular time.”⁵⁶ Colonel Gereski, the Director of Operational Law for NORTHCOM, and Lieutenant Colonel Brown, an Alabama National Guardsman, maintain in their article in *Army Lawyer* that “to remain consistent with the three-hat

analogy outlined in *Perpich*, the commander must exercise command over state and federal forces in a mutually exclusive manner.”⁵⁷ To be more succinct, a dual-status commander will receive orders from two chains of command, essentially the President of the United States exercising authority over active federal forces and the Governor of the state exercising authority over the National Guard forces.

Dual-status command is not limited to National Guard Officers. Title 32, Section 315 of the United States Code provides that “the Secretary of the Army shall detail commissioned officers of the Regular Army to duty with the Army National Guard of each State.”⁵⁸ This section also provides the Secretary of the Air Force with the authority to “detail commissioned officers of the Regular Air Force to duty with the Air National Guard.”⁵⁹ Additionally, officers detailed to duty with either the Army National Guard or Air National Guard, may also accept a commission in that state’s National Guard, without having to give up their status in the active federal forces.⁶⁰

This command and control arrangement provides for better unity of effort as the orders from each authority are received by one commander who is able to resolve any operational conflicts. The dual-status commander does not, however, achieve full unity of command, because in accordance with the Supreme Court’s ruling in the *Perpich* case, the dual-status commander is subject to the orders of the President and the orders of the Governor of the effected state thereby creating a bifurcated command and control structure.

The *Constitution*, Title 10, and Title 32, however, favor the National Guard officer for the role of dual-status commander when consideration of state’s rights is taken into account. Under the Tenth Amendment, the states are guaranteed the powers “not delegated to the United States,” including the appointment of officers in the National Guard of the state.⁶¹ It is more likely,

given that officers of the National Guard maintain both federal and state appointments as an officer, that a National Guard officer would receive the approval of both the President and the Governor to hold a dual-status command. The Commander of NORTHCOM, Admiral James Winnfield, reinforced this argument at the 132nd General Conference of the National Guard Association of the United States when he stated that “no commander working for me will ever come into your state to operate independently of what you and your governor believe needs to be done.”⁶² Admiral Winnfield also stated that NORTHCOM is “aggressively exploring new ways to close a historical gap in understanding of command and control of federal forces operating in support of a state.”⁶³

The use of a dual-status commander to command both active federal forces and state National Guard forces to respond to incidents of domestic emergencies would require significant planning and understanding between the DOD and the Governor of a state. Colonel Gereski and Lieutenant Colonel Brown provide evidence of this in their article in which they provide the Memorandum of Agreement for the 2009 Pittsburgh Summit.⁶⁴ In this agreement, it is written that the dual-status commander will receive orders from a “Federal chain of command and a State chain of command” and that “as such, the dual-status commander is an intermediate link in two distinct, separate chains of command flowing from different sovereigns.”⁶⁵

The use of a dual-status commander, while providing for better unity of effort, does not satisfy the need of a Governor during time of domestic emergency to receive control of federal forces deployed within that state. Colonel Gereski and Lieutenant Colonel Brown note in their article that it is possible to maintain unity of effort by assigning deputy commanders to the dual-status commander.⁶⁶ The authors recommend utilizing two deputy commanders, each subordinate to the dual-status commander, “one National Guard Officer in state status and the

other a Title 10, federal military officer.”⁶⁷ This construct maintains the essential elements of the *Perpich* case by enabling the dual-status commander to exercise one authority at a time. This construct would, as Colonel Gereski and Lieutenant Colonel Brown indicate, enable “the deputies [to] coordinate between themselves to ensure operational gaps and seems are identified and addressed.”⁶⁸ This construct allows for greater unity of effort while respecting the authority of the different sovereigns.

The use of a dual-status commander is currently the best option to maintain the power of the respective executives. It permits the President to maintain authority over federal forces, and the Governor to retain authority over the National Guard of the state. The construct is not perfect, in that it is not supported for use in contingency operations by current policy and that it does not respect the authority of the Governor of a state to command the federal military forces provided by the President pursuant to that Governor’s request. Allowing a Governor either operational control or tactical control of federal military forces would alleviate these issues, since the Governor, through his National Guard, could directly task federal forces. This option obviously requires examination, as the same constitutional arguments for this construct could be used to contradict it depending on the interpretation utilized.

Command and Control

The National Guard traces its roots to the colonial militias that were established to protect the colonies. Secretary McHale recognized in his testimony before the Terrorism, Unconventional Threats, and Capabilities Subcommittee of the House of Representatives Committee on Armed Services that “two thirds of the military response for a natural disaster will likely be drawn from the National Guard” and that “the military portal into the state is through

the Adjutant General.”⁶⁹ This section will discuss the potential effects of command and control of federal forces executed by a Governor through the National Guard of the state.

The Adjutant General of each state generally serves as the senior military advisor to the Governor and is responsible for maintaining the National Guard forces of the state in such a manner that they are able to fulfill their Title 10 responsibilities. Title 32 of the United States code provides that every state, territory, and the District of Columbia will have an Adjutant General who will perform duties in accordance with the laws of the jurisdiction and provide information as required to the DOD.⁷⁰ The Adjutant General is normally an employee of a state who maintains “three hats” as in the *Perpich* analogy. The laws of the state dictate the manner in which an Adjutant General is selected. For example: the Adjutant General of South Carolina is elected via popular election; the Adjutant General of Vermont is elected by a vote of the legislature; and the Adjutants General of Rhode Island, Pennsylvania, and Texas are appointed by their respective Governors.⁷¹

Since the Adjutant General is an officer of the state’s National Guard who maintains “three hats” he is an ideal candidate for a contingency dual-status command. This is especially true given the unique role of the Adjutant General. The function of the Adjutant General as a state employee varies from state to state, but generally remains under the direction of the Governor. The Adjutant General is able to maintain awareness of social, political, cultural, economic and other influences within the state due to his stature. Knowledge of these influences would surely benefit any commander charged with responding to a domestic contingency. Additionally, each state organizes the different departments essential to the maintenance of state government in different ways, meaning that an Adjutant General in his role as a state employee may have control of other departments besides the National Guard. A report by the Federal

Research Division of the Library of Congress indicates that “in eight of the 55 states and territories, the adjutant general heads the emergency management or homeland security department.”⁷² The emergency management agency of each state is normally responsible for maintaining the emergency response plans and coordinating the emergency response assets of the state. Given that the role of the Adjutant General as a state employee can overlap as the director of the state’s emergency management agency, it is likely that this relationship may best effect unity of effort since, in this case, the Adjutant General in his civilian capacity, as an employee of the state, maintains control of the agency responsible for coordinating the response efforts of the state.

An Adjutant General with the ability to exercise authority to exercise dual-status command and command over the Emergency Management Agency of the state could possibly exercise the greatest amount of unity of effort by providing the influence necessary to coordinate the actions of all of the forces involved. Besides the potential unity of effort achieved, the Adjutant General in this role may also provide the greatest opportunity to exercise unity of command since all of the forces involved report back to a central figure who is responsible for coordinating the efforts of all response agencies.

The capability of a State National Guard to provide command and control of either state or federal military forces during times of domestic emergency has increased over the last several years. A recent DOD Directive, DOD Directive 5105.83, subject National Guard Joint Force Headquarters – State (NG JFHQs-State), provided guidance to the 54 individual National Guards of each state and territory that provides “policy for and defines the organization and management, responsibilities and functions, relationships, and authorities of the NG JFHQs-State.”⁷³ This DOD Directive formalizes what states have been doing for years, especially since

the September 11, 2001, attacks on the Pentagon and the Hurricane Katrina response efforts in 2005. DOD Directive 5105.83 further states that state Joint Force Headquarters “be prepared to provide one or more JTF [Joint Task Force] command elements (or to serve as component elements of (larger) JTFs that might be established by proper authority) able to exercise command and control of military forces to execute assigned missions.”⁷⁴ Since the Adjutant General is the senior military official within the state who generally is subordinate to the Governor, it is appropriate that the Adjutant General be nominated to serve as a dual-status commander.

The appointment of an Adjutant General as a dual-status commander requires examination. The examples provided earlier, South Carolina, Vermont, Rhode Island, Pennsylvania, and Texas, reveal that Adjutants General are either appointed or elected. A review of the qualifications required to be the Adjutant General in each of these states reveals differences in the rank that an officer must hold to be considered for the position. In Texas, for example, an officer who aspires to be the Adjutant General “must be serving as a federally recognized officer of not less than field grade in the Texas National Guard.”⁷⁵ Thus, the federally recognized rank of a National Guard officer could be a discriminating factor when selecting the dual-status commander.

Additionally, consideration must be given as to whether or not an Adjutant General is still able to be federally recognized as an officer. Title 10 of the United States Code states that an Adjutant General “shall on the last day of the month in which the officer becomes 66 years of age, be separated.”⁷⁶ Being separated means that the Adjutant General is withdrawn from the active roles of the reserve component they serve. The Adjutant General may continue to serve in a state capacity, however, since he is appointed in accordance with state law. This was the

case in South Carolina where the former Adjutant General retired at the age of 73 and in West Virginia where the Adjutant General stated that “when he turns 66 ..., he'll lose federal recognition as a major general and although he could continue his role as an adjutant [general]” he wanted to give someone else the opportunity.⁷⁷

These examples demonstrate that while the Adjutant General is the senior military officer, he may not maintain the proper credentials to be appointed as a dual-status commander. DOD Directive 5105.83 has tasked the states with ensuring that an officer with the proper qualifications to become a dual status commander is pre-designated.⁷⁸

The National Guard will set the stage for follow on military forces, and it makes sense that the National Guard is given a leading role in domestic military response. Diligence must be utilized when nominating an officer of the National Guard as a dual-status commander, but the use of a National Guard officer as a dual-status commander makes more sense when consideration of the social, economic, political and cultural issues of a state are taken into account.

Conclusion

While the nation has come a long way since the September 11 attacks, Hurricane Katrina, and other noteworthy domestic events, the issue of command and control of domestic military forces remains in debate. Tactical control of military forces by a governor via his Adjutant General or other qualified commander accomplishes the goals of Homeland Security Presidential Directives 5 and 8 by enhancing the interoperability of National Guard and federal forces tasked with responding to a domestic incident.

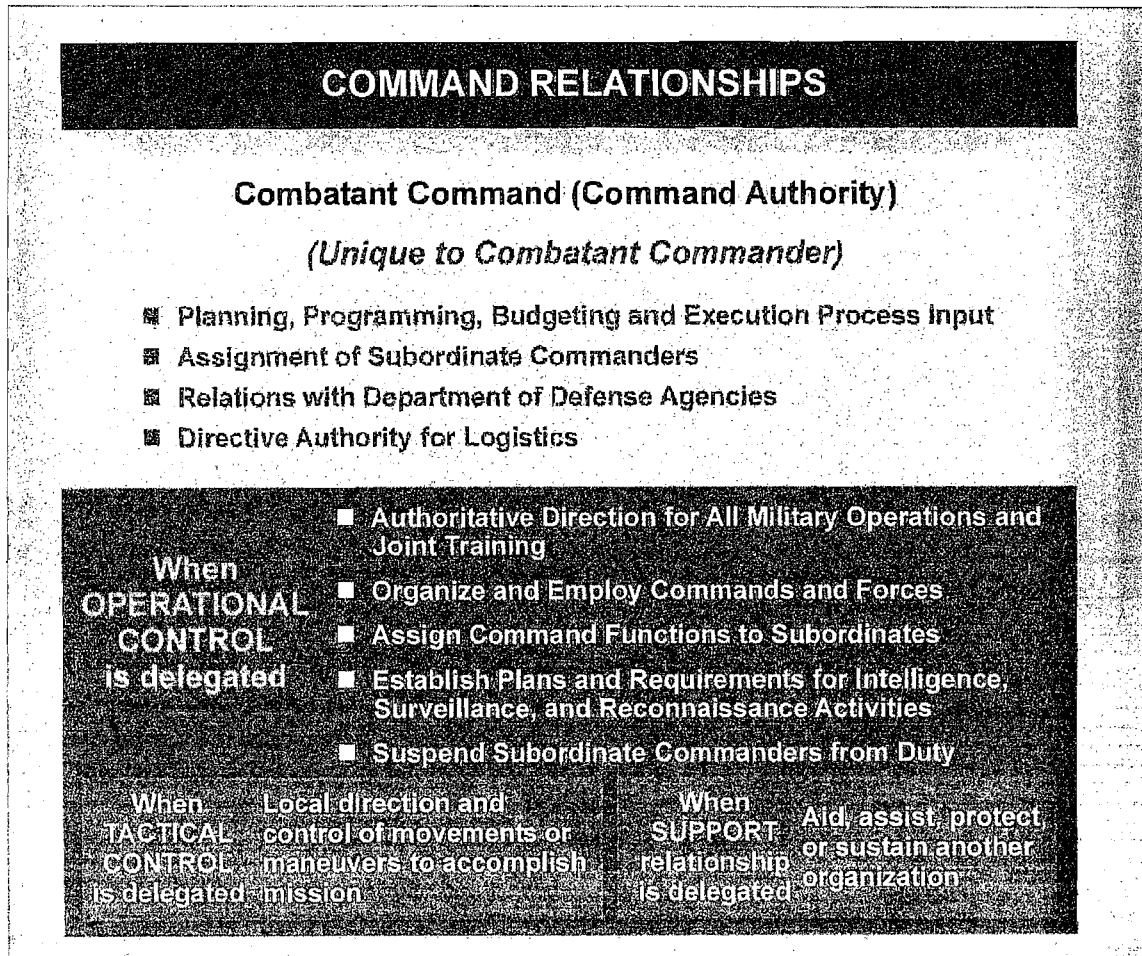
Despite the fact that a partial answer to the question of command and control of domestic forces has been found by the use of a dual-status commander, the concept remains untested

during contingency operations. Moreover, the dual-status commander as currently organized is still subordinate to two executives at the same time which creates divided command structures and the potential for emergency response gaps. The Governor, as the executive responsible for emergency response within his state, should retain command and control of all forces dispatched to his state unless circumstances such as those provided in the *Constitution* dictate otherwise.

The fact remains that the National Guard will be the first military force to respond to a domestic incident and federal military forces will only be dispatched in response to a Governor's request for additional support. The Governor, as the chief executive of a state should, through his organic resources, be able to identify where needs are not being met and be able to task federal troops dispatched in response to his request for additional support. Although there are weaknesses in solely nominating the Adjutant General as a dual-status commander, there is still great benefit to using a dual-status commander, especially if a Governor is willing to provide a state commission to a federal commander tasked with providing support to civil authorities.

The addition of pre-planned response forces such as the Chemical, Biological, Radiological, Nuclear and Explosives Consequence Management Force and the Homeland Response means the relationship between the National Guard of the different states and United States Northern Command needs to be strengthened. Current military doctrine provides that tactical control of federal military forces would allow a Governor to task federal troops while the DOD would retain its original authorities. The writings of Homeland Security Presidential Directive 5 support a Governor in an effort to maintain command within his state, and the changes to Title 32 enable officers of the National Guard or federal military forces to hold a dual-status command.

Tactical Control of federal forces responding to a domestic emergency through the use of a dual-status commander should be granted to the Governor of a state. This will strengthen the response capabilities of the state's military forces and federal military forces alike. It will simultaneously provide the Governor to retain his authority as the chief of the state and allow the President, as Commander in Chief of the Military, to retain his authority by allowing him to exercise his authorities as granted by the *Constitution*.



Source: "Joint Publication 1, Doctrine for the Armed Forces of the United States; Incorporating Change 1, 20 March 2009." May 2, 2007, IV-2.

Source: Department of the Army. *FM 3-0 Operations*. Washington, District of Columbia: United States Army, 2008, B-10.

Table B-2. Command relationships

If relationship is:	Then inherent responsibilities:							
	Have command relationship with:	May be task-organized by: ¹	Unless modified, ADCON responsibility goes through:	Are assigned position or AO by:	Provide liaison to:	Establish/maintain communications with:	Have priorities established by:	Can impose on gaining unit further command or support relationship of:
Organic	All organic forces organized with the HQ	Organic HQ	Army HQ specified in organizing document	Organic HQ	N/A	N/A	Organic HQ	Attached; OPCON; TACON; GS; GSR; R; DS
Assigned	Combatant command	Gaining HQ	Gaining Army HQ	OPCON chain of command	As required by OPCON	As required by OPCON	ASCC or Service-assigned HQ	As required by OPCON HQ
Attached	Gaining unit	Gaining unit	Gaining Army HQ	Gaining unit	As required by gaining unit	Unit to which attached	Gaining unit	Attached; OPCON; TACON; GS; GSR; R; DS
OPCON	Gaining unit	Parent unit and gaining unit; gaining unit may pass OPCON to lower HQ ¹	Parent unit	Gaining unit	As required by gaining unit	As required by gaining unit and parent unit	Gaining unit	OPCON; TACON; GS; GSR; R; DS
TACON	Gaining unit	Parent unit	Parent unit	Gaining unit	As required by gaining unit	As required by gaining unit and parent unit	Gaining unit	TACON; GS; GSR; R; DS

Note: ¹ In NATO, the gaining unit may not task-organize a multinational force. (See TACON.)

ADCON	administrative control	HQ	headquarters
AO	area of operations	N/A	not applicable
ASCC	Army Service component command	NATO	North Atlantic Treaty Organization
DS	direct support	OPCON	operational control
GS	general support	R	reinforcing
GSR	general support-reinforcing	TACON	tactical control

¹ *Chemical, Biological, Radiological, Nuclear and High Yield Explosive (CBRNE) Consequence Management Reaction Force (CCMRF)*. http://www.army.mil/aps/09/information_papers/cbnre_consequence_mgmt_ccmrf.html (accessed December 28, 2010).

² Department of Defense. "Quadrennial Defense Review." *defense.gov*. February 2010. http://www.defense.gov/qdr/images/QDR_as_of_12Feb10_1000.pdf (accessed 20 December, 2010), 18-19.

³ "Quadrennial Defense Review." February 2010. 18-19.

⁴ *Homeland Security Presidential Directive 5: Management of Domestic Incidents*. September 18, 2009. http://www.dhs.gov/xabout/laws/gc_1214592333605.shtm (accessed January 8, 2011).

⁵ United States Department of Homeland Security. "National Response Framework." *United States Department of Homeland Security*. January 2008. <http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf> (accessed December 28, 2010), 1.

⁶ "National Incident Management System." *NIMS Core*. December 2008. http://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf (accessed January 14, 2011), 5.

⁷ "National Incident Management System." *NIMS Core*. December 2008, 5.

⁸ United States Department of Homeland Security. "National Response Framework." *United States Department of Homeland Security*. January 2008. <http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf> (accessed December 28, 2010), 40.

⁹ United States Department of Homeland Security. "National Response Framework," 11.

¹⁰ *About United States Northern Command*. <http://www.northcom.mil/About/index.html> (accessed January 17, 2011).

¹¹ *About United States Northern Command*.

¹² "Title 10-Armed Forces." *Title 10*. June 9, 2010. <http://uscode.house.gov/pdf/2009/2009usc10.pdf> (accessed December 22, 2010), 38.

¹³ "Title 10-Armed Forces." *Title 10*. June 9, 2010, 38.

¹⁴ "Title 10-Armed Forces." *Title 10*. June 9, 2010, 39.

¹⁵ "Title 10-Armed Forces." *Title 10*. June 9, 2010, 39.

¹⁶ "National Defense Authorization Act for Fiscal Year 2011, H.R. 6523." January 5, 2010. www.gpo.gov/fdsys/pkg/BILLS-111hr6523enr/.../BILLS-111hr6523enr.pdf (accessed January 17, 2011), 219

¹⁷ "National Defense Authorization Act for Fiscal Year 2011, H.R. 6523." January 5, 2010, 219.

¹⁸ "National Defense Authorization Act for Fiscal Year 2011, H.R. 6523." January 5, 2010, 220.

¹⁹ "Joint Publication 1, Doctrine for the Armed Forces of the United States; Incorporating Change 1, 20 March 2009." May 2, 2007, IV-4.

²⁰ "Joint Publication 1, Doctrine for the Armed Forces of the United States XV.

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- ²¹ "Joint Publication 1, Doctrine for the Armed Forces of the United States XV.
- ²² "Joint Publication 1, Doctrine for the Armed Forces of the United States XV.
- ²³ "Joint Publication 1, Doctrine for the Armed Forces of the United States IV-9.
- ²⁴ "Joint Publication 1, Doctrine for the Armed Forces of the United States XXI.
- ²⁵ "Department of Defense Directive 3025.18, Subject Defense Support of Civil Authorities." December 29, 2010. <http://www.dtic.mil/whs/directives/corres/pdf/302518p.pdf> (accessed January 19, 2011), 1.
- ²⁶ "Department of Defense Directive 3025.18, Subject Defense Support of Civil Authorities," 4.
- ²⁷ "Department of Defense Directive 3025.18, Subject Defense Support of Civil Authorities," 6.
- ²⁸ United States Department of Homeland Security. "*National Response Framework*," 40.
- ²⁹ *Joint Publication 3-0: Joint Operations, 17 September 2006 Incorporating Change 2 (22 March 2010)*. Washington, District of Columbia, 2010, xiii.
- ³⁰ Joint Publication 3-0: Joint Operations, II-5.
- ³¹ Joint Publication 3-0: Joint Operations, II-5.
- ³² "Department of Defense Directive 3025.18, Subject Defense Support of Civil Authorities," 4.
- ³³ "Joint Publication 1, Doctrine for the Armed Forces of the United States," I-12.
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- ³⁵ Robert T. Stafford Disaster Relief and Assistance Act, 1-2.
- ³⁶ Robert T. Stafford Disaster Relief and Assistance Act, 51-53.
- ³⁷ Robert T. Stafford Disaster Relief and Assistance Act, 28.
- ³⁸ *Homeland Security Presidential Directive 5: Management of Domestic Incidents*.
- ³⁹ United States Department of Homeland Security. "*National Response Framework*," 11.
- ⁴⁰ Joint Publication 1, Doctrine for the Armed Forces of the United States, XV.
- ⁴¹ Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina. *A Failure of Initiative, Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina*. Washington: U.S. Government Printing Office, 2006, 218.
- ⁴² Committee to Investigate the Preparation for and Response to Hurricane Katrina. *Final Report*, 219.
- ⁴³ "Title 10-Armed Forces," 196-198.
- ⁴⁴ "Title 18 - Crimes and Criminal Procedure," 218.

⁴⁵ *Testimony of Lieutenant General Steven H. Blum*. April 24, 2007.

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⁴⁶ *Testimony of Lieutenant General Steven H. Blum*.

⁴⁷ *Testimony of Lieutenant General Steven H. Blum*.

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⁵³ *PERPICH v. DEPARTMENT OF DEFENSE*.

⁵⁴ "Title 10-Armed Forces." *Title 10*, 2199.

⁵⁵ "Title 32 National Guard." August 6, 2010. <http://uscode.house.gov/pdf/2009/2009usc32.pdf> (accessed December 22, 2010), 24.

⁵⁶ *PERPICH v. DEPARTMENT OF DEFENSE*.

⁵⁷ Gereski, Colonel John T., and Lieutenant Colonel Christopher R. Brown. "Two Hats Are Better Than One: The Dual-Status Commander in Domestic Operations." *The Army Lawyer, Headquarters, Department of the Army*. June 2010. http://www.loc.gov/frd/Military_Law/pdf/06-2010.pdf (accessed December 23, 2010), 75.

⁵⁸ "Title 32 National Guard," 21.

⁵⁹ "Title 32 National Guard," 21.

⁶⁰ "Title 32 National Guard," 21.

⁶¹ Clinton Rossiter, introduction and notes by Charles R. Kessler, ed. *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*. New York: New American Library, 2003, 560.

⁶² "Transcript of Admiral James A. Winnefeld, Jr. remarks to the 132nd General Conference of the National Guard Association of the United States." *United States Northern Command Transcripts and Speeches*. August 22, 2010. <http://www.northcom.mil/News/Transcripts/index.html> (accessed January 11, 2011), 8.

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