

NATIONAL SECURITY

REPORT



U.S. SOLDIERS WITH THE 63RD CIVIL SUPPORT TEAM, OKLAHOMA ARMY NATIONAL GUARD, CONDUCT SEARCH AND RESCUE OPERATIONS MAY 21, 2013, IN MOORE, OKLA., AFTER AN EF5 TORNADO. AT LEAST 24 PEOPLE WERE KILLED. (PHOTO BY MAJ GEOFF LEGLER)

Defense Support of Civilian Authorities

Dealing With Natural and Man-Made Disasters

By LTC Kevin Govern, USA (Ret.)

The Department of Defense released DoD Instruction 3025.21, “Defense Support of Civilian Law Enforcement Agencies,” on Feb. 27, 2013, replacing several older publications on military assistance to civilian law enforcement and affecting the way in which Active and Reserve Component forces implement nearly 50-year-old civil disturbance contingency plans in the 21st century. Weeks prior to the devastating Boston Marathon bombings, as well as the El Reno tornado in Oklahoma and summer 2013 wildfires in Arizona and Colorado, DoD issued an instruction clarifying the rules for the involvement of military forces in civilian law enforcement. The instruction establishes DoD policy, assigns responsibilities, and provides procedures for DoD support to federal, state, tribal, and local civilian law enforcement agencies, including responses to civil disturbances within the United States.

The instruction requires that senior DoD officials develop procedures and issue appropriate direction as necessary for defense support of civilian law enforcement agencies, in coordination with the general counsel of the DoD, and in consultation with the attorney general of the United States, including “tasking the DoD components to plan for and to commit DoD resources in response to requests from civil authorities for [civil disturbance operations].” Military officials are to coordinate with civilian law enforcement agencies on policies to further DoD cooperation with civilian law enforcement agencies, and the heads of the combatant commands are instructed to issue procedures for “establishing local contact points in subordinate commands for purposes of

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coordination with federal, state, tribal, and local civilian law enforcement officials.”

These capabilities come from all service components in support of U.S. Northern Command’s (NORTHCOM’s) missions of conducting homeland defense or defense support of civil authorities in the event of a disaster.

The Foundations for Defense Support

These policy changes must be read in light of an evolution, rather than revolution, involving more than a century of federal troop deployments and 200-plus years of legal precedent, starting with the U.S. Constitution. Article I, Section 8, is the wellspring from which military support of civil authorities draws sustenance. Specifically, “Congress shall have power ... to provide for calling forth the militia to execute laws of the union, suppress insurrections, and repel invasions.” In conjunction with this congressional authority, each president “shall take care that the laws be faithfully executed” consistent with Article II, Section 3. Read in conjunction with those provisions, the basis for federal government support, including

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DoD assistance, to state and local authorities arises under the 10th Amendment, inasmuch as “the powers not delegated to the United States by the Constitution, nor prohibited by it, are reserved to the states respectively.”



U.S. ARMY SSG ROBIN MATTSON SPEAKS WITH A RESIDENT WHILE PATROLLING IN MOORHEAD, MINN., MARCH 28, 2009. APPROXIMATELY 500 MEMBERS OF THE MINNESOTA NATIONAL GUARD, UNDER THE DIRECTION OF THE GOVERNOR OF MINNESOTA, CONTINUE TO PROVIDE ASSISTANCE TO CIVIL AUTHORITIES IN SUPPORT OF FLOOD-FIGHTING EFFORTS. (PHOTO BY MSG JASON W. ROLFE)

Presidential emergency power was established in various federal statutes between 1792 and 1878. The Insurrection Act of 1807 was one of the first and most important U.S. laws on this subject, and was followed some 71 years later by the Posse Comitatus Act of 1878, which further limited executive authority to conduct military law enforcement on U.S. soil. Each of those laws still in force has evolved over time—consistent with the times and the popular will expressed through Congress.

The Insurrection Act (codified, as amended, at 10 U.S.C. § 331–335) has consistently exempted federal (and federalized) troops from legal prohibitions on employment and deployment on U.S. soil when: troops provide federal aid for state governments (§ 331), when they are militia and armed forces enforcing federal authority (§ 332), are dealing with interference with state and federal law (§ 333), or where there has

been a proclamation to disperse in times of civil disturbance (§ 334), including Guam and the U.S. Virgin Islands (§ 335).

The Posse Comitatus Act uses a Latin term found in 16th-century English law, meaning “to have the right to an armed retinue.” The Posse Comitatus Act was passed on June 18, 1878, prohibiting federal troops from supervising Confederate state elections in the latter portion of the Reconstruction era. It originally applied only to the U.S. Army, but was amended after the U.S. Air Force was created to include those forces in 1956. It has been applied by DoD regulation to include U.S. Navy and U.S. Marine Corps forces as well. The Posse Comitatus Act reads as follows:

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

The Posse Comitatus Act has prohibited troops under federal authority (Title 10 Active Component troops and “federalized” Title 32 National Guard troops) from generally conducting law enforcement duties on U.S. soil absent congressional or constitutional authority or exception. By comparison and contrast, the Reserve Components of the armed forces are the Army National Guard of the United States, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard of the United States, the Air Force Reserve, and the Coast Guard Reserve (10 U.S.C. § 10101). Federal troop-use exceptions to the Insurrection Act and Posse Comitatus Act would be troop employment and deployment during a biological, radiological, or nuclear event, or intelligence, military equipment, training, advice, or facilities usage, among other matters, in support of civilian law enforcement.

The 1988 Robert T. Stafford Disaster Relief and Emergency Assistance Act authorizes the president to release federal funds and assistance to states for use in disaster response and to declare an emergency or major disaster at the request of a state (or U.S. territory) governor, as well as the mayor of Washington, D.C.

AT THE READY

PRIOR to the tumultuous events of 2013, federal (or federalized) troops were called upon many times to support local and state civilian authorities. Here are some of the notable examples, starting with the early 20th century:

In 1919, President Woodrow Wilson called out federal troops to quell race riots in 20 cities, starting in Chicago.

In 1932, President Herbert Hoover called upon General Douglas MacArthur, with the aid of his staff officers, Majors George Patton and Dwight D. Eisenhower, to send U.S. troops to disperse 20,000 aggrieved World War I veterans (the so-called “Bonus Marchers”) encamped on or near the National Mall in Washington, D.C.

President Harry S Truman sent out federal troops in 1946 against 800,000 striking railroad workers—the largest strike in America’s history—and proposed legislation (which failed to pass) to draft striking workers into the armed forces.

Race Riots and War Protests

President Dwight D. Eisenhower federalized Arkansas National Guard troops in 1957 and sent Active Component troops to Little Rock, Ark., to counter desegregation violence in the aftermath of the landmark *Brown v. Topeka Board of Education* Supreme Court ruling. Five years later, President John F. Kennedy sent 16,000 federal troops under the XVIII Airborne Corps to Mississippi to quell the “Ole Miss Riot,” in conjunction with 123 deputy federal marshals, 316 U.S. Border Patrol officers, and 97 federal prison guards protecting James Meredith, an African American blocked from registering at the university. In 1963 and 1965, military forces also deployed to Tuscaloosa, Tuskegee, and Selma, Ala., to counter racial violence. Domestic disturbances and anticipated



CIVIL UNREST IN WASHINGTON, D.C., AFTER THE ASSASSINATION OF DR. MARTIN LUTHER KING JR. ON APRIL 4, 1968, LED TO THE LARGEST FEDERAL OCCUPATION ON U.S. SOIL SINCE THE CIVIL WAR. (PHOTO BY WARREN K. LEFFLER)

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threats to security gave rise in 1965 to the U.S. Army Intelligence Command (USAINTC), the Army counterintelligence element conducting operations in the continental United States. After the August 1965 Los Angeles Watts rioting, USAINTC provided crisis support and contingency planning for collecting domestic intelligence under the Steep Hill plan to be implemented in the event of deployment of federal troops. That plan,

redesignated Garden Plot in 1967 (and still extant today), proved to be inadequate with respect to aiding Army commanders in civil disturbance situations.

The years 1967 and 1968 were especially significant—and tragic—with respect to military support to civilian authorities. The Detroit riots of 1967 involved 5,000 federal troops and 17,000 police officers quelling one of the deadliest and most destructive riots in U.S. history. Forty-three people died, and 467 were injured. A total of 7,200 arrests were made, and 2,000 buildings were destroyed.

The October 1967 Pentagon riot was the first national protest against the Vietnam War, during which 5,000–6,000 armed Army troops deferred to 300 U.S. deputy marshals to deal with 35,000 protesters. Race riots in 110 cities across the United States broke out following the April 4, 1968, assassination of the Rev. Dr. Martin Luther King Jr., most critically affecting Washington, D.C. In the

A significant change to the law came on Dec. 31, 2011, providing for the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to be called to active duty to provide assistance in response to a major disaster or emergency (10 U.S.C. § 12304). When a governor requests federal assistance in responding to a major disaster or emergency, the secretary of defense may, without the consent of the member affected, order any unit and any member of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the governor's request.

President George W. Bush signed The Homeland Security Act of 2002 on Nov. 25, 2002, creating the Department of Homeland Security (DHS) to “analyze threats, ... guard our borders and airports, protect our critical infrastructure, and coordinate the response of our nation to future emergencies.” Empowering DHS to take a “nationwide approach for federal, state, and local governments to work effectively and efficiently together to prepare for, respond to, and recover from domestic incidents, regardless of cause, size, or complexity,” President Bush then issued a Homeland Security Presidential Directive (HSPD-5) assigning the responsibility of developing a National Incident Management System (NIMS) to the DHS secretary, including a mandate for a National Response Plan (NRP)—later called National Response Framework (NRF). The following HSPD-5 criteria define the terms under which the DHS shall assume overall federal incident management coordination responsibilities:

1. A federal department or agency acting under its own authority has requested DHS assistance;
2. The resources of state and local authorities are overwhelmed, and federal assistance has been requested;
3. More than one federal department or agency has become substantially involved in responding to the incident; or
4. The secretary has been directed by the president to assume incident management responsibilities.

The NRF authorizes immediate action to save lives, prevent human suffering, or mitigate property damage, and establishes a pre-approved authority under *in extremis* immediate response conditions, which are imminently serious conditions resulting from any civil emergency. If time does not permit approval from higher headquarters, local military commanders and responsible officials from DoD components and agencies are

authorized by DoD directive and pre-approval by the Secretary of Defense, subject to any supplemental direction that may be provided by their DoD component, to take necessary action to respond to requests of civil authorities consistent with the Posse Comitatus Act (18 U.S.C. § 1385). All such necessary action is referred to as “Immediate Response.”

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The Framework and Capability for Future Response

The NRF presents the DHS' guiding principles that enable all response partners to “prepare for and provide a unified national response to disasters and emergencies from the smallest incident to the largest catastrophe.” The NRF establishes a comprehensive national all-hazards approach to domestic incident response. When federal military and civilian personnel and resources are authorized to support civil authorities, command of those forces will remain with the secretary of defense. Any DoD elements in the incident area and National Guard forces under the command of a governor will coordinate closely with response organizations at all levels.

When employed or deployed after civil disturbances or natural disasters, federal troops would and will receive direction from FEMA, in accordance with the NRF, to work alone or in concert with other federal agencies to provide personnel, equipment, supplies, facilities, and managerial, technical, and advisory services. Support scenarios could include: a presidential declaration of a major disaster; an order to perform emergency work essential for the preservation of life and property; and a presidential declaration of an emergency.

In all but the instance of a presidential declaration of emergency, the affected governor must request assistance, regardless of any state or local capacity to render disaster assistance.

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largest federal occupation on U.S. soil since the Civil War, the White House dispatched some 13,600 *federal troops*, including the 3rd Infantry Division (Old Guard) and 1,750 federalized D.C. National Guard troops, to quell disturbances across the city.

The year 1970 saw the peaceful as well as lethal use of military force to deal with civil disturbance. The 1970 postal strike involved more than 200,000 workers in 30-plus cities. In response, President Richard Nixon ordered 18,500 troops into New York City, ostensibly to sort mail, but with follow-on efforts of up to 115,000 troops to deploy to 35 cities if the strike continued. While those troops avoided confrontation, the Ohio National Guard killed four unarmed students during Kent State University campus protests.

President Nixon sent federal troops to Wounded Knee, S.D., in 1973 during a 71-day siege of properties occupied by American Indian Movement activists. The FBI cordoned off the area by using U.S. marshals and later National Guard units.

The Late 1970s Through Early 1990s: Garden Plot Revisited

President Jimmy Carter established the Federal Emergency Management Agency (FEMA) in 1978 and shifted disaster relief efforts and civil defense to the new agency.

After Hurricane Hugo damaged or destroyed more than 90 percent of the structures on the island of St. Croix in 1989 and created hazardous oil spills everywhere, President George H.W. Bush sent troops at the request of the territorial governor to quell civil disturbance and provide disaster assistance to more than 50,000 inhabitants. Under the 1967 Garden Plot contingency plan, Joint Task Force 140 brought together Army, Navy, and Coast Guard, with a contingent from the U.S. Marshals Service and the Federal

Bureau of Investigation for Operation Hawkeye, FEMA's first major test of disaster relief capabilities.

Military police, augmented by medical, engineering, legal (including this author), and other support personnel, enforced a dusk-to-dawn curfew—but not martial law—patrolling the island for two months, securing key installations, working with the FBI and the U.S. marshals to apprehend several hundred escaped prisoners and to intercept air-dropped bundles of cocaine valued at more than \$50 million. They also carried out extensive training for the Virgin Islands National Guard and conducted joint patrols with the St. Croix Police Department.

Garden Plot yet again became the contingency plan in early May 1992. The streets of Los Angeles were filled with rioting, arson, murder, and mayhem following the controversial acquittal of officers involved in the Rodney King beating. Some 10,000 activated California National Guard troops served alongside 2,500 Active Component troops and 1,700 federal law-enforcement officers from different agencies across the state to put down disturbances.

In August 1992, FEMA's second major test came as Hurricane Andrew struck the Florida and Louisiana coasts with 165-mph winds, leaving 250,000 people homeless in the affected areas. Within five days, roughly 20,000 National Guard and active



SOLDIERS STAND GUARD NEAR THE U.S. CAPITOL DURING RIOTS SPARKED BY THE ASSASSINATION OF DR. MARTIN LUTHER KING JR. ON APRIL 4, 1968. (PHOTO BY WARREN K. LEFFLER)

duty troops deployed under the Garden Plot contingency plan and FEMA's oversight. This event and FEMA's performance were reviewed by the National Academy of Public Administration in its February 1993 report *Coping With Catastrophe*, which identified several basic paradigms in emergency management and FEMA administration that were causes of the failed response.

Katrina, Rita, and Beyond

Notwithstanding the realignment of FEMA under the new Department of Homeland Security, and the lessons that should have been learned during Hurricane Andrew and

The NRF allows DHS to coordinate federal agencies that work alongside state and local agencies. In the words of past DHS Secretary Michael Chertoff, these scenarios do not “supersede the state and local government,” but “fit with the state and local government in a comprehensive response plan.”

Plans are useful only if reviewed, rehearsed, and effectively implemented when needed. Toward that end, the DHS cautions that effective preparedness is critical for successful

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response. The agency encourages “engaged partnerships” with elected and appointed officials, dedicated emergency management practitioners, nongovernmental organizations, and the private sector by drawing a sharper focus on the value of the following preparedness activities: planning, organizing, training, equipping, exercising, and applying lessons learned. For end-users of the NRF who are preserving and protecting private and public assets, the “mastery of these key functions supports unity of effort, and thus [the] ability to save lives, protect property, and meet basic human needs.”

The National Defense Authorization Act of 2012 enhanced capabilities under the NRF most recently updated in May 2013. It allows Reserve Component service members’ valuable skills to be leveraged at home to save lives, preserve property, and mitigate damage. The new mobilization authority for the Defense Security Cooperation Agency serves as the mechanism to activate federal Reserve Components during a catastrophe, as seen by the rapid response to aid the victims of Hurricane Sandy.

The core competency of the Reserve Component lends itself to such missions. In accordance with direction from the chairman of the Joint Chiefs of Staff, the Army provides the

bulk of the Defense Chemical, Biological, Radiological, and Nuclear Response Force for Fiscal Year 2013 and beyond.

Past is certain to be prologue when it comes to both causes and effects of natural and man-made disasters. The history of the Insurrection Act, the Posse Comitatus Act, and current and future defense policies and regulations strictly delineate the limits of the military’s role in cooperating with civil authorities when disasters strike. Then-Lieutenant Colonel Michael L. Sullivan, one of 1989 Operation Hawkeye’s key military police commanders (see “At the Ready,” p. 43), noted that military forces have tremendous capabilities to “restore public order and essential services following a natural disaster, to train local law enforcement personnel to improve services, and to operate in a complex cultural and political setting.”

In particular, many Reserve Component Citizen Warriors have civilian skills and military training that are invaluable to disaster response. If weapons of mass destruction are ever used on U.S. soil, the Army Reserve’s consequence management capabilities notably will prove indispensable in providing mission-ready Soldiers and equipment. DoD will also continue to use its expertise to protect the nation in cyberspace, working closely with its interagency partners, including the departments of Justice and Homeland Security, to address threats to the United States from wherever they originate.

Today, more than ever before, our Total Force is positioned to provide unique capabilities in support of NORTHCOM’s disaster response and complex catastrophic contingency missions. ▀

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prior troop deployments, federal and state response plans were not adequately revised or rehearsed before the September 11 terrorist attacks in 2001 or the August-September 2005 disasters of hurricanes Katrina and Rita, the first and ninth-most costly and devastating Atlantic hurricanes ever recorded. Within the United States, disaster response and planning was first and foremost a local government responsibility.

States had the option of receiving disaster assistance in accordance with numerous interjurisdictional mutual aid agreements, such as the Emergency Management Assistance Compact (EMAC), under which 20,000 civilians and 46,500 active and National Guard personnel were deployed to the Gulf Coast region to respond to these disasters. Aside from an estimated \$200 billion cleanup cost, the inspector general of the DHS said his office had “received accusations of fraud and waste in the multibillion-dollar relief programs linked to Hurricane Katrina.”

Many agencies, including the military, thereafter sought the opportunity—and resources—to “get well” and become fully equipped and ready to deploy instantly in a crisis. For instance, the then-chief of the National Guard Bureau testified to a

President Jimmy Carter established FEMA in 1978 and shifted disaster relief efforts and civil defense to the new agency.



PRESIDENTS CALLED IN NATIONAL GUARD TROOPS ON SEVERAL OCCASIONS TO QUELL VIOLENCE RELATED TO SCHOOL DESEGREGATION. THIS PHOTO FROM 1956 WAS TAKEN OUTSIDE CLINTON HIGH SCHOOL IN CLINTON, TENN. (PHOTO BY THOMAS J. O'HALLORAN)

congressional committee in September 2005 that the National Guard had only a third of the equipment it needed to respond to domestic disasters and terrorist attacks and would need \$7 billion to acquire the radios, trucks, construction machinery, and medical gear. Of that, \$1.3 billion was required immediately, since National Guard units deployed to Iraq and Afghanistan wisely took the newest equipment with them and then left it there for replacement Soldiers to use. The homefront was left with an outdated and dwindling supply of gear.

The 2008 revisions that resulted in the NRF were put to the test during the fall of 2012, when Hurricane Sandy and the northeaster swept through the Mid-Atlantic and northeastern United States. DoD provided emergency temporary power and pumping capability and distributed fuel, food, cold-weather clothing, and other comfort items as requested by civil authorities. In November 2012, the Army Reserve supported the Hurricane Sandy Response

operations with trained and ready personnel, equipment, and facilities, along with some 4,000 Active Component NORTHCOM personnel and 6,618 National Guard personnel. This event was historically significant, marked by using the expanded mobilization authority. Then-Defense Secretary Leon Panetta responded to requests by several state governors in the anticipated storm path by appointing dual-status commanders in New Jersey, New Hampshire, New York, Maryland, and Rhode Island.

The dual-status commander concept was lauded as a dramatic and positive shift from past practices requiring two distinct chains of command for forces responding to domestic disasters. By these appointments, National Guard officers had the authority to command both federal and state National Guard forces if they would serve as joint task force commanders during a Sandy response. Still, history will judge whether federal troops were employed to the fullest extent they might have been under such authority. ▀