
Send in the Guard: The National Guard Response to Natural Disasters

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For the past one hundred years, the National Guard of each of the states and territories has been at the vanguard of any response to a natural disaster. Composed of citizen-soldiers who serve their country on a part-time basis, the National Guard has been most governors' first choice in responding to natural disasters, such as floods, snowstorms, tornadoes, earthquakes, and forest fires that overwhelm the ability of local responders. For "routine" natural disasters that can be handled wholly with in-state resources, most state's National Guards have well-established procedures for mobilization, employment, and demobilization and are uniquely equipped and situated to augment traditional first responders when a natural disaster exceeds local capabilities. The image of National Guard troops engaged in post-disaster relief operations is familiar to most Americans.

However, the massive destruction caused by Hurricane Katrina forced one of the first large-scale deployments of National Guard units across state lines with over fifty thousand members of the National Guard responding. The amount of personnel and equipment requested by the affected states, and the urgency of the need, quickly overwhelmed the conventional procedures employed for responding to smaller emergencies. Although the National Guard units generally received praise for their operations, their deployment presented numerous challenges for leadership in each state's National Guard, and there were a number of early media stories questioning both the timeliness and efficacy of the response. In addition, there was a large federal response, including the deployment of thousands of active-duty soldiers. The legal differences between National Guard and active duty military confused the situation. Although both the active-duty military and the National Guard may look the same to a detached observer—they both wear the same uniforms and operate the same equipment—the practical and legal differences between the two present real issues to overcome.

Many of the early criticisms of the response are the result of a misapprehension of the nature and mission of the National Guard. This article explains the organization and operation of the National Guard and helps answer some of the questions in the Katrina media stories. It provides a background on the history and mission of the National Guard, the traditional role of the National Guard in responding to natu-

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ral disasters, the different types of National Guard duty and the benefits and limitations of each, the issue of interstate assistance, and some current challenges facing the National Guard. For a more detailed analysis, the Center for Law and Military Operations at The Judge Advocate General's Legal Center and School, Army (www.jagcnet.army.mil/CLAMO), is an outstanding resource for information on domestic operations for natural disaster response.

The National Guard has its origins in the Constitution. Following the colonies' experience with the British Army, two conflicting themes emerged at the Constitutional Convention. On one side there was a fear that a national standing army posed a threat to liberty and to the sovereignty of the states. Contrarily, there was acceptance of the proposition that "modern" warfare required continuous training and drilling. The compromise crafted in the Constitution was to authorize Congress both to raise an army and to organize a militia. Article I, Section 8, Clause 16 empowers Congress "to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

Although this bifurcated system provided an attractive academic solution, it did not work in practice. States trained and operated their National Guards with little input, or money, from the federal government. The long mobilization period to prepare for the Spanish-American War demonstrated that states' militias—and to be fair, the regular Army—were unprepared for modern warfare. In response, Congress passed the Militia Act of 1903, or the Dick Act, 32 Stat. 775, named after Representative Charles Dick, a major general in the Ohio National Guard. The Dick Act increased federal coordination and funding of the states' National Guards. In return for the increased federal funding, National Guard units were subject to inspection by active duty Army officers and had to meet federal standards. The Dick Act also required National Guard units to hold monthly drills and annual training.

Following the Dick Act, several years' iterations of the National Defense Act modified the National Guard into its current form. A 1933 amendment to the National Defense Act codified the dual role of the National Guard. It mandated that—at least on paper—there are two National Guards: the National Guard of the several States, employed in local emergencies and civil unrest, and the National Guard of the

United States, a deployable reserve component of the Army. Coincident with the creation of the Department of the Air Force, the National Security Act of 1947, 61 Stat 495, created the Air National Guard.

The National Guard is organized under Title 32 of the United States Code and consists of a ground component (Army National Guard) and an air component (Air National Guard). Each state, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands maintains a Joint Forces Headquarters commanded by an adjutant general comprising fifty-four separate National Guards. The state establishes locations for the individual units in its territory: the Army National Guard in armories located throughout a state and often providing a focal point for community activity in many smaller neighborhoods. The local nature of these armories is one of the great strengths of the National Guard.

Due to the large amount of personnel and equipment necessary to operate fixed-wing aircraft, Air National Guard units are normally concentrated at an air base. Although these often lack the community-based nature of an armory, their size provides more extensive capabilities than most armories. For example, an air base will contain more robust communications and medical capabilities than most armories. Smaller Air National Guard units, typically those that do not operate fixed-wing aircraft, are located at an Air Guard Station, which have capabilities similar to an armory.

In addition to each state's National Guard, the National Guard Bureau (NGB) is a joint bureau of the Departments of the Army and the Air Force, and it serves as the conduit for communications between the active army and air force and the fifty-four National Guards. 10 U.S.C. § 10,501. NGB does not exercise any command and control over the National Guards, but serves a coordination and policy role. For natural disasters that exceed the scale of an in-state response, NGB may coordinate state responses to ensure maximum unity of effort and avoid the waste of resources.

Each state's National Guard has two distinct missions. The first—as part of the National Guard of the United States—is its traditional federal role to prepare for combat as a reserve force of the standing army and air force. In this role, the federal government provides money to the states to train and equip the National Guard to the same level of proficiency as their active duty counterparts. The second role is to provide trained personnel and equipment to support state and local authorities during natural disasters or civil strife. For state missions, the National Guard falls under the command and control of the state's governor. The state mission makes the National Guard unique among America's military forces.

The National Guard Has Significant Emergency Capabilities

During a natural disaster, a state's National Guard can bring a great amount of personnel, equipment, and expertise to assist in rescue and recovery. However, these capabilities are secondary to those provided by other state agencies, local governments, and the private sector. The National Guard's

capabilities are expected to supplement, but not supplant, the activities of civil government and free enterprise. Pennsylvania's State Emergency Operations Plan (SEOP) provides a good example of the types of support the National Guard can provide. All states have emergency operations plans that delineate similar support missions for their National Guards.

Pennsylvania's SEOP identifies fifteen Essential Support Functions (ESFs) critical to responding to any natural disaster. Of these fifteen, the Pennsylvania National Guard provides secondary support for eleven ESFs. These are: transportation, communications, public works and engineering, emergency management, mass care, resource support, public health, search and rescue, hazardous materials, public safety, and recovery. The four ESFs for which the Pennsylvania National Guard does not provide any support are agriculture, energy, firefighting, and public affairs. The Pennsylvania National Guard does not have primary responsibility for any of the fifteen ESFs—it will always support another lead agency or organization. For example, the Pennsylvania Department of Environmental Protection is the lead agency for hazardous materials, the Department of Health is the lead for public health, and the Pennsylvania Emergency Management Agency is the lead for recovery.

Transportation—in terms of both equipment and personnel—is one of many resources that each state's National Guard can provide during a natural disaster. Most armories are equipped with wheeled vehicles capable of traversing varied terrain. These vehicles include the ubiquitous M998 High Mobility Multipurpose Wheeled Vehicle or HMMWV (pronounced Humvee). The HMMWV is a light tactical vehicle used for light cargo, personnel transport, and ambulance. The HMMWV is highly reliable and can travel on all types of terrain and in all weather while carrying up to five thousand pounds. The National Guard may also use larger vehicles, such as the M-809 and M-939 series of five-ton trucks, to carry greater loads. National Guard units commonly are tasked to provide transportation to other state agencies and to private organizations during natural disasters. For example, during blizzards, it is common for National Guard HMMWVs to transport doctors and nurses from their homes to hospitals.

The National Guard also can provide aviation support during natural disasters. Army National Guard units may provide aviation support in the form of utility helicopters and light fixed-wing aircraft. Many states have Air National Guard units that operate airlift aircraft such as the C-130 Hercules tactical transport or the KC-135 Stratotanker refueling aircraft, which can be converted to carry cargo or personnel. Pennsylvania Air National Guard KC-135 aircraft were among the first to touch down in New Orleans after Hurricane Katrina passed. These aircraft transported Army and Air National Guard troops and their supplies for immediate operations in the affected area.

Communications is another critical resource the National Guard can provide during a natural disaster. Most National Guard units are equipped with extensive communications capability. Armories have access to both land-line and cellular

telephones, Internet, and short-range radios. The National Guard operates high-frequency (HF) radios for long-range communication and ultra high-frequency (UHF) and very high-frequency radios (VHF) for short-range coordination of field activities. In addition, many states have begun to procure 800 Megahertz emergency radio systems for their National Guard units to communicate directly with first responders.

For mobile communications, by November 2006, all states will have fielded Weapons of Mass Destruction (WMD) Civil Support Teams (CSTs). These CSTs are mobile units designed to respond to a potential WMD event. For a natural disaster, the National Guard uses its robust communications capability to establish a command post. The CST has a mobile communication vehicle equipped with radio and satellite communications and Internet capabilities. Some states—such as Florida, Pennsylvania, and Texas—are equipped with the Interim SATCOM Incident Site Command Set (ISISCS), which provides a comprehensive suite of satellite communication, Internet, videoconference, and radio/phone interoperability. The ISISCS were in great demand during Hurricane Katrina. In addition, some states have Air National Guard Combat Communication Squadrons that operate extensive mobile communication equipment, including satellite communication and Internet connectivity.

Unlike for transportation and communication where the National Guard is a principal source of equipment and personnel, the role of the National Guard in the areas of public works and engineering is rather circumscribed. For example, in Pennsylvania, the SEOP limits the National Guard to emergency road-clearing and debris removal. These activities are limited to those essential to prevent any immediate threat to further loss of life or property and to allow for the restoration of emergency services to the affected areas. Specialized engineering battalions in the Army National Guard have the equipment and trained personnel capable of providing debris removal functions. Similarly, Air National Guard Civil Engineering Squadrons—located on all air bases—and stand-alone Rapid Engineer Deployable Heavy Operational Repair Squadron Engineers (RED HORSE) units perform these activities. However, the public should not depend on the National Guard to provide long-term debris removal, which is a task more appropriate for other state agencies or the private sector.

Emergency management is another area in which the National Guard provides extensive capabilities during a natural disaster. Following the events of September 11, 2001, the National Guard Bureau required all states to operate a Joint Emergency Operations Center (JEOC) on a continuous basis. JEOC collects, assembles, analyzes, and disseminates information about an emergency and coordinates National Guard response and recovery operations. Although the JEOC is designed to support the command and control of National Guard forces, it can augment the capabilities of the state's emergency management agency. If the emergency management agency's operations center loses capability because of the natural disaster, JEOC can provide back-up

capability. In addition, many National Guard officers and noncommissioned officers have extensive training and real-world experience in command and control of assigned forces. The National Guard may provide their knowledge and expertise to the state emergency management agency by serving as Emergency Preparedness Liaison Officers (EPLOs). As an EPLO, these personnel may supplement the staff of the emergency management agency during times of extreme tasking.

In the areas of mass care, housing, and human services, the National Guard provides personnel and facilities to augment other state and private capabilities. Most Army National Guard units maintain inherent, albeit limited, medical capabilities. They can provide simple on-the-spot triage capabilities. Their armories may be used as a staging area for the sick, injured, or displaced so long as it does not interfere with mission accomplishment. In the Air National Guard, flying wings have more robust, fixed medical facilities, with support of professional medical personnel. Moreover, the Air National Guard operates the Expeditionary Medical Support System (EMEDS), a transportable soft-sided hospital able to perform surgery, provide dental services, laboratory services, pharmacy services, supply, and in-patient care.

Mass care encompasses the functional area of public health and medical services, or all services relating to the health and wellness of citizens and emergency responders, including emergency medical response, triage, transport and treatment and efforts to prevent the spread of post-disaster diseases. As with mass care, the National Guard assists in medical service operations. The National Guard provides significant mortuary service operations to augment state assets. Finally, the National Guard can provide significant capability to assist with transportation, security, and operations at vaccination/prophylaxis sites or distribution centers.

The National Guard can provide significant capability for Search and Rescue (SAR) operations. National Guard personnel represent a large pool of rescuers equipped to operate in adverse weather conditions. Army National Guard helicopters can be pressed into service for SAR, either to conduct airborne visual searches, or if equipped, to use advanced infrared searches using Forward Looking Infrared technology. As demonstrated during Hurricane Katrina, National Guard personnel may represent the largest number of search and rescue workers, rescuing more than fifteen thousand people and relocating another seventy-eight thousand.

National Guard response related to oil and hazardous materials is limited. Individual units can provide security and transportation for trained responders. However, for small-scale spills of oil and other similar materials, such as hydraulic fluid, all National Guard units are equipped with the training and materials to contain and remediate at least to an initial level of care.

Another significant potential contribution of the National Guard is the function of public safety and security. National Guard units assist in the maintenance of law and order. Army National Guard Military Police units and Air National Guard Security Forces are specially trained in law enforcement oper-

ations. Other Army and Air National Guard units may provide law and order operations. The National Guard can also provide logistical support to state and local law enforcement agencies.

National Guard Deployment Makes a Difference

Before the National Guard can begin to perform these functions, its soldiers must be recalled from their civilian life and placed into a duty status. Yet, because the National Guard has two missions—one state, one federal—there is more than one method to get the National Guard to perform duty. Indeed, there are three duty statuses for National Guardsmen (State Active Duty, Title 10 Duty, and Title 32 Duty) that affect what it can lawfully do. Deciding how to deploy the Guard can be a difficult issue involving political and economic considerations, as proved to be the case in Katrina.

State Active Duty (SAD) is the traditional method to deploy a National Guardsman for duty involving a natural disaster. On SAD, a National Guardsman is under the direct command and control of the governor of the state through the adjutant general. These channels of communication avoid any complications of having to pass through the federal government and allow a rapid response. Moreover, the types of missions the National Guard is able to perform on SAD is limited only by state constitutions and law and is generally broader than the missions allowed under federal law.

There are fiscal and military disadvantages with SAD. Pay and other compensation is in accordance with state law and comes from the state treasury. Some states pay less than the federal duty. For the soldiers, federal benefits and entitlements available while on active duty may be unavailable. For the state, the coffers quickly may be depleted. However, if the President declares an emergency under the Stafford Act, 42 U.S.C. §§ 5121 *et seq.*, the Federal Emergency Management Agency may reimburse the National Guard for pay. Regarding infractions of military discipline, the active duty's system of courts-martial, the Uniform Code of Military Justice (UCMJ), is not available. Although many states have state codes of military justice, these generally contain rather weak punishments and are not very effective at dealing with discipline.

On Title 10 duty, the National Guard is mobilized into federal service. Command and control rests with the President of the United States through the Secretary of Defense. The National Guard may perform any mission authorized to be executed by the active duty military. The UCMJ applies to National Guard soldiers on Title 10 duty.

The two greatest drawbacks of Title 10 duty are command and control of the assigned forces and the lack of the ability of federal troops to support law enforcement. For command and control, the governor loses the ability to direct the mission of National Guard forces on Title 10 duty. The National Guard is treated like any other active-duty military force subject to the orders of the President. Thus, the National Guard loses the flexibility of exercising the command relationships with the governor that have been built over the years.

Active-duty forces—including National Guard on Title 10 duty—may not participate in law enforcement activities. The Posse Comitatus Act (PCA) was passed by Congress in 1878 in the wake of Reconstruction to keep the regular Army from being used for domestic law enforcement, especially to support African American voting. Codified now at 18 U.S.C. § 1385, the PCA states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or 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 PCA generally prohibits active duty military personnel from direct participation in law enforcement activities. These activities would include interdicting vehicles or making arrests on behalf of civilian law enforcement authorities. These prohibitions are in accordance with long-standing law and policy limiting the military's role in domestic affairs. However, Congress has enacted a number of exceptions to the PCA that may be applicable during a natural disaster. The Insurrection Act, 10 U.S.C. §§ 331–335, allows the use of the active-duty military, including National Guard soldiers on Title 10 duty, to suppress insurrections at the request of a state governor, or in extreme situations even without the state's invitation. Although not defined in the statute, an insurrection is commonly understood as any open and active opposition of a number of persons to the execution of the law in a state. In addition, 42 U.S.C. § 97, allows the active-duty military to execute quarantines and state health laws.

Under Title 32 duty, a governor retains the command and control of the National Guard. The federal government provides the pay and other allowances. National Guard soldiers performing duty in this status are considered federal employees under the Federal Tort Claims Act, 28 U.S.C. § 1346. The federal government, and not the state, is liable for any act committed within the scope of their employment. Yet, as these soldiers are under the command and control of the governor, and not in a Title 10 status, PCA does not apply. The only limitations on law enforcement activities are those imposed by state law.

Although Title 32 would seem to be the preferred method of deploying National Guard soldiers during a natural disaster—the federal government pays the bill and the governor retains command—there remains one major hurdle. Title 32 status may only be used if there is specific congressional or presidential authority for the deployment. In the absence of such authority, the federal government may require a state that deploys its National Guard in a Title 32 status to reimburse the federal government for pay and allowances.

Once it is established in which duty status the National Guard will deploy, the next hurdle to clear is to get the soldiers across state lines. If the National Guard has been activated into federal service under Title 10, this is a straightforward step. Under the President's constitutional authority to enforce federal law, or statutory authority to respond to natu-

ral disasters under such statutes as the Stafford Act, the active-duty military may enter a state to provide assistance. However, when the National Guard is under SAD or Title 32 status, it is the Emergency Management Assistance Compact (EMAC) that gives the National Guard of one state authority to enter into and perform operations in another state.

The EMAC is law in every state and territory except Hawaii. It is an interstate agreement that streamlines the assistance one governor can lend another after a natural disaster by providing a framework for flexible response. Congress ratified the EMAC in 1996, 104 P.L. 321. The National Emergency Management Association (NEMA)—a nonpartisan, nonprofit association—administers the EMAC.

The EMAC addresses many of the issues associated with requesting and receiving assistance. It is divided into thirteen articles to address everything from implementation by a contracting state to the authority for states to develop supplemental agreements. Several provisions of the EMAC are particularly critical during a natural disaster.

Article III establishes the procedures for a state to request assistance from another state. The state requesting the assistance is the receiving state; the state providing assistance is the sending state. Under the EMAC, the authorized representative of the receiving state—usually the governor—may request assistance either verbally or in writing. If verbal, the receiving state must confirm the request in writing within thirty days. The request shall provide: a description of the types of emergency services requested, the amount and type of personnel and equipment, an estimate of the length of time of the need, and place and time for staging.

Article V of the EMAC waives any requirement for the sending state to obtain professional licenses to operate in the receiving state. Personnel holding a license, certificate, or other permit from the sending state evincing the necessary professional skills may render assistance as if licensed in the receiving state. However, the Governor of the receiving state may limit the types of services of such assistance by executive order.

For the purpose of tort liability and immunity, Article VI of the EMAC makes personnel from the sending state agents of the receiving state. Neither the sending state nor its personnel rendering aid may be liable for any act or omission in good faith. The immunity applies to not only operations, but also covers claims regarding the maintenance of equipment or supplies. This immunity does not cover willful misconduct, gross negligence, or recklessness.

The sending state is entitled to reimbursement under Article IX by the receiving state for any loss of or damage to or expense incurred in the operation of any equipment. The sending state may seek reimbursement of any expenses incurred in the provisioning of services. Compensation for pay and death benefits of personnel are the responsibility of the sending state and are not reimbursable.

The final provision of the EMAC, Article XIII, applies only to the National Guard. It specifically prohibits the use of military force by the National Guard of any state outside of

that state in any emergency for which the President is authorized by law to call the militia into federal service or for any purpose for which the active duty military would be prohibited by the PCA. Although some argue this provision prohibits the deployment of armed National Guardsman across state lines during an EMAC mission, in practice, states have sidestepped this provision by authorizing arming through a separate agreement.

Katrina Aftermath: Issues and Questions

The affected states of Alabama, Louisiana, and Mississippi invoked the EMAC to request assistance following Hurricane Katrina. The subsequent interstate deployment of over fifty thousand National Guard soldiers to support recovery and relief operations was an unqualified success. However, the National Guard had to overcome numerous challenges to accomplish the mission. Three of the most challenging issues that plagued the mission, and that are still being worked today, are the professional requirements of medical personnel, the duty status of deployed National Guard soldiers, and the need to “federalize” the National Guard.

As previously discussed, Article V of the EMAC waives any requirement for deployed responders to obtain professional licenses in the receiving state. Yet, it is unsettled whether this provision automatically exempts medical personnel because the medical credentialing process is not a license. During Hurricane Katrina, Governor Blanco of Louisiana sidestepped this issue by signing an executive order waving a board review for incoming medical professionals. However, there must be a long-term solution to this issue.

The initial response of soldiers during Hurricane Katrina was through State Active Duty. The federal government quickly realized the massive amount of National Guard soldiers, and the corresponding pay and allowances, would overwhelm the capacity of most states. State Active Duty also created pay inequities as soldiers from different states were paid different amounts under their varied state laws. On September 7, 2005, Deputy Secretary of Defense Gordon England approved funding for the National Guard in a Title 32 status. However, there was no implementing guidance, which created problems for the deployed soldiers as their pay and allowances were switched from their state’s pay system to the federal system.

A final issue, and the most divisive, is the desire to “federalize” the National Guard’s response to large-scale natural disasters. Following Hurricane Katrina, Congress held hearings to investigate methods to streamline relief and recovery efforts. Some questioned the pace of the National Guard’s response and its failure to get “boots on the ground” in the affected area in a timely manner.

In response to these questions, some lawmakers have proposed to federalize the National Guard during such large events. They argue the benefits of this would be twofold. First, such a response would ensure that all military operations—

those conducted by active duty and National Guard soldiers—would achieve unity of effort under the command and control of the federal government. Second, federalization of the National Guard would hasten its deployment.

Neither of these reasons is supported by any shortcomings identified during the National Guard's response to Hurricane Katrina. NGB already has a statutory role to coordinate the operations of the National Guard with the active duty military. In addition, United States Northern Command, the Department of Defense's combatant commander for the continental United States, Alaska, Canada, and Mexico, has a strong working relationship with the National Guard, including National Guard officers on its full-time staff. Thus, unity of effort was achieved by coordination of the National Guard's activities through these two organizations. Regarding timeliness, the numbers speak for themselves. On August 30, 2005, less than twenty-four hours after Hurricane Katrina passed, more than nine thousand National Guard troops were on duty in the affected states. By September 5, 2005, that number increased to thirty-seven thousand. It is hard to imagine the response of a federalized National Guard would occur more quickly.

Most governors are opposed to any proposal to federalize the National Guards' response to a natural disaster. For example, in a September 30, 2005, letter to the

Washington Post, Florida Governor Jeb Bush argued vociferously, "federalizing emergency response to catastrophic events would be a disaster as bad as Hurricane Katrina." Governor Bush's argument highlights the inherent strengths in keeping the National Guard under state control during natural disasters. States already have a proven method to deploy troops rapidly to support relief operations. State control allows local officials to redeploy National Guard assets to best respond to changing conditions, without having to get permission from the federal government. Finally, state control of the National Guard is consistent with principles of federalism that led the founders to draft the militia clause.

The response to Hurricane Katrina demonstrated the National Guard is still vital to the states' ability to respond to natural disasters. Indeed, this has been the mission of the National Guard since 1906, when 1,700 soldiers of the California National Guard responded to the San Francisco earthquake. Although the massive requirements caused by Hurricane Katrina stretched its ability to respond, the National Guard rose to meet the challenge. There is every reason to believe the National Guard will continue to be available to every governor who needs to "send in the Guard" to respond to natural disasters. 🌳