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DUAL STATUS COMMAND FOR NO-NOTICE EVENTS:

INTEGRATING THE MILITARY RESPONSE TO DOMESTIC DISASTERS

LUDWIG J. SCHUMACHER

ABSTRACT:

This article describes the history of the challenges in developing structures and processes to integrate military forces during domestic disaster response, and the recent progress made with regard to employing a Dual Status Command construct for no-notice events. Absent this recent initiative enabled by the Council of Governors, our nation would employ the same construct which was roundly criticized as a major factor and significant causal factor for hampering the military response to Hurricane Katrina – through separate and uncoordinated chains of command, state military forces would be employed under the control of the governor, and any federal military forces would be employed under the control of the president. The new Dual Status Command construct is a transformative initiative which, if implemented, will affect meaningful progress, for the benefit of both state and nation.

It has now been five years since Hurricane Katrina. In that time, we have seen a flurry of documents identifying domestic response lessons for our nation's military, catalogued in reports by the House, Senate, White House, commissions and think tanks. There certainly is abundant evidence that we have been moving in the right direction in many areas. There have been improvements between the National

Guard and the Department of Defense (DoD) in the areas of planning, training, joint exercises, and communications. This article will address the long impasse, and significant recent progress, with regard to the most critical military deficiency identified during Hurricane Katrina: the requirement to properly configure command and control arrangements for state and federal military forces responding to domestic disasters.

Military command relationships for domestic operations need to be sorted out in advance of an event. The proper integration of military forces results in the most-effective, most-coordinated use of limited resources. Integration constructs with the best potential for success are those that recognize state and federal authorities inherent in our federalist system of government. To date, vesting a military commander with both state and federal authorities (e.g. a dual status command) has proven successful during several large-scale planned events, such as national political conventions and the recent presidential inauguration. Governors and the secretary of defense are currently close to jointly endorsing the expanded use of dual status command beyond planned events, to now include no-notice events. This proposal has the potential to enable us to overcome the single greatest challenge currently facing

our nation's military when responding to domestic disasters.

Hurricane Katrina: An Uncoordinated Military Response

Under our federal system of governance, there is a constitutional basis for distinct and separate chains of command for state and federal military forces. During disaster response missions, National Guard soldiers and airmen typically operate under the control of the state governors in a Title 32 or State Active Duty status. The president has historically directed responding federal military forces operating in a Title 10 status under a separate chain of command. The separate chains of command employed during Hurricane Katrina significantly degraded the integration and synchronization of more than 54,000 National Guard and 20,000 Title 10 military personnel from different commands. National Guard and federal responses were coordinated across several chains of command but not integrated, which led to inefficiencies and duplication of effort. Without a means for integrating the response, no one had the total picture of the forces on the ground, the forces that were on the way, the missions that had been resourced, and the missions that still needed completion.¹

During Hurricane Katrina, National Guard forces from all states and territories were deployed to impacted states, and operated under the control of the respective impacted state's adjutant general and governor. President Bush attempted to convince Governor Bush (FL), Governor Barber (MS), and Governor Blanco (LA) to give a state commission to Lieutenant General

Russell Honore and place him in command of their respective National Guard forces, which would have placed the National Guard of the three states under federal command and control. All three Governors refused.

Post-Katrina Failures to Integrate the Military Response

Unfortunately, the lesson that DoD took from Hurricane Katrina was that DoD needed to have command and control over all military forces, including National Guard forces, during domestic emergencies. DoD believed that in major multi-state disasters such as Hurricane Katrina, the Department of Homeland Security needed authority to craft a prioritized and flexible response using all available resources, to include National Guard, federal forces, and non-National Guard reserve forces. The DoD perspective was that during a multi-state event involving limited resources, centralized command and control would be needed to direct resources in accordance with a priority of effort strategy determined by the Lead Federal Agency. DoD's solution was to propose legislation to allow the president to federalize the National Guard in domestic emergencies without the prior knowledge or consent of the governors. Although fifty-one governors signed a letter objecting to the changes when proposed, Congress passed the federal fiscal year 2007 National Defense Authorization Act (NDAA) which included DoD-drafted text amending the federal Insurrection Act to authorize the president to federalize the National Guard and mobilize all other military components to respond to "any serious emergency."

The changes to the Insurrection Act infringed on the primary and sovereign responsibility of each state to prepare for and respond to disasters/emergencies within its borders. In the spring of 2007, the congressionally-chartered Commission on the National Guard and the Reserves issued an interim report stating Governors should be given the authority to control all military forces engaged in domestic operations within their respective states. In its final report, the Commission stated:

The Department of Defense disagreed with the Commission's March 1 recommendation to develop protocols that allow governors to direct the efforts of federal military assets responding to an emergency such as a natural disaster, and incorrectly suggested that such an approach is inconsistent with established law. In fact, similar protocols are employed routinely overseas when U.S. forces are placed under the command of a foreign commander. The process is fully consistent with law and precedent. The President, as commander in chief, can assign a task force of active duty forces as a supporting command to a state military joint task force while retaining ultimate command authority over those federal forces. This decision by the Department to reject the Commission's recommendation, while offering no viable substitute, places the nation at risk of a disjointed federal and state military response to a catastrophe.²

Concurrently with the work of the Commission on the National Guard and Reserves, the governors unanimously advocated for the repeal of the changes to the Insurrection Act. The 2008 NDAA signed by the president on January 28, 2008, repealed all of the 2007 NDAA changes to the Insurrection Act to which the governors had objected.

Recognizing the ongoing lack of communication between DoD and the

governors in this area and others, Congress took action. The creation of the Council of Governors was required by the National Guard Empowerment Act of 2007, passed by Congress as part of the 2008 NDAA. The act directed the president to establish a bipartisan council of ten governors, in order to provide governors a forum to exchange views on matters related to the National Guard and civil support missions with specified federal officials, including the secretary of defense, the secretary of homeland security, and the White House Homeland Security Council.

In the absence of presidential action with regard to the establishment of the Council of Governors, DoD – again without consulting with governors – sought statutory authority in the 2009 NDAA to federalize the National Guard and activate other reserve components for domestic operations. DoD's efforts were unsuccessful with regard to the 2009 NDAA. In the Joint Explanatory Statement submitted by the chairman and the ranking members of the House and Senate Committees on Armed Services regarding the 2009 NDAA, Congress recommended that DoD “engage with the community of governors to work out an understanding of unity of effort during domestic terrorist events and public emergencies.”³ The Statement noted that this issue must be addressed before Congress would consider legislation to implement any DoD proposal to permit the call-up of non-National Guard reservists to assist in responses to disasters.

In the 2010 NDAA, DoD again attempted to increase its own authority to amass and employ significant military forces external to the control of the governors. In June of 2009, DoD

requested Congress grant the secretary of defense the authority to order non-National Guard reserve component forces to active duty to assist in the response to a natural disaster or other emergency outside a terrorist attack. On August 7, 2009, Governor Manchin (WV) and Governor Jim Douglas (VT) sent a letter on behalf of the National Governors Association to DoD, stating in part that without assigning a governor the ability to control all military forces engaged in disaster response, “strong potential exists for confusion of mission execution and dilution of Governors’ control over situations with which they are more familiar and better capable of handling than a federal military commander.”⁴ As a result of the governors’ unified opposition, DoD was again unsuccessful in their legislative attempt to establish authorities for greater access to the reserves.

The Council of Governors

On January 11, 2010, President Obama issued an Executive Order establishing the Council of Governors, designating Governor Chris Gregoire (WA) and Governor Jim Douglas (VT) as co-chairs. The first plenary meeting of the Council was held on February 23, 2010. The Council established five working groups, and charged the Unity of Effort Working Group with addressing the proper integration of military forces during domestic operations. The Council made quick progress on issues through two additional plenary meetings in 2010, working group-specific workshops, and numerous conference calls. Representing a significant collaborative accomplishment, these efforts resulted in the proposal to employ dual status command for no-notice events, known

then as the Contingency Dual Status Commander concept. The secretary of defense opened the policy door with his willingness to consider dual status command authorities to address the Governors’ concerns. This enabled the new commander of U.S. Northern Command (NORTHCOM), Admiral Winnefeld, to identify key middle ground, and shift course to a new vision on this critical issue.

The significant progress made in a very short period of time was only possible through the support and partnership of all stakeholders, including the assistant secretary of defense for homeland defense and America’s security affairs, National Guard Bureau (NGB), and other offices within the Office of the Secretary of Defense and DoD. The continuous support of the adjutants general to the Council of Governors throughout this process was instrumental. A proof-of-concept tabletop was held in Florida on November 5, 2010, involving over sixty representatives from numerous agencies. The Lessons Learned from this event stated “[T]here is consensus among the exercise participants (Florida Division of Emergency Management, Florida National Guard, National Guard Bureau, US Northern Command, Federal Emergency Management Agency-Region IV and the Region IV Defense Coordinating Element) that the Dual Status Commander concept will improve Unity of Effort.”⁵

Dual Status Command during No-Notice Events

Employing a Dual Status Commander (DSC) during a no-notice event provides a cooperative and innovative approach to increase unity of effort and purpose

for state military and federal military support to states by establishing standardized procedures for commanding and integrating state and federal military forces for contingency, or no-notice, operations. The end result is an agreed upon command and control construct which eliminates the time consuming task of synchronizing organizational structures and processes under crisis conditions. This allows an increased focus on military operations to save lives, prevent human suffering, and mitigate great property damage.

The concept of using a DSC for no-notice events capitalizes on established procedures which have been successfully employed for pre-planned events since dual status command was made available in the 2004 NDAA. This unique command construct has been used eight times, at events such as the G8 Summit, the Democratic and Republican National Conventions, and Operation Winter Freeze (a northeastern-border security operation). Dual status command 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 a governor and the authorization of the president. This centralized command and control construct provides both the federal and state chains of command with a common operating picture through the eyes of the DSC. It also enables the DSC to maximize his or her federal and state capabilities, as well as facilitate unity of effort from all assigned forces.

When utilizing a DSC, Title 10 forces and Title 32/State Active Duty forces have separate chains of command. Command authority within each of the separate chains of command may be

exercised by the appointed DSC only through the separate chains of command. While acting pursuant to state authority, the DSC cannot issue orders to federal military forces; while acting pursuant to federal authority, the DSC cannot issue orders to state military forces. As such, the establishment of a DSC does not give the president command of state military forces, or the governor of a state command of federal military forces. The National Guard remains a state entity under the exclusive command and control of the governor, unless federalized, and the DSC has a state chain-of-command that reaches through the adjutant general, to the governor, and directs both Title 32 and State Active Duty National Guard forces in response to the state mission. The president remains the commander-in-chief of Title 10 forces, and the DSC has a federal chain-of-command that reaches through the NORTHCOM Commander, to the secretary of defense, to the president, and directs Title 10 forces in response to federal requests for assistance (RFAs).

National Guard officers are currently being pre-designated for appointment as DSCs for no-notice events. The adjutants general, coordinating through their governors, are nominating National Guard officers who are genuinely the best qualified. When federal military forces and state military forces are employed simultaneously in support of civil authorities in the United States, appointment of a National Guard DSC would be the usual and customary command and control arrangement. Actual appointment of the DSC following a no-notice event will continue to require the approval and consent of the president and the appropriate governor. In order for pre-designated

DSCs to be quickly available to respond to a contingency, required proper consent and authorization memoranda of agreement are being pre-coordinated and maintained ready for signature.

Specialized training and certification to command U.S. military forces in support of civil authorities will enable the DSC to improve unity of effort, ensuring a rapid response to save lives, prevent human suffering, and protect property in the United States. NORTHCOM, through NGB and with the military departments, worked with the adjutants general to develop a standardized training and certification program for DSC candidates. In addition to training and certification, DSCs are expected to participate in regular joint exercises involving state and federal civilian and military personnel.

In order to support a DSC during a no-notice event involving both National Guard and Title 10 forces, NORTHCOM is pre-designating Title 10 officers to serve as the federal or Title 10 Deputy Commander. The Title 10 Deputy Commander's responsibility is to ensure proper execution of the DSC's orders to Title 10 forces and to act as an advisor to the DSC on Title 10 matters. Title 10 Deputy Commanders will establish close and habitual relationships with the pre-designated DSCs, engage senior state leaders, and develop close working relationships within their assigned states and other key partners.

NORTHCOM has also developed a scaleable and tailorable Title 10 staff element, called the Joint Support Force (JSF). The JSF utilizes trained, experienced, and deployable staff elements to work directly for the DSC, integrate with the state National Guard staff, and support the federal military response. The JSF will, when feasible

and requested by the states, participate in state-level exercises to hone integration with the pre-designated DSC and state structures. The development of implementation plans for staff integration of Title 10 personnel into state Joint Task Force and Joint Force Headquarters will address several employment considerations, including ensuring effective mission assignment to both Title 10 and state military forces given the restriction of Posse Comitatus, the development of associated supporting Rules on the Use of Force, and maintaining procedures for reporting federal mission status through federal chains of command. For example, leaders must be aware that military forces supporting a federal Mission Assignment are limited by the scope of that Mission Assignment. Command and control options must be scalable from small footprints (when Title 10 forces are contributed to a disaster, 95 percent of the time the Title 10 force is less than a battalion, requiring a small JSF staff element), to very large (possible integration of U.S. Army North's Contingency Command Post as a large JSF).

Pre-event planning for the employment of a joint force will reap significant dividends in terms of increasing the effectiveness of the military response. For example, tremendous efficiencies will be realized in logistics, including the joint reception, staging, onward movement and integration (JRSOI) of forces. Inadequate control of this strategic movement results in a loss of potential capabilities and capacities. The DSC construct is the vehicle which will enable the long-sought coordinated and synchronized planning effort by joint Title 10 and Title 32/State Active Duty

organizations in advance of an incident. The DSC construct will also result in progress with regard to development of additional pre-scripted mission assignments (PSMA). PSMA contain pre-agreed language about those federal capabilities that are expected to be requested in a Stafford Act-declared major disaster or emergency. The development of additional PMSA, beyond the twenty-seven currently established with DoD, will streamline the process and reduce the time it takes to deploy military resources for many contingency scenarios.

DSC Employment during Multi-State Incidents

To date, all but one (i.e., Operation Winter Freeze, November 2, 2004, to January 28, 2005) of the eight instances in which a DSC was appointed involved operations in a single state. It is highly likely that our nation will face a catastrophic incident affecting multiple states simultaneously. A multiple state response gives rise to several challenges, including ensuring limited resources are appropriately shared among states during a regional event, in accordance with priorities established by states and a Lead Federal Agency. Some have argued that establishing a single DSC with multi-state authorities and responsibilities could assist in centralizing the interstate coordination of limited federal resources. During disasters/emergencies affecting multiple states simultaneously, the proper solution is to employ a DSC in each state.

Any multi-state DSC construct would immediately conflict with the responsibilities of governors for the welfare of the citizens of their states for

several reasons. All agree that limited resources must be allocated in an expeditious manner to the affected state with the most urgent requirements. Title 10 forces are requested, sourced, deployed, and employed using the existing Request for Assistance/Mission Assignment process. When there are not enough resources to go around at the local, state, or federal levels, allocation decisions are made by civilian emergency management personnel at those levels in coordination with elected officials at those levels. Arbitration of civilian response requirements is not properly a military decision, either at the state military or federal military levels. Federal military forces are committed in accordance with the priorities of the Joint Field Office Unified Coordination Group locally and by the Lead Federal Agency nationally. If there are not enough federal military resources to meet the requirements of every state simultaneously, prioritization should continue to be performed using existing structures and processes, regardless of the command and control relationships used to integrate the military forces assigned to each state. For example, if there are Joint Field Offices established in several states, these requests can be prioritized in a multi-state Area Command.

A multi-state DSC charged with prioritizing resources between states would be in the immediately untenable position of being in conflict with the Lead Federal Agency, the federal coordinating official, and the governors of the several states. As a practical matter, the DSC will be from one of the states, and any appearance of favoritism will immediately end the effectiveness of a multi-state DSC. Further, state Joint Force Headquarters are optimized to

perform their domestic operations planning and operations in support of a specific state's emergency management structures and governor. National Guard domestic operations staffs are highly evolved for domestic operations within their state. A multi-state integrated National Guard/Title 10 staff would have the immediate challenge of being responsive in different states with distinct supported civilian structures, missions, authorities, funding, and other issues. Determining which states are assigned limited federal resources should be accomplished exactly as it is now, regardless of military command and control structure.

The DSC as a Foundation for Future Progress

Successful implementation of the DSC construct for no-notice events is likely to provide a necessary prerequisite for resolving an important gap in the law that limits our ability to use all our nation's military capabilities. Federal law currently limits the ability of the president or the secretary of defense to mobilize non-National Guard reservists for natural disasters. During Council of Governor proceedings, several governors have gone on record stating that when they are guaranteed control of military forces operating in their state, including non-National Guard reserve forces, at that time they would be willing to support new authorities allowing increased availability of non-National Guard reservists for disaster response. Approving the DSC concept for no-notice events therefore will resolve the impasse of governor support for congressional action with regard to enacting legislation to allow

mobilization of non-National Guard reservists to help in natural disaster response.

CONCLUSION

The DSC compromise being developed through the Council of Governors will dramatically reshape how the U.S. military responds to an emergency involving both state and federal forces, whether our nation has prior notice of the event or not, enabling the most effective, most coordinated use of military forces for domestic contingencies. Anytime there is a response to an emergency involving both state and federal military forces, a National Guard DSC will normally be appointed to simultaneously direct the operations of both National Guard and federal forces. During multi-state events, a DSC should be appointed in each impacted state to enable effective and coordinated military response throughout all impacted areas. These effects will be achieved while fully adhering to the sovereign status of the governors in managing and directing emergencies within their states and territories and the responsibility of the president in ensuring legal, safe, and effective employment of federal forces.

About the Author

Colonel Ludwig J. Schumacher currently serves as the director, Operations for Military Support, Vermont National Guard. He oversees the organizing, equipping, training, exercising, and, if directed by the governor, employment of 3,700 members of the Vermont National Guard for domestic support to civilian authorities. He holds a Juris Doctor from the University of Connecticut School of Law

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¹ *Hurricane Katrina: Better Plans and Exercises Needed to Guide the Military's Response to Catastrophic Natural Disasters*. GAO-06-643 (Washington D.C.: U.S. Government Accountability Office, May 15, 2006), <http://www.gao.gov/products/GAO-06-643>.

² Commission on the National Guard and the Reserves, "Executive Summary," *Final Report* (January 31, 2008), 21, <http://www.cngr.gov/resource-center/CNGR-reports.asp>.

³ In a letter from National Governors Association, addressed to Assistant Secretary of Defense for Homeland Defense and America's Security Affairs Paul Stockton and dated August 7, 2009 (copy available from the author).

⁴ Ibid.

⁵ "Dual Status Commander Florida Tabletop Exercise," PowerPoint presentation, November 5, 2010, slide #5 (copy available from the author).



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