

## Commentary

# Practical aspects of federalizing disaster response

James L Clark

Col (ret), Highlands, North Carolina, USA

Corresponding author: James L Clark, [editorial@ccforum.com](mailto:editorial@ccforum.com)

Published: 14 December 2005

This article is online at <http://ccforum.com/content/10/1/107>

© 2005 BioMed Central Ltd

*Critical Care* 2006, **10**:107 (doi:10.1186/cc3939)

On 25 September 2005, the US President, responding to growing criticism of the response to Hurricane Katrina, said '... is there a natural disaster – of a certain size – that would then enable the Defense Department to become the lead agency in coordinating and leading the response effort? That's going to be a very important consideration for Congress to think about.' [1]. Five days later his brother wrote, 'As the Governor of a state that has been hit by seven hurricanes and two tropical storms in the past thirteen months, I can say with certainty that federalizing emergency response to catastrophic events would be a disaster as bad as Hurricane Katrina ... Before Congress considers a larger, direct federal role, it needs to hold communities and states accountable for properly preparing for the inevitable storms to come.' [2].

There is no doubt that Hurricane Katrina overwhelmed the local and state governments of Louisiana and, to a lesser degree, the Federal Emergency Management Agency (FEMA). However, as Governor Bush has pointed out, the current system has served us well in the past. Is Louisiana an aberration or must we federalize our response to disaster? It is essential to understand that, under existing law, the federal role is to '... supplement state and local resources in major disasters or emergencies.' [3]. The most significant errors during Katrina were the failure of the city to evacuate the 100,000 residents without cars and the inability of local, state, and FEMA personnel to work together. As we move into an examination of federalizing disaster response, for the sake of brevity we shall focus on these two issues, namely evacuation, and command and control of the response effort.

A federal/state exercise called Hurricane Pam, conducted in July 2004, was a simulation of a category 3 storm hitting New Orleans. It clearly forecast exactly what happened in Katrina and demonstrated that the evacuation of New Orleans would take at least 72 hours [4]. Mayor Nagin declared a mandatory evacuation less than 24 hours before Katrina's landfall [5]. Additionally, no direction was given to potential evacuees

regarding destination [6]. The lateness of the evacuation decree invalidated the state's disaster plan, which calls for buses to take the 100,000 residents without cars out of the city once the Governor declares a state of emergency. Governor Blanco made this declaration 66 hours before Katrina's landfall [4]. Mayor Nagin's failure was partially execution but primarily preparation. Terry Ebbert, the Director of Emergency Management for the city, said 'We always knew we did not have the means to evacuate the city.' [4]. I know Terry Ebbert personally; if he says the plan for evacuation is unworkable, then that is proof enough for me. The evacuation failed because New Orleans was not 'properly prepared' for an inevitable event.

Would having the Department of Defense (DOD), as the President suggested, as the lead federal response agency have ensured a successful evacuation? Certainly not; there was not yet a disaster to respond to. The news media made much of the unused city and school buses [6], but who was supposed to drive those buses? Is it realistic to expect transit and school bus drivers to remain in the city until mandatory evacuation is ordered, or will they have moved with their families out of the city during the voluntary evacuation phase? Many expressed surprise that significant numbers of public employees (including Transportation Security Agency personnel from New Orleans airport) evacuated with the 'civilians'. In fact, they are civilians; the only people that can be ordered to remain in the face of imminent danger are military personnel. Have we come full circle, back to the President's proposal? No; the President proposed a federal solution, using DOD (active duty) military personnel. Jeb Bush is correct – federalizing is not the solution. However, each state has its own military, namely the National Guard.

There are four primary reasons for using the National Guard rather than active duty forces for domestic support: responsiveness, unity of command, readiness, and *posse comitatus*. A governor does not have to request his state's National Guard to participate; he owns it. If the President

---

FEMA = Federal Emergency Management Agency; DOD = Department of Defense.

sends active duty forces, he retains command thereof; it is not possible to subordinate active duty forces to a state government. The National Guard already has a domestic support mission; they are ready, trained and equipped. The active force is not ready for this mission, assuming this mission would damage their readiness in current mission areas. The Posse Comitatus Act is a law dating back to 1878 that forbids use of federal troops in law enforcement [7]. It does not apply to the Coast Guard unless it is assigned to the DOD during war or to the National Guard, unless federalized. The impact of this law on federal troops used in domestic support is incapacitating. To give two examples at either end of the spectrum, federal troops cannot direct traffic, and neither can they defend a policeman who is outnumbered, outgunned, and under attack; federal troops can only defend themselves when they are under direct life-threatening attack. This is not a legal scholar's classroom interpretation of the law. These were part of the formal DOD rules of engagement I worked under as the Commanding Officer of 23rd Marines while conducting counter-narcotics operations on the Mexican border.

Turning to the issue of local, state, and FEMA personnel not functioning as a team, the controversial statement by Michael Brown – former FEMA Director – that Louisiana was dysfunctional well before Katrina's landfall [8] appears to be well supported by the facts. 'The state and local government [in New Orleans] command and control there were nothing short of pathetic ... leaders refused to communicate with each other and the Federal government elements ... essential personnel were AWOL ... decision making was non-existent.' [9]. Frustrated with state incompetence, the President sought to federalize the relief effort on 2 September; Governor Blanco refused. 'We're still fighting over authority', Mayor Nagin said the following day [10]. Martha A Madden, former Secretary of the Louisiana Department of Environmental Quality, said she believes that a critical systemic breakdown occurred at the moment the levee broke. She said contingency plans have been in place for decades but were either ignored or improperly executed [11]. Would replacing FEMA, as lead federal agency, with the DOD have prevented meltdown of state government? Only if DOD supplanted, rather than supplemented, state government. When the President proposed federalizing the National Guard and the recovery, it was an attempt essentially to supplant state government. When the Governor refused, martial law was discussed both in the media and within the Whitehouse.

Most legal scholars define martial law as the suspension of habeas corpus (imprisonment without due process or appeal) and military assumption of police powers. Martial law was severely limited by the Supreme Court in 1863; it can only be imposed when civil authority (the courts) cannot operate [12]. The Posse Comitatus Act effectively eliminates federally imposed martial law except in three circumstances [13]: insurrection or rebellion, crimes involving nuclear materials,

and emergency situations involving chemical or biological weapons of mass destruction [13]. I use Northcom's website as reference here [13] to demonstrate that their Commander is fully aware of the limitations on the President's power in this area. Forget (federal) martial law in disasters – it's not going to happen. However, each state has laws granting the governor exceptional executive powers. In Louisiana it is called a state of public health emergency, and when declared it permits the governor to suspend laws, order evacuations, and limit sale of items such as liquor and firearms [14]. This power essentially equates to martial law; however, note that it is implemented and enforced by the state (another argument for using the National Guard). Governor Blanco declared this state of emergency on 26 August 2005, to expire on 25 September 2005.

As for FEMA's performance, most of the criticism is the result of one of three factors – misunderstanding of FEMA's role, underestimation of the scope of Katrina's damage, and ignorance of the incompetent performance of the state authorities – or a combination of two or all of these factors. FEMA is not a first responder, has no internal response assets, and consists of less than 3000 employees spread nationwide. FEMA coordinates federal response assistance through the state Emergency Operations Center. If the Emergency Operations Center is dysfunctional, then FEMA cannot perform its mission. Katrina's damage was spread over 90,000 square miles, with the most severe damage in Mississippi, not Louisiana. The unified command and control that FEMA depends on was functional in Florida, Alabama and Mississippi, but was absent in Louisiana [15]. Has FEMA suffered a decline after being folded into the Department of Homeland Security? Absolutely, but this was not the critical factor in FEMA's poor performance [16]. Finally, it is becoming obvious that exaggerations of mayhem by officials and rumors repeated uncritically in the news media slowed FEMA's response in New Orleans [17].

In conclusion, Governor Bush is correct. We must hold local and state governments accountable for proper preparation for disasters. The President is partially correct – the military must play a greater and earlier role in catastrophic-scale disasters – but it must be the National Guard, not the DOD, that is involved. An active duty soldier or Marine would make no better policeman than a policeman would a combat infantryman. Finally, FEMA should be removed from the Department of Homeland Security and restored to its previous status.

## Competing interests

The author(s) declare that they have no competing interests.

## References

1. VandeHei J, White J: **Bush urges shift in relief responsibilities.** *Washington Post* 2005, **26 September**:A12
2. Bush J: **Think locally on relief [OpEd].** *Washington Post* 2005, **30 September**:A19.

3. *Congressional Research Service Memorandum: Hurricane Katrina – Stafford Act Authorities*. 12 September 2005. Internal congressional memo to representative John Conyers. ([http://www.uscongress.com/section/pdf/conyers\\_9\\_14.pdf](http://www.uscongress.com/section/pdf/conyers_9_14.pdf))
4. Glasser SB, Grunwald M: **The steady buildup to a city's chaos**. *Washington Post* 2005, **11 September**:A01.
5. Yourish K, Stanton L, Tate J: **Hurricane Katrina: what went wrong?** *Washington Post* 2005, **11 September**:2.
6. Pierre RE: **New Orleans mayor faces tough questions**. *Washington Post* 2005, **10 September**:A14.
7. US code 18 section 1385 ([http://caselaw.lp.findlaw.com/scripts/ts\\_search.pl?title=18&sec=1385](http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=1385))
8. Hsu SS: **Brown defends FEMA's efforts**. *Washington Post* 2005, **28 September**:A01.
9. Anonymous: **FEMA under scrutiny in hearings**. *Washington Post* [[http://www.washingtonpost.com/wp-dyn/content/discussion/2005/09/27/DI2005092701348\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/discussion/2005/09/27/DI2005092701348_pf.html)]
10. VandeHei J: **Officials deal with political fallout by pointing fingers**. *Washington Post* 2005, **9 September**:A17
11. White J, Whoriskey P: **Planning, response are faulted**. *Washington Post* 2005, **2 September**:A01
12. **ex parte Milligan (71 US 2; 1866)**. [[http://www.usconstitution.net/consttop\\_mlaw.html#milligan](http://www.usconstitution.net/consttop_mlaw.html#milligan)]
13. **Posse Comitatus Act** [<http://www.northcom.mil/index.cfm?fuseaction=news.factsheets&factsheet=5#pc>]
14. The US Constitution Online: **Constitutional topic: martial law**. [[http://www.usconstitution.net/consttop\\_mlaw.html](http://www.usconstitution.net/consttop_mlaw.html)]
15. Testimony of Michael D Brown before Congress. 27 September 2005.
16. Glasser SB, White J: **Storm exposed disarray at the top**. *Washington Post* 2005, **4 September**:A01.
17. Pierre RE, Gerhart A: **News of pandemonium may have slowed aid**. *Washington Post* 2005, **10 October 2005**:A08.