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# Public Health Law & (and) Military Medical Assets: Legal Issues in Federalizing National Guard Personnel

James Balcius

*Naval Manpower Personnel Education Training Command*

Bryan A. Liang

*California Western School of Law*

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## Public Health Law & Military Medical Assets:

### Legal Issues in Federalizing National Guard Personnel

*James Balcus\* & Bryan A. Liang\*\**

#### ABSTRACT

*Background.* Public health actions may involve military medical professionals supporting legally- mandated public health efforts.

*Issue.* The power of military medical professionals to enforce public health mandates is dictated by the specific laws under which they act. If National Guard members are “federalized” through activation under Title 10 of the *U.S. Code*, they are prohibited from engaging in law enforcement activities under the federal Posse Comitatus Act. Yet if they are activated under Title 32, they are under state control and hence are able to engage in law enforcement efforts, which may include public health functions. This

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\* Medical Service Corps officer assigned to Naval Manpower Personnel Education Training Command (Full-time Out-service student). B.S. Zoology University of Massachusetts; M.S. Biology 1998, Worcester State College; M.S.P.H. Global Emergency Preparedness & Response Program 2008, San Diego State University. Assistant Director of Aviation Survival Training Center Miramar, California, 2004 – 2006; Aeromedical Safety Officer, Marine Aircraft Group 39, Camp Pendleton California, 2000 – 2004; Division Officer Aviation Survival Training Center Lemoore, California, 1999 – 2000; Aerospace Physiologist, Naval Operational Medicine Institute, Pensacola, Florida, 1998 – 1999; Biological Sciences Assistant, United States Army Research Institute of Environmental Medicine, Natick, Massachusetts, 1994 – 1998; Infantryman, Massachusetts Army National Guard, Stoughton, Massachusetts, 1989 – 1994.

\*\* Executive Director and E. Donald Shapiro Distinguished Professor of Health Law, Institute of Health Law Studies, California Western School of Law; Adjunct Associate Professor of Public Health, Global Emergency Preparedness and Response Program, College of Health and Human Services, San Diego State University; Co-Director and Adjunct Associate Professor of Anesthesiology, San Diego Center for Patient Safety, University of California San Diego School of Medicine; B.S. Massachusetts Institute of Technology; Ph.D. University of Chicago Graduate School of Public Policy Studies; M.D. Columbia University College of Physicians & Surgeons; J.D. Harvard Law School.

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legal subtlety may delay effective public health responses to emergencies and disasters.

*Discussion.* Efforts to address this legal conflict must take into account the law and policy implicated in public health activities and emergency and disaster response. Understanding the basis of the conflict, the relevant public health tools, such as quarantine and compulsory vaccination, and legal liability issues are imperative to drive appropriate reform.

*Conclusion.* Through assessments of legal conflicts and public health activities, clarification of law can result to allow effective use of military medical assets in emergency and disaster response.

## I. INTRODUCTION

Since its inception, the United States has prohibited the use of its military in civil law enforcement actions.<sup>1</sup> The tension between the state's police powers and the federal government's role in protecting national interests has been delicately balanced.

An example of this balancing is the use of the National Guard, which can be activated by state governors in emergency and disaster situations to address public health issues.<sup>2</sup> The National Guard may only be integrated in federal efforts under highly circumscribed situations as to limit integration of the National Guard as federalized troops.<sup>3</sup>

However, the underlying goal in emergency and disaster response law is to facilitate the complex coordination of all levels of government, including federal and non-federal military medical personnel, in the effective mitigation of a large scale public health crisis, while avoiding complicated legal restrictions. Retrospectively, well-documented civil law enforcement issues have arisen when military personnel were incorporated into the disaster response for support of traditional law enforcement actions, but were not considered when response efforts encroached upon public health law enforcement.<sup>4</sup>

Under ordinary circumstances, public health endeavors are inherently affected by myriad legal issues for medical professionals, first responders,

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1. William L. Shaw, *The Interrelationship of the United States Army and the National Guard*, 31 MIL. L. REV. 39, 40-55 (1966).

2. U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE PLAN 8 (2004), available at <http://www.iir.com/global/FusionCenter/NRPbaseplan.pdf>.

3. See U.S. CONST. art. I, § 8, cl. 16.

4. DONALD J. CURRIER, U.S. ARMY WAR COLLEGE, THE POSSE COMITATUS ACT: A HARMLESS RELIC FROM THE POST-RECONSTRUCTION ERA OR A LEGAL IMPEDIMENT TO TRANSFORMATION? 1, 9-11 (2003), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB249.pdf>; see John R. Brinkerhoff, *The Posse Comitatus Act and Homeland Security*, J. HOMELAND SECURITY (Feb. 2002), <http://www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm>.

and victims. Yet for the benefit of the polity, during an emergency and disaster response, where time-critical allocation of resources is essential and citizens' lives are at stake, the entry of military medical personnel in support of civil public health objectives cannot be impeded by laws that might force these individuals to question their status as responders in any capacity. However, it is this situation that confronts responders in the current legal infrastructure.

For example, in an attempt to facilitate federal military entry into disaster response management, recent changes to the Insurrection Act, which were repealed subsequently, specifically inserted National Guard troops as federalized military medical personnel into a legal quagmire of disaster-related laws and state police powers. The debate surrounding the Insurrection Act of 2007, and the Act's ultimate repeal, prompt further examination of how best to ensure proper entry of federal military medical personnel into the realm of disaster response, with the appropriate legal protections to ensure timely and adequate support of local and state public health systems. These include laws, designed more for military activities over a century ago, that continue to dictate how those in the National Guard can respond to emergencies and disasters.<sup>5</sup>

Hence, this article examines how federalized military medical professionals, including federal active duty personnel such as those in the Army, Navy, Air Force, and Marines, and reserve state-based National Guard that are "federalized" under federal law are potentially restrained from public health law enforcement, and describes possible methods to mitigate this result. Part II reviews the statutory basis for the federal government's use of military forces in times of emergency, and considers the constitutional authority, the Posse Comitatus Act (PCA), the Insurrection Act (IA), the John Warner National Defense Authorization Act of 2007, and the Stafford Act. In Part III, the article describes the use of the military, both National Guard and federal Department of Defense (DoD) personnel (that is, Army, Navy, Air Force, Marines) as disaster response resources supporting civil authorities. Specifically, the part examines mechanisms of National Guard activation and current DoD instructions. Part IV addresses public health law concerns, such as quarantine, compulsory vaccination, and medical liability, as they relate to federalized medical military personnel directed to act outside of the IA. Part V then discusses some recommendations and options to address the issues and concerns raised. Finally, in Part VI, the article concludes with an emphasis on addressing policy-based barriers to effective utilization of federalized military medical personnel.

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5. Posse Comitatus Act, 18 U.S.C. § 1385 (2006); *see* Insurrection Act, 10 U.S.C. § 333 (2006).

## II. LEGAL BASIS

*A. Constitutional Authority: Permission from the States*

The basic construct of the United States Constitution authorizes the federal government to employ armed military forces in times of civil disturbance. Article I, Section 8 provides “for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions,” which thereby allows state militias to be deployed as federal entities.<sup>6</sup> This constitutional provision also assigns fiscal responsibility for federalized troops to the federal government, while yielding militia training responsibilities, for instance, “providing 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, . . . the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress,” to the respective states.<sup>7</sup>

The Constitution assigns the President the responsibility of commander in chief over any federalized state militia.<sup>8</sup> Article II, Section 2 establishes the chain of command for federalized troops by stating “[t]he President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States.”<sup>9</sup>

To employ federalized troops, the President must confer with the state to determine if it will accept armed assistance as defined in Article IV, Section 4.<sup>10</sup> This Section states, “[t]he United States shall guarantee to every state

6. U.S. CONST, art. I, § 8, cl. 15.

7. *Id.* cl. 16.

8. U.S. CONST. art. II, § 2, cl. 1. For the purposes of this article, the term “militia” refers to state sponsored and funded uniformed military units organized for federal and state missions (i.e., the National Guard). The term “militia” also refers to unorganized, state-funded military units comprised of unpaid volunteers who serve in support of state emergency response, homeland defense, and homeland security missions. Title 32, § 109 of the *U.S. Code* authorizes state establishment of the latter. The California State Military Reserve is an example of a state-sponsored unorganized militia and is not discussed for the purposes of this article. Shaw, *supra* note 1 at 44; *see also* California State Military Reserve Act, CAL. MIL. & VET. CODE § 551-53 (2007). These state uniformed services are staffed by state resident volunteers who are not financially compensated for their service, unless the state places them on active-duty status. *Id.* These forces are state entities whose members are ineligible for federalized service under Titles 10 and 32 of the *U.S. Code*, and are not available for service via the Insurrection Act. 32 U.S.C. § 109(c). State militias provide support as “augment staff” to National Guard forces to disaster response, military support of civil authorities, and Homeland Security missions. Emory J. Hagan, III, Brigadier General, CSMR Commanding General, Commanding General’s Mid-Year Update (June 30, 2008), <http://www.calguard.ca.gov/casmr/Pages/default.aspx>.

9. U.S. CONST. art. II, § 2, cl. 1.

10. *Id.* art. IV, § 4.

in this Union a Republican Form of Government, and shall protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”<sup>11</sup> These constitutional authorities are well established in case law and have been further refined through U.S. history as delineated in various laws.<sup>12</sup> Under the Presidential Reserve Call-Up Authority (PRCA), the state militias may be called into federal service under command of the President, acting as the commander in chief.<sup>13</sup>

*B. The Posse Comitatus Act: Additional Limits on Federal Power*

The presidential power to deploy armed forces upon the populace is defined in Title 10, Chapter 18 of the *U.S. Code (Code)*, Military Support for Civilian Law Enforcement Agencies, commonly referred to as the Posse Comitatus Act (PCA).<sup>14</sup> This law limits the presidential use of federal assets to avoid infringing upon the police powers of the state, while providing a mechanism for the use of armed forces against US citizens should the need arise.<sup>15</sup>

Taken literally, *posse comitatus* means the “force of the county.”<sup>16</sup> The Act is actually a criminal statute of the *Code*. The PCA states in its entirety:

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.<sup>17</sup>

The brevity and vagueness of the PCA has resulted in numerous exceptions to the law as it exists today.<sup>18</sup> To date, no president has been prosecuted for violations in relation to the law.<sup>19</sup>

The PCA has a long and convoluted history that has led to minor and gross misinterpretations of the law in theoretical discussion, practical

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11. *Id.*

12. Shaw, *supra* note 1, at 43-44.

13. 10 U.S.C.S. § 12304 (LexisNexis 2008).

14. Posse Comitatus Act, 18 U.S.C. § 1385 (2006).

15. *See id.*

16. Brinkerhoff, *supra* note 4 (citing COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY (1971)).

17. 18 U.S.C. § 1385

18. CURRIER, *supra* note 4, at 9-11, 17-28.

19. Craig Trebilcock, *The Myth of Posse Comitatus*, J. HOMELAND SECURITY (Oct. 2000), <http://www.homelandsecurity.org/journal/articles/Trebilcock.htm>.

discourse, and tactical implementation.<sup>20</sup> In 1788, Alexander Hamilton's *Federalist Paper No. 29* influenced the Constitutional Ratification debates by introducing the term *posse comitatus* into doctrinal discussion at a time when lawmakers were drafting and authorizing the language of the IA.<sup>21</sup> Several historical events in the years between 1788 and 1878 would play significant roles in the eventual drafting and incorporation of the PCA into law.<sup>22</sup> For example, prior to the PCA's passage, certain conflicts highlighted the need for a federal response mechanism to quell civil disturbances,<sup>23</sup> including the Whiskey Rebellion, Shay's Rebellion, and the Dorr Rebellion.<sup>24</sup> These cases of civil unrest stimulated congressional and

20. See *id.*; see also Brinkerhoff, *supra* note 4.

21. THE FEDERALIST NO. 29 (Alexander Hamilton); Eugene Visco, *More Than You Ever Wanted to Know About Posse Comitatus 3-4* (2001) (on file with author).

22. See Visco, *supra* note 21, at 3-20.

23. See Brinkerhoff, *supra* note 4; Visco, *supra* note 21, at 12-15. Several incursions upon the Insurrection Act and the use of federal forces upon U.S. citizens occurred before the PCA would be formalized with regard to law enforcement, such as vigilante actions in San Francisco in 1851, the Kansas Troubles from 1854 to 1857, the Utah Expedition of 1857, and the Harpers Ferry Incident of 1859. Visco, *supra* note 21, at 12-15. Ironically, it would be the aftermath of the Civil War and the political pressures of Southern states to countermand the use of *posses comitatus* during the post Reconstruction period that would give birth to the PCA. Brinkerhoff, *supra* note 4. The use of *posses comitatus* was brought forth as a means for Southern politicians to secure escaped slaves. *Id.* During the Reconstruction period, federal forces provided the essential authority to facilitate the Reconstruction and restoration of civil order to the Southern states. *Id.* In due time, the federal presence in the South would be perceived as overbearing and enforcing unpopular laws. Visco, *supra* note 21, at 22; see Brinkerhoff, *supra* note 4. The Southern democrats favored a return to a regionally-administered legal system. Visco, *supra* note 21, at 22. This would provide further impetus to remove federal armed forces from the South, and the Southern-controlled Congress of 1878 eventually passed the PCA into law. *Id.*; see Brinkerhoff, *supra* note 4.

24. ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878*, at 4-7 (1988); see also Visco, *supra* note 21, at 6-8; CURRIER, *supra* note 4, at 1-3. Daniel Shay led the first domestic insurrection in the newly-formed Union, which occurred from 1786 to 1787 in central Massachusetts. Visco, *supra* note 21, at 2. In response to excessive taxation and confiscation of land and property to pay war debts incurred from the Revolutionary War, internal discord between the state government and the affected constituency escalated to conflict. COAKLEY, *supra*, at 4. Local farmers of western Massachusetts clashed with state militia forces under the command of Massachusetts Governor James Bowdoin. *Id.* at 5-7. This pivotal incident had a unifying effect, and drove the central government to pass stronger legislation allowing the federal government to respond to and quell insurrections. *Id.* at 7. The Whiskey Rebellion of 1794 stemmed from the federal government's taxation of distilled spirits, and resulted in the first application of military forces against the domestic population. *Id.* at 28-29; see also CURRIER, *supra* note 4, at 8. The disparity of the tax burden on small, individual producers, whose taxes were assessed by the gallon, while large producers were assessed at a flat rate, served as a rallying point for the general populace to organize and rebel against the federal government. *Id.* at 30-31. President Washington suppressed the insurrection under the authority of the Calling Forth Act of 1792. Visco, *supra* note 21, at 6. Thomas Wilson Dorr led the Dorr Rebellion of 1842, which was an insurrection occurring after a failed effort to create a new state constitution in Rhode Island. COAKLEY, *supra* note 24, at 120-21; see also Visco, *supra* note

presidential discussions concerning the utilization of federal forces against US citizens.<sup>25</sup> The use of federal military forces to recover fugitive slaves for Southern slave owners elicited the need for federal assistance to civilian law enforcement prior to the Civil War. After the Civil War, Southern democrats introduced the PCA into legislation to prohibit the use of federal military forces for civilian law enforcement.<sup>26</sup>

Courts consider military actions be in violation of the PCA, and construe them as prohibited civil law enforcement actions, if the actions fulfill any of the following: (1) “the military regulate[s], proscribe[s], or compels civilians as part of the operation;” in other words, the military engages in an action involving search, seizure, or arrest of a civilian,<sup>27</sup> (2) “the military directly and actively participate[s] in the law enforcement activity,” including use of equipment or resources; the military action is classified as violative of the PCA if an exception for the specific equipment or resource does not already exist,<sup>28</sup> or (3) “the military activity pervade[s] the activities of the civilian authorities;” that is, the military participation overtly influences the law enforcement outcome.<sup>29</sup>

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21, at 8-9. Rhode Island Governor Samuel Ward King requested federal assistance, as tensions rose amongst Dorr supporters who were attempting to seize the Providence Armory. *Id.* at 121. President John Tyler viewed the Dorr Rebellion as an attempt to undermine the federal government’s guarantee of the states’ right to a republican form of government. *Id.* at 119-20. President Tyler recognized the existing state government as the seat of power in Rhode Island, and subsequently, efforts by Dorr and his supporters were stifled. *See id.* at 121, 125.

25. *See* Brinkerhoff, *supra* note 4.

26. COAKLEY, *supra* note 24, at 344. In 1850, the Fugitive Slave Act required that fugitive slaves be returned to their owners. Brinkerhoff, *supra* note 4. To execute the recovery of slaves, U.S. Marshals were empowered to recruit and direct a *posse comitatus* at the regional level. *Id.* In some instances individuals recruited into a *posse comitatus* refused to act, and political discussions ensued in the administrations of Presidents Fillmore and Pierce as to the use of federal military members as part of local posses utilized by U.S. Marshals. Visco, *supra* note 21, at 10-12. Summarily, federal troops were allowed to be employed in the recovery of fugitive slaves. *Id.* at 10. U.S. Marshals needed only to seek the certification of district judges or that Supreme Court justice, thus completely circumventing the requirement of congressional authorization of federalized forces in the execution of civil law. *Id.* The Cushing Doctrine under President Pierce further entrenched the use of *posse comitatus* by defining power of the U.S. Marshal to summon the full “able-bodied force of his precinct,” including regular forces and militias, and to negate the requirement of presidential authorization for the use of federal forces in law enforcement. *Id.* at 11. In an effort to appease the Southern interest in returning slaves to their respective owners, the use of federal forces to execute civil laws did not address the nuances of federal forces engaging in civilian law enforcement. *Id.* at 12.

27. CURRIER, *supra* note 4, app.1 at 17 (citing *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1975)).

28. *Id.* (citing *United States v. Red Feather*, 392 F. Supp. 916, 922 (D.S.D. 1975) and *United States v. Hartley*, 678 F.2d 961, 978 (11th Cir. 1982)).

29. *Id.* (citing *United States v. Jaramillo*, 380 F. Supp. 1375, 1379-80 (D. Neb. 1974)).



Although the scope of prohibited PCA activities is quite broad, there are twenty-six disjointed exceptions to the law that allow federalized military to support a spectrum of governmental agencies and actions.<sup>30</sup> These exceptions include civilian-military drug interdiction operations, insurrections, civil support for threat mitigation related to weapons of mass destruction, various environmental protection programs, and protection of foreign and United States dignitaries.<sup>31</sup>

### C. *The Insurrection Act: Unilateral Federal Authority for State Entry*

The President may act without state authority. The Insurrection Act of 1807, contained in Chapter 15 of Title 10 of the *Code*, provides the executive branch of the federal government the legal mechanism to domestically deploy federal military troops unilaterally in certain circumstances.<sup>32</sup> This Act authorizes the President to suppress an insurrection, a rebellion, domestic violence, or an unlawful combination thereof, by means of armed forces.<sup>33</sup> To engage the powers under this law, the President must consider whether conditions in the state are such that:

(1) [E]xecution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.<sup>34</sup>

If such a circumstance exists, the President will issue a proclamation to disperse, and will direct the insurgents to return to their homes.<sup>35</sup> The Act ensures that the President has legal means to maintain national security in circumstances borne of internal political unrest.<sup>36</sup>

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30. MATT MATTHEWS, *THE POSSE COMITATUS ACT AND THE UNITED STATES ARMY: A HISTORICAL PERSPECTIVE* 81-83 (Combat Studies Institute Press 2006), available at [http://www.au.af.mil/au/awc/awcgate/army/csi\\_matthews\\_posse.pdf](http://www.au.af.mil/au/awc/awcgate/army/csi_matthews_posse.pdf).

31. *Id.* at 81-83.

32. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1068, 122 Stat. 3, 325 (2008) (to be codified as amended at 10 U.S.C. § 331-35) (originally enacted as Act of Mar. 3, 1807, ch. 39, 2 Stat. 443, 443).

33. *Id.*

34. *Id.*

35. 10 U.S.C. § 334 (2006).

36. COAKLEY, *supra* note 24, at 7-18. In an effort to improve upon the Articles of the Confederation, the Constitutional Convention of 1787 recognized the inherent need for a legal mechanism by which the federal government could quell domestic violence, and this

*D. The John Warner National Defense Authorization Act of 2007:  
Elevating Federal Authority*

The John Warner National Defense Authorization Act of 2007<sup>37</sup> dramatically altered the balance of this authority under Title 10, Chapter 15, Section 333 of *Code*, yielding the Insurrection Act of 2007 (IA of 2007).<sup>38</sup> Specifically, the IA of 2007 substantively altered the PRCA, which is the legal mechanism that calls a state's National Guard into federal service.<sup>39</sup>

The PRCA refers to the presidential power to "federalize" or call forth state militias. This power has existed since the eighteenth century, as defined by Article 1, Section 8 of the United States Constitution.<sup>40</sup> Prior to 2007, the President was specifically prohibited from using this authority to

was the basis for the Insurrection Act. *Id.* at 7. Eventually, the need for federal power to act in times of domestic disturbance to support the laws of the union was further defined in the First Enabling Act of 1792, and its companion legislation, the Militia Act of the same year. *Id.* at 19. The language of the Insurrection Act would be further shaped and solidified by the Calling Forth Act of 1795. *Id.* at 67. The Insurrection Act, as it exists today in Title 10 of the *Code*, is substantially the same in construction as the First Enabling Act of 1792. *Id.* Until that point in history, only militia forces could be employed to quell an insurrection. The need for "regular" federal forces and militia forces to be jointly deployed was not a consideration until 1806, when Vice President Aaron Burr planned expeditions into territories not at war with the United States. *Id.* at 77-79. Subsequent to Vice President Burr's potential transgression, President Jefferson authorized the presidential power to deploy regular forces with militias, with the intent to suppress domestic violence and to quell insurrections. *Id.* at 83.

37. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, 120 Stat. 2083 (2006).

38. See CHARLES HENNING ET AL., CRS REPORT FOR CONGRESS, THE FY2007 NATIONAL DEFENSE AUTHORIZATION ACT: SELECTED MILITARY PERSONNEL POLICY ISSUES 31 (2006), available at <http://www.fas.org/sgp/crs/natsec/RL33571.pdf>.

39. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083, 2404 (2006), *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 325-26; see HENNING ET AL., *supra* note 38, at 31. Prior to the IA of 2007 the President was prohibited from federalizing or employing reserve military personnel by §12304 of title 10, which states:

No unit or member of a reserve component may be ordered to active duty under this section to perform any of the functions authorized by chapter 15 or section 12406 of this title or, except as provided in subsection (b), to provide assistance to either the federal government or a state in time of a serious natural or manmade disaster, accident, or catastrophe.

10 U.S.C. 12304 (2006). The IA of 2007 was altered by removal of these prohibitions. The IA of 2007 was rewritten to allow the President to use armed forces for public emergencies. It states:

The President may employ the armed forces, including the National Guard in Federal service, to— (A) restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States.

John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

40. U.S. CONST. art. I, § 8.

execute “any functions authorized by Chapter 15” of the *Code*, the chapter which empowers the President to quell an insurrection.<sup>41</sup> Also, the President was specifically prohibited from utilizing the PRCA to provide “assistance to either the Federal Government or a State in time of a serious natural or manmade disaster, accident, or catastrophe.”<sup>42</sup>

Hence, before its repeal, the IA of 2007 allowed the President to engage the PRCA without authorization from the state’s executive or legislative branch.<sup>43</sup> The President, upon his own determination and without consent from the state governor, could federalize state National Guard units during major public emergencies such as natural disasters, epidemics, and other serious public health emergencies, as well as terrorist attacks and incidents that could potentially overwhelm states’ capabilities to maintain public order.<sup>44</sup>

Presidentially-directed military actions without substantive state input or control have been highly debated from the initial Continental Congresses to recent times.<sup>45</sup> The Warner Bill was no exception, and faced significant resistance from the National Governor’s Association (NGA) when proposed.<sup>46</sup> According to the NGA, the Warner Bill enabled the federal government to usurp state control over a vital emergency response mechanism, during what could be critical phases of hazard mitigation, risk assessment, and establishment of essential command and control elements.<sup>47</sup>

Importantly, the IA of 2007 highlighted the significant legal issues that disasters and emergencies present to federalized military health care providers and other medical care responders.<sup>48</sup> The IA of 2007 created situations where military medical professionals found themselves at a legal

41. HENNING ET AL., *supra* note 38, at 31.

42. 10 U.S.C. § 12304 (2006); *see also* HENNING ET AL., *supra* note 38, at 31.

43. *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083, 2404-06 (2006) (repealed).

44. *See* HENNING ET AL., *supra* note 38, at 31; *see also* S. 513, 110th Cong. § j1 (2007).

45. *See* Visco, *supra* note 21, at 3-20. During the nascent days of the Union and Continental Congress, the debate surrounding presidential use of military forces to quell domestic disturbances focused on establishing the authority to use such force to maintain the political integrity of the Union. *Id.* As this authority has evolved, the delicate balance between state police powers and presidential authority has become a central point of political debate in recent times as highlighted by the most recent changes to the IA of 2007. *See* Visco, *supra* note 21, at 3-20; HENNING ET AL., *supra* note 38, at 31.

46. Letter from Janet Napolitano & Michael Huckabee, Nat’l Governors Ass’n, to Duncan Hunter, Chairman, U.S. House of Representatives Armed Servs. Comm. (Aug. 1, 2006) [hereinafter Huckabee Letter]; *see also* Letter from Janet Napolitano, Nat’l Governors Ass’n, to D. R. Rumsfeld, Sec’y of Def. (Aug. 31, 2006) [hereinafter Napolitano letter].

47. *See* NAT’L GOVERNORS ASS’N, POLICY POSITION: HHS-03. ARMY AND AIR NATIONAL GUARD (Mar. 5 2007), <http://www.nga.org/portal/site/nga/menuitem>.

48. *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

nexus of laws, acts, and policies that were altered by the PRCA.<sup>49</sup> Under the IA of 2007, legal authority for National Guard participation in identical public health emergency and disaster response activities would have depended upon the *Code* title under which the National Guard was activated.<sup>50</sup> The NGA rightly recognized the potential for confusion over the power and authority of National Guardsmen called to federal service in times of crisis.<sup>51</sup> The challenges of the IA of 2007 point to the need to further examine scenarios, as well as the legal basis for, and status of, National Guard military personnel called to act in public health crises.<sup>52</sup>

### *E. The Stafford Act: Limits on Federal Power in Emergencies and Disasters*

The Stafford Act (SA) is the primary legal gateway for facilitating federal support to the states in times of disaster and emergency.<sup>53</sup> Determining the extent of federal support depends heavily upon the magnitude of damage as assessed by the affected state's governor, and his or her conclusion that the state's emergency response mechanisms and resources are insufficient.<sup>54</sup>

Under the SA, at the request of the affected state governor, federal support may assist the state in its response and recovery efforts.<sup>55</sup> The request for a disaster declaration, as defined by the SA, must come from the governor, and the SA specifically prohibits the President from declaring a major disaster in the affected state.<sup>56</sup> This gubernatorial origin of assistance is consistent with constitutional language concerning application for federal support from a state executive or legislative branch, prior to federally-led entry into the sovereign state.<sup>57</sup>

Numerous examples exist of states requesting federal assistance. Recent instances of federalized military assistance given at a state's request occurred after the Minnesota Bridge collapse in August 2007, in which specialized active duty Navy diving units were deployed to assist with debris removal and body recovery, as well as the coordination of DoD assets in response to Hurricane Ike of 2008.<sup>58</sup> The Hurricane Katrina

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49. *Id.*; see HENNING ET AL., *supra* note 38, at 31.

50. See NAT'L GOVERNORS ASS'N, *supra* note 47.

51. *Id.*

52. See HENNING ET AL., *supra* note 38, at 31.

53. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C.A. §§ 5121-5207 (West Supp. 2008).

54. *Id.* at § 5170.

55. *Id.* at § 5170; see also U.S. DEP'T OF HOMELAND SEC., *supra* note 2, at 7.

56. 42 U.S.C.A. §§ 5170; see also U.S. DEP'T OF HOMELAND SEC., *supra* note 2, at 7.

57. U.S. CONST. art. IV, § 4.

58. DoD, *Navy and USNORTHCOM to Support Recovery Effort in Minneapolis-St.*

response is perhaps a better-known example.<sup>59</sup> Upon invitation by the state to the President for federal support, the President can declare a state of emergency or a disaster.<sup>60</sup>

Once the emergency or disaster response effort is federalized, considerable federal resources are available for the affected population.<sup>61</sup> The state, by way of federally-approved funding, technically becomes subordinate to the federal control of the response and recovery efforts.<sup>62</sup>

When directed to support disaster response and recovery efforts via the SA, federal DoD assets and personnel are essential parts of the federal government's response and aid package.<sup>63</sup> There are no exceptions in the SA for law enforcement activities, including public health actions, which medical personnel may need to execute by acting under federal authority.<sup>64</sup>

*Paul*, USNORTHCOM NEWS, Aug. 6, 2007, <http://www.northcom.mil/News/2007/080607.html>; see also *U.S. Northern Command Continues Response to Hurricane Ike's Aftermath*, USNORTHCOM NEWS, Sept. 14, 2008, [http://www.northcom.mil/News/2008/091408I\\_e.html](http://www.northcom.mil/News/2008/091408I_e.html).

59. The Hurricane Katrina response also exemplifies how issues of state sovereignty may complicate such a request, and the inherent controversy that may arise from an invited federal military response. MARK C. WESTON, REVIEW OF THE POSSE COMITATUS ACT AFTER HURRICANE KATRINA 15 (U.S. Army War College 2006), available at <http://www.strategicstudiesinstitute.army.mil/pdf/files/ksil535.pdf>; see SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H.R. REP. NO. 109-377, at 222-23, available at <http://www.cbsnews.com/htdocs/pdf/katrinahouse021506.pdf> [hereinafter THE SELECT BIPARTISAN COMM.]; Corey P. Hanrahan & Bryan A. Liang, *Promoting Public Health and Provider Response to Emergencies and Disasters*, 11 U. PA. J. L. & SOC. CHANGE 29 (2008) (describing confused emergency response requests and resource allocations, and conflict between state and federal authorities).

60. 42 U.S.C.A. §§ 5121-5207; see Joseph R. Barnes, *Amend the Stafford Act to Fund Emergency State Use of the National Guard*, J. HOMELAND SECURITY (Feb. 2002), <http://www.homelandsecurity.org/journal/Commentary/barnesstafford.htm>.

61. See U.S. DEP'T OF HOMELAND SEC., *supra* note 2, at 41-43.

62. Note, however, that the President may activate federal support functions under emergency authority without state governor request if primary responsibility of laws of the United States are affected by the disaster inside of that state (i.e., a disaster impacting federal properties or personnel stationed/employed in the affected state), or declare a significant public health emergency via the Department of Health and Human Services. STEVE BOWMAN ET AL., CRS REPORT FOR CONGRESS, HURRICANE KATRINA: DOD DISASTER RESPONSE 4-5 (2005), available at <http://www.fas.org/sgp/crs/natsec/RL33095.pdf>; see also JENNIFER ELSEA, CRS REPORT FOR CONGRESS, THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES 4-6 (2006), available at <http://www.fas.org/sgp/crs/natsec/RS22266.pdf>. The President can declare a catastrophe an Incident of National Significance or National Emergency, which summarily federalizes the disaster response. See 50 U.S.C. § 1631 (2000); Bowman et al., *supra*. Neither of these last two mechanisms negates restrictions of the PCA or requirements of the SA and the IA. See U.S. DEP'T OF HOMELAND SEC., *supra* note 2, at 7.

63. See U.S. DEP'T OF HOMELAND SEC., *supra* note 2, at 41-43.

64. See 42 U.S.C.A. §§ 5121-5207; ELSEA, *supra* note 62, at 4-6.

It should be noted that federal DoD support may be directly requested by the affected state's governor through an "immediate response request."<sup>65</sup> The immediate response request authorizes federal active duty military commanders co-located in the disaster area to support response activities for a loosely-defined period of time ranging from seventy-two hours to ten days.<sup>66</sup> Under this immediate response request, local active duty military commanders are required to keep their respective military chains of command in place, so they can be informed of specific responsibilities and activities.<sup>67</sup>

The immediate response request authority defined in the SA has been referred to as a statutory exception to the PCA.<sup>68</sup> However, DoD instruction 3025.1, Military Support for Civil Authorities, clearly states that this authority does *not* permit support of civil law enforcement activities.<sup>69</sup> The immediate response request authority is reserved solely for the express purpose of preventing immediate loss of life or great property damage.<sup>70</sup> Extension of this authority can only be approved via the previously-defined route—from the governor to the President.<sup>71</sup>

Importantly, beyond limitations of federal asset use under the SA, the SA provides no specific language regarding the activation of a state's National Guard.<sup>72</sup> A state governor is expected only to have activated the state emergency response plan; however, it is assumed that the National Guard is an integral emergency response asset under "state active duty status."<sup>73</sup> In

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65. DEP'T OF DEF., MILITARY ASSISTANCE TO CIVIL AUTHORITIES, DIRECTIVE NUMBER 3025.15, at 4 (1997), available at <https://eportal.usace.army.mil/sites/ENGLink/EmergencyManagement/Shared%20Documents/DoD%203025-15.pdf> [hereinafter DOD DIRECTIVE No. 3025.15].

66. AM. BAR ASS'N, HURRICANE KATRINA TASK FORCE REPORT 36 (2006), available at <http://www.nationalstrategy.com/Portals/0/PDFs/SCOLNS%20Hurricane%20Katrina%20Report%20Feb%202006%202.pdf>; see DEF. THREAT REDUCTION AGENCY, WMD CONSEQUENCE MANAGEMENT LEGAL SEMINAR II: SEMINAR REPORT 9 (Science Applications International Corporation 2002), available at [http://www.dtra.mil/documents/newsservices/deskbook/full\\_text/Other\\_Relevant\\_References/Seminar%20II%20Report%2012-19-02.pdf](http://www.dtra.mil/documents/newsservices/deskbook/full_text/Other_Relevant_References/Seminar%20II%20Report%2012-19-02.pdf); see also Jim C. Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, 31 ARMY LAW. 3, 3-5 (1997).

67. See DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 9; DEP'T OF DEF., *supra* note 65, at 4.

68. CURRIER, *supra* note 4, at 9-10, app. 2 at 19.

69. DEP'T OF DEF., MILITARY SUPPORT TO CIVIL AUTHORITIES, DIRECTIVE NO. 3025.1, at 4-5 (1993), available at <https://eportal.usace.army.mil/sites/ENGLink/EmergencyManagement/Shared%20Documents/DoD%203025-15.pdf> [hereinafter DOD DIRECTIVE No. 3025.1].

70. *Id.* at 21.

71. *Id.* at 7.

72. 42 U.S.C.A. §§ 5121-5207.

73. U.S. DEP'T OF HOMELAND SEC., *supra* note 2, at 8. State active duty declarations are often addressed in an individual state's constitution or laws, such as the Military Veteran sections 550-52 of the California Code. CAL. MIL. & VET. CODE §§ 550-52 (2007). Title 32 status of National Guard units requires coordination with Secretary of Defense, due to the

this situation, the state governor has determined that state resources are overwhelmed, and has requested a federal disaster declaration.<sup>74</sup> In these situations, it is likely that the state governor has previously activated the National Guard.

### III. MILITARY SUPPORT OF CIVIL AUTHORITIES

#### A. *The National Guard*

The roots of the National Guard trace back to the militia forces established by the First Continental Congress on June 14, 1775, as the First Continental Army formed to fight the War for Independence.<sup>75</sup> By 1777, individual state constitutions, and ultimately the Articles of the Confederation, created various pieces of legislation that laid the foundation for establishing military forces at the state level as the federal government began to take shape.<sup>76</sup> The United States Constitution and Bill of Rights further substantiated the purposeful existence of these state militia forces in what are commonly referred to as the Army and Militia clauses.<sup>77</sup> The Constitution defines the application of militia forces and lays the foundation of duality of service with respect to federal versus state service.<sup>78</sup> This duality stemmed from the responsibility of Congress to raise a standing federal Army and the President's ability to call state militias to execute laws of the Union.<sup>79</sup> The PCA and the IA would further define the instances where federal and state military forces could be employed domestically.<sup>80</sup>

At the time the Constitution was written, militias were construed as individual citizens and resident aliens who assembled in response to an emergency.<sup>81</sup> The modern day concept of a militia, however, is that of a collective group of able-bodied individuals enrolled into an organized, uniformed, and equipped unit of the National Guard.<sup>82</sup> These militias were first described by General Lafayette in 1824 as national guards that were similar in composition to volunteer forces the French formed during the

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federal funding associated with this activation mechanism. See 32 U.S.C. § 902 (2006); HENNING ET AL., *supra* note 38, at 39.

74. See 42 U.S.C.A. § 5170.

75. Shaw, *supra* note 1, at 40.

76. *Id.* at 43-44.

77. *Id.*

78. U.S. CONST. art. II, § 2; see Shaw, *supra* note 1, at 43-44.

79. Shaw, *supra* note 1, at 47-48, 53.

80. *Id.* at 55, 63; PAUL SCHEIPS, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945-1992, at 4-5 (Center of Military History) (2005).

81. Shaw, *supra* note 1, at 44.

82. *Id.* at 54.

French Revolution.<sup>83</sup> New York militias then assumed the title of National Guards, and public acceptance of the term ensued. It is this definition that is used when referring to the National Guard of today.<sup>84</sup>

Today's National Guard exists in all 50 states and all U.S.-held territories.<sup>85</sup> Its composition of community members, and its local presence, yields the ideal immediate response capability in times of crises.

### B. Mechanisms of National Guard Activation

Currently, there are four mechanisms through which the National Guard of any state can be activated to provide support in times of crises. First, the governor of an affected state can activate the National Guard in a "state active duty status."<sup>86</sup> From the state perspective, the benefit of state active duty status is that the state governor retains control of the National Guard forces, and can activate forces more rapidly than in any other manner.<sup>87</sup> Also, state active duty National Guard forces from other states may be mobilized to provide assistance to a disaster-affected state via Emergency Management Assistance Compacts (EMACs).<sup>88</sup>

83. *Id.*

84. *Id.* at 55.

85. NAT'L GUARD BUREAU, NATIONAL GUARD FACT SHEET, ARMY NATIONAL GUARD (FY2005) 1 (2006), available at [http://www.ngb.army.mil/media/factsheets/ARNG\\_Factsheet\\_May\\_06.pdf](http://www.ngb.army.mil/media/factsheets/ARNG_Factsheet_May_06.pdf).

86. NAT'L GUARD BUREAU, *supra* note 85, at 4. In this manner, National Guard members are considered state employees working directly for the governor and receiving payment from state coffers. National Guard personnel that are state active duty do not receive all the benefits of active duty federal service member, including: time applied to retirement status; federal pay scale; and protections afforded under the Soldier's and Sailor's Relief Act and the Uniformed Services Employment and Reemployment Rights Act. State active duty service is viewed as the least preferable status to the service member, due to lack of federal benefits and the lack of certain personal legal protections. See NAT'L GUARD BUREAU, *supra* note 85, at 4; NAT'L GUARD BUREAU, NATIONAL GUARD DUTY STATUS CHART (2007), available at <http://www.ngb.army.mil/II/LL/publications/misc/statuschart.pdf> [hereinafter NATIONAL GUARD DUTY STATUS CHART].

87. DAVID R. BROWN, U.S. ARMY WAR COLL., RELEVANCE OF NATIONAL GUARD UNITS IN THE PREPARATION AND RESPONSE TO NATURAL DISASTERS 10 (2006), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil285.pdf>; see also NATIONAL GUARD DUTY STATUS CHART, *supra* note 86.

88. BROWN, *supra* note 87, at 6. EMACs provide a legal means of lending disaster support and requesting support from states that have entered into this type of agreement. Through EMACs, National Guard personnel are activated as "state active duty" of their respective state. They are administratively attended to by their respective states, even though they might be assigned to another state for disaster assistance and placed into the command structure of the affected state. Large scale deployments from multiple states may become administratively burdensome. This is due to each state affording different benefits and protections to their National Guard personnel. See THE SELECT BIPARTISAN COMM., *supra* note 59, at 249-50.



The second means of calling up the National Guard to active duty is under the authority of Title 32 of the *Code*, which is derived from Article 1, Section 8 of the United States Constitution.<sup>89</sup> A state governor would coordinate this type of activation through the state Adjutant General (AG) of the National Guard.<sup>90</sup> The AG would request Title 32 authority and funding from the Secretary of Defense via the National Guard Bureau.<sup>91</sup> Under this authority, the National Guard acts under direction of the state governor and its activities are funded by both state and federal appropriations.<sup>92</sup> For example, the state funds five percent and the federal government funds ninety-five percent of California State National Guard missions when activated under Title 32 authority.<sup>93</sup> Generally, a state governor applies for Title 32 authority when he or she determines that the disaster at hand is beyond the capabilities of local response organizations, and EMAC provided aid would not be sufficient.<sup>94</sup> Note, however, that legally, in both state active duty status and under Title 32 capacities above, National Guard members are *not* subject to limitations of the PCA because they are strictly under the authority of the state governor.<sup>95</sup>

Under a third method, the President may directly and exclusively call the National Guard to federal service under Title 10 of the *U.S. Code*.<sup>96</sup> In this manner, the National Guard operates directly under the federal DoD, is directed by the President, and its activities are funded in whole by the federal government.<sup>97</sup>

It bears emphasizing that National Guard personnel operating under Title 10 authority are subject to the limitations concerning the use of force as construed by the PCA, while Title 32 National Guard personnel are not.<sup>98</sup> It is this area in particular, i.e., whether National Guard members are acting in a federal or state capacity, where confusion may arise as to how these federalized forces can be employed.<sup>99</sup>

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89. U.S. CONST. art. I, § 8; 32 U.S.C. § 502 (2006).

90. THE SELECT BIPARTISAN COMM., *supra* note 59, at 39; *see* BROWN, *supra* note 87, at 6.

91. THE SELECT BIPARTISAN COMM., *supra* note 59, at 39; *see* 32 U.S.C.A. § 902.

92. *See* NAT'L GUARD BUREAU, *supra* note 85, at 4.

93. OFFICE OF THE GOVERNOR, THE CALIFORNIA PERFORMANCE REVIEW 1218 (Cal. Performance Review Comm'n ed., 2004), *available at* [http://cpr.ca.gov/CPR\\_Report/](http://cpr.ca.gov/CPR_Report/).

94. U.S. DEP'T OF HOMELAND SEC., *supra* note 2, at 8.

95. *See* NAT'L GUARD BUREAU, *supra* note 85, at 4. These activation statuses do not implicate the PCA because the National Guard personnel are employed in a federalized capacity. *See also* NAT'L GUARD BUREAU, *supra* note 87.

96. 10 U.S.C. § 332 (2006).

97. THE SELECT BIPARTISAN COMM., *supra* note 59, at 39, 41.

98. *See* NAT'L GUARD BUREAU, *supra* note 85, at 3-4.

99. *See* DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 8-14; STEVEN L. MILLER, AIR UNIV., AIR COMMAND & STAFF COLL., THE MILITARY, DOMESTIC LAW ENFORCEMENT, AND POSSE COMITATUS: A TIME FOR CHANGE 16-21 (2000), *available at*

The fourth and final mechanism of activation is a hybrid method, which was proposed by President Bush during the Hurricane Katrina response.<sup>100</sup> In this rarely-used approach, the President and the governor of a disaster-affected state can both authorize a state National Guard commander under Title 10 status to retain Title 32 authority.<sup>101</sup> In this mixed federal-state status, “the National Guard commander reports to both the governor (for state requirements) and the supported combatant commander (for DoD mission assignments).”<sup>102</sup> Placing National Guard leadership in a mixed-status allows Title 32 personnel to be placed under a Title 10 and 32 command structure while preserving the various Title statuses of subordinate units.<sup>103</sup>

### C. Disaster Response Legal Conflict

National Guard medical personnel acting under state authority are not subject to the civil law enforcement limitations of the PCA.<sup>104</sup> However, federalizing National Guard medical personnel called to duty under Title 10 authority essentially imposes roadblocks to law enforcement activities, including public health actions that may be part of a disaster response.<sup>105</sup>

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<https://research.maxwell.af.mil/papers/ay2000/acsc/00-120.pdf>; DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, DOMESTIC WMD INCIDENT MANAGEMENT LEGAL DESKBOOK (2003), available at <http://www.dtra.mil/newsservices/publications/deskbook/index.cfm>.

100. THE SELECT BIPARTISAN COMM., *supra* note 59, at 206-07. During Hurricane Katrina, the President had desired to place the Louisiana National Guard in a federalized status to unify response efforts. *Id.* at 206. President Bush opted to offer Louisiana Governor Blanco an alternative to federalizing her National Guard personnel through a letter titled “Memorandum of Agreement Concerning Authorization, Consent and Use of Dual Status Commander for JTF Katrina,” placing Lt. Gen. Honore from Northern Command in charge of Joint Task Force Katrina, while simultaneously being a member of the Louisiana National Guard. *Id.* The letter stated:

In order to enhance Federal and State efforts, and if you grant permission, I would like to appoint the Regular Army officer commanding the Federal Joint Task Force Katrina to be an officer in the Louisiana National Guard. I would assign him to command the National Guard forces under my command.

*Id.* Governor Blanco declined to surrender her National Guard personnel to federal command. *Id.* at 207.

101. See AM. BAR ASS’N, *supra* note 66, at 27; National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 516, 117 Stat. 1392, 1461 (2003).

102. See AM. BAR ASS’N, *supra* note 66, at 27.

103. See 32 U.S.C. § 325(a) (2006).

104. See NAT’L GUARD BUREAU, *supra* note 85, at 4.

105. AM. BAR ASS’N, *supra* note 66, at 23; see also ELSEA, *supra* note 62, at 2; BOWMAN, *supra* note 62, at 9; WESTON, *supra* note 59, at 4-6. Forced vaccination, isolation, and quarantine of a civilian populace during a public health emergency would be prohibited by PCA restrictions should federalized military medical personnel be in charge of enforcing or administrating such efforts. See DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 11-12.

This may impair vital public health measures, depending on the nature of the emergency and required protective measures. Also, Title 32 National Guard medical personnel supporting a mixed status leadership may be subject to legal prohibitions concerning public health actions that have legal implications regarding tort liability if they act outside the scope of their employment.<sup>106</sup>

All federalized military personnel are authorized to perform their military missions under Title 10 of the *United States Code*.<sup>107</sup> As previously discussed, Title 10 forces are bound by numerous statutory limitations when their missions encompass domestic civil law enforcement functions.<sup>108</sup> It should be noted that these limitations do not prohibit federal DoD involvement in disaster response; rather, they ensure that such involvement is conducted in accordance with PCA prohibitions, and due respect for state sovereignty.<sup>109</sup>

However, a PCA exception to allow protracted federalized military support of sustained public health law enforcement remains nonexistent.<sup>110</sup> The DoD directive that describes the time-limited immediate response requests by local and state agencies purportedly permits authorized entry into the state to provide disaster assistance through the SA.<sup>111</sup> Thus, this immediacy requirement arguably negates, at least temporarily, the required routing through appropriate state and federal levels of approval.<sup>112</sup> However, both Title 10 and immediate response request methods of entry subject federalized military personnel to policy legal boundaries,<sup>113</sup> including the specific requirement that activation must be in strict adherence with the PCA.<sup>114</sup>

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106. 28 U.S.C. § 2680(f) (2006). *See also* DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 18.

107. *See* 10 U.S.C. § 121 (2006).

108. *See* NAT'L GUARD BUREAU, *supra* note 85, at 3.

109. *See* DoD DIRECTIVE NO. 3025.15, *supra* note 65, at 6-8; DoD DIRECTIVE NO. 3025.1, *supra* note 69, at 2-3.

110. *See* MATTHEWS, *supra* note 30, at 81-83.

111. *See* DoD DIRECTIVE NO. 3025.1, *supra* note 69, at 2.

112. *See id.* at 2-3.

113. *See* DEP'T OF DEF., DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, DIRECTIVE NUMBER 5525.5 (1989), *available at* [http://www.fas.org/irp/doddir/dod/d5525\\_5.pdf](http://www.fas.org/irp/doddir/dod/d5525_5.pdf) [hereinafter DOD DIRECTIVE NO. 5525.5].

114. *See id.* at 14.

## IV. PCA, PUBLIC HEALTH LAW, AND OTHER LEGAL ISSUES

A. *Foundation*

The deployment of Title 10 military personnel as an essential medical response asset during large scale disasters with respect to PCA restrictions must be reconsidered, given the changed consequences of modern-day threats, and the increased complexity of emergency and disaster response efforts. The PCA, as it applies to military forces, was drafted at a time when such robust military medical capability was unforeseeable. Furthermore, this possible conflict of between the PCA and current public health laws has gone without scrutiny or testing in a court of law.<sup>115</sup> There is simply no specific exclusion to allow federalized military medical professionals to act in a public health capacity in today's world.<sup>116</sup>

The PCA's numerous exceptions attempt to dispel the inherent vagueness embodied in the PCA.<sup>117</sup> However, the critical issue is whether the SA would withstand legal scrutiny as a PCA exception to permit use of the federalized military personnel and equipment for public health civil law enforcement. Such use as a PCA exception is highly questionable.

The immediate response section of the SA is constrained by the brevity of the action required to "limit loss of life or property from great danger."<sup>118</sup> This constraint limits the time during which local military commanders can act without approval.<sup>119</sup> As previously discussed, the SA is a source document for the DoD instruction covering Military Support for Civil Authorities, which expressly disallows civil law enforcement functions.<sup>120</sup>

Recognizing this limitation, Congress, in an attempt to expedite a more prominent federal military presence during future disasters, successfully passed the Insurrection Act of 2007 with limited public debate. The Act expressly allowed federalized National Guard activation without state involvement.<sup>121</sup> There is little doubt that its ease of passage was facilitated by the federal government's desire to quickly remedy the marred disaster response to Hurricane Katrina.<sup>122</sup>

In hindsight, however, this policy change created a confluence of juxtaposed disaster and use of military support laws, which only added to

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115. See DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 15-17; See also DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, §4, at 15-17.

116. See MATTHEWS, *supra* note 30, at 81-83.

117. See *id.* at 71-72.

118. See 42 U.S.C. § 5170(b) (2006).

119. See DOD DIRECTIVE NO. 3025.1, *supra* note 69, at 7.

120. *Id.* at 2-5.

121. Huckabee Letter, *supra* note 46; Napolitano Letter, *supra* note 46.

122. See *id.*

the confused interpretations of the PCA.<sup>123</sup> The inclusion of categorical justifications for military intervention in natural disasters, public health emergencies, and epidemics interjected a premature federalized military presence, and impinged upon state police powers.<sup>124</sup> Ultimately, the challenges associated with such circumstances resulted in the rescission of the IA of 2007.<sup>125</sup>

Note that merely returning the legal status of a federalized National Guard to the status quo ante does not remediate the legal problems that Congress intended to rectify with the IA of 2007. Instead, the effort to enhance legal clarity was simply misplaced, and should have been directed to the PCA in some form or another.

### B. Examples

When acting as a federal entity under Title 10, federalized National Guards, or active duty military medical professionals, are constrained by the PCA and prohibited from acting in law enforcement roles.<sup>126</sup>

Practical instances, neither previously defined nor contemplated by law, create confusion as to the boundaries of military medical professionals serving in federal roles. For example, public health laws related to quarantine powers by any Title 10 personnel acting in a medical support role, as well as potential medical liability, may have significant legal ramifications.<sup>127</sup> These concerns are discussed below.

#### 1. Quarantine Powers

The potential for the complete collapse of a state's public health infrastructure in response to a human-sourced epidemic or to one borne of natural means begs the question: Who will enforce either state or federal quarantine orders in the absence of state public health personnel?

The authority to quarantine exists at both the state and federal level.<sup>128</sup> State police power is the primary tool for limiting the spread of contagious

123. *See id.*

124. *See* HENNING ET AL., *supra* note 38, at 31.

125. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1068, 122 Stat. 3, 325-36 (2008).

126. DOD DIRECTIVE NO. 5525.5, *supra* note 113, at 14.

127. DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 15; DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 11-18.

128. *See* U.S. CONST. amend. X; *see also* 42 U.S.C. § 243 (2006).

disease within state boundaries.<sup>129</sup> When interstate commerce is affected, federal quarantine authority is employed to prevent disease transmission.<sup>130</sup>

Ideally, a state public health official would be the issuing authority for quarantine orders, irrespective of a federal declaration of disaster. State public health departments would be working in concert with non-federalized or joint state-federal federalized National Guard members. Given the option, having the National Guard remain in a non-federalized or joint state-federalized status would still permit National Guard personnel to enforce quarantine restrictions. In the absence of a recognized state public health representative or department, non-federalized National Guard personnel could assume authority in issuing quarantine orders, and the governor could have authority to enforce those orders.

However, should a federalized National Guard or a Title 10 active duty DoD military member execute or even support enforcement or issuance of quarantine orders, would the PCA bind such medical personnel, who operate under federal authority? Title 42 of the *U.S. Code* indicates that United States officers must observe state health laws.<sup>131</sup> Title 42 indirectly addresses the use of U.S. (i.e., federalized) military personnel in enforcing, or aiding, a state-mandated quarantine effort. As noted in the *Code*:

The quarantines and other restraints established by the health laws of any state, respecting any vessels arriving in, or bound to, any port or district thereof, shall be duly observed . . . by the military officers commanding in any fort or station upon the seacoast; and all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws, according to their respective powers and within their respective precincts, and as they shall be directed, from time to time, by the Secretary of Health and Human Services.<sup>132</sup>

As this section of the *Code* reads, federalized military officers could enforce quarantines, particularly those co-located in the affected state.<sup>133</sup> At least with respect to ports and vessels, a federalized National Guard enforcing a state or federally-mandated quarantine order would be legally justified in doing so, and should not be limited by the PCA.<sup>134</sup> A dual chain of command would be possible since these federalized Guardsmen would

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129. *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905); see Lawrence O. Gostin, *Jacobson v Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 576 (2005).

130. 42 U.S.C. § 264 (Supp. V 2005).

131. 42 U.S.C. § 97 (2000); see also 42 U.S.C. §243.

132. 42 U.S.C. § 97.

133. DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 17; see 42 U.S.C. § 268 (2000).

134. DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 17.

take direction from the Secretary of Health and Human Services and the state.<sup>135</sup> Non-federalized National Guardsmen would act as agents of the state governor, and could execute law enforcement functions in support of a state or federally-mandated quarantine.

Yet the broader, modern questions about quarantine in circumstances such as a bioterrorism or pandemic influenza create significant challenges because they are outside of this historic purview.<sup>136</sup> The possibility of PCA limitations on federal military personnel enforcing a state-mandated quarantine is a crucial concern that places military medical professionals in a legal bind—they are first responders in modern emergencies and disasters—but are limited in what they can do when confronted with citizens' needs.<sup>137</sup>

In the absence of a state's public health infrastructure and personnel due to a catastrophic event, the governor of the affected state would likely consider the possibility of utilizing National Guard assets to ameliorate this critical incapacitation. However, because of PCA limitations, Title 10 National Guard or DoD active duty personnel could not legally execute the responsibilities of state public health authorities.<sup>138</sup> In effect, governor-directed quarantine and isolation of an affected state population would only be possible with Title 32 National Guard personnel.<sup>139</sup> Title 32 forces would not have to question public health directives that emanate from the governor's office because they are acting as agents of the state and not the federal government. Under the PCA as currently written, Title 10 forces might be left questioning whether they could legally enforce quarantine or isolation orders on an affected civilian populace during a time-sensitive response.

This is not a theoretical concern. For example, confusion over whether a military unit was Title 10 or 32, and whether it could serve a role in civil law enforcement, surfaced during the 1992 Los Angeles riots.<sup>140</sup> In addition, Title 32 National Guard medical units, operating under EMAC agreements and responding to Hurricane Katrina in 2005, questioned whether they could legally provide treatment to civilians. In some cases, National Guard units partnered with Disaster Medical Assistance Teams

135. AM. BAR ASS'N, *supra* note 66, at 25.

136. See DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 16-17, app. E at E-4.

137. See *Id.*

138. See *Id.*

139. See DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 16-17. This is another reason why a state governor may opt not to surrender Title 32 National Guard medical capabilities.

140. See SCHEIPS, *supra* note 80, at 441-48; Brinkerhoff, *supra* note 4; JOHN H. EBBIGHAUSEN, UNITY OF COMMAND FOR HOMELAND SECURITY: TITLE 32, TITLE 10, OR A COMBINATION 49-59 (2006), available at <http://cgsc.cdmhost.com/cgi-bin/showfile.exe?CISOROOT=/p4013coll2&CISOPTR=561&filename=562.pdf>.

(DMAT) in response to Hurricane Katrina in an attempt to avoid any possible PCA violations.<sup>141</sup> Certainly, these same issues could resurface during a state-wide, multi-state, or national disaster, particularly one associated with a terrorist event. The delay associated with determining the correct command structure in the midst of a disaster could be costly in terms of the number of lives saved and the severity of the impact.

Because emergencies and disasters implicate national security and other federal concerns, the President could utilize the IA to federalize the National Guard, and provide Title 10 active duty medical personnel to intervene in disaster response efforts. The IA would provide the necessary exception to the PCA to allow entry of the federal government.<sup>142</sup> However, the PCA exception that covers emergency situations involving chemical or biological weapons of mass destruction would not allow federalized National Guard members to participate in law enforcement, because it prohibits these functions even under such extreme emergency situations.<sup>143</sup>

Would the IA ultimately be deemed the appropriate option if the quarantine was the result of terrorist actions, rather than domestic in origin or naturally occurring? Unfortunately no. A quarantine order enforced by a federalized military command likely fails the first two tests for determining whether a PCA violation has occurred.<sup>144</sup> Quarantine is on par with seizing an individual's liberty.<sup>145</sup> This would be viewed as controlling and compelling a civilian populace to adhere to a militarily-enforced public health mandate.<sup>146</sup> A military-directed quarantine likely fails the second PCA test as well, by virtue of the military taking a direct role in the execution of a public health law.<sup>147</sup> Both of these powers are reserved to the states.<sup>148</sup>

What legal vulnerabilities might apply to medical personnel serving as public health officials and executing quarantine or isolation orders? This part considers, below, the Federal Torts Claims Act's (FTCA) discretionary authority, but it should be noted that the FTCA specifically precludes tort

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141. Carl J. Bonnett et al., *Task Force St. Bernard: Operational Issues and Medical Management of a National Guard Disaster Response Operation*, 22 PREHOSPITAL & DISASTER MED. 440, 445 (2007), available at <http://pdm.medicine.wisc.edu/22-5%20PDFs/bonnett.pdf>.

142. 10 U.S.C. § 333 (2006).

143. 10 U.S.C. § 382 (2006).

144. See CURRIER, *supra* note 4, app. 1 at 17 (citing *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1975), *United States v. Red Feather*, 392 F. Supp. 916, 922 (D.S.D. 1975), and *United States v. Hartley*, 678 F.2d 961, 978 (11th Cir. 1982)).

145. See U.S. CONST. amends. V, X; see also U.S. CONST. amend. XIV, § 1.

146. See CURRIER, *supra* note 4, app. 1 at 17 (citing *McArthur*, 419 F. Supp. at 194).

147. See *id.* (citing *Red Feather*, 392 F. Supp. at 922 and *Hartley*, 678 F.2d at 978).

148. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).



actions that stem from quarantines.<sup>149</sup> However, questions concerning constitutional violations, civil rights, and wrongful imprisonment may come into play if a federalized military responder violates PCA restrictions by engaging in law enforcement activities.<sup>150</sup> A related issue follows: would the civilian populace be legally accountable if they disobeyed a Title 10 National Guard-directed quarantine order? Civilians reluctant to obey a federally-enforced quarantine order may be on solid legal ground if they decline to cooperate because federal forces would violate the PCA when acting under Title 10.<sup>151</sup>

In addition, a similar question arises from the responder's perspective: when must the Title 10 National Guardsman or DoD active duty responder consider use of military force to establish a compliant populace—if at all? In recent U.S. history, National Guard and active duty forces have been deployed to quell civil disturbances in response to desegregation protests of the 1950s and 1960s, Vietnam War protests of the 1960s and 1970s, and the 1992 Los Angeles Riots.<sup>152</sup> These deployments were small in comparison to the catastrophic disaster response associated with Hurricane Katrina.<sup>153</sup> These smaller deployments were accompanied by presidential implementation of the IA, while Hurricane Katrina did not result in the invocation of the IA, but rather a presidential federal disaster declaration for the state of Louisiana.<sup>154</sup> In the case of the Los Angeles riots, the largest of the pre-Hurricane Katrina deployments requiring joint operations between federal troops and state activated National Guard troops, several post-event analyses highlighted the lack of clarity concerning the legality of the use of force by active duty DoD and National Guard personnel.<sup>155</sup>

These examples highlight the confusion created by the use of a federalized military to address civil concerns. Yet as a security matter, public health law enforcement is inordinately more complex when considering adequate and effective responses to emergencies and disasters that implicate isolation and quarantine.

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149. 28 U.S.C. § 2680 (2006) (Federal Tort Claims Act Exceptions).

150. See DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 6.

151. See *id.*

152. See SCHEIPS, *supra* note 80, at 441-48. See also EBBIGHAUSEN, *supra* note 140, at 56-57.

153. See EBBIGHAUSEN, *supra* note 140, at 16, 79, 88.

154. See *id.* at 51, 60-61.

155. See SCHEIPS, *supra* note 80, at 441-48. See also EBBIGHAUSEN, *supra* note 140, at 56-57; Christopher M. Schnaubelt, *Lessons in Command and Control from the Los Angeles Riots*, 27 PARAMETERS 88, 106-08 (1997).

## 2. Compulsory Vaccination Issues

Beyond the use of quarantine, compulsory treatment through vaccination may also be necessary to address public health needs. National Guard and federal DoD medical units may have to support mandated vaccination policies in response to a public health crisis.<sup>156</sup> Federal law has established that vaccinations are constitutional both as protective treatment measures and as a proper use of state police power to limit the transmission of disease under appropriate circumstances.<sup>157</sup> However, the PCA potentially limits the scope of federalized military medical powers to administer compulsory vaccinations.<sup>158</sup>

Courts have held that in order to protect and preserve public health, states may employ police powers to vaccinate their citizenry.<sup>159</sup> This power is highly relevant today, when potential bioterrorist-induced events may require such vaccinations. These types of vaccinations are specifically highlighted in most state emergency measures statutes to protect public health and empower agents of the state governor to limit the transmission of disease through compulsory (i.e. legally-mandated) vaccination measures applied to state citizens.<sup>160</sup> For example, under Title 32 activation, National Guard members administering a smallpox vaccine to a citizen after a potential smallpox-based bioterrorist event would be able to enforce the laws of the state for compulsory vaccination as agents of the governor.<sup>161</sup> However, if National Guard members were federalized, limitations of the PCA would prevent them from acting in this capacity, and indeed, all Title 10 forces as well as active duty DoD personnel would be constrained in a similar manner.<sup>162</sup>

This outcome is of great importance. For example, it is likely that military members would be called forth specifically to administer smallpox vaccinations within states in the event of an outbreak or bioterrorist attack with this agent. This is because a portion of military members have already been vaccinated against smallpox and anthrax, and hence may retain some level of immunity not existing in the general healthcare provider or public population.<sup>163</sup> Therefore, they are the natural first responders to engage in and implement such public health efforts.

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156. DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 17.

157. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

158. DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 15-17; *see also* DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 6.

159. *See Jacobson*, 197 U.S. at 25; *Gostin*, *supra* note 129, at 577.

160. *See Jacobson*, 197 U.S. at 25.

161. DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 6-7, 17; *see also* AM. BAR ASS'N, *supra* note 66, at 23-31.

162. *See* AM. BAR ASS'N, *supra* note 66, at 23-31.

163. J. Jones et al., *Future Challenges in Preparing for and Responding to Bioterrorism*

Yet, if legal barriers exist to preclude or confuse such participation, they will effectively remove a critical emergency and disaster resource.<sup>164</sup> In this situation, allocation of other critical resources, such as unimmunized physicians and nurses, may be necessary; since this could hinder the effectiveness of the response and potentially risk infection of these providers, thereby removing these critical and valuable human resources from public health efforts.<sup>165</sup> Such a circumstance would create a vicious cycle resulting in a dwindling supply of healthcare providers available for public health purposes. Meanwhile, the providers who are potentially most capable would be blocked from the public health effort because of artificial legal boundaries.<sup>166</sup>

Further, the possibility of events requiring federalized forces to actively administer compulsory vaccination programs to the U.S. citizenry is growing larger in today's asymmetric battlefield: the homeland and all of its citizens across states.<sup>167</sup> Military personnel, including the National Guard, have a defined military command structure to support a response to such events by using coordinated efforts and communications that are neither dependent upon, nor limited by state borders.<sup>168</sup> However, the PCA would limit significant portions of that federalized team from engaging in public health response efforts, and would again undermine state emergency and preparedness efforts.<sup>169</sup>

Unfortunately, this application of military capabilities, including the National Guard personnel so activated, would be subject to the limitations of the PCA.<sup>170</sup> Constrained by the legal implications of the PCA, the federalized clinician simply does not have the authority to execute civil law enforcement, including the administration of public health compulsory

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*Events*, 20 EMERGENCY MED. CLINICS OF N. AM. 501, 524 (2002); see also Phillip R. Pittman et al., *Antibody Response to a Delayed Booster Dose of Anthrax Vaccine and Botulinum Toxoid*, 20 VACCINE 2107 (2002) (discussing anthrax vaccine and/or botulinum toxoid inoculations in active-duty military personnel in preparation for Operations Desert Shield and Desert Storm); Erika Hammarlund et al., *Duration of Antiviral Immunity After Smallpox Vaccination*, 9 NATURE MED. 1131, 1134 (2003) (stating that several studies indicate immunity against smallpox infection for many years after inoculation).

164. DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 15-17; see also DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 6.

165. DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 6-9.

166. DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 11-12.

167. DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 5-8.

168. See U.S. DEP'T OF HOMELAND SEC., *supra* note 2, ESF Annex 13 at 1, available at <http://www.nmfi.org/natlresp/files/ESF13.pdf>; see also U.S. DEP'T OF HOMELAND SEC., *supra* note 2, ESF Annex 8 at 9, available at <http://www.nmfi.org/natlresp/files/ESF8.pdf>.

169. See DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 15-17; DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 6.

170. DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 15-17.

vaccinations.<sup>171</sup> In this circumstance, legal vulnerabilities would arise, as they do when an attempted quarantine is implemented under the incorrect Title.<sup>172</sup> Here, as in the case of quarantine, the discretionary exception to the FTCA<sup>173</sup> may not apply to the actions of a federalized clinician who may be acting outside the scope of his or her authority due to Title 10 status.<sup>174</sup> A Title 10 individual administering a compulsory vaccination program, because he or she might not fit within an FTCA exception, may therefore be subject to individual liability claims, as would both the state and federal government.<sup>175</sup>

This transformation from health care worker to federal military personnel creates a barrier to effective response, even when the provider is ready, willing, and able to address the needs of the populace, and to fulfill the public health goal using the established, effective tool of vaccination.<sup>176</sup> In this situation, the public health goal will be lost in the concern over activation authority issues, which are generally irrelevant to the provider and the patient he or she wishes to treat.

### C. Medical Liability Issues

The federalized military members, Title 32 Guardsmen, and state active duty National Guard members acting in medical support capacities are protected by several federal and state statutes, thus promoting the effective and efficient delivery of medical care in times of crisis or disaster.<sup>177</sup> Yet these protections are based on appropriate activation of National Guard personnel.<sup>178</sup>

When responding in a Title 10 status, military members are afforded the federal protections of the FTCA.<sup>179</sup> The FTCA provides employees of the federal government immunity for civil acts that were committed as federal employees and imposes liability on the federal government.<sup>180</sup> Emergency personnel protections in the context of public health are further defined in

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171. DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 6-10.

172. DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 12-13; *see also* DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 10.

173. *See* 28 U.S.C. § 2680(a) (2006).

174. *See id.*

175. *See id.*

176. DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 2, at 10; *see also* DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 15-17.

177. DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 18, 23.

178. *See infra* note 186 and accompanying text.

179. *See* DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 20. Federal military medical personnel also provides protections under the Homeland Security Act and the Military Claims Act. *Id.* at 22-23.

180. 28 U.S.C. § 2671 (2006).

Title 28 of the *Code*, which prohibits bringing “[a]ny claim for damages caused by the imposition or establishment of quarantine by the United States.”<sup>181</sup> This section also prohibits suit against the federal government for acts or omissions of its agencies and employees if the claim arose when they exercised due care in the execution of a statute or regulation.<sup>182</sup>

The FTCA also provides protection for employees directed to act as part of the discretionary function exceptions.<sup>183</sup> The Federal Tort Claims Act makes an exception for federal employees only when they act within the scope of their offices or employment, and therefore military personnel whose actions conflict with the PCA would not meet this exception.<sup>184</sup> As noted above, inappropriate quarantine and compulsory vaccinations administered by federalized military personnel are unlikely to be protected by FTCA discretionary exceptions.<sup>185</sup>

For example, in *Berkovitz v. United States*, the Court noted that:

[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee’s conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception in the conduct for the discretionary function to protect.<sup>186</sup>

Military medical professionals acting in violation of the PCA, which specifically prohibits federal military participation in civil law enforcement, do not appear to be protected by the discretionary FTCA exception in the instance of a state-mandated public health law or action, such as a compulsory vaccination or quarantine.<sup>187</sup> Here, federalized military personnel would be acting expressly outside of legal authority and

181. 28 U.S.C. § 2680(f).

182. 28 U.S.C. § 2680(a).

183. *Id.*

184. *See* 28 U.S.C. § 2671.

185. *See* DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 15-17, app. E, E-4 to -6.

186. *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). In *United States v. Varig Airlines*, the FTCA discretionary function exception was established, defined, and determined to “prevent judicial ‘second guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984), *citing* *Dalehite v. United States*, 346 U.S. 15, 58 n.12 (1953). The decisions of *Dalehite* and *Varig Airlines* were summarized in a two part inquiry in *Berkovitz*, which required that conduct of federal employees must contain “an element of judgment or choice” and be “grounded in social, economic, or political policy.” *Berkovitz*, 486 U.S. at 536-37 (1988).

187. *See Berkovitz*, 486 U.S. at 536-39 (1988); *see also* DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 15-17.

established federal law when enforcing public health emergency orders, which are law enforcement actions.<sup>188</sup> Hence, federalized military responders may be subject to liability for injuries associated with important public health measures.

Without protection, participation by National Guardsmen and federal DoD medical personnel may be significantly reduced, placing a tremendous burden on a strained public health system already faced with an emergency crisis. This burden is no better exemplified than during the Hurricane Katrina response; National Guard units, uncertain of how to proceed with civilian patient care, opted to partner with DMATs to avoid legal issues.<sup>189</sup> This is not the best use of military and federal medical assets in the face of an overwhelming disaster response. This legal outcome undermines emergency and preparedness efforts.

#### D. Mixed Status Leadership

In efforts to retain response control, states may refuse to request disaster assistance or refuse to allow a declaration by the President even during a large-scale disaster. This situation has already occurred during Hurricane Katrina.<sup>190</sup> The governor of Louisiana chose to retain control of the

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188. Other legal protections include the Homeland Security Act of 2002 (HSA) and the Military Claims Act (MCA). The HSA contains provides legal protections to those involved in mass vaccination efforts that might be required in an outbreak of smallpox. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). It specifically establishes exclusive immunity for those administering small pox vaccinations during a declared public health emergency. *Id.* Federalized responders are afforded limited protection for care delivered via the Military and Civilian Personnel Claims Act, which covers “personal injury, death, or property damage incident to military service . . . [or] noncombatant activities of the military department.” DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 22-23; *see also* The Military Claims Act, 10 U.S.C. § 2733(b)(4) (2006).

Most states have individual emergency statutes and tort claims acts that mirror the federal level of protection from liability when state employees are acting at the behest of the state government. DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 23. By way of the Eleventh Amendment to the U.S. Constitution, state employees are protected from liability by providing protection from claims made against state employees from citizens of other states or foreigners. *See* U.S. CONST. amend. XI. This has been extended to protect state employees from actions filed from citizens of the same state. Florida Dep’t of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982); *see also* DEF. THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 23-24.

Medical liability issues for federalized military providers appear to be sufficiently addressed to the point of redundancy, except for compulsory vaccinations of a civilian populace by federalized military medical professionals. *See* DEFENSE THREAT REDUCTION AGENCY OFFICE OF THE GEN. COUNSEL, *supra* note 99, § 4, at 25.

189. *See* THE SELECT BIPARTISAN COMM., *supra* note 59, at 221-22; *see also* Jeffrey W. Burkett, *Command and Control of Military Forces in the Homeland*, 54 JOINT FORCE Q., 4th Quarter 2008, at 130, 131, available at [http://www.ndu.edu/inss/Press/jfq\\_pages/editions/i51/27.pdf](http://www.ndu.edu/inss/Press/jfq_pages/editions/i51/27.pdf).

190. It may also have served as a partial justification for the IA of 2007. AM. BAR

Louisiana National Guard, even in the face of intense federal pressure to request a federal disaster declaration.<sup>191</sup>

As noted earlier, at the time of Hurricane Katrina, if a state governor deemed it unnecessary or undesirable to absorb a federal command structure or presence of federal assets, the federal government generally could not force itself into the disaster response.<sup>192</sup> Such a state response could create difficulties and handcuff federal efforts perceived by the federal government as necessary to protect national interests, while the IA of 2007 would have allowed for federal entry by the President even without a request by the state governor.<sup>193</sup>

However, allowing such unilateral action by the federal government would not make preparedness or response desirable or effective.<sup>194</sup> Indeed, such an authority would have been highly problematic in Louisiana.<sup>195</sup> Instead, the Governor of Louisiana chose to retain authority over the Louisiana National Guard personnel and assets, and by retaining this Title 32 authority, there were no PCA issues for Louisiana National Guard personnel in their response to Katrina.<sup>196</sup> In this circumstance, state public health laws could be enforced, and Title 32 National Guard medical personnel could execute those orders. Yet, the federal government could not allow the state to retain control over the disaster response.<sup>197</sup> The federal government attempted to place the Louisiana National Guard Adjutant General under the mixed status leadership of a federal army officer who possessed the authority to simultaneously lead both Titles 10 and 32 forces.<sup>198</sup>

Mixed status leadership authority potentially undermines state sovereignty and police powers.<sup>199</sup> It also creates dangers or political pitfalls, by having a senior federal military leader answer to both a state and federal command structure while commanding Title 32 units, whose interests may compete with those of the affected state.<sup>200</sup> Critically,

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ASS'N, *supra* note 66, at 3; *see also* THE SELECT BIPARTISAN COMM., *supra* note 59, at 220-25.

191. THE SELECT BIPARTISAN COMM., *supra* note 59, at 206-07.

192. *See* U.S. CONST. art. IV, § 4.

193. *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083, 2404-06 (2006) (repealed); *see also* HENNING ET AL., *supra* note 38, at 31.

194. *See* Burkett, *supra* note 189, at 131-34.

195. *See Id.*; *see also* THE SELECT BIPARTISAN COMM., *supra* note 59, at 206-07.

196. *See* Burkett, *supra* note 189, at 130-31; *see also* THE SELECT BIPARTISAN COMM., *supra* note 59, at 206-07.

197. *See* THE SELECT BIPARTISAN COMM., *supra* note 59, at 206-07.

198. AM. BAR ASS'N, *supra* note 66, at 27.

199. *See* Burkett, *supra* note 189, at 131.

200. This would occur under a mixed federal-state status command structure. *Id.*

undermining or confusing state control is contrary to a basic premise in disaster management, that “[a]ll disasters are local,”<sup>201</sup> and creates problems of management in the administration of necessary personnel and assets.<sup>202</sup> Of course, the resultant chaos and mismanagement of the Katrina response illustrates the unwise strategy that mixed-status leadership creates.

An alternative mixed status leadership, proposed by the Commission on the National Guard and Reserves, would allow a state governor to command Title 10 forces under the Title 32 National Guard Adjutant General (TAG) of the disaster-affected state. The DoD has resisted such authority, and continues to advocate for a parallel command structure.<sup>203</sup>

## V. DISCUSSION AND RECOMMENDATIONS

Several approaches may mitigate the legal issues associated with public health law enforcement by federalized military medical personnel.

### A. *Mixed Status Military Option*

A previously proposed solution was to establish a legal basis for mixed status military commands.<sup>204</sup> This option was removed from the National Defense Authorization Act of 2008 (NDAA of 2008).<sup>205</sup> Had this option passed into law, the statute would have allowed federal commanders to lead and direct National Guard forces.<sup>206</sup> Essentially, this legislation reflected an attempt to counter the current inflexibility of command as it relates to the current Title 10 forces or Title 32 command elements operating jointly with National Guard units.<sup>207</sup>

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201. R. David Paulison, Dir., Fed. Emergency Mgmt. Agency, Address at the National Press Club (Nov. 30, 2006), *available at* [http://www.fema.gov/pdf/about/paulison/speeches/11-30-06\\_national\\_press\\_club.pdf](http://www.fema.gov/pdf/about/paulison/speeches/11-30-06_national_press_club.pdf); *see also* U.S. DEP’T OF HOMELAND SEC., *supra* note 2, at 15.

202. *See generally* Hanrahan & Liang, *supra* note 59 (describing state-based flexibility in emergency and disaster response).

203. COMM’N ON THE NAT’L GUARD & RESERVES, TRANSFORMING THE NATIONAL GUARD AND RESERVES INTO A 21<sup>ST</sup>-CENTURY OPERATIONAL FORCE: FINAL REPORT TO CONGRESS AND THE SECRETARY OF DEFENSE 108-112 (U.S. G.P.O. 2008) *available at* [http://www.cngr.gov/Final%20Report/CNGR\\_final%20report%20with%20cover.pdf](http://www.cngr.gov/Final%20Report/CNGR_final%20report%20with%20cover.pdf); *see also* Burkett, *supra* note 189, at 135.

204. NAT’L GUARD BUREAU, INFORMATION PAPER: “MIXED STATUS FORCES” PROVISION OF THE HOUSE VERSION OF HR. 1585 (2007), *available at* <http://www.ngb.army.mil/ll/analysisdocs/2008/Mixed%20Status%20Forces%20sec%20of%20HR1585.pdf>.

205. *See* Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008); NAT’L GUARD BUREAU, LEGISLATIVE LIAISON, FY08 NDAA SIDE BY SIDE (DRAFT AS OF AUG. 24, 2007), *available at* <http://www.ngb.army.mil/ll/analysisdocs/2008/FY08%20NDAA/Analysis,%20side%20by%20side,%2024Aug07.pdf>.

206. *Id.*

207. *See id.*



However, this option lacked state governor approval because it placed federal commanders in charge of non-federalized National Guard forces, and the National Guard Bureau re-emphasized the unconstitutionality of placing a federal officer in charge of state-controlled militia.<sup>208</sup> This solution therefore addressed neither the fundamental conflict between Title 10 and Title 32 National Guard activation, nor the legal status and limitations of federalized National Guard members participating in public health response activities.<sup>209</sup>

Another potential mixed status approach involves placing certain Title 10 forces under the command of Title 32 military leadership under the direction of the disaster-affected state's executive.<sup>210</sup> This type of mixed status could be constructed in such a way that specific military professions, specifically health care personnel engaged in public health activities, might be considered for such missions. By allowing these Title 10 military medical professionals to become Title 32 forces, temporary de-federalized service members would avoid PCA violations and would be afforded various legal protections of Title 32. However, this effort may be cumbersome because it would not only require new legislation, but also would present the challenge of identifying which professionals, acting in which capacities, would allow Title 32 leadership of these carved-out Title 10 professionals. Although this is theoretically possible, in the field, the status of National Guard personnel would be very difficult to discern, particularly if medical professionals were acting in multiple roles that included, but were not limited to, public health.

### *B. Posse Comitatus Options*

The successful effort to repeal the IA of 2007 rectifies the quandaries of usurping state control of National Guard assets, but leaves historical PCA issues in place.<sup>211</sup> Resolving issues stemming from PCA concerns requires addressing these concerns through legislative reform. These options include recodifying the PCA as an organic statute of Title 10 of the *Code*, or substantively integrating public health into the PCA as a functional exception. These options are discussed below.

#### 1. Title 10 Recodification

Several proposals have attempted to address the issue of legal conflict with respect to federal military medical assets. One key proposal is to

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208. *Id.*

209. *Id.*

210. See Burkett, *supra* note 189, at 134.

211. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1068, 122 Stat. 3, 325-26 (2008).

clarify the PCA by recodifying the law under Title 10 of the *Code*.<sup>212</sup> Purportedly, this solution would provide legal guidelines for use of the federal armed forces.<sup>213</sup> Placing such guidance in Title 10, Chapter 18, Military Support for Civilian Law Enforcement Agencies, would permit local DoD forces acting as first responders greater latitude in the initial phases of a multi-agency disaster response.

For example, a revision of the PCA with respect to application of force, which would allow military commanders to support law enforcement activities while retaining verbal flexibility to adapt to yet undefined situations, has been proposed below:

Title 10 U.S.C.:

(a) Any part of the armed forces, excluding the Coast Guard, is prohibited from acting as a posse comitatus or otherwise to execute the laws, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.

(b) Exceptions to paragraph (a) allowing use of the armed forces must meet the following criteria:

(1) the use must be triggered by an emergency, which is defined as any occasion or instance for which Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe—generally a sudden, unexpected event;

(2) the use must be beyond the capabilities of civilian authorities as determined by the affected state executive; and

(3) the use must be one limited in duration and not one which addresses a chronic, continuing issue or problem.

(c) Clarifications to prohibitions in subsection (a) are to be made by regulations to be published in the *Federal Register* and printed in the *Code of Federal Regulations*.

(d) This section is an affirmation of the fundamental precept of the United States of separating the military and civilian spheres of authority and deference to recognized state police powers.

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212. See CURRIER, *supra* note 4, at 10-11.

213. *Id.*

(e) Nothing in this section shall be construed to affect the law enforcement functions of the United States Coast Guard.<sup>214</sup>

Under this proposed change, use of federal forces would be contingent upon the affected state's law enforcement capabilities being overwhelmed, defining a period of time, and an unexpected event occurring. Yet its limitations in specification cause tremendous challenges in interpretation, since these general terms provide little guidance to military commanders, whether or not they are federalized. The suggested change is more consistent with the language in the SA, DoD instructions, and immediate response requests from states to the military, with regard to the President's ability to use "any federal agency" for disaster support; yet, by its very terms it propagates the difficulties in determining when and where federalized National Guard medical personnel can act in a public health, or other, capacity.

In a very broad manner, this change might permit Title 10 forces to support and execute certain law enforcement functions related to public health and safety, life-saving efforts, and property protection under limited time periods. This suggested version of the PCA could limit federalizing a response by maintaining the state's application for federal assistance as outlined in the Constitution.<sup>215</sup> But, this version may still result in questions concerning the permitted scope of law enforcement functions and actions, both disaster and non-disaster related and public health and non-public health related, such as joint drug interdiction efforts and border patrol missions. As a practical matter, this version of the PCA would ensure only that the state governor remained in control of the National Guard until he or she deemed it necessary to acquiesce to federally controlled response;<sup>216</sup> yet it would provide little guidance as to when and

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214. Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 980-81 (1997).

215. U.S. CONST. art. IV, § 4.

216. *Id.* The American Bar Association (ABA), in their post-event analysis of Hurricane Katrina and the federal response, identified the issue of using federalized National Guardsmen in conflict with the PCA. See AM. BAR ASS'N, *supra* note 66, at 28. In response, one proposition was to rename the IA as "the Domestic Disaster Relief Act or Major Disaster Assistance Act," or "the Domestic Disaster Relief and Insurrection Act." *Id.* at 29. The re-branding effort would serve to "limit any political stigma from the name and thus empower leadership to look solely to the circumstances of the disaster for guidance as to whether or not to turn to this authority." *Id.* This recommendation is an attempt to soften the image of a president who utilized the IA-like law.

The ABA also recommended leaving the IA as written. AM. BAR ASS'N, *supra* note 66, at 29. The law has the inherent robust authority that only needs to be executed or the willingness to be executed by the Executive branch. See *id.* at 30. The IA of 2007 has been causally related to events that transpired between the disagreements on to how best handle the response effort to Hurricane Katrina. See NAT'L GOVERNORS ASS'N, *supra* note 47. The lack of state willingness to federalize the response at the behest of the federal government is

where public health activities could be engaged, or the law under which liability issues would be addressed.<sup>217</sup>

Indeed, this proposal's conception is significantly ambiguous as to public health in general. Without at least some attention to common public health actions, tools, and activities, it does not address the legal conflict of federalized National Guard or DoD assets. As such, it does not modernize the PCA with respect to the circumstances of today, and the use of federalized military for civil law enforcement functions.<sup>218</sup>

## 2. The PCA and Public Health Integration

Redrafting the PCA, so that it addresses modern potential disaster scenarios, is an option to address legal issues associated with deploying federalized medical assets to support public health law enforcement. Drafting new legislation would allow clarification of a law that was written in the late nineteenth century, and premised on laws of the late eighteenth century. The human-sourced disaster scenarios of modern day asymmetric threats surpass the "niceties" of colonial American warfare, which served as a frame of reference for worst case scenario planning of the day.<sup>219</sup>

New legislation could employ the strategy of making an express exception to the PCA. Defining, through PCA exceptions, the scenarios in which federalized forces could be applied to support civil law enforcement functions,<sup>220</sup> and providing an opportunity to address any unique legal circumstances not presently covered in existing exceptions, may be a viable alternative. Providing defined guidelines for the application of federal forces for civil law enforcement may facilitate asset deployment by eliminating the need for timely legal confirmation of what a commander, federalized or not, can do in civil support scenarios.<sup>221</sup>

Hence, the new legislation should incorporate the catastrophic disaster tools the public health community deems appropriate to address events of national significance which could overwhelm state resources.<sup>222</sup> The disasters themselves most certainly will dictate what public health laws and

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openly viewed as the primary impetus for changing the IA in 2007. See NAT'L GOVERNORS ASS'N, *supra* note 47; see also THE SELECT BIPARTISAN COMM., *supra* note 59, at 206-07; WESTON, *supra* note 59, at 11-12; AM. BAR ASS'N., *supra* note 66, at 3-10.

217. See Hammond, *supra* note 214, at 980-82.

218. See *id.*

219. See *id.*

220. See Brinkerhoff, *supra* note 4.

221. See AM. BAR ASS'N., *supra* note 66, at 29; Brinkerhoff, *supra* note 4; WESTON, *supra* note 59, at 18-20.

222. See U.S. DEP'T OF HOMELAND SEC., *supra* note 2, at CAT-1 *passim* (Catastrophic Incident Annex), available at [http://www.learningservices.us/pdf/emergency/nrf/nrp\\_catastrophicincidentannex.pdf](http://www.learningservices.us/pdf/emergency/nrf/nrp_catastrophicincidentannex.pdf).

tools may be employed for the benefit of an affected civilian populace. Careful analysis of the military professionals (medical, environmental, general law enforcement/marshal law, etc.) who might find themselves executing civil law enforcement, including public health law enforcement, can define when to maintain those professions in a Title 32 status. Functional requirements of response, rather than legal means of activation, would be the foundation for when federalized military professionals could engage in appropriate response efforts. Even defining more specifically the “law enforcement” activities that cannot be performed could provide flexibility to allow all other activities, including public health efforts, to be engaged clearly. With this forethought, pre-scripted deployment plans for Title 10 and 32 forces could be considered in a way that would minimize misapplication of federalized forces and potential legal confusion and conflict.<sup>223</sup>

Redrafting the Act so that it clearly defines when federalized troops, including the National Guard and DoD assets, may be deployed for civil law enforcement functions will also provide clear guidance to all military commanders, and their federal agency partners.<sup>224</sup> It will also provide important clarification for states, and the National Guard itself, in determining the scope of permitted activity. Indeed, defining the human-sourced and natural disaster response scenarios that would overwhelm regional infrastructure, and would require DoD support, including federalization of the National Guard, will allow for a long overdue update in the face of threats that could not have been perceived in the past.<sup>225</sup>

A redefined PCA could read as follows:

Title 18 U.S.C.:

(a) Any part of the armed forces, including Department of Defense active duty troops and federalized National Guard under Title 10, excluding the Coast Guard and Title 32 reserve forces, is prohibited from acting as a posse comitatus or otherwise to execute the laws, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.

(1) Actions by armed forces are considered meeting criteria of a posse comitatus should any of the following conditions be satisfied:

(i) military actions resulted in the regulation, proscription, or compulsion civilians.

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223. See Burkett, *supra* note 189, at 135.

224. See MATTHEWS, *supra* note 30, at 72.

225. AM. BAR ASS'N, *supra* note 66, at 29-30; see Hammond, *supra* note 214, at 982-83.

(ii) military actions directly and actively participated in civilian law enforcement activity.

(iii) military actions pervaded the activities of the civilian authorities.

(b) Exceptions to paragraph (a) allowing use of the armed forces, including Department of Defense active duty troops and federalized National Guard under Title 10, must meet the following criteria:

(1) the use must be triggered by an emergency, which is defined as any occasion or instance for which Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe—generally a sudden, unexpected event;

(2) the use must be beyond the capabilities of civilian authorities as determined by the affected state executive; and

(3) the use must be one limited in duration and not one which addresses a chronic, continuing issue or problem.

(4) previously approved exceptions of the former posse comitatus act remain exempt.

(5) the use of Department of Defense active duty troops and federalized National Guard under Title 10 medical emergency response personnel deployed in support of disaster affected state executing public health laws, including disasters and emergencies requiring quarantine, isolation, or compulsory vaccination or other public health activity, tool, or treatment of affected citizenry to protect and promote the public health will be exempt.

(c) Department of Defense active duty troops and federalized National Guard under Title 10 acting under subparagraph (b) will deemed acting under Title 32 status and placed under Title 32 leadership.

(d) Department of Defense active duty troops and federalized National Guard under Title 10 acting under subparagraph (b) shall be considered federal employees for the purpose of the Federal Tort Claims Act.

(e) Clarifications to prohibitions in subsection (a) are to be made by regulations to be published in the *Federal Register* and printed in the *Code of Federal Regulations*.

(f) Nothing in this section shall be construed to affect the law enforcement functions of the United States Coast Guard.

(g) Willful use of the armed forces as a posse comitatus to engage in civil law enforcement activities not previously exempted shall be fined an amount commensurate with cost of use of armed forces, imprisoned for two years or more, or both.<sup>226</sup>

This proposal specifies that both DoD active duty troops, and federalized National Guard under Title 10 performing public health activities as medical military personnel, are acting under the authority of Title 32. In this manner, the proposal addresses PCA prohibitions directly. Further, the proposal addresses the omission in the SA, which does not provide a mechanism for activation of National Guard assets. In addition, to ensure that liability concerns are clearly delineated as being under federal law, the proposed PCA revision specifically states that the FTCA is the governing statute for any tort claims associated with DoD active duty troops and federalized National Guard troops under Title 10 acting in a public health capacity. This approach addresses the key issues of activation, public health needs, and liability, and allows DoD and National Guard personnel a clear understanding of their permitted role in public health responses to emergencies and disasters.

If military medical professionals' statuses are determined by what they do, rather than whose pen signed them into action, public health preparedness and response will not be hindered or confused by legal nuances. Further, providing information within the statute, including common public health measures, will give commanders and courts the ability to discern what falls within the public health exception, and what falls outside of it. Indeed, because of the functional means in the statute that define the status of the military medical personnel, each can be engaged in both Title 10 and Title 32 actions without a need to engage in the complex undertaking of formal assignment or, indeed, even knowledge of who activated them. In this way, military medical personnel under federalized or active duty status can go forth with the job of responding to emergencies and disasters, rather than wasting valuable time, resources, and energy determining which documents and laws dictate whether they can save lives.

## VI. CONCLUSION

Previously, it was thought that a medical professional, acting as a federalized member of a state's National Guard or active duty service member, would administer treatment to a civilian patient only in extreme

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226. This version of the PCA incorporates many of the proposed changes originally suggested in Hammond, *supra* note 214, at 980-82.

and rare circumstances.<sup>227</sup> Significant events in the last few years, such as the World Trade Center attacks and the response to Hurricane Katrina, have brought the legality of such a situation into the foreground of national debate.

National Guard action by medical professionals and combat units under Title 10 and Title 32 presents myriad complications, which may impair disaster response and recovery efforts by way of PCA conflicts. The PCA impairs the capability of National Guardsmen and DoD medical assets to fill vital public health roles by prohibiting the execution of public health laws, and creating confusion as to what is permitted action and what is not.

For the sake of clarity and effective and efficient response efforts, resolution of this conflict is essential. Redrafting laws, writing additional laws, or modifying laws may address some of these issues. But efforts must be made to substantively alleviate the conflict created by the current legal framework. Public health efforts, and the citizens served by these efforts, are harmed by laws prohibiting federalized military providers from acting to save lives. Laws must serve the people and assist in disaster response efforts to promote the public welfare. Otherwise, we may be party to the tragedy of having the personnel and tools to save lives, but not having the ability to use those resources because of ill-considered laws and legal barriers that do not take into account the practical nature of responding to emergencies and disasters in effective and efficient ways.

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227. DEF. THREAT REDUCTION AGENCY, *supra* note 66, at 8-9, 12-13, 16.