

The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)

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At 0902 on 19 April 1995, a massive car bomb, containing approximately 4000 pounds of ammonium nitrate and diesel fuel, destroyed the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.¹ The blast killed 169 people and injured 467.² By 1600 that afternoon, President Clinton had declared a federal emergency in Oklahoma City.³ Prior to that time, however, commanders at Fort Sill and Tinker Air Force Base (AFB), relying on the Immediate Response Authority,⁴ had already provided support to Oklahoma City civil authorities. Fort Sill released two medical evacuation helicopters, explosive ordnance personnel, and two bomb detection dog teams, while Tinker AFB dispatched two ambulances and a sixty-six person rescue team.⁵ In addition to that immediate support, the Secretary of the Army, through his Director of Military Support,⁶ subsequently coordinated the efforts of over 1000 Department of Defense (DOD) personnel to perform a myriad of support functions at the height of the operation.⁷ In the days following the tragedy, civilian law enforcement authorities also

requested support in the form of bomb detection dog teams and DOD linguists.

This article explores the legal authorities supporting the DOD response to the Oklahoma City bombing. It focuses on the Immediate Response Authority and the Stafford Act, the key disaster relief legal authorities underpinning Military Support to Civil Authority (MSCA) operations in Oklahoma City. In doing so, it reviews the history and limits on these authorities. It then examines some of the legal authorities and considerations triggered by requests from federal law enforcement agencies for Military Assistance to Civil Authority (MACA) in the aftermath of the bombing.⁸

MSCA in Oklahoma City

Military Support to Civil Authority refers primarily to natural disaster relief, but the term also includes a broad spectrum of support operations such as environmental clean-up assis-

1. REPORT OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY, REVIEW OF THE BOMBING OF THE ALFRED P. MURRAH BUILDING, EM 3115, DR-1048, at 17 (1995) [hereinafter FEMA REPORT]; Information Paper, Dep't of Army Operations, DAMO-ODS, subject: Murrah Federal Building Bombing, Oklahoma City, Oklahoma, para. 1a (13 Sept. 1995) [hereinafter Information Paper].

2. Information Paper, *supra* note 1, para. 1a.

3. FEMA REPORT, *supra* note 1, at 18; President's Letter Declaring a Federal Emergency in Oklahoma City, 60 Fed. Reg. 22,579 (1995).

4. The Immediate Response Authority is found in DOD Directives 3025.15 and 3025.1 and in AR 500-60, and the authority will be discussed in detail later in this article. DEP'T OF DEFENSE, DIRECTIVE 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (MACA) (18 Feb. 1997) [hereinafter DOD DIRECTIVE 3025.15]; DEP'T OF DEFENSE, DIRECTIVE 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) (15 Jan. 1993) [hereinafter DOD DIRECTIVE 3025.1]; DEP'T OF ARMY, REG. 500-60, DISASTER RELIEF (1 Aug. 1981) [hereinafter AR 500-60].

5. *U.S. Military Support for Oklahoma City*, FEDERAL NEWS SERVICE, Apr. 20, 1995, at 2; Memorandum, Major General Robert H. Scales, Director of Military Support, to the Secretary of the Army, subject: DOD Support to the Bombing in Oklahoma City (20 Apr. 1995) [hereinafter Scales Memorandum] (on file with author).

6. The Secretary of Defense (SECDEF) has designated the Secretary of the Army (SECARMY) as his Executive Agent for MSCA operations. DOD DIRECTIVE 3025.1, *supra* note 4, para. 3a. The Director of Military Support is the SECARMY's action agent for MSCA. AR 500-60, *supra* note 4, at 1-2. Note, however, that a recent DOD Directive has affected the SECARMY's MSCA role. The SECDEF has continued to delegate approval authority to the SECARMY for MSCA operations. To reflect the realities of post-Goldwater-Nichols DOD operations, however, SECDEF now requires SECARMY to coordinate support requests requiring the deployment of Combatant Command assets (forces or equipment) with the Chairman of the Joint Chiefs of Staff. The Chairman must then determine whether such a deployment involves a "significant issue requiring SECDEF approval." DOD DIRECTIVE 3025.15, *supra* note 4, paras. D5, D7c. The Director of Military Support actually performs these coordination functions with the Joint Staff. *Id.* If SECDEF approval is not required, then the SECARMY will approve the mission. *Id.* The guidance in DOD Directive 3025.15 formalizes the guidance contained in a fairly well publicized SECDEF policy memorandum written following a 1995 review of DOD procedures for assisting civilian authorities. Memorandum, Secretary of Defense, to Secretaries of the Military Departments, subject: Military Assistance to Civil Authorities (12 Dec. 1995).

7. Information Paper, *supra* note 1, para. 1c. The specific types of support provided will be discussed later in this article.

8. Military Assistance to Civil Authorities (MACA) is the new term employed in DOD Directive 3025.15 to describe several domestic support operations, specifically civil disturbance operations, key asset protection operations, disaster relief operations (MSCA), operations involving acts or threats of terrorism, and support to civilian law enforcement agencies. DOD DIRECTIVE 3025.15, *supra* note 4, para. B(2).

tance, radiological emergencies, mass immigration emergencies, wild fire support, the Military Assistance to Safety and Traffic Program, explosive ordnance support, and postal augmentation, to name a few.⁹ A recent example of a nondisaster relief MSCA mission was the DOD support of the TWA Flight 800 crash.¹⁰ Nonetheless, most of the DOD MSCA, and often the most highly visible MSCA operations, are disaster relief operations. For the vast majority of these operations, the relevant legal authority is the Stafford Act. With one exception, the Immediate Response Authority, the DOD has no legal authority outside the Stafford Act framework.¹¹

Immediate Response Authority

The Immediate Response Authority exception to the Stafford Act authorized the use of the medevac aircraft, ambulances, bomb detection dog teams, and various military personnel at Oklahoma City. This exception permits a local commander, when time does not permit prior approval from higher headquarters, to provide assistance to local authorities in the case of emergencies.¹² The provisions of *DOD Directive 3025.1* contain the most relevant articulation of the authority, stating:

Imminently serious conditions resulting from any civil emergency or attack may require

immediate action by military commanders, or by responsible officials of other DOD Agencies, to save lives, [to] prevent human suffering, or [to] mitigate great property damage. When such conditions exist and time does not permit prior approval from higher headquarters, local military commanders and responsible officials of other DOD components are authorized by this Directive, subject to any supplemental direction that may be provided by their DOD Component, to take necessary action to respond to requests of civil authorities. All such necessary action is referred to in the Directive as “Immediate Response.”¹³

This authority is firmly entrenched in current Army Regulations, forerunners of which may be traced to the early twentieth century.¹⁴ Additionally, judge advocates should be aware that there is analogous emergency authority applicable to cases of civil disturbance contained in both DOD Directives and Army Regulations which has an equally distinguished lineage.¹⁵

The Immediate Response Authority reflects the historical role of the military, particularly the Army, to provide an immediate or emergency response to the civilian community in case

9. DEP'T OF DEFENSE, MANUAL 3025.1, MANUAL FOR CIVIL EMERGENCIES, 3-1 through 3-27 (2 June 1994) [hereinafter CIVIL EMERGENCIES MANUAL].

10. Message, Director, Military Support, DCSOPS, Washington, D.C., subject: Support to TWA Flight 800 Crash Investigation (251931Z July 96). Note that this was not considered support to law enforcement agencies because the National Transportation Safety Board (NTSB) acted as the lead federal agency for the investigation of the crash. While the FBI also investigated the crash scene, it was not the lead agency.

11. John J. Copelan & Steven A. Lamb, *Disaster Law and Hurricane Andrew—Government Lawyers Leading the Way to Recovery*, 27 URB. LAW. 29, 36 (1995).

12. DOD DIRECTIVE 3025.1, *supra* note 4, para. D5a. This same authority also requires the installation providing immediate assistance to notify the DOD Executive Agent (normally the Director of Military Support in the Army Operations Center in the Pentagon) through command channels, by the most expeditious means available.

13. *Id.* para. D5.

14. AR 500-60, *supra* note 4, para. 2-1f (stating that “[w]hen a serious emergency or disaster is so imminent that waiting for instruction from higher authority would preclude effective response, a military commander may do what is required and justified to save human life, [to] prevent immediate human suffering, or [to] lessen major property damage or destruction”). The 1917 Regulations Governing Flood Relief Work of the War Department also contained an emergency provision. While the regulations first state the norm, that the Army will not undertake relief efforts unless authorized by Congress, the regulations went on to state that the emergency exception applied in cases where “the overruling demands of humanity compel immediate action to prevent starvation and extreme suffering and local resources are clearly inadequate to cope with the situation.” DEP'T OF ARMY, SPECIAL REG. NO. 67, para. 1 (12 Oct. 1917).

15. DEP'T OF DEFENSE, DIRECTIVE 3025.12, MILITARY ASSISTANCE TO CIVIL DISTURBANCES (MACDIS), para. D2b (4 Feb. 1994); DEP'T OF ARMY, REG. 500-50, CIVIL DISTURBANCES, para. 2-4 (21 Apr. 1972). This emergency-based authority may be traced to the late nineteenth century. In his seminal treatise on military law, Colonel William Winthrop cites, without comment, the 1895 Army Regulation authorizing officers of the Army to aid law enforcement in cases of:

[S]udden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in cases of attempted or threatened robbery or interruption of the United States mails, or to other equal emergency so imminent as to prohibit communication by telegraph, officers of the Army may, if they think a necessity exists, take such action before the receipt of instructions from the seat of Government as the circumstances of the case and the law under which they are acting may justify.

DEP'T OF ARMY, REGS., para. 489 (1895), *quoted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 868, n. 26 (2d ed. 1920).

Note also that the corresponding directives governing the provision of military support to civilian law enforcement authorities (a branch of MACA), of which MACDIS is a component, also refer to the emergency authority. DEP'T OF DEFENSE, DIRECTIVE 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, encl. 4, para. A2c (15 Jan. 1986) [hereinafter DOD Directive 5525.5]; DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT OFFICIALS, para. 3-4 (1 Aug. 1983) [hereinafter AR 500-51].

of disaster. One of the most celebrated examples of the use of this authority in this century was the 1906 San Francisco earthquake and fire. There, General Frederick Funston, commander of the Department of California and, at the time of the earthquake, the Pacific Division, deployed all troops at his disposal to assist civil authorities in both a civil disturbance and a disaster relief role.¹⁶ Destroying large parts of the city, the earthquake and resulting fire left 250,000 San Franciscans homeless. Troops were immediately employed to stop looting and to protect federal buildings such as the mint and the post office.¹⁷ In addition, they assisted firefighters in battling the conflagration.¹⁸ While General Funston telegraphed the War Department to inform it of his actions, he took those actions he deemed necessary in what was clearly an emergency situation.¹⁹

Another documented case of immediate response involves the commander of Hamilton AFB providing personnel to the local authorities of Yuba City-Marysville, California. In December 1955, a flood struck Yuba-Marysville, and base personnel assisted in building levees and evacuating civilians the day before the presidential disaster declaration.²⁰ A more recent example was the 1994 Flint River flood in southwest Georgia, which left over 40,000 people homeless. Using the Immediate Response Authority, the commander of the Marine Corps Base in Albany, Georgia provided personnel to assist in the rescue of several hundred people.²¹ Finally, in September 1996, over 600 soldiers from the XVIII Airborne Corps responded to a request from the governor of North Carolina for aid in the wake of Hurricane Fran. The soldiers provided emergency generator support and debris removal services.²²

While the doctrine has firm historical roots, there are no statutes or constitutional provisions which expressly authorize the President, much less a military commander, to direct this type

of assistance.²³ This fact alone counsels caution in its exercise. The Supreme Court, however, has articulated two lines of authority which could support the use of Immediate Response authority. The first rationale draws on the historical lineage of Immediate Response Authority. In *Cafeteria Workers v. McElroy*,²⁴ the Supreme Court held that the commanding officer of an installation, based on departmental regulations and “historically unquestioned power,” had the authority to exclude civilians from an area of his command.²⁵ The Immediate Response Authority presents a similar situation, as it, too, is expressed in regulation and has been “unquestioned” over the past century. Nonetheless, the two situations are not entirely analogous; it is one thing for the base commander to exclude persons from his post to ensure the safety and security of his installation and quite another to send personnel off-post to assist state or local authorities. For that reason, and the lack of commentary applying the *McElroy* authority to Immediate Response actions, the *McElroy* authority is not the strongest authority to support Immediate Response actions.

The second and most commonly cited rationale to support Immediate Response actions is the common law principle of necessity. To determine the nature of necessity, one must look to the nineteenth century for the seminal Supreme Court opinion. The Supreme Court, in *Mitchell v. Harmony*,²⁶ described the doctrine as follows:

[W]e are clearly of the opinion that in all of these cases the danger must be immediate and impending; or the necessity urgent of the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is

16. FEDERAL AID IN DOMESTIC DISTURBANCES, S. DOC. NO. 67-263, 309 (1922).

17. MAJOR CASSIUS M. DOWELL, THE GENERAL SERVICE SCHOOLS, FORT LEAVENWORTH, KANSAS, MILITARY AID TO THE CIVIL POWER 195 (1925).

18. *Id.*

19. *Id.*

20. Carter L. Burgess, *The Armed Forces in Disaster Relief*, 309 ANNALS AM. ACAD. POL. & SOC. SCI. 71, 72 (1957).

21. Jason Vest, *Georgia Flood Waters Continue Lethal Surge*, WASH. POST, July 10, 1994, at A-1, A-4.

22. Telephone Interview with LTC Corey Gruber, Directorate of Military Support (Sept. 27, 1996) [hereinafter Gruber Interview].

23. The Supreme Court has held, however, that the President has inherent sovereign authority to employ federal troops to preserve federal functions and to protect federal property. See *In re Debs*, 158 U.S. 564, 582 (1895). Nonetheless, the Immediate Response scenario is not a classic exercise of sovereign authority for two reasons. First, it is not the sovereign that is acting in this situation, it is the military commander. Second, the commander undertakes his Immediate Response activities not to preserve a federal function or to protect federal property, both of which are clear examples of inherent authority, but to assist state or local authorities.

24. 367 U.S. 886 (1961).

25. *Id.* at 893.

26. 59 U.S. 115 (1851). Mitchell, an army colonel, seized the private property of Harmony, a United States citizen accompanying Mitchell's force as a trader during the Mexican War. Harmony sued Mitchell for the loss of his property. The colonel was concerned that the trader would supply the enemy as well as his own forces and justified his actions on grounds of necessity. The court upheld the lower court finding that, given the facts presented, Colonel Mitchell's actions were not justified by necessity.

impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.²⁷

Although *Mitchell* and other Supreme Court opinions discussing necessity do not discuss it in a disaster relief setting,²⁸ it is not unreasonable to extend its application to such situations. The key component of necessity is protecting the public welfare, and, while not facing a foreign or internal enemy, emergency disaster relief is, nonetheless, an act of self-preservation.²⁹ Few situations can be more compelling than attempts to rescue citizens ravaged by hurricane, flood, or an explosive device.

Several commentators agree that necessity is the basis for the Immediate Response Authority. This belief first became apparent in the aftermath of the previously mentioned San Francisco fire and earthquake of 1906, the classic example of Immediate Response Authority in both a civil disturbance and a disaster relief (MSCA) setting. In commenting on the Army's response to the San Francisco disaster, then Secretary of War Robert Taft stated, "[i]n a desperate situation General Funston saw clearly the thing that was necessary to be done and did it."³⁰ Analyzing that same incident in his treatise on martial law, Frederick Wiener, Special Assistant to the Attorney General, cited necessity as the legal basis for General Funston's actions.³¹ Major Cassius Dowell, in his 1925 book entitled *Military Aid to the Civil Power*, similarly approved of the Army's actions in San Francisco and went on to say that in sudden emergencies involving disasters, military assistance should be based on

"necessity," with the local commander exercising his "best judgment."³² Finally, in an article on the Posse Comitatus Act, Major H. W. C. Furman also cited approvingly to the principle of necessity in those circumstances and stated that the faculty of The Judge Advocate General's School, U.S. Army (TJAGSA) cited necessity as the basis for a military commander's ability to conduct emergency disaster relief.³³

A 1964 TJAGSA lesson plan entitled *Martial Law* indeed cited necessity as the basis for the military commander's authority to respond to emergency situations, whether it be caused by insurrection, riot, or natural disasters.³⁴ Relying on the language of the *Mitchell* case, the lesson plan contained a two-part test for the use of the doctrine: the first element being sudden and unexpected calamity and the second being the inability of civil authorities to act effectively.³⁵

This test continues to be an apt one, and it reflects the limited nature of the doctrine—the situation must be a bona fide emergency which overwhelms the ability of civilians to respond. These limitations have found their way into the modern-day regulations governing Immediate Response Authority, which will be discussed below. The local commander must evaluate these two elements and make a decision to deploy personnel in Immediate Response based on the facts presented to him at the time of the incident.³⁶

The existence of the emergency work provisions of the Stafford Act³⁷ also underscores the limited circumstances in which commanders should rely on Immediate Response Authority. One of the principal reasons for the 1988 passage of this provision was to enable the President to deploy the armed forces "during the immediate aftermath of a natural catastrophe."³⁸ Thus, despite the rare use of the emergency work provi-

27. *Id.* at 134.

28. *See* *United States v. Russell*, 80 U.S. 623, 627-28 (1871) (justifying the federal seizure of private vessels for military service during the Civil War on the basis of necessity). Necessity is most often discussed as the basis for martial law. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1945) (Stone, J., concurring) ("[Martial law] is a law of necessity to be prescribed and administered by the executive power.").

29. *See Mitchell*, 59 U.S. at 134 (stating that necessity is related to the "public service"); *Russell*, 80 U.S. at 628 (stating that necessity arises in cases of "public danger").

30. FREDERICK B. WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* 52 (1940). Following the incident, both the governor and the state legislature had high praise for General Funston's actions. *See also* FEDERAL AID IN DOMESTIC DISTURBANCES, S. DOC. NO. 67-263, at 310 (1922).

31. WIENER, *supra* note 30, at 51-52.

32. DOWELL, *supra* note 17, at 207.

33. Major H.W.C. Furman, *Restrictions Upon Use of the Army Imposed By the Posse Comitatus Act*, 7 MIL. L. REV. 85, 105 n.120 (1960).

34. THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, COMMON SUBJECTS LESSON PLANS: MARTIAL LAW 7 (July 1964) (on file at TJAGSA).

35. *Id.*

36. *Mitchell v. Harmony*, 59 U.S. 115, 135 (1851) (stating that "[i]n deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision").

37. 42 U.S.C. § 5170b(c) (1995). *See also infra* notes 77-82.

sions,³⁹ it is clear that Congress left little room for DOD disaster relief activity outside the Stafford Act framework.

Current Guidance on the Use of Immediate Response Authority

Contemporary DOD directives ensure the limited nature of Immediate Response activities undertaken by the armed forces. First, consistent with the federalism concerns discussed below, there must be a request from local authorities.⁴⁰ In evaluating such requests, a commander should take into account two other considerations which flow from the fundamental principle that the state or local authorities have the primary responsibility to respond to these situations: Those authorities should have applied their own resources to the situation prior to making the request, and those authorities must have found that the situation was beyond their capabilities.⁴¹ The DOD, for a variety of reasons, both legal and fiscal, cannot become a “first responder” to all types of emergencies.

While the type of assistance permitted under the Immediate Response Authority is broad,⁴² it is not a blanket authority to provide disaster relief.⁴³ The authority is intended to be used in genuine emergencies which overwhelm the capabilities of local authorities. To ensure that the civilian request is for a bona fide emergency, the Director of Military Support Manual for Civil Emergencies, which implements *DOD Directive 3025.1*, places general temporal limits on the use of the authority. The manual

states that immediate response authority is “time sensitive” and that requests for assistance should be received from local officials within 24 hours of the completion of a damage assessment.⁴⁴

Fiscal concerns also limit Immediate Response activities. The Stafford Act contains a general reimbursement provision.⁴⁵ Consequently, the DOD expenditures for actions taken pursuant to a mission assignment from the Federal Emergency Management Agency (FEMA) are ultimately reimbursed by the FEMA, as long as the DOD follows the established procedures.⁴⁶ The statutory reimbursement mechanism is not available in the case of Immediate Response actions;⁴⁷ however, the DOD Directive states that even in Immediate Response situations, DOD support should be provided on a cost-reimbursable basis.⁴⁸ In these times of budget shortfalls, commands should more carefully scrutinize requests for Immediate Response support. Nonetheless, humanitarian concerns ultimately trump the fiscal concerns, as the directive emphasizes that assistance “should not be delayed or denied because of the inability or unwillingness of the requester to make a commitment to reimburse the Department of Defense.”⁴⁹

The final limit on Immediate Response activities is that such activities must not “take precedence over [the military’s] combat and combat support missions, nor over the survival of their units.”⁵⁰ This requirement is consistent with the provisions in the Military Support to Civilian Law Enforcement Agency

38. Disaster Relief, 55 Fed. Reg. 2,284 (1990).

39. The speed with which Presidents are making emergency or major disaster declarations has limited the usefulness of this authority. Gruber Interview, *supra* note 22. For example, President Clinton declared a federal emergency in Oklahoma City within seven hours of the blast.

40. DOD DIRECTIVE 3025.1, *supra* note 4, at 6 (stating that commanders may take action “to respond to the requests of civil authorities”). See also *infra* notes 56-64. The initial request may be verbal, but must be followed by a written request. DOD DIRECTIVE 3025.15, *supra* note 4, at paras. D7a, D8c.

41. Lieutenant Colonel Fenton Thomas & Lieutenant Colonel Corey Gruber, Immediate Response: In Time of Need (1994) (unpublished manuscript, on file with author).

42. It includes: the rescue, evacuation, and emergency medical treatment of casualties; maintenance or restoration of emergency medical capabilities; the safeguarding of public health; the emergency restoration of essential public services; and emergency clearance of debris, rubble, and explosive ordnance from public facilities and other areas to permit rescue or movement of people and restoration of essential services, to name a few. DOD DIRECTIVE 3025.1, *supra* note 4, at 6.

43. CIVIL EMERGENCIES MANUAL, *supra* note 9, at 2-2; Thomas & Gruber, *supra* note 41, at 2.

44. Thomas & Gruber, *supra* note 41, at 2. The authors elaborate on this point by recommending that commanders consider “a time and distance relationship in determining the appropriateness of responding to a request for military resources.” The time element referred to is the twenty-four hour time-frame mentioned in the manual, while the distance element referred to is the proximity of the afflicted area to the supporting installation. DOD Directive 3025.15 echoes this guidance by stating that the request “may be made to the nearest DOD component or military commander.” DOD DIRECTIVE 3025.15, *supra* note 4, at para. D8c.

45. 42 U.S.C. § 5147 (1995).

46. After reviewing a request for support from state or local authorities, officials from the FEMA determine what agency will provide the support. Once a determination is made, the FEMA directs the agency to perform a particular assistance mission. A mission assignment letter to the agency articulates the scope of the job, the costs, and the time limitations associated with the project. CIVIL EMERGENCIES MANUAL, *supra* note 9, at 9-2 (explaining the DOD-FEMA reimbursement process). See also *infra* notes 82, 106.

47. On occasion, however, the FEMA has provided reimbursement to the DOD for Immediate Response activities by “ratifying” the DOD action after the fact. Such ratification, however, is done on an ad hoc basis, and commanders cannot rely on the FEMA doing so in every case. Gruber Interview, *supra* note 22. The FEMA is under no obligation to reimburse the DOD for response actions taken prior to a presidential declaration.

48. DOD DIRECTIVE 3025.1, *supra* note 4, at para. 5b.

Statutes,⁵¹ which state that such support may not be provided if it will “adversely affect the military preparedness of the United States.”⁵² That provision reflects a congressional recognition that the armed forces have the ultimate responsibility for the nation’s defense and that military readiness could be seriously compromised by draining DOD assets into other agencies.⁵³ The policy behind the Immediate Response Authority stems from similar concerns about draining DOD assets.⁵⁴ Thus, while Immediate Response Authority is firmly embedded in the DOD’s history and practice, it should be employed judiciously.

The Federal Government and Disaster Relief

Although the DOD’s provision of the medevac aircraft and the bomb dog teams to authorities in Oklahoma City, pursuant to the Immediate Response Authority, was undoubtedly valuable, the bulk of the DOD disaster relief assistance derives from express statutory authority. The remainder of this section will review that authority: the Stafford Act.⁵⁵ Before reviewing the Stafford Act, however, it is worthwhile to consider the larger context in which the federal government delivers such assistance.

In the aftermath of Hurricane Andrew, the Director of the Dade County (Florida) Office of Emergency Management asked, in light of the devastation, “Where in the hell is the cavalry?”⁵⁶ This statement highlighted a misconception about the role of the federal government in disasters, whether natural (as in the case of Hurricane Andrew), or man-made (as in the case of the Oklahoma City bombing). When disasters strike, people often overlook the concept of federalism, particularly in the current age of live media coverage.⁵⁷

Within the United States constitutional system, the Tenth Amendment reserves broad authority to states.⁵⁸ Response to disasters is considered to be one of the “police powers” left to state and local governments.⁵⁹ Virtually all federal statutes and regulations dealing with disaster relief recognize the primacy of state and local governments and specify that federal aid is intended to supplement state and local efforts.⁶⁰ For that reason, in the vast majority of disaster and emergency situations, the Stafford Act requires a request for federal disaster assistance from the governor of the affected state.⁶¹

The federal government, however, has traditionally played a role in disaster relief since the nation’s birth. The first case of such assistance was in 1793 as thousands of political refugees

49. *Id.* In 1989, Congress acted to mitigate the stress placed on DOD Operations and Maintenance Funds accounts (O & M accounts) as a result of providing disaster relief by establishing the Emergency Response Fund, a revolving fund. National Defense Appropriations Act, Pub. L. No. 101-165, Title V, 103 Stat. 1126-27 (1989). The fund is designed to “finance the costs of Department of Defense efforts to relieve the effects of natural and man-made disasters prior to the receipt of a reimbursable request for assistance from Federal, state, or local authorities.” CIVIL EMERGENCIES MANUAL, *supra* note 9, at 9-1. The fund may be used for reimbursing the DOD for the provision of supplies and services, plus the costs associated with providing such supplies and services. The fund may subsequently be reimbursed by the FEMA or by civilian authorities, in the case of the Immediate Response scenario. Use of the fund requires authorization by the office of the Secretary of Defense. *Id.* at 9-3. Unfortunately, this fund is no longer available to reimburse DOD activities because it has been depleted. Gruber Interview, *supra* note 22.

50. CIVIL EMERGENCIES MANUAL, *supra* note 9, at 2-2.

51. 10 U.S.C. §§ 371-81 (1995).

52. 10 U.S.C. § 376 (1995).

53. H.R. CONF. REP. NO. 100-989 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2582.

54. *But see* James F. Miskel, *Observations on the Role of the Military in Disaster Relief*, 49 NAVAL WAR C. REV. 105 (1996) (arguing for an expanded DOD role in disaster relief).

55. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121-5204 (1995).

56. Mary Jordan, *President Orders Military to Aid Florida*, WASH. POST, Aug. 28, 1992, at A1.

57. NATIONAL ACADEMY OF PUB. ADMIN., COPING WITH CATASTROPHE: BUILDING AN EMERGENCY MANAGEMENT SYSTEM TO MEET PEOPLE’S NEEDS IN NATURAL AND MANMADE DISASTERS 28 (1993), *reprinted in* *Rebuilding FEMA: Preparing for the Next Disaster: Hearing Before the Senate Comm. on Governmental Affairs*, 103d Cong., 1st Sess. (1993) [hereinafter NAT. ACAD. PUB. ADMIN].

58. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

59. NAT. ACAD. PUB. ADMIN., *supra* note 57, at 28.

60. Stafford Act, 42 U.S.C. § 5121(b) (1995) (stating that it is the intent of Congress to provide an orderly and continuing means of assistance by the federal government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from disasters); 44 C.F.R. § 205.32 (1993) (containing Federal Emergency Management Agency Rules with language that is identical to the language of the Stafford Act); DOD DIRECTIVE 3025.1, *supra* note 4, at paras. D1(b) & D4(d) (stating that federal assistance is supplemental to state and local assistance and that civil resources are to be applied first).

61. 42 U.S.C. § 5170 (1995) (stating the procedure for Presidential declaration of a major disaster); 42 U.S.C. § 5191 (1995) (stating the procedure for Presidential declaration of an emergency).

from Santo Domingo arrived in various east coast cities. To relieve the stress the refugees placed on the cities, Congress appropriated \$15,000 to ten states to relocate the refugees.⁶² In so doing, Congress exercised its spending power to promote the “general welfare.”

Congress continued this ad hoc method of disaster relief until 1950, when it passed The Disaster Relief Act of 1950.⁶³ This statute was drafted to provide nationwide, continuing authority for the Federal Government’s disaster relief efforts.⁶⁴ Thus, instead of having to make postdisaster authorizations of relief each time a hurricane or flood occurred in a region of the country, permanent legislation addressed these recurring situations. This statute and its successors authorized the President to coordinate the response of Federal agencies.⁶⁵ The current version of the Disaster Relief Act of 1950, the Stafford Act, permits Federal agencies to provide extensive assistance.

The Stafford Act

The Stafford Act contains four triggers for federal disaster relief. By far, the most widely used are the first two: the Presidential declaration of a major disaster⁶⁶ and an emergency.⁶⁷ Both scenarios require the governor to make a request to the

President for assistance.⁶⁸ The procedures in both provisions require the governor to make a finding in the request that the incident is of such “severity and magnitude” that it is beyond the State’s and the local government’s ability to remedy.⁶⁹ Specifically, the governor must state that the State has taken the appropriate response action under State law and has executed the State’s emergency response plan.⁷⁰ The major disaster provision also requires the governor to furnish information regarding the nature and amount of State and local resources committed to the incident and to certify that the State and local government obligations and expenditures will comply with all cost-sharing requirements of the Act.⁷¹ The emergency procedure provision contains slightly different additional criteria: the governor shall furnish information describing State and local efforts that have been, or will be, committed to the emergency and define the type and extent of federal aid required. The President then makes the appropriate declaration.⁷² These conditions, which the state must meet before making the request, underscore the principle of dual sovereignty and state primacy in these incidents.

The primary distinction between the two declaration procedures is the requirement in the emergency procedure for the governor to define the type and amount of federal aid required.

62. RUTH M. STRATTON, *DISASTER RELIEF: THE POLITICS OF INTERGOVERNMENTAL RELATIONS* 21 (1989) (containing a brief history of United States disaster relief policy); *See generally* PETER J. MAY, *RECOVERING FROM CATASTROPHES: FEDERAL DISASTER RELIEF POLICY AND POLITICS* (1985); CONGRESSIONAL RESEARCH SERVICE REPORT TO THE HOUSE COMM. ON GOVERNMENT OPERATIONS, 93D CONG., 2D SESS., *AFTER DISASTER STRIKES: FEDERAL PROGRAMS AND ORGANIZATIONS* (Comm. Print 1974).

63. Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109, 1110 (1950).

64. S. REP. NO. 81-2571 (1950), *reprinted in* 1950 U.S.C.C.A.N. 4023, 4024.

65. *Id.*; Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109, 1110 (1950) (stating that federal agencies are authorized to provide assistance when directed by the President). The current disaster relief statutes, 42 U.S.C. §§ 5121-5204 (1995), contain identical language.

66. The statute contains the following definition:

“Major disaster” means any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

42 U.S.C. § 5122 (1995).

67. The statute contains the following definition:

“Emergency” means any occasion or instance for which, in the determination of the President, 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 [to] avert the threat of a catastrophe in any part of the United States.

Id.

68. *Id.* § 5170 (containing the procedure in the case of a major disaster); *Id.* § 5191(a) (containing the procedure in the case of an emergency).

69. 42 U.S.C. § 5191(a) (1996).

70. *Id.*

71. 42 U.S.C. § 5170 (1995).

72. In the case of a request for a major disaster declaration, the President may declare a major disaster, an emergency, or deny the request. In the case of a request for an emergency declaration, the President may declare an emergency or deny the request. 44 C.F.R. § 206.38 (1993).

The distinction stems from the establishment in 1974 of the second trigger for federal disaster relief: the emergency. Prior to 1974, the President could only invoke Federal disaster statutes by declaring a major disaster; such a declaration provided all of the benefits of the Federal statutes.⁷³ Congress, however, recognized that lesser emergencies existed which did not require the full complement of Federal disaster aid.⁷⁴ Consequently, the Disaster Relief Act of 1974 established a new category of response, the emergency, to increase the flexibility of the Federal response and to make it more practicable to provide aid in situations of a less extensive nature.⁷⁵ Passage of these statutes prompted Congress to impose a five million dollar ceiling on emergency aid⁷⁶ because the assistance provided would be less comprehensive than assistance provided for major disasters. The five million dollar ceiling created a need for the State to specify the nature and amount of support needed.

The other two triggers, which are more infrequently used, were added to the Disaster Relief Act of 1974 in the 1988 revisions to that act.⁷⁷ The first permits the President, prior to making a major disaster declaration or an emergency declaration, to use the DOD resources in the immediate aftermath of an incident to preserve life and property.⁷⁸ The intent of Congress in passing this legislation was to provide “gap-filler” authority in those cases where the emergency was so severe that immediate DOD⁷⁹ involvement was necessary prior to the completion of

the Presidential declaration process.⁸⁰ This “emergency work” authority only lasts for ten days⁸¹ and also requires a request for such resources from the governor of the affected State.⁸² This authority is rarely employed.⁸³

The other trigger is the only one of the four which does not require a request from the governor. This provision, contained in the emergency assistance subchapter of the Stafford Act, allows the President to declare an emergency when the affected area is one in which the United States exercises exclusive or preeminent responsibility and authority under the Constitution or United States law.⁸⁴ While no formal request from the governor is required in this scenario, the statute does require, if practicable, consultation with the governor.⁸⁵ President Clinton was the first president to exercise this authority when he declared an emergency in the wake of the Oklahoma City Bombing.⁸⁶

The nature and extent of federal assistance varies, depending on the categorization of the catastrophe. As discussed above, the emergency declaration provision was designed to have a short-term focus, and the relief authorized in such situations reflects that statutory focus. The President’s designee, the FEMA, is authorized to direct any appropriate federal agency to employ its resources to save lives; to protect property, public health, and safety; and to lessen or to avert the threat of a catas-

73. See S. REP. NO. 93-778 (1974), reprinted in 1974 U.S.C.C.A.N. 3070, 3072.

74. *Id.*

75. *Id.* See also CONGRESSIONAL RESEARCH SERVICE, REPORT TO THE HOUSE COMM. ON GOVERNMENT OPERATIONS, 93D CONG., 2D SESS., AFTER DISASTER STRIKES: FEDERAL PROGRAMS AND ORGANIZATIONS 68 (Comm. Print 1974) (stating that the 1974 statute eliminated “the all or nothing situation” of prior disaster relief legislation which only provided Federal assistance upon declaration of a major disaster). In 1988, Congress amended the definition of emergency to emphasize further that federal support in the case of an emergency was to be of the “short term, immediate response” variety. 55 Fed. Reg. 2,284 (1990).

76. 42 U.S.C. § 5193 (1995). This statute permits the provision of additional federal emergency funding if the President makes the requisite determination.

77. H.R. REP. NO. 100-517, at 7, 12 (1988), reprinted in 1988 U.S.C.C.A.N. 6085, 6091.

78. 42 U.S.C. § 5170b(c) (1995).

79. The authority only applied to DOD assets; it did not authorize the early involvement of any other Federal agencies under the provisions of the Stafford Act. *Id.* See also 44 C.F.R. § 206.34 (1993) (discussing the interplay of this authority with independent statutory authorities applicable to other Federal agencies).

80. 55 Fed. Reg. 2284 (1990).

81. The 10-day period begins with the FEMA’s issuance of its mission assignment. 44 C.F.R. § 206.34 (1993). The FEMA mission assignment letter is a critical document in the Federal disaster relief process. It is defined as the “[w]ork order issued to a Federal agency by the Regional Director, Associate Director, or Director (of the FEMA), directing completion by that agency of a specified task and citing funding, other managerial controls, and guidance.” 44 C.F.R. § 206.2 (1993). The mission assignment letter thus provides the basis for agency reimbursement under the Stafford Act. In acting without a mission assignment letter, DOD assets providing disaster relief assistance run the risk of the FEMA not reimbursing them for the assistance. DEP’T OF ARMY, DOMESTIC DISASTER ASSISTANCE: A PRIMER FOR ATTORNEYS 3 (1992) [hereinafter DISASTER RELIEF PRIMER].

82. 42 U.S.C. § 5170b(c) (1995).

83. See *supra* note 39.

84. 42 U.S.C. § 5191(b) (1995).

85. *Id.*

86. FEMA REPORT, *supra* note 1, at 1.

trophe.⁸⁷ In addition, the FEMA may also provide some other emergency assistance, as well as assistance under two of the major disaster provisions: temporary housing assistance and debris removal.⁸⁸ While the emergency assistance subchapter is significantly more limited in its scope of programs, it does provide ample authority for the federal government to relieve the immediate threats to persons and property with its savings clause.⁸⁹

Major disaster assistance includes all of the emergency-type assistance mentioned above plus extensive programs of a wide-ranging and long-term nature, such as unemployment assistance, individual and family grant programs, relocation assistance, legal service assistance, and crisis counseling assistance, to name a few.⁹⁰ Many of these types of assistance do not involve the DOD; nonetheless, judge advocates should keep in mind that the Stafford Act provides the authority for the vast majority of the DOD's domestic disaster relief missions.

The FEMA and DOD Disaster Relief

Since the DOD is one of several federal agencies that the FEMA may draw on once the President has declared a major

disaster or an emergency, the FEMA orchestrates the DOD support that is authorized by the Stafford Act.⁹¹ In 1992, the FEMA concluded the Federal Response Plan,⁹² which established a memorandum of understanding between the FEMA and the DOD, as well as several other federal departments and agencies, regarding the support expected from the DOD. While the FEMA had several purposes in drafting the Federal Response Plan, the FEMA's division of federal disaster response into twelve functional areas is the crucial part of the plan for the DOD.⁹³ "Public works and engineering"⁹⁴ is the emergency support function for which the DOD is responsible. The DOD's designation as the primary agency in this area does not mean that the DOD cannot be a supporting agency to all of the Federal Response Plan's emergency support functions.⁹⁵

The FEMA executed the Federal Response Plan during the Oklahoma City tragedy and activated seven Emergency Support Functions.⁹⁶ The Federal Coordinating Officer orchestrated the federal support.⁹⁷ This action was predicated on President Clinton's emergency declaration on the same day.⁹⁸ Consistent with the Stafford Act, local and state officials responded first, with Governor Keating declaring a state of emergency at 0945. The Oklahoma City Fire Department was

87. 42 U.S.C. § 5192 (1995).

88. *Id.*

89. "Whenever the federal assistance provided under subsection (a) of this section with respect to an emergency is inadequate, the President may also provide assistance with respect to efforts to save lives, [to] protect property and public health and safety, and [to] lessen or [to] avert the threat of a catastrophe." *Id.* at § 5192(b). Note also that the following section in the Stafford Act places a \$5,000,000 cap on emergency assistance. However, the section also contains Presidential waiver authority, if the President finds that: (1) continued emergency assistance is immediately required; (2) there is a continuing and immediate risk to lives, property, public health or safety; and (3) necessary assistance will not otherwise be provided on a timely basis. 42 U.S.C. § 5193(b) (1995).

90. 42 U.S.C. §§ 5170-89b (1995). For a detailed discussion of the types of Federal assistance available in cases of major disasters, see Terry A. Coble, *Disaster Assistance Guide for Legal Services Practitioners*, 29 CLEARINGHOUSE REV. 3 (1995).

91. 44 C.F.R. § 206.5 (1993). Both Presidents Carter and Bush delegated the vast majority of the authority given to them by the Stafford Act and its revisions to the Director of the FEMA via Executive Order. The primary authority reserved was that of declaring a major disaster or an emergency. Exec. Order No. 12,148, 44 Fed. Reg. 43,239 (1979), reprinted in 42 U.S.C. § 5195 (1996); Exec. Order No. 12,673, 54 Fed. Reg. 12,571 (1989), reprinted in 42 U.S.C. § 5195 (1996).

92. FEDERAL EMERGENCY MANAGEMENT AGENCY, THE FEDERAL RESPONSE PLAN (1992).

93. *Id.* at 1-2 (stating that the purposes of the plan are: (1) to establish fundamental assumptions and policies; (2) to establish a concept of operations that provides an interagency coordination mechanism to facilitate the immediate delivery of federal response assistance; (3) to incorporate the coordination mechanisms and structures of other appropriate federal plans and responsibilities into the overall response; (4) to assign specific functional responsibilities to appropriate federal departments and agencies; and (5) to identify actions that participating federal departments and agencies will take in the overall federal response, in coordination with the affected state).

94. *Id.* at 14. The twelve emergency support functions are: transportation, communications, public works and engineering, firefighting, information and planning, mass care, resource support, health and medical services, urban search and rescue, hazardous materials, food, and energy. Originally, the DOD was also assigned the urban search and rescue emergency support function; however, that function was reassigned to the FEMA.

95. *Id.*; Copelan and Lamb, *supra* note 11, at 36.

96. FEDERAL EMERGENCY MANAGEMENT AGENCY, OKLAHOMA CITY BOMBING BRIEFING BOOK 1-3 (1995) [hereinafter FEMA BRIEFING BOOK]. The seven emergency support functions were communications, public works and engineering, information and planning, mass care, resource support, health and medical, and urban search and rescue.

97. FEMA REPORT, *supra* note 1, at 14-19. In this situation, as is often the case, the FEMA appointed one of their Region Directors as the Federal Coordinating Officer, who operated out of the Disaster Field Office (DFO).

98. See *supra* note 3. Exactly one week later the President declared Oklahoma City a major disaster. Because no counterpart to section 501(b) exists for major disasters, this action required a request from Governor Keating of Oklahoma for such a declaration. FEMA REPORT, *supra* note 1, at 14.

on the scene within seconds, and the staff from the state Department of Civil Emergency Management arrived within minutes of the blast. A key participant in the State emergency response was the Oklahoma National Guard, which had been activated within an hour of the bombing to provide security.⁹⁹

The Department of the Army, as the DOD Executive Agent for MSCA, transmitted its *execute order* for military support to civil authorities on 20 April.¹⁰⁰ Citing the Stafford Act and the Federal Response Plan as the legal and procedural authority, respectively, for the support effort, the message stated the mission as being one in support of the FEMA and the Department of Justice to provide military support and to conduct disaster relief operations to assist civil authorities in Oklahoma.¹⁰¹ The Commander, United States Atlantic Command, was designated as the supported commander-in-chief for the operation. Therefore, the chain of command for the operation ran from the Commander of the United States Atlantic Command, through the Secretary of the Army and the Secretary of Defense, to the President.¹⁰² The Commander of the United States Atlantic Command deputed a Defense Coordinating Officer to work with the Federal Coordinating Officer, serving as the DOD point of contact for all requests for military support.¹⁰³

Primary efforts by the DOD involved supporting the FEMA's urban search and rescue emergency support function. The FEMA deployed eleven of its twelve urban search and rescue teams to Oklahoma City to provide a continuous rotation of searchers for the victims.¹⁰⁴ The DOD provided C-141 airlift

assets to transport civilian rescue units to Oklahoma City from places such as Dade County, Florida; Fairfax, Virginia; and San Francisco, California.¹⁰⁵ The Army Corps of Engineers augmented the efforts of those rescuers by providing two of its Systems to Locate Survivors (STOLS) teams as well as some search and structures specialists.¹⁰⁶ On a somewhat less glamorous level, the FEMA assigned the DOD to provide clothing such as field jackets, Battle Dress Uniforms, socks, and portable shower units to the rescuers.¹⁰⁷ The DOD also provided C-5 aircraft to transport FBI mobile crime lab vans.¹⁰⁸

Support to Law Enforcement Authorities in Oklahoma City

Military support to civilian law enforcement agencies is, along with MSCA, one of the principal types of MACA.¹⁰⁹ The airlift support that the DOD provided to the FBI illustrated that form of support to law enforcement agencies and also highlighted the unique nature of the Oklahoma City mission. The nature of the event, an intentional destruction of Federal property, resulted in a dual agency command designation, with the FEMA being the lead agency for all non-crime-scene relief efforts and the FBI being the lead federal agency at the crime scene.¹¹⁰ This was the first time such a bifurcation of leadership roles had occurred in a disaster situation.¹¹¹ Consequently, not only did the DOD provide MSCA, as already discussed, but it also provided support to law enforcement, as discussed below.

99. In total, 465 National Guard personnel participated in the relief effort. Information Paper, *supra* note 1.

100. Message, Headquarters, Dep't of Army, subject: Execute Order for DOD Support to the Federal Emergency Management Agency (202244Z Apr 95).

101. *Id.*

102. *Id.* Note that the Commander, United States Atlantic Command, has delegated authority to Forces Command, its Army component command, to conduct MSCA.

103. *Id.* The Public Works Director at Fort Sill, a colonel, was appointed as the Defense Coordinating Officer at 1600 on 19 April 1995. Scales Memorandum, *supra* note 5.

104. FEMA REPORT, *supra* note 1, at 3.

105. Information Paper, *supra* note 1. The FEMA initially authorized assignments for the DOD by issuing a mission assignment activation letter. This letter indicated that all mission assignments would be supported by a "Request for Federal Assistance (RFA)" form. As an example, the RFA directing the Dade County and Fairfax missions contained a funding limitation of nearly \$98,000 to provide the transportation of those units. This figure could have been augmented, if adequately supported; however, the RFA generally sets the ceiling on DOD reimbursement under the Stafford Act. Letter from Sean P. Foohey, Director, Emergency Support Team, to MG Robert H. Scales, Director of Military Support (Apr. 28, 1995) (with attached RFAs) [hereinafter Mission Assignment Activation Letter].

106. FEMA BRIEFING BOOK, *supra* note 96, at 2. The DOD provided the structures specialists, as well as some Corps of Engineer personnel to provide debris removal, under the DOD's primary support role for Emergency Support Function 3 (public works and engineering). Memorandum, Secretary of the Army, to Secretary of Defense, subject: Support to the Oklahoma Bombing #3 (21 Apr. 1995).

107. The FEMA authorized \$65,000 for the provision of 500 field jackets and Battle Dress Uniforms, plus 1,000 pairs of socks. Mission Assignment Activation Letter, *supra* note 105.

108. Memorandum, Director of Military Support, to Secretary of the Army, subject: DOD Support to the Bombing in Oklahoma City, para. 3 (20 Apr. 1995).

109. DOD DIRECTIVE 3025.15, *supra* note 4, at para. B2.

110. FEMA REPORT, *supra* note 1, at 14.

111. *Id.* at 2.

A threshold legal concern in the context of this dual support mission is the statement in *DOD Directive 3025.1* that MSCA operations do not include “military assistance for civil law enforcement operations.”¹¹² That statement, however, does not mean that the armed forces cannot undertake law enforcement support operations *concurrently* with MSCA operations. Instead, it means that commanders and judge advocates must look to separate authorities when conducting such operations. The remainder of this article discusses those authorities. Before doing so, however, it provides a brief refresher on the fundamental legal consideration in all domestic support operations, and particularly in law enforcement support operations: the Posse Comitatus Act.¹¹³

Posse Comitatus Act

The Posse Comitatus Act (PCA) is a fundamental limitation on law enforcement support operations and MSCA activities. Absent an exception, the statute prohibits the use of active duty military personnel, and certain other military personnel,¹¹⁴ to “execute the laws.”¹¹⁵ The traditional exceptions include the military purpose doctrine, sovereign authority, and civil disturbance statutes.¹¹⁶ Noticeably absent as an exception to the

Posse Comitatus Act is the Stafford Act; thus, MSCA operations do not permit DOD units to perform any law enforcement functions in support of civilian law enforcement authorities under the authority of the Stafford Act.¹¹⁷ It is conceivable, however, that a disaster situation (MSCA) may deteriorate into a civil disturbance (another type of MACA operation) and thereby fall into an exception to the Posse Comitatus Act.¹¹⁸

Whatever the situation, judge advocates should be alert to the possibility that support to law enforcement issues may arise in any MSCA operation. Such situations require judge advocates to be familiar with other statutes which do authorize military support to civilian law enforcement. These statutes are not exceptions to the PCA and, consequently, permit only indirect support. The following section discusses these statutes and their application in Oklahoma City.

General statutory authority to support law enforcement rests in the Economy Act¹¹⁹ and the Military Support to Civilian Law Enforcement Agency Statutes.¹²⁰ Regulatory guidance for such support can be found in *DOD Directives 3025.15* and *5525.5*, and each service’s implementing regulation.¹²¹ Requests for

112. DOD DIRECTIVE 3025.1, *supra* note 4, at 4.

113. 18 U.S.C. § 1385 (1995).

114. DOD DIRECTIVE 5525.5, *supra* note 15, at 4-6. Personnel not restricted by the PCA include members of the Reserves who are not on active duty, active duty for training, or inactive duty for training; members of the National Guard when not in federal service; civilian employees when not under the command and control of a military officer; and active duty personnel when off duty and in a private capacity. Note that the Navy and Marine Corps are not legally subject to the PCA, but both services are subject to the DOD guidance on the PCA as a matter of policy. The Secretary of Defense may make exceptions to this policy on an ad hoc basis. *Id.*

115. Determining when military personnel are “executing the law,” and thus violating the PCA, has been an elusive concept for the judiciary. Federal courts have articulated three separate “tests” to determine when a PCA violation has occurred. Courts may employ all three tests in a given case. See INT’L AND OPERATIONAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK, 22-3 (1 June 1996); Paul J. Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 109, 116-17 (1984).

116. DOD DIRECTIVE 5525.5, *supra* note 15, at 4-1 through 4-3. Often included as another exception are the Military Support to Civilian Law Enforcement Statutes (10 U.S.C. §§ 371-82); however, this DOD Directive does not categorize them as such. Instead, it considers that authority to be “indirect assistance,” discussed under the categories of training, expert advice, operating and maintaining equipment, and the transfer of information. *Id.* at 4-3 through 4-6. The final form of indirect assistance is a “catch-all” category including other actions approved in accordance with Service directives that do not subject civilians to the use of military power that is regulatory, proscriptive, or compulsory. *Id.* at 4-6. Congress passed these statutes to clarify the intent of the Posse Comitatus Act after the federal courts generated confusion as to what the PCA proscribed. Rice, *supra* note 115, at 113-17. The most recent addition to these statutes, however, contains a specific, albeit limited, exception to the PCA. Section 1416 of the 1997 National Defense Authorization Act (codified at 10 U.S.C. § 382) permits the Secretary of Defense to provide assistance to the Department of Justice in emergency situations involving a biological or chemical weapon. While the statute prohibits the direct participation of military personnel in most cases, it authorizes direct participation in arrest, search and seizure, and intelligence collection when necessary to save human life and civilian authorities are unable to take the required action, as long as the action is otherwise authorized by law. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1416, 110 Stat. 186 (1996). See also H.R. REP. NO. 104-724, at 819 (1996) (emphasizing that the use of the military in such circumstances “should be limited both in time and scope to dealing with the specific chemical or biological weapons-related incident”).

117. See DISASTER RELIEF PRIMER, *supra* note 81, at 17-18. This primer, which constituted the after-action report from Hurricanes Andrew and Iniki in 1992, reiterated that military personnel could, of course, provide security for military personnel assets and personnel. Furthermore, relying on the military purpose exception, Army units deployed to South Florida after Hurricane Andrew used active duty military personnel to direct traffic on military supply routes and to provide security to food warehouses established by the Army Material Command. *Id.* Civilian law enforcement and national guardsmen should perform the law enforcement role in MSCA operations where no military purpose doctrine exception exists. *Id.*; Copelan & Lamb, *supra* note 11, at 38. This is exactly what happened in the case of the Oklahoma City Bombing as Oklahoma National Guardsmen took on the law enforcement role.

118. The 1906 San Francisco earthquake and fire is one historical example. See *supra* notes 16-19. More recently, in 1989, before it pounded Charleston, SC, Hurricane Hugo struck the Virgin Islands. After declaring a disaster and upon notification of widespread looting in St. Croix, President Bush invoked the Civil Disturbance Statutes and dispatched units of the XVIII Airborne Corps to restore order. Exec. Order No. 12,690, 54 Fed. Reg. 39,153 (1989).

119. 31 U.S.C. § 1535 (1995). The Economy Act provides authority for federal agencies to order goods and services from other federal agencies and to pay the actual costs for those goods and services. Note that the Economy Act is limited to other federal agencies. CONTRACT L. DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-506, FISCAL LAW DESKBOOK 8-1 (May 1996) [hereinafter FISCAL LAW DESKBOOK].

support to law enforcement must be processed according to these directives. The recently promulgated *DOD Directive 3025.15* is the starting point in handling any request for DOD assistance from civil authorities.¹²² It provides policy guidance on the provision of MACA, requiring the DOD approval authorities to consider six factors in evaluating all requests by civil authorities for DOD assistance. The six factors to be considered are: legality (compliance with laws); lethality (potential use of lethal force by or against DOD forces); risk (safety of DOD forces); cost (who pays, and what is the impact on the DOD budget); appropriateness (whether conducting the requested mission is in the interest of the DOD); and readiness (impact on the DOD's ability to perform its primary mission). The directive contains guidance on the processing of, and the approval authorities for, requests for all types of MACA operations. Regarding support to law enforcement authorities, *DOD Directive 3025.15* refers the reader to *DOD Directive 5525.5* for approval procedures for such requests. However, *DOD Directive 3025.15* slightly modifies the approval procedures in *DOD Directive 5525.5* by requiring at least flag officer or general officer approval of all such requests.¹²³ Support to law enforcement authorities is subject to the restrictions of the Posse Comitatus Act and its Title 10 counterpart: 10 U.S.C. § 375.¹²⁴

To illustrate the Economy Act authority and Posse Comitatus Act limitations, consider the following example. Following the Oklahoma City bombing, the FBI requested the use of several Defense Intelligence Agency linguists to assist their special

agents in the investigation. This type of support, while of an indirect nature, is not the kind specifically authorized under the Military Support to Civilian Law Enforcement Agencies Statutes.¹²⁵ Thus, the FBI cited the Economy Act as authority for the request, and the FBI provided the required reimbursement.¹²⁶ Guidance accompanying this assignment reflected Posse Comitatus Act concerns, from both a law and policy perspective, as it forbade linguists from participating in any law enforcement activities or conducting any real-time translation. The DOD permits only non-real-time translation of tapes and documents.¹²⁷ Another legal aspect of this request involved the mission operational specialty of the detailed personnel—in this case, intelligence personnel. In addition to the normal approval required by the applicable DOD or service regulation, *DOD Regulation 5240.1-R* requires the approval of the servicing DOD component's General Counsel for use of employees of the DOD intelligence components, such as the Defense Intelligence Agency.¹²⁸ This regulation also reiterates the applicability of 10 U.S.C. § 375 to this type of support.¹²⁹

The United States Marshals Service also made a request for support in the aftermath of the bombing. While relying on the Economy Act, the request from the Marshals Service also highlighted the Military Support to Civilian Law Enforcement Agency Statutes. On 26 April 1995, the Marshals Service requested Military Working Dog Teams (MWDTs) for explosive ordnance detection purposes, primarily to check vehicles and packages.¹³⁰ In addition to the Economy Act, the DOD has analyzed the use of teams under the provisions of 10 U.S.C. §§

120. 10 U.S.C. §§ 371-82 (1995). Note the relationship between these statutes and the Economy Act. The Economy Act only applies in the absence of a more specific interagency acquisition authority (e.g., the Military Support to Civilian Law Enforcement Agency Statutes). FISCAL LAW DESKBOOK, *supra* note 119, at 8-3. Nonetheless, other federal agencies tend to cite the Economy Act as authority for various law enforcement support operations because they are accustomed to using it.

121. AR 500-51, *supra* note 15; DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5820.7B, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (28 Mar. 1988); DEP'T OF AIR FORCE, AIR FORCE INSTR. 10-801, AIR FORCE ASSISTANCE TO CIVILIAN LAW ENFORCEMENT AGENCIES (15 Apr. 1994).

122. DOD DIRECTIVE 3025.15, *supra* note 4, at paras. D10 and 12 (stating that all requests for DOD support, whether from federal, state, or local authorities, must be in writing).

123. DOD DIRECTIVE 3025.15, *supra* note 4, at para. D7b. The service directives cited in footnote 121 amplify the guidance contained in DOD Directive 5525.5.

124. Note that 10 U.S.C. § 375 constitutes parallel prohibitory, albeit noncriminal, legislation to the PCA as it directs the Secretary of Defense to prescribe regulations that prohibit direct participation by any member of the armed forces (including the Navy and Marine Corps) in any search, seizure, arrest, or other similar activity. Those regulations are contained in DOD Directive 5525.5, which proscribes interdiction of vehicles, vessels, or aircraft; apprehension, stop, and frisk; and the use of military personnel for surveillance, the pursuit of individuals, or as undercover agents, informants, investigators, or interrogators. DOD DIRECTIVE 5525.5, *supra* note 15, at 4-3. The key difference is, of course, that 10 U.S.C. § 375 is regulatory as opposed to criminal. Additionally, these statutes also apply to the Navy and Marine Corps, to whom the PCA does not apply. Nonetheless, DOD Directive 5525.5 preserves the ability of the Navy and Marine Corps to perform any of these prohibited functions because it contains a Secretary of Defense waiver of those restrictions. *Id.* at 4-6. How can a regulation permit, through a waiver by the Secretary of Defense, what appears to be prohibited by 10 U.S.C. § 375? First, 10 U.S.C. § 375 contains qualifying language, "unless otherwise authorized by law." While the PCA does not authorize the use of the Navy and Marine Corps in direct support, it certainly does not prohibit either service from doing so. Furthermore, 10 U.S.C. § 378 provides support for the conclusion that the DOD may waive the 10 U.S.C. § 375 restrictions because it states that nothing in the Military Support to Civilian Law Enforcement Agency Statutes was intended to limit the authority of the Executive Branch beyond that provided by law before 1 December 1981. Thus, because sailors and marines were not considered to be restricted by the PCA prior to 1 December 1981, and could participate directly in law enforcement with secretarial authority, they could not be restricted by 10 U.S.C. § 375. The Secretary of Defense waiver in DOD Directive 5525.5 provided the same flexibility that previously existed. *See*, RICE, *supra* note 115, at 127.

125. Note, however, that specific authority exists for linguist support, along with nine other specific types of support, as part of counterdrug support operations. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485 (1990), *reprinted in* 10 U.S.C. § 374 (1995). Note that this authority has been extended through 1999. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

126. Letter from John C. Harley, Deputy Assistant Director, Federal Bureau of Investigation, to Chief of Staff, Defense Intelligence Agency (Apr. 20, 1995) (on file with author).

372-73. Military working dogs are considered pieces of equipment under the provisions of 10 U.S.C. § 372, and their handlers are considered expert advisors under 10 U.S.C. § 373.¹³¹ Posse Comitatus Act restrictions apply equally to these operations. The applicable DOD instruction emphasizes that only the drug detection capabilities of the MWDT are to be used; MWDTs are not to be used to “track persons, seize evidence, search buildings or areas for personnel, pursue, search, attack, hold, or in any way help in the apprehension or arrest of persons.”¹³² This DOD Instruction applies to counterdrug missions, but a recent Air Force Instruction contains these same restrictions and applies them to the MWDT’s explosive detection capabilities as well as its drug detection capabilities.¹³³ The Marshals Service indicated its awareness of these restrictions in its request, and the request was granted.¹³⁴

Conclusion

While the role the DOD assets played in support of civilian authorities in Oklahoma City was, by no means, as highly visi-

ble or as extensive as that provided following Hurricane Andrew in 1992, it, nonetheless, affords an excellent case study of various MACA legal authorities. Commanders at nearby military bases relied on the Immediate Response Authority to provide help within minutes of the blast, and those same commanders, along with units all over the country, supplied additional disaster relief support over the course of the next week under the authority of the Stafford Act. The Murrah Federal Building was also a federal crime scene, requiring the exercise of legal authorities which permitted, and also limited, the support the DOD could send to aid civilian law enforcement agencies that were providing security and investigating the crime.

Disasters, whether natural or man-made, arise with little or no warning and require swift responses in order to deal with what is inevitably a human tragedy. Judge advocates need to possess a sound knowledge of MACA authorities so they can be up to the task of supporting their commanders in a fast-moving and chaotic environment.

127. Memorandum for Record, Major P. A. Jenkins, DAMO-ODS, subject: Linguist Support to the Federal Bureau of Investigations (19 Apr. 1995) (on file with author). This guidance stems from a June 1994 FBI request for the use of DOD personnel proficient in Spanish to monitor court authorized electronic surveillance. Letter from James C. Frier, Deputy Assistant Director, Criminal Investigative Division, Department of Justice, to Mr. Brian Sheridan, Deputy Assistant Secretary for Drug Enforcement Policy and Support, Department of Defense (June 27, 1994). Prior to this request, the DOD had provided linguists for non-real-time translation support. This assistance was provided under the authority of the Economy Act. The Frier letter was thus viewed as an expansion of the DOD role in this area to include “live” monitoring. Letter from Brian Sheridan, Deputy Assistant Secretary of Defense for Drug Enforcement Policy and Support, to Mr. James C. Frier, Deputy Assistant Director, Criminal Investigative Division, Department of Justice (Nov. 16, 1994).

The DOD ultimately refused the FBI request, based on legal and policy grounds. From a legal perspective, the DOD was not convinced that a court would not view such activity by DOD personnel as a seizure in violation of the PCA. *Id.* The DOD held this opinion notwithstanding a contrary conclusion by the Department of Justice Office of Legal Counsel. Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Jo Ann Harris, Assistant Attorney General, Criminal Division, Department of Justice (Apr. 5, 1994) (stating that real-time monitoring would not violate the PCA). The DOD also cited several other policy-based concerns in denying the request (for example, creating the perception that the Army was again “spying” on U.S. citizens, adversely affecting military readiness by participating in activities with no corresponding military benefit, and disrupting unit deployments because of the requirements for court appearances).

128. DEP’T OF DEFENSE, REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS, 12-1 (7 Dec. 1982).

129. *Id.* (stating that the use of intelligence personnel will be consistent with enclosure 4 of DOD Directive 5525.5, the section of the directive containing the implementation of the 10 U.S.C. § 375 limitations).

130. Letter from Pat Wilkerson, United States Marshal, to Major P. A. Jenkins, DAMO-ODS (26 Apr. 1995) (on file with author) [hereinafter Wilkerson Letter]. This request, coming one week after the bombing and motivated by security concerns, can be contrasted with the immediate response use of bomb detection dog teams on the day of the blast.

131. DEP’T OF DEFENSE, INSTR. 5525.10, USING MILITARY WORKING DOG TEAMS (MWDTs) TO SUPPORT LAW ENFORCEMENT AGENCIES IN COUNTERDRUG MISSIONS 2 (17 Sept. 1990). The instruction also cites 10 U.S.C. § 374 as potential authority for the use of MWDTs as it authorizes the use of personnel to operate and maintain equipment. Section 374, however, is a more narrow authority, as it applies only to specified functions undertaken in the enforcement of specified criminal statutes.

132. *Id.* at 10.

133. DEP’T OF AIR FORCE, AIR FORCE INSTR. 31-202, MILITARY WORKING DOG PROGRAM, 8.9.3 (18 Mar. 1994). It should be noted that the DOD Instruction designated the Secretary of the Air Force as the DOD executive agent for MWDTs.

134. Wilkerson Letter, *supra* note 130.