

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Military Affairs and Domestic Security Committee

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BILL: SM 480

INTRODUCER: Senator Baker

SUBJECT: Control of the Florida National Guard by the Governor

DATE: February 15, 2010      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Pardue	Skelton	MS	<b>Favorable</b>
2.	_____	_____	RC	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

Senate Memorial 480 urges the United States Congress to preserve the authority of the Governor to retain command and control of the Florida National Guard and reject any changes that would restrict or diminish the Governor’s ability to activate the Guard in time of emergency.

**II. Present Situation:**

Authority for governance of the National Guard derives from a number of sources including:

- Article I, Section 8 of the United States Constitution which provides for the organizing, arming, and disciplining of the militia and for governing such part of them as may be employed in service to the United States;
- Title 10, U.S.C., which governs the Guard while called to active federal service;
- Title 32, U.S.C., which governs the Guard while under the control of the state governor;
- The Insurrection Act of 1807<sup>1</sup> which grants authority to the President of the United States, upon the call of the state legislature or the governor if the legislature cannot be convened, to call the militia into federal service in time of insurrection; and
- The Posse Comitatus Act of 1878<sup>2</sup> which prohibits the use of federal troops for law enforcement purposes.

The response to Hurricane Katrina highlighted significant issues with respect to the command and control of National Guard and federal forces during a time of emergency. National Guard forces acting under the control of the state governor are granted the authority to enforce laws to

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<sup>1</sup> 10 U.S.C. 331 – 335

<sup>2</sup> 18 U.S.C. 1385

maintain civil order and discipline. The Louisiana state government, however, appeared to be temporarily overwhelmed by the magnitude of the disaster. Federal laws, beginning with the founding of this country, have placed limitations on the power of the federal government to use the federal military to enforce laws within the states. These limitations were seen by some as adversely impacting the timely rescue of Katrina survivors and restoration of civil order. As federal military forces deployed to Louisiana with significant equipment and personnel resources to begin rescue efforts they quickly became embroiled in disagreements between state and federal officials over command and control of the forces.

The United States Congress amended the Insurrection Act as part of the 2007 Defense Authorization Act granting the President the authority to employ the armed forces, including the National Guard in federal service, to restore public order and enforce the laws of the United States 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.

The amended Insurrection Act retained previous provisions authorizing the President to take such necessary measures to suppress any insurrection, domestic violence, unlawful combination, or conspiracy if it so hinders the execution of the laws of a state or possession and of the United States 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. This provision applies to the case in which the constituted authorities of a state are unable, fail, or refuse to protect that right, privilege, or immunity or opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

The Congress then repealed the amended portion of the Insurrection Act in 2008 restoring the Act to its pre-2007 language.<sup>3</sup> This repeal was in response to strong opposition by the states related to federal preemption of the states' authority to command and control their Guard forces in time of disaster or emergency.

Department of Military Affairs officials have informed committee staff that there have been subsequent attempts by federal officials to further expand the federal authority to take command and control of state National Guard forces during time of disaster or emergency. Legislation is currently pending before the Congress to assure that tactical control of the Armed Forces on duty within a state or possession is vested in the governor thereof when such forces are engaged in a domestic operation, including emergency response.<sup>4</sup>

The National Governors Association has published a policy position on this issue stating:

In order to carry out their homeland defense and homeland security responsibilities, governors must retain command and control over the domestic use of their own National Guard forces and supporting National Guard forces from other states operating within the supported governor's state or territory. For the same reasons, when a Dual Status Command has not been established under 32 USC 325, governors, acting through their Adjutants General and Joint Force Headquarters-State, must have tactical control over all

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<sup>3</sup> National Defense Authorization Act for Fiscal Year 2008, H. R. 4986.

<sup>4</sup> 111<sup>th</sup> Congress Second Session, Senate Bill 1361.

Title 10 active duty and reserve military forces engaged in domestic operations within the governor's state or territory. Exceptions to this are: (1) if the application of lethal military force is required to repel an invasion or attack against the United States; and/or (2) if National Guard forces in state active duty or Title 32 status are being used to resist a lawful order of the executive or judicial branch of the federal government. In these two instances, a governor's tactical control of Title 10 military forces would be inappropriate and federal activation of the governor's National Guard forces under Title 10 USC for domestic operations should be authorized. Unless or until governors are given tactical control over Title 10 active duty and reserve military forces engaged in domestic operations within their state or territory, governors support the congressional rejection of provisions to change the Insurrection Act to allow the President to call-up and domestically deploy federal reservists during the response to a domestic event.<sup>5</sup>

### **III. Effect of Proposed Changes:**

Senate Memorial 480 urges the Congress of the United States to preserve the authority of the Governor to retain command and control over the Florida National Guard. This memorial further calls on the Congress to reject any changes to federal law which would restrict or diminish the authority of the Governor to activate the Guard in response to a domestic crisis, disaster, or other emergency.

Copies of the memorial are to be dispatched to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, and each member of the Florida delegation to the United States Congress.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

None.

#### **C. Trust Funds Restrictions:**

None.

### **V. Fiscal Impact Statement:**

#### **A. Tax/Fee Issues:**

None.

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<sup>5</sup> National Governors Association Policy Position HHS-03, Army and Air National Guard, located on National Governors Association website at <http://www.nga.org/portal/site/nga/menuitem.8358ec82f5b198d18a278110501010a0/?vgnextoid=24ca9e2f1b091010VgnVC M1000001a01010aRCRD> last viewed on February 16, 2010.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.