

The U.S. Military Should Not Become "Team America: City, County, State, Hurricane, Earthquake, Flood, and Riot Police"

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The U.S. Military Should Not Become "Team America: City, County, State, Hurricane, Earthquake, Flood, and Riot Police"

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Images of desperate and helpless Americans dying and looting in the aftermath of hurricane Katrina caused ordinary citizens and high-ranking government officials to question if the federal and state emergency preparation and response systems should have done more.

An active duty Marine could only watch as fellow Americans suffered the devastating effects of Hurricane Katrina, and its aftermath, with the relief efforts constrained supposedly by the Posse Comitatus Act (PCA).¹ Critics would have the Act amended or repealed in order to alleviate the perceived problems. Instead of repealing the PCA, the U.S. government should ensure that federal, state, and local planning and decision making are integrated and that the most appropriate force is deployed.

Background

In the days following Katrina, President George W. Bush stated that he wanted a "broader role" for the military in response and support to domestic disasters.² As a result, Congress, the Armed Services Committee, the Joint Chiefs of Staff (JCS), and U.S. Northern Command (USNORTHCOM) were tasked with preparing proposals. However, those proposals and

¹ 18 U.S.C. §1385, states "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or 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."

recommendations will not repeal the PCA; instead, they will honor the PCA. In fact, in October 2005, the Secretary of Defense (SECDEF), Donald Rumsfeld, told Representative Ike Skelton (D-MO) of the House Armed Services Committee that the Pentagon has no plans to propose changes to the PCA.³ The Basis for the Secretary's position rests in an understanding of the PCA and its history.

PCS History

Constitutional framers saw militias/guardsmen as necessary to curb the need for, and the power of, the standing army. Combining the best of both worlds, Hamilton and Madison wrote in the *Federalist Papers* that "the militia is an ineffective body and that a standing army is required".⁴ Their intent was that the state militias could defend the people from any oppression that a standing army might inflict. A standing army need not be feared as long as there was a clear division between the state and federal forces.

The PCA provides a clear division when it comes to local law enforcement, and as the PCA is, in fact, a criminal statute, the PCA acts as a deterrent to the potential abuses of a

² Megan Scully, "Pentagon begins review of law on military's domestic role," Congress Daily, *GOVEXEC.COM DAILY BRIEFING*, 27 September, 2005, <<http://www.govexec.com>> (20 November 2005).

³ "Skelton: Rumsfeld Confirms DOD Has No Plans to Alter Posse Comitatus Act," *Inside the Pentagon*, Vol. 21 No. 41, (13 October 2005).

⁴ Alexander Hamilton, James Madison, John Jay, *The Federalist Papers* (New York: New American Library, 1961).

standing army.⁵ The PCA was enacted to prevent federal troops from acting as local police and "influencing" elections in the southern states after the Civil War.⁶ The PCA (as amended), in conjunction with Department of Defense (DoD) Directive 5525.5, applies to active duty members of the Army, Air Force, Navy, and Marines acting in their official capacity.⁷ Further, under DoDD 5525.5, the PCA applies to reservists on active duty or on inactive duty for training, National Guard personnel in federal service (i.e., Title 10 status), and civilian employees of the DoD when under the direct command and control of a military officer.

The PCA and DoDD 5525.5 make it a crime for any of the above to participate directly, on behalf of civilian law enforcement authorities, in searches, seizures, surveillance, pursuits, arrests, apprehensions, stop and frisks, vehicle/vessel/aircraft interdictions, or similar activities, or to act as undercover agents, informants, investigators, or

⁵ Wrynn v. United States, 200 F. Supp. 457 (E.D. N.Y. 1961) and Lieutenant Colonel Donald J. Currier, *The Posse Comitatus Act: A Harmless relic from the Post-Reconstruction Era or a legal Impediment to Transformation?*, (Carlisle Barracks, PA: U.S. Army War College, 7 April 2003) 18. An Air Force pilot was held personally liable because he presumably was familiar with the PCA for personal injury caused to a bystander when the pilot landed on an unprepared landing site under instructions from his base operations to assist the local sheriff.

⁶ Currier, *The Posse Comitatus Act: A Harmless relic from the Post-Reconstruction Era or a legal Impediment to Transformation?*, 7, 8.

⁷ 10 U.S.C. § 375 and U.S. Department of Defense, *DoD Cooperation with Civilian Law Enforcement Officials*, (Washington, D.C.: Government Printing Office, 20 December 1998), 1.

interrogators. The PCA grants two exceptions: **when authorized by the Constitution or when authorized by Act of Congress.**

Consequently, laws, executive orders, plans, and policies use the PCA as their decision point for what kinds of actions can be taken in certain situations.

Integrated Planning and Decision Making

The legal basis for using the military in situations such as Katrina does exist. However, to conduct a domestic operation, a President, Governor, commander, or troop must be familiar with and understand a myriad of sources and procedures.⁸

The criticism that the PCA causes confusion for and limits U.S. commanders and troops is quickly answered, in that uncertainty can be diminished and managed "by developing simple, flexible plans; planning for likely contingencies; developing standing operating procedures; and fostering initiative among subordinates."⁹ The key is to analyze the situation, then apply the appropriate law, plan, procedure, or combination of the three.

⁸ At least three DoD Directives must be reviewed by a commander to ensure proper actions and planning, including funding: 1) DoDD 3025.1 MSCA does not include military assistance for civilian law enforcement operations; 2) DoDD 3025.12 MACDIS applies to insurrections, rebellions, and violence. It requires Presidential authorization or an emergency where Presidential approval is not feasible; and 3) DoDD 3025.15 MACA speaks to the requesting process, approval authorities, and evaluation criteria to validate military support to civil authorities (the criteria are: legality, lethality, risk, cost, appropriateness, readiness).

⁹ U.S. Marine Corps Doctrinal Publication 1, *Warfighting*, 1997 (Washington, D.C.: Department of the Navy, 1997), 8.

For example, the Commander, U.S. Northern Command (NORTHCOM) who is responsible for the U.S. forces within the U.S. supporting civil authorities and providing civil support in response to attacks and natural disasters had analyzed the Katrina threat and developed a plan well within the PCA and the current legal parameters.¹⁰ "Days before Hurricane Katrina hit New Orleans, NORTHCOM Commander, Adm. Timothy J. Keating approved the use of bases in Meridien, MS, and Barksdale, LA, to pre-position emergency meals and medical equipment."¹¹ However, Lieutenant General Joseph Inge, deputy commander NORTHCOM, which provided the forces for the military part of the relief effort, said "active-duty soldiers will not get involved in any forced evacuations...[because] there are some 900 policemen in New Orleans [and] authorities in the state of Louisiana [can choose] to use their National Guard, in a state status."¹² U.S. military forces stood ready to support the federal agencies, state national guards, and local police but would not assume their duties unless properly authorized.

Several acts and plans have been created allowing appropriate lawful action while maintaining vital checks and balances.

¹⁰ *Fact Sheets U.S. Northern Command*, <<http://www.northcom.mil/index.cfm?fuseaction=news.factsheets>> (2 February 2006).

¹¹ "JTF Katrina," *GlobalSecurity.org*, 2005, <<http://www.globalsecurity.org/security/ops/jtf-katrina.htm>> (2 February 2006).

¹² JTF Katrina.

1. The Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121, *et seq.*, as amended) provides four situations allowing federal government involvement in the relief effort: 1) The President declares an area a "major disaster" and, at the request of the Governor, the federal government may supplement local efforts; 2) The President declares an area an "emergency" and determines that federal assistance is needed to supplement local efforts and protect health and safety. However, the Governor must define the type and amount of assistance requested; 3) Under the President's ten-day emergency authority to preserve life and property, the Governor may request that the President direct the SECDEF to utilize DoD resources to clear debris and wreckage and support essential public facilities and services for up to ten days; and 4) The area affected is under the primary responsibility of the Federal Government. The above require the state's Governor to request support and none of the above allow federal troops to participate directly in state law enforcement.

2. In the National Response Plan (NRP), the Department of Homeland Security (DHS) directs "Proactive notification and deployment of Federal resources in anticipation of or in response to catastrophic events in coordination and collaboration with State, local, and tribal governments and

private entities when possible.”¹³ The NRP allows for Presidential or SECEF action when all other local and Federal resources are “overwhelmed” or when an event “almost immediately exceeds resources normally available to State and local authorities” and “to take necessary [immediate response] action to respond to requests of civil authorities [that are] consistent with the PCA.”¹⁴

Applying the above to Katrina, DHS Secretary Michael Chertoff did not declare hurricane Katrina a catastrophe or incident of national significance under the Stafford Act or NRP until the evening after the storm made landfall.¹⁵ The debate continues as to who should have reacted better and faster -- the federal and/or state governments. However, what is clear is that the PCA was not the critical vulnerability that caused the alleged inadequate and slow response. Hence, the argument for changing or repealing the PCA because it is no longer applicable is quickly answered. Senators Christopher Bond (R-MO) and Patrick Leahy (D-VT), co-chairmen of the National Guard Caucus, wrote to the President that the “the current system [allowing overwhelmed local systems/Governor to call on the Guard before the Federal Government]...is fundamentally sound,” and the

¹³ U.S. Department of Homeland Security, *National Response Plan*, (Washington, D.C.: GPO, 2004), 43.

¹⁴ *National Response Plan*, 42.

¹⁵ William Banks, “Mold, Mildew, and the Military Role in Disaster Response,” *Jurist*, 17 October 2005, <<http://jurist.law.pitt.edu>>.

"arrangement preserves local control and state authorities granted under the Constitution."¹⁶

From a purely legal standpoint, the arguments against the PCA are best answered by examining how the courts have ruled when hearing cases involving the PCA. Three judicial tests are applied to determine whether the use of military personnel has violated the PCA.¹⁷ First, was the action of the military personnel active or passive? Second, did the use of armed forces pervade the activities of civilian law enforcement? Third, did the military personnel subject citizens to the exercise of military power that was regulatory (controlling or directing), proscriptive (prohibiting or condemning), or compulsory (coercive force). Ultimately, the judicial test is broader and might prevent more federal intrusion than already exists under laws, plans, and policies that focus on preventing "direct" military involvement in civilian law enforcement.

Appropriate Law Enforcement Agency

Finally, it has been argued that federal forces are better equipped and better trained to handle major domestic disasters. However, states' guards may be better suited than the federal government to conduct civilian law enforcement. According to

¹⁶ William Mathews, "Disaster Response; Weak reception for Bush's proposal to broaden military's role in domestic emergencies," *Armed Forces Journal* (1 November 2005): 8.

¹⁷ United States v. Kahn, 35 F.3d 426 (9th Cir.1994) and U.S. v. Hitchcock, 103 F.Supp. 2d 1226 (D. Haw. 1999).

Lieutenant General (LTGEN) Steven Blum, Director of the National Guard Bureau, "the National Guard is being restructured to reflect changing demand patterns and to make it more responsive across a broadened mission space."¹⁸ The Guard is upgrading its equipment, force structure, and alignment with USNORTHCOM, U.S. Pacific Command, other services and agencies. It is increasing its military police battalions and creating rapid reaction forces coordinated via joint-forces headquarters in each state and territory. The Guard remains the bridge between local communities, state governments, and federal agencies.¹⁹

In fact, restoring order and recovery operations are primary missions of the Guard.²⁰ In contrast, federal military rules of engagement (ROE) and rules for the use of force (RUF) severely limit what a military member can and cannot do. When LTGEN Russell Honore, Commander of the Federal troops in New Orleans, ordered his troops to keep their weapons pointed down, he reminded them that "this isn't Iraq."²¹ The basic ROE/RUF that a military member must use minimum force, proportional force, and military necessity still apply, but there is no standing domestic ROE/RUF. ROE/RUF are written for the situation and are intended to prevent military intrusion into

¹⁸ Daniel Goure, "The New Guard; at home and abroad, the nation's citizen soldiers are busier than ever," *Armed Forces Journal*, 1 October 2005: 20.

¹⁹ Goure.

²⁰ Goure.

civil liberties. With primary mission training geared toward domestic operations, the national guard is the appropriate force to conduct civilian law enforcement.

Conclusion

The solutions to the disaster response deficiencies uncovered by hurricane Katrina do not include amending or repealing the PCA. Confusion can be alleviated by better written directives, orders, and plans. Similarly, exercises and training must be conducted by all agencies, institutions, and levels of the federal and state government. Readiness requires an understanding of the roles and responsibilities that must be defined before the next "Hurricane Katrina."

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²¹ Gene Healy, "What of Posse Comitatus," *Cato Institute*, 8 October 2005, <<http://www.cato.org>>.

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