Posse Comitatus Should Not Be Revoked as a Response to Hurricane Katrina

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In the weeks following Hurricane Katrina, President Bush suggested that, in order to respond better to natural disasters, the Posse Comitatus Act should perhaps be relaxed or repealed.¹ This would, he argued, allow the active military immediately to take control in the event of a disaster and thus by implication avoid future mishaps such as the Katrina response.² The Posse Comitatus Act prohibits the willful domestic use of the Army or the Air Force for law enforcement except “in cases and under circumstances expressly authorized by the Constitution or Act of Congress.”³ It has been on the books for well over a century, having been enacted in 1878 in response to excesses in the use of the military during Reconstruction following the Civil War.⁴ Given the President’s suggestion, in the context of a natural disaster, to what extent would revocation of Posse Comitatus be useful in protecting the lives and health of our residents?

The answer is likely to be “almost not at all.” Over the years, numerous exceptions and limitations have been made to Posse Comitatus. Most notably, Posse Comitatus does not apply to either the National Guard or the Coast Guard.⁵ Thus, for example, the governor of a state may call up the National Guard forces of his or her state, in the state Guard’s capacity as a successor to state militias, to enforce a quarantine, evacuate residents from a contaminated or hazardous area, or take other steps potentially related to law enforcement in the event of a state emergency.⁶ If an individual state’s available National Guard troops are inadequate in number to deal with the task, the Emergency Management Assistance Compact (EMAC), to which nearly all U.S. jurisdictions are a party, permits other states party to the EMAC to “lend out” their own troops to the governor of the affected state.⁷

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² Id. Revocation of Posse Comitatus to deal with a biological or chemical attack or an insurrection is not necessary as exceptions are already made for this. See, e.g., 10 U.S.C. § 332 (West 2005); id. § 382(a) (West 2005).
³ 18 U.S.C. § 1385 (West 2005). Although the law itself mentions only the Army and Air Force, cases in at least two federal circuits hold that the law’s silence concerning the Navy and the Marine Corps does not constitute congressional approval to use either of those branches of the military to enforce the laws. See, e.g., U.S. v. Walden, 490 F.2d 372, 374 - 75 (4th Cir. 1974); U.S. v. Chon, 210 F.3d 990, 993 (9th Cir. 2000).
⁵ Id. at 394. The National Guard was created and is expressly intended to provide for domestic security, and, in its state capacity, is also successor to individual state militias. 32 U.S.C. § 102 (West 2005); Jorden v. Nat’l Guard Bureau, 799 F.2d 99, 101 (3rd Cir. 1986). The law expressly charges the Coast Guard with enforcing the federal laws on the high seas and on the water, among other duties. 14 U.S.C. § 2 (West 2005).
⁶ Jordan, 799 F.2d at 101. Hurricane Katrina provided an example of such a use, where Governor Blanco of Louisiana called up her state’s National Guard forces – to the extent they were not already occupied in Iraq or Afghanistan – to assist in the aftermath of the disaster. See, e.g., Eric Lipton et al., Political Issues Snarled Plans for Troop Aid, N.Y. TIMES, Sept. 9, 2005, at A1.
⁷ See, e.g., TEX. HEALTH & SAFETY CODE § 778.001, Art. 1 (West 2005) (codifying EMAC’s execution).
Additionally, on the President’s orders, any branch of the armed forces may put down any insurrection, including acts of looting and rioting. This provision was used in the Los Angeles riots of 1992 and was considered for use (though ultimately rejected, allegedly on political grounds) in response to reports of lawlessness in New Orleans following Hurricane Katrina. The Department of Defense may also make any equipment, base facility or research facility in its control available to state or local law enforcement agencies for the purposes of law enforcement.

The U.S. armed forces may also provide humanitarian and civic assistance activities that complement (rather than supplant) the efforts of other agencies. Although this provision is usually executed in foreign nations, nothing in the relevant law prohibits such actions from taking place within the borders of the United States. Thus, for example, had it wished to do so, and had sufficient active duty troops been available, the Administration could have ordered members of the armed forces to assist in rescue and relief efforts immediately following Hurricane Katrina.

Given this framework, Mr. Bush already had all the legal authority he needed, had he wished to press the active military into service following Hurricane Katrina to stem looting in New Orleans and to engage in rescue and relief efforts for those who remained trapped in the city. As his own legal advisers informed him, nothing in Posse Comitatus stood in his way in those respects. Rather, political considerations – in addition to an arguable failure of leadership – prevented such measures from being taken in the case of Katrina. Revocation of Posse Comitatus would do nothing to eliminate either of those two issues.

It does seem correct, however, that a stronger and more centralized system of control and responsibility should be instituted to deal not only with natural disasters such as hurricanes, but also with a variety of health emergencies, such as an influenza pandemic or a biological or chemical attack. The response to Hurricane Katrina made it abundantly clear that a state or locality’s response system could be entirely shut down when stricken by a disaster affecting not only the populace but also the potential responders. Katrina also made it clear that a single disaster can of course affect more than one jurisdiction, and may be better served by a more global response.

Laws such as the Model State Emergency Health Powers Act (MSEHPA), which pertains to bioterrorist acts, provide for an inter-jurisdictional chain of authority and responsibility. However, they do little with respect to providing for and coordinating intra-jurisdictional relief efforts other than to provide for a trigger for the EMAC and other similar multi-state compacts. Additionally, they provide for no method of consolidating authority in the event of a multi-state disaster as they are intended to be enacted by individual states, rather than by Congress. This is not unusual. Even the National Response Plan issued by the Department of

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9 See Lipton et al., supra note 6.
11 Id. § 401(a).
12 See, e.g., Lipton et al., supra note 6.
Homeland Security in December 2004 expressly assumes that a disaster is to be managed at the lowest possible jurisdictional level.\footnote{DEP’T OF HOMELAND SECURITY, NATIONAL RESPONSE BASE PLAN 6 (Dec. 2004), available at http://www.dhs.gov/interweb/assetlibrary/NRPbaseplan.pdf.}

Issues of federalism notwithstanding, it may make little sense for each jurisdiction to launch its own, largely uncoordinated response to a regional emergency. It may further be difficult or nearly impossible for a state to launch an adequate response at all if it experiences a severe hit. In addition to the issue of stricken personnel and/or damaged facilities and supplies in the event of a disaster, many state public health agencies are presently inadequately funded and staffed, even at the best of times, to respond sufficiently to a significant public health emergency.\footnote{For example, even following a federal infusion of nearly $1 billion in 2002, a study published by the Centers for Disease Control and Prevention found that a 45% increase in the number of epidemiologists was still necessary to fully staff state terrorism prevention and preparation efforts. M.L. Boulton et al., Terrorism and Emergency Preparedness in State and Territorial Public Health Departments: United States, 2004, 54 MORBIDITY \& MORTALITY WEEKLY REP. 459 (May 13, 2005). In 2002 and 2003, a majority of states cut their public health funding in the face of widespread budget crises. Trust for America’s Health, Ready or Not? Protecting the Public’s Health in the Age of Bioterrorism 12 (Dec. 2003), http://healthyamericans.org/state/bioterror/Bioterror.pdf.}

The logistics of organizing and funding a single response center, rather than one for each of our states and jurisdictions, suggests that a central response method may be preferable to our present system, at least with respect to serious public health emergencies.

It may therefore be time to consider enacting a federal law providing for a clear federal chain of command, with its locus in the Centers for Disease Control or other agency with significant public health expertise, in the event that a state or region experiences an incapacitating natural or man-made disaster. Especially because such a law would usurp the states’ traditional police powers, it would need to be carefully crafted to trigger only when, for example, the disaster placed the lives or health of a certain substantial minority of a state’s or region’s population in immediate jeopardy.\footnote{Although other definitions of “emergency” or “disaster” already exist under federal law dealing with disaster relief (see, e.g., 42 U.S.C. § 5122(1) & (2) (West 2005)), they are too lax to provide much protection to states against an overreaching federal government.}

It would also need to contain a short fixed endpoint, beyond which time it could be extended only with the permission of each affected state. Admittedly, there may be few natural disasters that would likely ever qualify as such a trigger. However, the potential for a bioterrorist act to function as such a trigger is arguably much larger.\footnote{As one example, the “Dark Winter” exercise of 2001, which examined what would happen if smallpox were released in Oklahoma City as of the date of the simulation, found that approximately 300,000 people would ultimately become infected throughout the country and beyond in such an event, and that approximately one-third of that number would be killed. See, e.g., Janice Hopkins Tanne, Preventing Dark Winter: The Public Health System’s Role in Strengthening National Security, 1 CARNEGIE REPORTER (Spring 2002), available at http://www.carnegie.org/reporter/04/preventing/index.html.} It should not require yet another Hurricane Katrina or a bioterrorist act to help ensure that we become better prepared.

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