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THE POSSE COMITATUS ACT: A HINDRANCE TO NATIONAL SECURITY IN NEED OF A CHANGE

by

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The Posse Comitatus Act was passed at the end of the American Civil War Reconstruction period. Since its inception in 1878, the Act has consistently been misinterpreted. The most common misinterpretation of the law is the statute that prohibits the federal government from using most federal troops for law enforcement. The Act limits the Department of Defense in accomplishing Defense Support to Civil Authorities (DSCA) missions during times of natural or man-made disasters. The Posse Comitatus Act (PCA) needs to be repealed and a new Interagency Coordination Act needs to put in its place. The intent of this paper is to show that there is a problem with the Posse Comitatus in obstructing federal forces from responding to domestic crisis and mitigating relief from loss of life or property. This research intends to offer a solution on how to better use not only military forces but a whole of government approach to prevent, prepare, and respond to domestic national disasters by recommending new legislature be passed. This paper will first take a look at the history of domestic use of the federal forces by the American people. Then, a background on the environment during the post-Civil War Reconstruction Period will be made in an effort to understand what led to the passing of the PCA. A description and explanation of the statutes PCA and its implications will also be reviewed. Modern case studies of recent national disasters or incidents will be used as examples where federal forces could have been utilized more effectively but were hindered by the PCA. This paper will end with the recommendation to pass a new act that more effectively uses federal assets to respond to a crisis.

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Contents

Page

DISCLAIMER II

PREFACE IV

ABSTRACT V

INTRODUCTION 1

USE OF MILITARY FORCES IN CIVIL AFFAIRS PRIOR TO THE US CIVIL WAR 3
- Federal Forces in Civil Affairs 3
- US Marshals and the US Army Prior to the Civil War 4

WHY THE POSSE COMITATUS ACT WAS PASSED 7
- Civil Unrest During the Post Civil War Reconstruction Period 7
- The Posse Comitatus Act 12

LA, WACO, AND KATRINA 16
- The Posse Comitatus and Civil Support 16
- The Los Angeles Riots 18
- JTF-6 and the Branch Davidians 19
- Katrina Strikes the US 21

A NEW WAY FORWARD 25
- A Transformation of Government 25
- A New bill needs to be ratified 27
- A Way Forward 28

CONCLUSIONS 33

BIBLIOGRAPHY 34

Preface

Having been assigned to the new headquarters of the United States Northern Command (USNORTHCOM) in 2005, I developed an appreciation for efforts made by some of America's best men and women in ensuring the Department of Defense was ready to respond to future domestic crisis. At times there was a clear understanding where military forces could be used either to prevent or to respond to any man-made or natural disaster. Other times, it was not so. En route to my assignment to USNORTHCOM in Colorado Springs, my family and I drove through several thunderstorms that were the remnants of Hurricane Katrina. In the aftermath of that event, the relatively new (having been created only two years earlier) geographical command was coming to grips with how to properly respond to a natural disaster while not overstepping the limitations of the Posse Comitatus Act, which prohibits the use of federal military forces without exclusive authorization from civilian leaders. The military could not act or mobilize until an order from the national leadership came. Yet throughout this crisis, the national public expected their government to do *something*. With this backdrop in mind, I decided to take an interest in the Posse Comitatus Act, its meaning, and how it has affected our nation's military in providing homeland security.

I would like to thank my wife, Samantha Zuniga, for suffering through long hours of neglect only to be rewarded with even more hours of listening to this paper through feigned interest. Without her support this submission would not have been possible.

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Abstract

The Posse Comitatus Act was passed at the end of the American Civil War Reconstruction period. Since its inception in 1878, the Act has consistently been misinterpreted. The most common misinterpretation of the law is the statute that prohibits the federal government from using most federal troops for law enforcement. The Act limits the Department of Defense in accomplishing Defense Support to Civil Authorities (DSCA) missions during times of natural or man-made disasters. The Posse Comitatus Act (PCA) needs to be repealed and a new Interagency Coordination Act needs to put in its place.

The intent of this paper is to show that there is a problem with the Posse Comitatus in obstructing federal forces from responding to domestic crisis and mitigating relief from loss of life or property. This research intends to offer a solution on how to better use not only military forces but a whole of government approach to prevent, prepare, and respond to domestic national disasters by recommending new legislature be passed. This paper will first take a look at the history of domestic use of the federal forces by the American people. Then, a background on the environment during the post-Civil War Reconstruction Period will be made in an effort to understand what led to the passing of the PCA. A description and explanation of the statutes PCA and its implications will also be reviewed. Modern case studies of recent national disasters or incidents will be used as examples where federal forces could have been utilized more effectively but were hindered by the PCA. This paper will end with the recommendation to pass a new act that more effectively uses federal assets to respond to a crisis.

Part 1

Introduction

The Posse Comitatus Act (PCA) was passed at the end of the American post-Civil War Reconstruction Period (1863-1877).[1] Since its inception in 1878, the Act has consistently been misinterpreted. The most common misinterpretation of the law is the statute that prohibits the federal government from using most federal troops for law enforcement. The Act limits the Department of Defense in accomplishing Defense Support to Civil Authorities (DSCA) missions during times of natural or man-made disasters. The PCA needs to be repealed and a new Interagency Coordination Act needs to put in its place.

Posse Comitatus, in Latin, means the 'force of the county'; the posse comitatus is that body of men above the age of 15 that a sheriff or marshal can summon to help prevent a riot or quell other civil unrest.[2] In the United States, it stems from the traditions of English common law, where a gathering of the local populace was called upon and organized into a posse in order to enforce the laws of the county. Throughout its more than 200-year history, America has used its federal military forces to handle domestic situations and crises on several occasions. From the very beginning Americans have had to call upon a militia to ensure that life, property, and rights are protected. The environment in which military force has been used to assist in domestic problems is of import to note. Following this, a look into events that led up to a decision to limit the authority to use federal military forces to support local and state law enforcement agencies or

organizations will be done. Since its inception the Posse Comitatus Act of 1878 has been misunderstood and misinterpreted and caused problems for the security of this nation.

Not only has the previously mentioned misinterpretation caused dilemmas in the use of military forces, but several other misunderstandings of the act have also been a source of impediment to national and domestic security. Even so, today's society is reticent about using military forces domestically in times of crisis unless conditions are severe. Therein lays a conundrum. While Americans do have an aversion to government control they do have a certain level of expectation from the government to protect them and their property from harm. In order to find a better balance between civil rights and government protection the PCA must be replaced with a more comprehensive Interagency Coordination Act. This will better enable the whole of government to take a holistic approach when meeting demands in times of national crisis. A study of historical uses of federal forces in America's past must first be examined to indicate that this nation has needed to use federal forces on several occasions before and after the Reconstruction Period. Additionally a look at the political environment must also be looked at in order to set up the backdrop that lead up to the enactment of the PCA of 1878.

Notes

[1] Barret, Brenda, Statement to the Senate Subcommittee on National Parks Concerning S. 2388.

[2] Brinkenhoff, John R. *The Posse Comitatus Act and Homeland Security*.

Part 2

Use of Military Forces in Civil Affairs Prior to the US Civil War

> *A marshal of the United States, when opposed in the execution of his duty by unlawful combinations, has authority to summon the entire able-bodied force of his precinct as a posse comitatus. This authority comprehends, not only bystanders and other citizens generally, but any and all organized armed force, whether militia of the State or officers, soldiers, sailors, and marines of the United States.*
>
> Attorney General Caleb Cushing, 27 May 1854

Federal Forces in Civil Affairs

In the early part of this nation's existence, the size of America's military force was small, but due to the demographic locations of the populace during those times, federal troops where needed to tame the American wilderness and maintain order in places where there was little in the way of local protection. At other times, federal forces have been called upon in other circumstances and continue to be used today. Some of these circumstances are to maintain domestic order, alleviate overwhelmed local police and firefighting forces, quell civil unrest, and provide disaster relief. Historically, the US Army has been the main instrument used in civil relief. As a land force, which by its nature interacts with the citizenry, the Constitution stated that the president would be the commander-in-chief of the military and Congress will control its financial support. Congress would use this power to limit the size of the US Army, consequently limiting the amount of power the army would have in the new nation. Incidentally, the Navy was not similarly controlled, being viewed as having minimal affect to interfere with civil affairs

at the time. The Constitution simply stated that Congress "provide and maintain a Navy."[1] The Constitution did not, however, prohibit the use federal forces to enforce laws when needed.[2] It simply preferred to use the militia (today the modern National Guard) instead of a standing army. There was no standardization among the militias for size or readiness. Each state's militia was equipped, trained, and used according to the desires and capabilities of that particular state. Often they were overwhelmed or failed to adequately respond to civil unrest, raising the need to use federal forces. This situation occurred on several occasions. The Whiskey Rebellion in 1794 was one of the very first cases where militiamen were federalized by President Washington to put down an insurrection when several counties in western Pennsylvania refused to pay federal excise taxes on their whiskey and production facilities.[3] Five years later, in 1799, President John Adams was similarly confronted with another minor tax rebellion in eastern Pennsylvania.[4] Having seen the success of using the federalized militia by his predecessor, Adams chose to quell this insurrection in similar fashion.[5]

US Marshals and the US Army Prior to the Civil War

The years leading up to the US Civil War were full of turmoil between northern and southern states. This friction was increased with emergence of the Fugitive Slave Act in 1850 that required all US Marshals and their deputies to detain escaped slaves with proper documentation and return them to the south.[6] The passage of the Fugitive Slave Act brought with it new enforcement authority for US Marshals allowing them to call for a formation of a posse to assist in the apprehension of fugitive slaves. The South supported the use of federal forces to enforce the new laws, and applauded utilizing the US Army as posse comitatus at the time. When northern state citizens refused to not only join the posse but also assisted in helping fugitive slaves escape then-President Fillmore called upon the military to support the marshals in their

duties. In the decade prior to the start of the Civil War, the heated issues of slavery were extended into the western territories. The passing of the Kansas-Nebraska Act of 1854 which allowed the Nebraska and Kansas to decide to enter the Union as free or slave states caused a mini civil war.[7] A clash between Kansas, which was anti-slavery, and Missouri, which was aligned with the South, ensued over several issues, but primarily focused on its alignment with the North or the South. Missourians would cross over into the Kansas Territory in an effort to tips the scales in the voting booth in the hopes that Kansas would not join as an abolitionist state. Kansas nevertheless joined the Union as a free state in 1861 with despite the wishes of its neighbor. The military was needed several times to quell the resulting clashes between the two states in the years leading to the US Civil War. Meanwhile, in the North, there was outrage anytime fugitive slaves were forcibly returned to the South and even more so when military forces were used. In Boston there was so much widespread chaos that it required the formation of force of 1,600 military and police officers to control the situation. To support his boss, then-President Franklin Pierce, Attorney General (AG) Caleb Cushing issued legal precedence by stating:

> A marshal of the United States, when opposed in the execution of his duty by unlawful combinations, has authority to summon the entire able-bodied force of his precinct as a posse comitatus. This authority comprehends, not only bystanders and other citizens generally, but any and all organized armed force, whether militia of the State or officers, soldiers, sailors, and marines of the United States.[8]

In the famous occurrence at Harper's Ferry, Virginia, federal forces were again needed and quickly sent to crush a riot where federal buildings were seized and hostages taken by a group led by abolitionist John Brown, who hoped to ignite a slave revolt. None other than Colonel Robert E. Lee led the forces that responded to the incident.[9] There were several instances in the American Frontier where the US Army was still needed to maintain order in

locations where there was very little, if any, in the way of local law enforcement. Vast areas of the West were still "untamed" and the small pockets of populations often could not defend themselves from either Indian attacks or local insurrections. The US Army in the frontier posts were the closest form of official government protection the Americans of the West could rely on whenever a local sheriff or US Marshal was overwhelmed. Often, US Marshals were authorized to deputize the federal forces in a posse comitatus in order to restore order. Events would happen, however, that would change how the federal forces in domestic crisis would be authorized. The South, which championed using the US Army in enforcing the Fugitive Slave Act would, in the aftermath of the Civil War, have a change of heart.

Notes

[1] US Constitution Online website. US Constitution, Article 1, section 8.
[2] Mathews, Matt. Posse Comitatus and the United States Army: A Historical Perspective., 6.
[3] Ibid., 8.
[4] Ibid., 13.
[5] Ibid., 13.
[6] Ibid., 14.
[7] Library of Congress. *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875*., 277.
[8] *Extradition of Fugitives from Service*, US Attorney General Opinion, Vol. 6, 466, 1854; quoted in Coakley, Robert., *The Role of Federal Military Forces in Domestic Disorders, 1789-1878*.,132.
[9] Mathews., 17.

Part 3

Why the Posse Comitatus Act Was Passed

> *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.*
>
> Title 18 USC 1385

Civil Unrest During the Post-Civil War Reconstruction Period

It is important to understand the setting which led to the enactment of the Posse Comitatus Act and the muddling of civil-military affairs. From that point until today confusion over the legal use of military force in domestic affairs has remained prevalent. During the post-Civil War Reconstruction Period (1865-1877) federal troops were again needed to maintain order in the former Confederate states until they could again offer their own local and state forces.[1] The Reconstruction Period was a tumultuous time where several political factions wrestled for control of the South. Numerous factors affected the post-bellum environment. Among some of them were former slaves' rights, status of Confederate officials, changing voting rights criteria, martial law imposed until a former Confederate state was readmitted into the union, the rise of terrorist-like paramilitary groups, and the controversy over the posting of federal troops at Southern polling stations.

The Reconstruction era generated many strong emotions in the South that often led to violence over who was legally allowed to vote for officials both in local, state, and federal

elections. In the beginning of the period President Johnson, who succeeded President Lincoln after his assassination, wanted to quickly restore the Union. He pardoned and appointed former Confederates to state government positions in order take control of the South despite the wishes of Congress. It must be pointed out that Congress was primarily made up of Northern Republican Congressmen as the Southern states lost all seats when they joined the Confederacy. It also important to note that Republicans at that time were focused on a strong central government and Democrats stood for states' rights and opposed a central Federal government mandating provisions to the states. This sentiment was especially strong in the Southern states, as it was one of the primary reasons for the Civil War. These sentiments did not end when the Civil War did, but instead permeated throughout the South, especially in politics. The new Southern governments were quick to develop laws that would oppress the newly-freed blacks and limit their rights as citizens. Furthermore, they allowed, if not encouraged, criminal and terrorist-like tactics to be used against the Southern black population. Congress responded by attacking both President Johnson's policy and the Southern states' racial practices by passing the Civil Rights Act in 1866. The act states that all persons born in the United States were citizens (with the exception of Native Americans) who would consequently have all the rights of American citizens regardless of race.[2] In the Civil Rights Act of 1866 a clause was included that nearly mirrored the Fugitive Slave Act in that it once again gave marshals the authority to raise a posse comitatus out of the populace to include military forces in the enforcement of laws. Congress also passed the 14th Amendment of the Constitution and required all Southern states to abide by it and ratify it in order to be allowed back into the Union.[3] Shortly thereafter, General Grant, in charge of all US Army forces, issued an order empowering the occupying military force in the South to arrest anyone who violated the rights of the citizens when local law enforcement failed

to do so.[4] In 1867 Congress went even further by declaring all Southern governments provisional because they were not able to legally protect their citizens-*all* of their citizens. The US Army would then be tasked by Congress to protect the rights of all citizens and to suppress any violence or insurrection. The US Army was also there to ensure black male citizens were allowed to vote free from racial persecution. As a result, racially-mixed Republican governments were established in the Southern states that were willing to quickly ratify the 14th Amendment and subsequently rejoin the Union. As Southern states were allowed to return to the Union, the Army would remove its forces and the state would be responsible for administering and maintaining law and order.

The post-bellum South was none too enthusiastic to accept terms that seemed to take away power from the traditional ruling class, in terms of both economic and racial demographics. As several changes were implemented on the voting base in the South, primarily due the addition of new freemen or former slaves, many whites resisted. Many did so by forming or joining radical paramilitary groups, such as the Ku Klux Klan (KKK), that often behaved criminally and often employed terror tactics against either blacks or Republican whites.[5] Grant's forces had to not only assist in administering the South but had to also pursue the paramilitary groups and quell any civic disorderly conduct. Precedence had been set in previous times by AG Cushing's opinion and reaffirmed in the Civil Rights Act giving US Marshals authority to raise a posse comitatus. Not only was this power used in the Frontier West, it was frequently exercised in the South. Due to limited manpower, local US Marshals were often overwhelmed, and were not able to maintain the peace. Federal troops stationed in the South were often pressed into duty by sheriffs and marshals much to the chagrin of their commanding officers. At times that power was abused by the local authorities to defend the very same groups who started the disorder in the

first place. Over time Congress caught wind of this practice and became embittered with the misuse of Federal troops. As the power and influence of white paramilitary groups grew several states asked for federal assistance, the US Army was typically the answer.

Southern judges would often not prosecute nor punish white citizens who participated in these domestic terrorism groups. In 1869, former General Ulysses S. Grant became president. Congress and the new president were committed to crushing white radical groups such as the KKK. The 15th Amendment and the Civil Rights Act of 1871 (aka Ku Klux Klan Act) were soon passed making it a federal violation to deprive another citizen of their rights regardless of color.[6] It took the matter out of the states' hands, particularly the Southern states, and gave authority to the federal government to arrest and prosecute violators. As a result, US Marshals and the US Army were able to severely hamper the ability of these groups to continue their terror practices. Many were arrested and imprisoned, others were disbanded. Some white activists went underground and decided to work through politics. This was an example of a successful use of federal forces to stamp out a domestic terrorist group; something that may be of vital use in the future. This success for the Army as a law enforcement entity would be short lived, however. As the Southern states were allowed to reenter the Union, congressional representation was also returned. Over time, Southern Congressmen who were sympathetic to the radical groups, like the KKK, were elected. The makeup of Congress was changing and it was less dominated by Northern Republicans over time. By 1874, the House of Representatives was controlled by the Democrats.[7] Additionally, as the Southern states were readmitted to the Union, the Army removed most of their forces from the corresponding state, thus reducing their influence in that particular state. Needless to say, Southern Congressmen, ex-Confederates, and large portions of the white citizenry were not at all pleased at the US Army for enforcing unpopular federal

Reconstruction laws and impeding on their "traditional" customs. Soon after federal forces were removed the South once again launched campaigns limiting the rights of blacks. A resurgence in violence towards blacks and moderate whites was again seen throughout the South. For the 1876 federal elections, US Marshals were again instructed to use military forces in the South, and deploy them to polling stations to ensure blacks were not barred from voting. The presidential election resulted in a race so close a special commission had to be created to determine who the next chief executive would be. The commission consisted of members of the House, the Senate, and the Supreme Court. The decision was made to give the victory to the Republican candidate in exchange for concessions for the Democrats. What resulted was called the Compromise of 1876. In the Compromise of 1876, the presidency went to Rutherford Hayes, but the Reconstruction Period would end and the removal of a large portion of federal military forces from the South would begin. The South rejoiced as the most of the Army left. The South, which once backed the use of the Army to support the Fugitive Slave Act, was by this time largely against the Union Army. The South, which had suffered defeat at the hands of the Union military, and had to live under its martial law during Reconstruction, would later get retribution.[8] Violence against certain groups was still prevalent, so US Marshals again used what few military forces remained in the posse comitatus role in an effort to assure civil rights to all citizens. Southern states were ready to make some changes and lessen the power of the federal government in what they saw as their internal affairs. It was immediately after this era that the PCA was enacted as a rider to an appropriations bill on 18 June 1878.[9]

The Posse Comitatus Act

In 1878, Congress, heavily influenced by the Southern states, attached a rider bill to the Army Appropriations Bill that was introduced by Congressmen J. Proctor Knott (D-Ky), which stated:

> From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years, or by both such fine and imprisonment.[10]

It was called the Knott Amendment, but we know it today as the Posse Comitatus Act.[11] The passage of the PCA was ultimately a political tool used by Democrats (proponents for states' rights) to lessen the federal forces' ability to impose on a state's self-administration. It was also a reaction to contested presidential election of Rutherford B. Hayes, and the compromise of 1877 in which the Southern states agreed to allow Hayes, a Republican Northerner, to take the presidency provided all federal troops were removed from their states. After the election Southerners felt that if the army would not have meddled with the voting stations in Louisiana, and South Carolina, which remained in Republican control, their candidate would have won.[12] So, it was a push by Southern politicians in Congress to regain control of their states, ensure control by the white population, and continue civil rights violations despite each of the states ratifying the 14th Amendment and the passage of the 15th Amendment. It can also be argued, perhaps, that it was also to place a limitation on the authority of US Marshals to use federal forces as a posse comitatus, by this time a provision welcomed by both Army commanders and Southerners alike. It was not, in fact, an effort to build a barrier to a police state by removing the ability of federal troops to conduct law enforcement. The PCA was not passed to protect US

citizens from having their rights infringed upon by federal military forces, but rather to ensure Southern states were allowed to do the very same without federal interference. Since that time, the PCA has caused confusion for politicians, military personnel, and the American people alike. Each seems to have their own interpretation and often they are wrong.

The president has a constitutional right to protect the nation during riots and preserve public order.[13] Therefore, the PCA was not designed to prohibit the president from using federal troops when the need arises. This misinterpretation has caused problems ever since. The PCA only originally applied to the Title 10 Regular Army and not the Navy or the Marines since they were, at that time, a separate department. The Navy and Marines, however, are expected to abide by it after the secretary of defense passed a directive mandating them to do so.[14] It does apply to the Air Force, due to its origins in the Army, but not the Coast Guard since it is not in the Department of Defense (DOD), during peacetime, and has US Title 14 law enforcement authorities. The Coast Guard is within the Department of Homeland Security, and even in time of war does not completely go over to the Navy. It does apply to the Reserve Forces of each of the services, as they are also Title 10 federal forces under the DOD. It is does not apply to militias, neither the National Guard nor the Air National Guard, which are state forces that report to the governors. It does not say anything about auxiliary organizations such the Civil Air Patrol or the Coast Guard Auxiliary. Neither does it mention DOD civilians nor the various agencies under DOD, such as the National Security Agency, the Defense Intelligence Agency, or the Missile Defense Agency. The PCA predates all of these organizations. Depending on the situation (as explained later) it may not even apply to the state forces when federalized by the president even though they then take their orders from the federal government.

In the 130 years since the PCA was passed the US Government (USG) has made amendments and passed other resolutions that authorize the president to use federal forces in certain situations. Additionally, federal forces have been used in various capacities involving traditional law enforcement duties. Throughout the 20th century federal forces were used in industrial crises by breaking up strikers who resorted to violence and overwhelmed local authorities. The military support on the War on Drugs in the 80s and 90s created Joint Task Force Six (JTF-6) to work with federal law enforcement agencies in combating drug cartels and drug trafficking both abroad and domestically. In 1992, the acquittal of the Los Angeles (LA) police officers involved in the Rodney King beating led to the LA Riots which required the National Guard and active duty federal forces to assist the LAPD in quelling and gaining control of hostile areas in south-central LA. President George H.W. Bush had the authorization to do so under the Title 10 Chapter 15 Section 331.[15] Military support to crises involving weapons of mass destruction caused Joint Forces Command to create Joint Task Force-Civil Support (JTF-CS) at Ft Monroe, VA. The US Armed Forces recently responded to the Hurricane Katrina disaster and assisted in law enforcement duties, rescue operations, and relief efforts. In all of the cases the PCA was consistently brought up and misinterpreted adding confusion to an already stressful situation.

Notes

[1] Mathews, 23.
[2] United States Code 42. Chapter 21, Subchapter I, § 1981-1988.
[3] US Constitution Online website. 14th Amendment-Citizenship Rights.
[4] Mathews., 25.
[5] Ibid., 26.
[6] US Constitution Online website. 15th Amendment-Race No Bar to Vote.
[7] Mathews., 30.
[8] Ibid., 32.
[9] Baker, Bonnie. *The Origins of the Posse Comitatus*.
[10] Coakley, *The Role of Federal Military Forces*.,344

Notes

[11] Ibid., 344.
[12] Ibid., 334.
[13] Baker, *The Origins of the Posse Comitatus*.
[14] United States., Department of Defense Directive 5525.5, section E4.3
[15] United States., Title 10 Chapter 15 Section 331-333.

Part 4

LA, Waco, and Katrina

Natural disasters will always be chaotic situations. But with proper planning and preparation, it is possible to respond quickly to restore order and begin recovery efforts

Governor of Alabama Bob Riley on Select Committee hearing, 9 Nov 05

The Posse Comitatus and Civil Support

There is an increased expectation for our federal government to protect its citizens from any and all man-made disasters should the need arise. After the events of 9/11 and Hurricane Katrina, the American public expects its government to do all that is possible either to prevent disaster or to mitigate consequences should prevention fail. However, due to American civic culture, the civil community is squeamish when it comes to giving up their rights and empowering the central government. The nation finds it difficult to find a balance between security and freedom. A look at more recent events where the PCA caused confusion or hesitation among the military and the public is necessary to understand why a change must be undertaken.

It is not at all unusual to see federal military forces assisting in disaster relief, search and rescue, and security for national events. Where the use of active military forces comes into question is in the area of law enforcement. The PCA prohibits the US Army and Air Force from conducting traditional law enforcement duties such as investigations, arrest and seizure, and use

of intelligence operations on US citizens. These types of activities are considered *active* military support to law enforcement and are generally frowned upon, if not seen as violations of civil rights, by the population. Military forces are allowed to support law enforcement in a *passive* role, such as training and using military equipment, base facilities for training, and sharing information for the purposes of assisting law enforcement in their duties.[1]

The Stafford Act allows the president to use federal aid to provide relief in widespread man-made or natural disaster.[2] Military actions such as medical care, distribution of water and food, and removal of debris are seen periodically during flooding, hurricanes, tornadoes, and forest fires.[3] Where it gets hazy is when looting or rioting occurs during these events. What role can the military play in those types of situations if there is no law enforcement available or they are overwhelmed? The Stafford Act does not give active military forces authority to participate in law enforcement.[4] Authorization for law enforcement by federal military forces must come elsewhere. Before the DOD can task its forces to assist in a disaster, the local or state government must first request assistance. DOD does have some authority to provide relief without waiting for approval under the Immediate Response Authority. The Immediate Response Authority is described as "immediate action taken by a DOD Component or military commander to save lives, prevent human suffering, or mitigate great property damage under imminently serious conditions."[5] However, the amount of support and the timeframe is limited. Despite all the regulations and legal authorities given in outlining the proper use of federal military forces, there still exists misunderstanding and uncertainty by military forces, local civilian leaders, and the civilian population as to what federal forces are allowed to do when disaster strikes. The LA Riots, the Branch Davidian Complex incident, and Hurricane Katrina are good examples.

The Los Angeles Riots

On 29 April 1992, racial riots broke out in the south-central section of Los Angeles, California after police officers involved in the beating of Rodney King were acquitted of the charges against them. Shortly after on CNN, the nation watched an innocent bystander named Reginald Denny get pulled out of his truck and nearly beat to death, himself.[6] The racially-motivated rioters destroyed large areas of their neighborhood through fire and vandalism. In the ensuing days, up to 54 deaths occurred and over 2,000 injuries were reported as a result of the riots.[7] The LAPD was overwhelmed and a request for the California Army National Guard (CAARNG) was made. The CAARNG, being a state military force is not limited by the PCA, so it could assist the LAPD in active law enforcement to restore law and order. At first 2,000 Guard troops from the local area responded. The national guard however, are a reserve force made of personnel who hold civilian jobs and have private lives, and take time to mobilize and respond once ordered. This belief led national leaders to put federal military forces from nearby Ft. Ord and Camp Pendleton on alert. Although the LAPD and CAARNG were slowly beginning to make some progress in the first few days, there was still significant violence, so Mayor Bradley and Governor Wilson felt that even the LAPD and CAARNG were overwhelmed. They requested federal assistance on 1 May 1992, and the same day over 4,000 soldiers and Marines were deployed to the area and formed Joint Task Force-Los Angeles (JTF-LA). President Bush deployed the troops not by invoking the Insurrection Act but rather by using his authority described in USC Title 10, Chapter 15, Section 333 which states:

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

> violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order.[8]

President Bush also federalized the CAARNG in his order. Once federalized the PCA did apply to the CAARNG, but because he had authority to use federal troops in this particular domestic incident per the aforementioned Title 10, Chapter 15, they were still permitted to participate in law enforcement. In this case the active duty federal forces were also allowed to perform law enforcement. Nevertheless confusion among the active component commanders still existed. JTF-LA was given several requests by local authorities to respond, but commanders where reticent and troubled by the PCA and the misunderstanding of their authorities. Military lawyers advised their commanders not to participate in law enforcement because of the PCA. Hesitation and failure to respond to requests for assistance rendered the deployment less than stellar. The LAPD and the CAARNG felt they did not need the federal forces' help as they were making good progress by the time the Guard was federalized and the troops were deployed into LA. This unwillingness by federal forces left local authorities wondering why they were sent at all. The PCA gave the active forces pause and did not allow federal troops maximum effectiveness, even though they had full authority to participate in duties needed to subdue the chaos. This hesitation actually helped another federal military task force from possible prosecution under the law in Waco, Texas the following year.

JTF-6 and the Branch Davidians

In 1981, Congress passed the "1981 Military and Civilian Law Enforcement Statute and the 1982 Defense Authorization Act, which led to the addition of Chapter 18 to Title 10 U.S.C., comprising Sections 371-382."[9] Congress wanted to increase military assistance to civil authorities and contribute to the war on drugs. "In response to President George H.W. Bush's

declaration of the 'War on Drugs,' General Colin Powell, then Commanding General of the U.S. Army's Forces Command, issued the order on November 13, 1989 that established JTF-6 at Fort Bliss, Texas."[10] JTF-6 (now called JTF-N) was a federal military task force created in 1989 to support these efforts. They were stationed at Ft Bliss, Texas and included among them members of special operation forces. JTF-6 worked with several local and federal agencies to combat drug trafficking and fully embraced their law enforcement authorities.[11] On 2 February 1993, JTF-6 received a request from Operation Alliance to assist in an operation involving a religious sect calling themselves the Branch Davidians led by David Koresh. The Bureau of Alcohol, Tobacco, and Firearms (BATF) had been monitoring a compound outside of Waco, Texas which the Davidians occupied. The Branch Davidians were receiving large amounts of firearms and appeared to be building some sort of military-type compound.[12] The BATF wanted to execute search warrants of the compound but wanted assistance from military forces. From JTF-6 they requested assistance, to include firing range support, medical personnel and evacuation, communications personnel and training in close-quarter combat and specialized equipment.[13] The BATF knew that the military would not get involved unless there was a drug connection. They briefed JTF-6 that chemicals were in the compound that were probably being used to produce methamphetamines. Initially JTF-6 agreed to active involvement due to the compound's involvement in drugs and the task force's mission as a counterdrug organization. Legal advice from the Army military lawyers cautioned against close involvement as a possible PCA violation could occur. JTF-6 scaled back their support and the event turned into a federal siege that lasted for 51 days. Federal law enforcement agencies were heavily criticized by the media and the public. Fortunately for the Army, the decision to downplay their participation saved them much public scorn. Even though, legally, JTF-6 had authority to participate in what was addressed as

counterdrug operation, the misunderstanding of the legal advisors benefitted the image of US Armed Forces. Once again confusion about the PCA caused hesitation. Many times when federal military forces are involved in civil support the PCA confounds the issues and causes indecision in responding properly. It was no different in the summer of 2005 when Hurricane Katrina slammed into the Gulf Coast of the southern United States.

Katrina Strikes the US

In the summer of 2005, Hurricane Katrina approached the Gulf Coast, specifically near the Louisiana and Mississippi coasts. It was a Category Three hurricane when it hit the coast. At one point it was as strong as a Category Five. President George W. Bush authorized prepositioning of federal resources by declaring the area a national disaster and stating the Stafford Act was in play. The hurricane made landfall on 29 August 2005, just east of New Orleans. Very quickly, the city of New Orleans was overwhelmed as levees broke and the large areas of the city flooded. The city's mayor, Ray Nagin, was not able to coordinate or access state assistance due to the devastation. For two days, state and even federal (primarily FEMA) assistance was not able to get to the city to provide relief. Louisiana Governor Kathleen Blanco called President Bush asking for assistance to alleviate the distressed city and surrounding areas.

Over 42,000 National Guard (NG) troops, 17,000 active duty troops, and 20 US ships were deployed to the area. The active forces would be fall under USNORTHCOM, which created a Joint Task Force-Katrina. The active duty troops were deployed under the command of Lt Gen Russell Honore. President Bush asked the governor to request federal assistance under the Insurrection Act to prevent looting, rioting, and vandalism of evacuated areas. Governor Blanco refused. Had she agreed, President Bush could have federalized the National Guard and all forces would fall under one command- JTF-Katrina. As it was, the NG followed one chain of

command, through the state adjutant to the governor, while the federal forces followed another through Lt Gen Honore, USNORTHCOM, the Secretary of Defense (SecDef), and President Bush. There was unity of effort but no unity of command. The NG troops were under Title 32 state orders and had law enforcement authority, so the PCA did not apply to them. The federal forces could assist in disaster relief efforts per the Stafford Act, but could not participate in law enforcement because the PCA did apply. If the Louisiana governor would have allowed President Bush the go-ahead to invoke the Insurrection Act then federal forces would have had authority to aid not only in disaster relief but also law enforcement. The governor only wanted federal equipment and personnel to help out in tasks such as medical aid, food and water distribution, rescue, and reconstruction. She did not want the active duty military involved in police duty. The federal troops could have mitigated loss of property or injury to persons in areas where there were no local police or NG available. In many cases when looting and violence among residents occurred, federal forces could do nothing to stop it due to the PCA restrictions. Unless local law enforcement or NG troops were available, looters and violators could not be arrested. People who had to evacuate their homes could return only find their domiciles burglarized. In the LA Riots unity of command was established by JTF-LA, federalizing the CAARNG, and placing all military forces under one command. Unity of effort was not made due to hesitation about Title 10 forces participating in law enforcement. In the Katrina case, unity of effort was made, but because of the two chains of command, unity of command was not. This resulted in placing limitations on federal forces' ability to aid in the much needed restoration of law and order.

The future is fraught with uncertainty and while there have been several amendments, executive orders, and bills passed over the years to allow the USG a better response posture to

respond to a national crisis, it is time for a change. Except for the American War of Independence, this country has never relied on other nations to help preserve the integrity of self governance. This nation had always relied on its civil and military forces to maintain order and enforce laws. This country has benefitted from not having to endure coup attempts. The military forces of the United States have always submitted to civilian leadership, and never have armed forces been required to replace the federal government. Once the Indian Wars of the 1800s were over this nation has not had to suffer from any prolonged insurgency that threatened the legitimate government. The United States has long stood for freedom and has been a shining example for others to follow in how citizens from varied backgrounds can live together despite their differences. While not without some setbacks along the way, this nation stands today a leader of the world. The relationship between its armed forces and the civilian leadership has been a pattern for other nations. Even during times where federal forces have been brought in to restore law and protect its citizens ultimate authority still rested with the civil government.

The Posse Comitatus Act was passed not to protect citizens from abuse of military intrusion but rather as a political tool to protect states when they were violating the rights of their own citizens. The PCA was passed in an era when the population of the United States was considerably smaller than today and access to law enforcement was limited in vast areas of the country. Today, in times of economic crisis, the American people expect their government to take care of them. The American people equally expect to be protected during times of natural crisis or terrorist assaults. The PCA should be repealed not because the federal forces need more power but because a new approach in managing federal resources should be taken to assure security of the homeland.

Notes

[1] Title 10, USC § 371-382. Chapter 18, Military Support For Civilian Law Enforcement Agencies

[2] Bea, Keith., *Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding*., 1.

[3] Ibid., 2.

[4] Elsea, Jennifer., The Use of Federal Troops in Disaster Assistance: Legal Issues., 4.

[5] US Department of Defense. Directive 3025.15. Military Assistance to Civil Authorities.

[6] Mathews., 47.

[7] Scheips, Paul., Use of Federal Military Forces in Domestic Crisis, 1945-1992., 448.

[8] Title 10, USC § 333. Chapter 15. Enforcement of the Laws to Restore Public Order.

[9] Weston, Mark., Review of the Posse Comitatus after Katrina, 6.

[10] Joint Task Force North Website., History of Joint Task Force North.

[11] Mathews., 65.

[12] Ibid., 63.

[13] United States Government Accounting Office., Military Assistance Provided at Branch Davidian Incident. August 1999.

Part 5

A New Way Forward

> *However the specific problems are labeled, we believe they are symptoms of the Government's broader inability to adapt how it manages problems to the new challenges of the 21st century.*
>
> — The 9/11 Commission Report, 2004

A Transformation of Government

There have been several arguments made in the post-9/11 world whether or not the Posse Comitatus Act should be rescinded in order to allow federal forces better ability to act in times of crisis without being hampered by antiquated laws. Mark Brinkenhoff in his article *The Posse Comitatus and Homeland Security* had this to say, "The Posse Comitatus Act is an artifact of a different conflict-between freedom and slavery or between North and South, if you prefer. Today's conflict is also in a sense between freedom and slavery, but this time it is between civilization and terrorism."[1] If a catastrophic event were to hit the United States today there is only so much first responders (local enforcement, firefighters, and paramedics) can do. Several large-scale Top Official (TOPOFF) exercises that only simulated a real crisis have proven that first responders are easily overwhelmed.[2] These exercises showed that more often first responders will need to be augmented by state and federal resources. In a real scenario, time is of the essence. Civic leaders should be proactive in preparing rather reactive, provided there is some forewarning. During crises with little or no warning, emergency resources should be

brought to bear as fast as humanly possible. Waiting for bureaucratic red tape that cause unnecessary delays could result in lives and property lost. Response needs to be organized and direction clear. There needs to be no confusion of authorities among responders. Proper organization and good management of resources needs to be customary. When local and state administrations are overcome in a national emergency, the federal government is best postured to provide relief. Federal forces have access to equipment, information, and resources that local and state governments may not. Federal forces and agencies need to collectively organize themselves and combine efforts to protect the citizenry and alleviate suffering during these times of need.

Within the government there are several movements to transform agencies in order to ensure there is no duplication of effort. Even the federal government has limited resources, so careful management of assets is essential. There are moves in US Government to take a whole-government approach in conducting the nation's international affairs. The Security, Stability, Transition and Reconstruction (SSTR) efforts made by the DOD, the Department of State (DOS), and other federal agencies in the Iraq and Afghanistan are good examples how several federal entities can work together to accomplish national goals. Those very same successes and efforts need to be gleaned from and adopted for use in home front. Fighting wars on foreign soil to prevent external forces from affecting the homeland are necessary but they will take a backburner if national security is not accomplished within our borders. At the very least, domestic interagency cooperation should receive the same priority as SSTR operations abroad. Since the PCA was passed, 130 years ago, there has been a need for federal military forces in domestic events. The Insurrection Act, USC Title 10-Chapter 15 (updated in 2006); the Stafford Act; and Title 10-Chapter 18 outlining military support in the war on drugs are some of the laws

made to allow federal military forces and resources to support civil matters. They have all been exceptions or additions made to work around the constraints of the PCA. A better solution is to repeal the act and pass a new piece of legislation that will take a holistic view in transforming government forces, both civilian and military, in a combined interagency operation; that is not a conglomeration of federal agencies but an interrelated effort mandated by law to work together.

A new bill needs to be ratified

It is time the PCA is repealed and a new law enacted that fits the national security environment in which the United States finds itself. Several criticisms about how USG agencies have performed in either preventing or mitigating significant crisis events have led many to believe a major overhaul of the USG is needed. The Goldwater-Nichols Act of 1986 revamped the Department of Defense to solve underperformance and foster a more "Joint" environment between the Armed Services. Perhaps it is time a 'Goldwater-Nichols-like' Interagency Coordination Act (ICA) is enacted to transform government agencies into a more cohesive force that is better positioned to respond to national disasters. Accordingly, the PCA should be repealed, and new provisions should be passed that allow federal forces, across the broad spectrum of agencies and departments, to work in a single unity of effort before and during times of need. The National Response Framework and other government documents should apply a more cohesive plan to properly and legally utilize federal military and civilian forces to support and serve the nation. The Department of Defense has been working on transforming itself since the 90s. The terrorist attacks on 9/11 gave it even more reason to transform and prepare for war in the full spectrum of operations. *The 9/11 Commission Report* gave some recommendations on how the government could fix the deficiencies and shortfalls it found during its investigation. One recommendation was the creation of the Director of National Intelligence to unite the

various agencies of the intelligence community within the executive branch into one cohesive voice to the president.[3] The creation of the Department of Homeland Security after the passage of the Homeland Security Act of 2003 was another. Some of these proposals are directed at protecting the United States from man-made disasters.

The Interagency Coordination Act will continue in the tradition of the Defense Reorganization Act of 1986. It mandated the military services cease counterproductive interservice rivalries and work together in a joint environment in training and operations. The Interagency Coordination Act will mandate that the various departments of the executive branch work together in during natural and man-made crises and disasters. The Constitution empowers Congress to finance government operations. By controlling the allocation of funds for government departments and agencies, they can not only induce but direct cooperation among the various entities.

A Way Forward

The Interagency Coordination Act should contain several provisions that make it easier for the all the various government entities (federal, state, and local) to ensure the nation's security. Proper planning, coordination, and execution are essential to prevent, mitigate, and recover from national disasters. In his book, *Defending the U.S. Homeland*, Anthony Cordesman commented on looking beyond September 2001 for future change:

> One thing is clear. This structure is the foundation of the United States now has to build upon. But it is a loose structure indeed and one that is not yet adequate enough to deal with the threat of "conventional" terrorism that emerged in September 2001, much less the threat of CBRN [chemical, biological, radiological, and nuclear] attacks. It is equally clear that some control plan, program, and budget to tie together those efforts; that more resources are needed to make each department effective; and that a new level of central control and direction is needed to reduce the current level of turf fights and focus departments and agencies in the actual mission.[4]

Several mandates should be enacted in the new ICA. Below are a few recommendations:

- *A New National Security Command Center should be created.* The new bill should contain provisions for a standing national crisis center that combines information from the National Counterterrorism Center (NCTC), FEMA's National Operations Center (NOC), the NORAD-USNORTHCOM Command Center (N2C2) and other national security centers into a single fusion center that maintains situational awareness of the national security environment, both foreign and domestic. This entity would be a full-scale Joint Interagency Task Force (JIATF) command center with several Joint Interagency Coordination Groups (JIACGs) that liaise with the JIACGs in the Combatant Commands and other JIATFs (such counterdrug JIATF-W and JIATF-S) in sharing intelligence among entities and coordinate closely when planning and executing operations. An article in Joint Forces Quarterly stated that, "These structures would collocate personnel for specific issues under one organization and one senior leader."[5]
- *A National CyberSpace Center should be created.* Terrorism is a tactic used by a weaker foe against his stronger adversary. When a nation or group cannot confront its enemy conventionally due the strength of that enemy they will resort to asymmetric warfare and attack not their enemy's strengths but their weaknesses. Anyone seeking to do harm to this nation will utilize all available tools at their disposal. Both state and non-state entities can cheaply acquire cyber weapons with a simple computer, access to the internet, and a few smart people. A national disaster can result from a successful attack that shuts down a critical computer network, such as a nuclear reactor's cooling system or other computerized components, causing a disastrous accident. So much of this nation's homeland security relies on computer and cyber technology that it is a national resource

that needs protecting just like any other critical infrastructure of the nation. The Computer Security Act passed in 1987 was just the beginning in standardizing federal computer protection and training of users.[6] The USG needs to employ both civilian and military cyber-warfare specialists to conduct not only network protection but network attack. Similar to the recommendation of *The 911 Report* to create the NCTC, the ICA would mandate a center focused on cyber-warfare.[7] This center will directly report to the recommended National Security Command Center mentioned above, and liaise with the NCTC, FEMA's NOC, NMCC, N2C2, and any other federal agency as needed during cyber crisis. The US Air Force has already taken steps in creating cyber-warfare specialists, but this needs to be expanded into all of the USG as all government computers can be vulnerable. Similar to other DOD agencies, this CyberSpace Center can be organized from members of all the Armed Services, DOD civilians, DHS, FBI, or other USG agencies. Like the rest of the ICA, this provision will mandate a whole of government approach to defending this nation from cyber attacks.

- *Civil and Military Service career mobility needs to be overhauled.* "Much like career military officers, national security personnel should attend professional education and be assigned inside interagency organizations and outside their departments or agencies."[8] The US Armed Forces were directed by the Goldwater-Nichols Act to be more "joint" and that officers must have served a joint tour before they can be promoted to the flag/general officer ranks. Similarly, all civil service employees will be encouraged and rewarded for being more "interagency-joint." The Senior Executive Service pay grades will require similar interagency tours. Additionally, a professional education system for national security professionals, similar to the DOD's professional military education

institutions, needs to be created and attendance mandated.[9] This will help break the negative cultural paradigms within federal agencies by building interagency jointness throughout their professional development.

- *The federal budget for the executive branch needs to be revamped.* "Congress would need to create a system to authorize and appropriate the budgets to make these organizations both successful and relatively independent of the current departments and agencies."[10] The Government Accounting Office (GAO) within the legislative branch would work with the Office of Management and Budget (OMB) in the executive branch to control the annual budgets of the various executive agencies in an effort to entice and promote further interagency cooperation. This provision in the ICA would investigate and audit federal agencies to eliminate redundancies and remove intercultural barriers within the agencies.

The above recommendations as provisions of the ICA would help focus federal government efforts. An overhaul of federal agencies may not be popular among federal employees, but this nation cannot allow major catastrophes like 9/11 or Katrina to be the impetus for change. Forethought of improved effectiveness in government efforts involving national or homeland security must be the standard. Too often the US Government has been reactive instead of proactive in protecting this nation. "Despite the events of September 11, creation of the Department of Homeland Security, reports from both the WMD and 9/11 Commissions, and the recently enacted Intelligence Reform and Terrorism Prevention Act, the United States remains poorly prepared to respond to such complex security challenges."[11]

Notes

[1] Brinkenhoff, Mark., *The Posse Comitatus Act and Homeland Security*.

[2] Inglesby, Thomas., Grossmand, Rita., and O'Toole, Tara., *A Plaque in Your Own City: Observations from TOPOFF*.

[3] United States. *The 911 Report*. The Commission on Terrorist Attacks on the Unites States, 399.

[4] Cordesman, Anthony., *Terrorism, Asymmetric Warfare, and Weapons of Mass Destruction: Defending the U.S. Homeland*., 367.

[5] Gorman, Martin J., and Krongard, Alexander. "A Goldwater-Nichols Act for the U.S. Government: Institionalizing the Interagency Process.," 54.

[6] Cordesman, Anthony., *Cyber-Threats, Information Warfare, and Critical Infrastructure Protection: Defending the U.S. Homeland*., 54.

[7] *The 911 Report*., 403.

[8] Ibid., 56.

[9] Ibid., 56.

[10] Ibid., 56.

[11] Ibid., 53.

Part 6

Conclusion

The PCA was enacted primarily as a political tool to ensure the South the right of self determination in their electoral practice by removing federal troops from the voting process created during the Grant Administration. Furthermore, this would allow the South to proceed, without federal martial law and the removal of reconstruction methods, in controlling their own destinies within the reunited Union. Additionally, the PCA was passed to prevent misuse of federal troops by local authorities and US Marshals to control their jurisdictions. It was not passed to keep federal troops from enforcing law and order or to forbid them from responding to a national emergency despite its current misinterpretations. Time and again misinterpretations of the PCA have caused problems for politicians, the military, and the public. The PCA is a piece of legislation whose removal is long overdue because it is a barrier the homeland defense. "New problems often need new solutions, and a new set of rules is needed for this issue."[1] A better method for homeland security operations is to replace the PCA with a new Interagency Coordination Act that takes a whole-of-government approach by utilizing all federal agencies and departments. A unity of effort and unity of command approach should focus on reducing the impact of national man-made or natural disasters, thus increasing our homeland security.

Notes

[1] Brinkenhoff.

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