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Critics of the Hurricane Response Miss the Mark in Focusing on Posse Comitatus

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The government response to Hurricane Katrina renewed debate over the efficacy of the Posse Comitatus Act, which prohibits the Pentagon from conducting domestic law enforcement. Amending the law to grant federal troops greater authority in restoring order in the wake of a domestic emergency is a bad idea. Establishing ways to ensure that the military is better prepared to respond to disasters makes sense, but changing Posse Comitatus would be a mistake. Altering the law in this way would undermine the principles of federalism, expanding the federal government's authority at the states' expense. Rather, Congress should restructure the military so that it is better prepared to respond quickly.

The Military and the Law. Under the Posse Comitatus Act, the armed services are generally prohibited from engaging in law enforcement activities inside the United States, such as investigating, arresting, or incarcerating individuals, except as authorized by federal law. The National Guard, however, enjoys a unique legal status. Guard troops are frequently referred to as citizen soldiers, part of the military's substantial Reserve components. Reserve forces are called to active service only for limited periods, such as for annual training or overseas deployments. When not on active duty, National Guard units remain on call to support the

governors of their respective states. Posse Comitatus does not apply to National Guard forces unless they are mobilized as federal troops. As a result, the Guard plays the primary role in augmenting state and local law enforcement under state control, while the Defense Department plays a supporting role, providing resources and logistical support.

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- Granting federal troops greater authority in restoring order after a domestic emergency is a bad idea.
 - Instead, Congress and the Administration should integrate Guard and Reserve, create a Navy Guard, and reorganize part of the National Guard for new missions.
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Furthermore, the Posse Comitatus Act has never been a serious obstacle to using federal forces to support domestic operations. For example, federal forces helped to quell riots by miners in Idaho in 1899; protected James Meredith, the University of Mississippi's first black student, in 1961; assisted in controlling the 1992 Los Angeles riots; and helped to reestablish order in the aftermath of Hurricane Katrina. In fact, federal forces have been used to enforce laws over 175 times in the past 200 years under the authority of laws such as the Insurrection Act.

The Military and Hurricane Katrina. In most disasters, local resources handle things in the first hours and days until national resources can be

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requested, marshaled, and rushed to the scene. Deploying national resources, including the military, usually takes days. In catastrophic disasters like Katrina, however, state and local resources may be exhausted from the onset. The challenge is then to deploy federal resources to the scene immediately. The greatest obstacle to overcome is not the legal barriers, but the tyranny of time and distance and the destroyed infrastructure, such as downed bridges and flooded roads, which might limit access.

Deploying the military faster—making it a more agile and flexible instrument to respond to all kinds of domestic security needs—is a question of force structure and policy. It does not require tampering with the sovereign responsibilities outlined in the Constitution. There are better solutions. Specifically, Congress could:

- **Mix National Guard and Reserve forces.** The Army Reserves, like the National Guard, are citizen soldiers. However, the Reserves are federal forces, meaning that they do not belong to the states in which they are based. Since assets indispensable to disaster relief are scattered throughout the Reserve components (both the Reserves and the Guard), disaster relief efforts should integrate both components' resources and clarify lines of authority in a manner that preserves states' autonomy in accordance with *Posse Comitatus*. Rather than amend the law to expand federal authority, Congress could consider adding a provision that would allow federal Reserve units to function under state control during a natural disaster or other emergency situation. Under such a provision, states could draft their own emergency response plans and submit them to the Department of Defense (DOD) and Department of Homeland Security (DHS). In an emergency, the DOD could then marshal the resources and logistical support necessary to support state authorities. Such an arrangement allows states to tailor plans to their individual needs, to maintain unity and continuity of command, and to allow for coordinating the needs and costs of responding to disasters and other contingencies before the event.
- **Create a Navy National Guard.** The emerging potential for maritime threats and low-altitude attacks augurs the need for an organizational

structure that better utilizes the Navy's capacity to support homeland security. Several states with maritime interests already have state naval militias. In fact, the New York Naval Militia assisted in the response to the terrorist attacks of September 11, 2001. Creating a Navy Guard to include all coastal states would offer several advantages. A Navy Guard would provide coastal states with more resources to address their state maritime security and public safety requirements. Unlike the Coast Guard, the Navy Guard would focus on state needs when not on active federal service. It would also provide an organization within the National Guard and the Navy that treats homeland security missions as an inherent responsibility and would work to develop the requisite competencies and capabilities to fully support these tasks. Finally, a Navy Guard would provide a suitable partner for the U.S. Coast Guard to ensure seamless integration of daily DOD and DHS maritime operations.

- **Reorganize part of the National Guard.** The Defense Department's Quadrennial Defense Review, in coordination with the Department of Homeland Security, should be used to determine the precise number and types of the forces that are required and how they can be established by converting the existing Cold War force structure into units that are appropriate for new missions overseas and at home.

A Better Way. Congress can do better than changing a law that safeguards the liberties of U.S. citizens, the principles of federalism, and the balance of civil–military relations. Rather, Congress and the Administration should improve integration of the Guard Reserve, create a Navy Guard, and reorganize part of the National Guard for new missions. These steps will make the nation better prepared for the next Katrina.

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