

#### 4. KATRINA, FEMA AND MARTIAL LAW

##### **The Governor Rebuffs the President's Proposal**

The term *posse comitatus* translates as “the formation of a posse.” The experience of the founding fathers with the British model that combined the functions was enough to cause them to set that division sharply in administrative powers and civilian command of the military. This principle began to be eroded in the period following the end of the Civil War, and the effective occupation of areas of the south by federal troops who were holding military tribunals, carrying out executions of citizens and usurping local police and judicial control. Their excesses came to the attention of the post-war Congress and they passed the Posse Comitatus Act under the 45<sup>th</sup> Congress in 1878. The Act makes unlawful:

...to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing 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...<sup>118</sup>

Louisiana State Governor Kathleen Babineaux Blanco declared a State of Emergency for New Orleans on August 26, 2005, three days before Hurricane Katrina made landfall, extending until September 25. State Attorney General Charles Foti's office issued a clarification about Martial Law claims in the media, stating that no such term exists in state law. However the declaration of a state of emergency “gives authorities wide latitude to suspend civil liberties as they try to restore order and bring victims to safety”<sup>119</sup> Louisiana law does not have a martial law provision.

The declaration of a State of Emergency in Louisiana was equivalent to the suspension of *posse comitatus* and the establishment of martial law while the Guard was under state control. It allows the National Guard to perform police functions if there is a threat to life or property, or breakdown of law and order. Thus the early State of Emergency declared by Governor Blanco overcame *posse comitatus* considerations. The standard operating procedure has been that only when local Guard forces and police are unable to control the situation or when it is beyond their capabilities will federal armed forces be called in under 32 CFR 50i and 10 USC 331 seq.

There were numerous reports of National Guard troops being used in place of police and enforcing orders with the use of weapons. This was potentially legal under Louisiana law, which suspends the distinction between local police and state-commanded National Guard in restoring order and saving life and property once a formal emergency is declared.

On September 2, 2005, Governor Blanco was presented with a contract proposal from the White House that would have established “Mutually Exclusive Chains of Command.” Governor Blanco refused to sign the Memorandum. Had the contract been signed, a “dual status commander” would have been designated to serve as commander of the Louisiana National Guard, subject to the orders of Governor Blanco, and *simultaneously* to provide “command and control over supporting Federal forces,” including federalized National Guard units. “Such

Federal forces are required to act in accordance with the Posse Comitatus Act,” the document declares.<sup>120</sup>

It is easy to see why this was a non-starter for the Governor. On paper, this was effectively a proposal for dual or shared command between the Governor and the Commander-in-Chief. Such a Y-shaped chain of command would work fine so long as the “dual status commander” handled directives for State Guard and Federal forces separately. But what would happen in the event that a problem arose that concerned both forces over which the Governor and the President disagreed? Surely Blanco knew that she would be holding the weaker stem of the wishbone. Moreover, and as noted past precedent, as well as the *National Response Plan* make it clear that the role of Federal forces is to play a supporting role. According to the NRP:

Federal departments and agencies are expected to provide their full and prompt cooperation, available resources, and support, as appropriate and consistent with their own responsibilities for protecting national security.<sup>121</sup>

Within that framework, it is the Secretary of Homeland Security who is “responsible for coordinating Federal operations within the United States.” In her response, dated September 3, 2005, Blanco said she agreed that a single military commander for Joint Task Force Katrina should be named. But she deflected the dual status commander proposal, suggesting instead that the President “direct the assigned Federal Coordinating Officer of Homeland Security (FEMA) to co-locate with my Homeland Security and Emergency and Preparedness Office at the Federal Joint Task Force headquarters.”<sup>122</sup> This is effectively what the National Response Plan calls for.

According to reports this led to a behind-the-scenes power struggle:

The administration sought unified control over all local police and state National Guard units reporting to the governor. Louisiana officials rejected the request after talks throughout the night, concerned that such a move would be comparable to a federal declaration of martial law. Some officials in the state suspected a political motive behind the request. “Quite frankly, if they’d been able to pull off taking it away from the locals, they then could have blamed everything on the locals,” said the source, who does not have the authority to speak publicly.<sup>123</sup>

In the days that followed, there was plenty of posturing: “The president will not let any form of bureaucracy get in the way of protecting the citizens of Louisiana,” said White House spokesman Dan Bartlett. Seeking to shore up her independence, and in the face of DHS/FEMA laxity, Blanco hired former FEMA director James Lee Witt to advise her in the relief effort.<sup>124</sup> Bush placed the blame for failures in the response on local government in his weekly radio address, stating that the magnitude of the crisis “has created tremendous problems that have strained state and local capabilities.” Chertoff followed suit, claiming that the reason why federal assets were not moved in more quickly was “because our constitutional system really places the primary authority in each state with the governor.”<sup>125</sup>

### **Bush Already Enjoyed Ample Authority**

President Bush had ample authority under provisions of existing laws on disaster response to mobilize and command any and all federal assets, including military forces. As already noted, State-directed National Guard units have always worked in conjunction with federal troops and are authorized under federal and state laws to use force to protect lives, property and public safety during a declared emergency. Police functions have been wisely left to local police and state National Guard forces, except when the situation was so dire they could not function. On September 5, 2005, Admiral Timothy J. Keating, speaking on *CNN*, discussed *posse comitatus*. Keating affirmed that the *Posse Comitatus Act* does not limit the use of active duty military for involvement in law enforcement activities during disaster relief efforts. Keating also mentioned that from his perspective, military command had no issue with State Governors exercising their duties to command their guards.

Yet Bush did not need any unified command structure to move troops and federal assets into New Orleans and the Gulf States in the wake of Hurricane Katrina, and he does not need them for other public health emergencies. Existing law is sufficient. Under the *National Response Plan*, a Governor may call upon the President to declare a “major disaster or emergency” (which Blanco did), should the “findings of a joint Federal-State-local Preliminary Damage Assessment (PDA)” warrant this. In extreme cases (which Katrina certainly was), the PDA can be waived. Once the President declares the incident a federal emergency, he “may unilaterally direct the provision of assistance under the act and will, if practicable, consult with the Governor of the State.”<sup>126</sup>

Other legislation confirms that the Commander-in-Chief has such powers. The President can order in active troops or call on volunteering Reserve units in civil disturbance (10 USC 672). Federal troops are expected to stay under their own command, and not be placed under National Guard or state officials (32 CFR 501.3). The Robert T. Stafford Disaster Relief Act of 1984 (42USC5121 et seq [amended 1988]) gives the President power in declared states of emergency to mobilize federal troops to respond under the direction of FEMA. There is no need for additional Martial Law authority to authorize civilian law enforcement or to federalize state troops.

There may have been other issues at play. There is certainly a regional precedent that would give any state governor pause before allowing the federalizing of State National Guard troops. In 2004, the deployment of Mississippi and Louisiana Guard units to Iraq reportedly weakened local disaster response efforts. Moreover, in a kind of de-federalization of Louisiana Guard units were recalled from Iraq to assist in the relief efforts after Katrina. It may have looked to Blanco that the President seeking to exert his control over the Guard to be able to command greater resources for his war effort, or Bush may have been dismayed that those assets were not put at his disposal.

### **Martial Law is Declared**

A declaration of martial law generally comes from the President, but in an extreme situation, a local commander can impose martial law (32 CFR 501.2 and .4). The Army decides when it is no longer needed, though it should end as soon as necessity ceases (501.6).

Pre-empting both the Governor and the President, City of New Orleans Mayor Ray Nagin declared Martial Law to crack down on looters and told 1,500 police to do “whatever it takes” to regain control of the city. Nagin said that Martial Law means that officers don’t have to worry about civil rights and Miranda rights in stopping the looters... “We will restore law and order,” Blanco said, apparently confirming Nagin’s decision.<sup>127</sup>

- “Martial law has been declared in New Orleans as conditions continued to deteriorate.” (*CBS News*, August 30, 2005).
- “Martial law has been declared in Mississippi and Louisiana” (White House Spokesman Scott McClelland, August 31, 2005).

Despite these reports, the *Times-Picayune* noted that there is no such term as martial law in Louisiana State Law, adding however that when a state of emergency has been declared it provides powers similar to martial law.

Martial law replaces civilian control with military control. A Supreme Court case in 1946 lifted martial law declared in Hawaii during the attack on Pearl Harbor in 1941, forcing civil criminal cases into military courts. The decision ruled that the only legal basis for martial law rests on the complete breakdown of the functions of civil control. Additionally, an 1866 Supreme Court ruling on martial law held that it couldn’t be instituted within the US when its civilian courts are in operation.<sup>128</sup>

On the surface of things, it would appear that *both* the President and the DHS were unclear about their roles and responsibilities, and the length and breadth of federal or executive powers. But this incident requires further study.

Recommendation: Congress should direct the Government Accountability office to investigate:

- 1) the degree to which confusion over roles, responsibilities and powers contributed to the tragic and unnecessary delay in dispatching Federal forces to the incident site; and
- 2) the Bush administration’s claims that the Commander-in-Chief needs more power than the Constitution envisions or allows.

We now turn to the first of these issues.

### **Why the Delay?**

Since governing legislation is clear, the question remains as to the source of the delay. The *Washington Post* ran the following story on September 3, 2005:

NEW ORLEANS, Sept. 3 -- Tens of thousands of people spent a fifth day awaiting evacuation from this ruined city, as Bush administration officials blamed state and local authorities for what leaders at all levels have called a failure of the country's emergency management. Louisiana did not reach out to a multi-state mutual aid compact for assistance until Wednesday, three state and federal officials said. As of Saturday, Blanco still had not declared a state of emergency, the senior Bush official said.

But this claim by the White House official was false. Governor Blanco had declared a State of Emergency ten days earlier on August 26<sup>th</sup>. On September 3<sup>rd</sup>—five days after landfall—the President finally authorized federal assets to move:

President Bush authorized the dispatch of 7,200 active-duty ground troops to the area—the first major commitment of regular ground forces in the crisis—and the Pentagon announced that an additional 10,000 National Guard troops will be sent to Louisiana and Mississippi, raising the total Guard contingent to about 40,000. At a Pentagon news conference Saturday, Lt. Gen. Joseph Inge, the deputy commander of the Northern Command, said the active-duty ground forces would be used mainly to protect sites and perform other functions not considered law enforcement.<sup>129</sup>

From some of the statements made, however, it would appear that some intended to go *beyond* law enforcement:

‘This place is going to look like a Little Somalia’ stated Brigadier General Gary Jones, Commander of the Louisiana National Guard’s Joint Task Force. ‘We’re going to go out and take this city back. This will be a combat operation to get this city under control.’ (*Army Times*, Friday, September 2, 2005)

The mobilization was the largest military mobilization on US soil since the Civil War, with nearly 65,000 military personnel deployed to the region. In the absence of early federal support to stabilize the situation, State assets did not or could not restore law and order. The *Army Times* reported September 2<sup>nd</sup> that the National Guard began a massive operation to “fight insurgents in the city.”

All indications suggest that it was only after receiving Blanco’s letter on September 3<sup>rd</sup> that the President decided to act, and that the confusion over the unnecessary and unsigned Memorandum of Agreement lay at the heart of the situation.

### **Martial Law and FEMA**

Aaron Broussard, President of Jefferson Parish, accused FEMA of deliberately sabotaging relief efforts. “New Orleans City Council President Oliver Thomas acknowledged that the city was

surprised by the number of refugees left behind, but he said FEMA should have been prepared to assist. "Everybody shares the blame here," said Thomas. "But when you talk about the mightiest government in the world, that's a ludicrous and lame excuse. You're FEMA, and you're the big dog. And you weren't prepared either."<sup>130</sup>

The Memorandum of Understanding which the White House presented to Blanco did not seek to Federalize the Guard *directly*, but by placing Louisiana State Guard and Federal forces under one commander loyal to two sovereigns, it would have achieved virtually the same result, since ultimate authority rests with the Commander-in-Chief. The insistence on achieving a result tantamount to federalizing the Louisiana National Guard and other resources might be explained by examining martial law and readiness exercise planning involving FEMA.

The types of martial law planning that FEMA had been involved in from the 1980s forward will be found shocking to some. FEMA in those years was headed by Louis Guiffrida. Guiffrida had earlier helped to develop a plan at the National War College that included provisions for the "detention of at least 21 million American Negroes" in "assembly centers or relocation camps."<sup>131</sup>

In 1981, President Reagan had put Guiffrida in charge of the California Specialized Training Institute for Counterterrorism with funding from Federal Law Enforcement Assistance Administration (LEAA) of \$425,000. Guiffrida designed plans for martial law with names like "Cable Splicer" and "Garden Plot," martial law plans that would have legitimized the arrest and detention of dissidents such as activists opposed to the war in Vietnam. In 1981, Guiffrida took charge of FEMA and created the Civil Security Division and a center for training civil defense personnel in military police methods. President Reagan also set up an Emergency Mobilization Planning Board (EMPB) to put National Security Council in charge of civil defense policy. This plan combined FEMA, the Pentagon and 10 federal agencies. Lt. Col. Oliver North served on the EMPB from 1982-1984 under Robert McFarlane, Assistant to the President for National Security Affairs.

When Attorney General William French Smith got wind of the plans to round up dissenters after being asked to review Executive Order 11490 (a sweeping order giving near dictatorial powers to the President during an emergency), he admonished McFarlane, writing: "I believe that the role assigned to [FEMA] on the revised Executive Order exceeds its proper function as a coordinating agency for emergency preparedness."<sup>132</sup>

North assisted FEMA in making martial law plans to counter civil unrest, according to his testimony during the 1987 Iran-Contra scandal.<sup>133</sup> Guiffrida's tenure FEMA did not last long. He resigned in 1985 under charges of mismanagement and embezzlement. The EMPB was dissolved soon thereafter. Yet one planning concept that was initiated in that period and which survives is Continuity of Government (COG). Continuity of Government essentially replaces Congress with appointed officials. During an emergency, COG replaces federal government with pre-selected executive agency teams that run affairs from secure locations, as Vice President Dick Cheney was reported to be doing well after 9/11. Command was said to rest with the National Security Council (NSC), FEMA and the Department of Defense.<sup>134</sup> We know of no clear indication that Continuity of Government has been lifted since September 11, 2001.

The obvious concern about the various plans just mentioned is that most of these plans appear to move in the direction of suspending the Posse Comitatus Act *indefinitely*. Moreover, both President Bush and Senator Mark Warner (VA) have recently renewed calls to undermine or reverse the *Posse Comitatus Act* of 1878.

Whatever his reasons, President Bush should be the one held responsible for the delay in deploying federal forces to the stricken region of the Gulf Coast. The President has no leg to stand on if he wishes to place blame for the delay on Governor Blanco, as we have seen above, for he did not need her consent in order to move forces. “Existing law is sufficient, and the Congress needs to investigate the New Orleans response by FEMA and government troops, as well as examine and reject the Bush administration’s claims that they need more power than the Constitution envisions or allows.”<sup>135</sup>

Recommendation: The Constitutional principle and practice of separating military and police functions has become a cornerstone of our democracy. Congress should re-affirm the Posse Comitatus Act in light of proposals to amend or overturn it being made by our President.