

Notes from the Field

The Posse Comitatus Act: Does It Impact the Department of Defense during Consequence Management Operations?

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Introduction

In the wake of the Department of Defense (DOD) response to Hurricane Katrina, many have questioned whether the DOD can conduct its domestic response mission while faced with the law enforcement restrictions of the Posse Comitatus Act (PCA).¹ Television clips showing looters in New Orleans left the American public questioning why the military did not act and why the military could not perform law enforcement activities.² Discussions and questions continued regarding the role of the military in other national emergencies, such as a terrorist act involving chemical, biological, nuclear, or high-yield explosives (CBRNE). If a terrorist act of the magnitude that requires a DOD response were to occur, it is likely that Joint Task Force Civil Support (JTF-CS) would be directed to command and control DOD forces responding to the incident.³ The PCA restrictions raise the question as to whether the PCA has a significant negative impact on the JTF-CS consequence management mission. Further, does the PCA prevent DOD from fulfilling its Defense Support to Civil Authorities (DSCA) mission?

To answer this question, this article begins by describing the JTF-CS mission, as well as the larger DOD DSCA mission. The article then discusses the PCA, its historical foundation, and its current status. Next, the article discusses the PCA's impact on the JTF-CS mission, using JTF-CS anticipated requests for support as a basis for analysis. When discussing likely JTF-CS missions, this article reviews the potential for law enforcement tasks within the support requirements. Finally, the article concludes with an assessment that the PCA does not unduly impact JTF-CS's ability to accomplish its mission; further, this article concludes that the PCA in its current status does not unduly hinder any DOD support to civil authorities during consequence management.

Joint Task Force Civil Support Overview

Joint Task Force Civil Support is a standing joint task force headquarters of approximately 185 military and civilian personnel at Fort Monroe, Virginia.⁴ It is a deployable command and control headquarters for DOD units and personnel executing consequence management operations in response to a CBRNE incident.⁵ Further, the JTF-CS is a center of knowledge for developing response plans for essential DOD support to the lead federal agency.⁶

¹ 18 U.S.C. § 1385 (2000) (Use of Army and Air Force as Posse Comitatus).

² Net television coverage following Hurricane Katrina showed footage of looters. See MSNBC, *New Orleans Mayor Orders Looting Crackdown*, Sept. 1, 2005, <http://www.msnbc.msn.com/id/9063708/> (linking the news article to multi-media coverage); CNN Videos, *Chaos in Louisiana*, Aug. 30, 2005, <http://search.cnn.com/search.jsp?query=Hurricane%20Katrina,%20looting&type=news&sortBy=date&intl=false> (follow "Chaos in Louisiana" hyperlink (providing an example of the media reports concerning looting in New Orleans)).

³ U.S. Northern Command, *About USNORTHCOM: Joint Task Force Civil Support*, <http://www.northcom.mil/About/index.html> (last visited Nov. 28, 2007) [hereinafter *About: JTF-CS*] (stating that "JTF-CS deploys to the incident site and executes timely and effective command and control of designated DoD forces, providing support to civil authorities. . .").

⁴ Fort Monroe will close as part of the 2005 Base Realignment and Closure and JTF-CS will relocate to Fort Eustis, Virginia, by 2011. See BASE CLOSURE AND REALIGNMENT COMMISSION, 2005 BASE CLOSURE AND REALIGNMENT COMMISSION REPORT 14 (Sept. 8, 2005), available at <http://www.brac.gov/finalreport.html>.

⁵ See *About: JTF-CS*, *supra* note 3.

⁶ Information about Joint Task Force Civil Support is available on its webpage. See generally Joint Task Force Civil Support, <http://www.jtfc.northcom.mil> (last visited Nov. 28, 2007) [hereinafter *JTF-CS Webpage*]; see also *About: JTF-CS*, *supra* note 3.

An Army National Guard major general serving on Title 10⁷ orders commands the JTF-CS.⁸ The staff consists of active and reserve component military from all five services, government service personnel, and civilian contractors.⁹ Collectively, the command possesses expertise in a wide range of functional areas to include operations, logistics, intelligence, planning, communications, medical and legal services.¹⁰ Created by the Unified Command Plan for 1999,¹¹ the JTF-CS provides both an operational capability and an oversight mechanism that can anticipate support requirements for responding to a catastrophic CBRNE incident, undertake detailed analysis, conduct exercises, and ultimately respond in support of civil authorities.¹²

Often the terms CBRNE and weapons of mass destruction (WMD) are used interchangeably, but there is a distinct difference between the two. A CBRNE incident could be an accident, an act of nature, or an act of terrorism.¹³ The term WMD refers to a CBRNE weapon, device, or material that is specifically designed to produce casualties or terror.¹⁴ While the nation is focused on terrorism and those who seek to employ weapons of mass destruction to create casualties or terror, the JTF-CS consequence management mission is much the same regardless of the cause of the incident.¹⁵ The command's principle focus is to plan for and integrate DOD support to the federal agency that has responsibility to manage the consequences of a domestic CBRNE incident.¹⁶

Consequence management focuses on the effects of an incident and involves undertaking measures to save lives, prevent further injury, and provide temporary critical life support.¹⁷ Conversely, crisis management focuses on the causes of terrorism. Crisis management includes the law enforcement functions of identifying, acquiring, and planning for the use of resources needed to anticipate, prevent, deter, or resolve a threat or act of terrorism.¹⁸ The JTF-CS mission is CBRNE consequence management, not crisis management.¹⁹

⁷ 10 U.S.C. § 12,301 (2000) (Reserve Components Generally) (allowing the President to order National Guard troops to federal service with the consent of the governor); *id.* § 12,304 (Selected Reserve and Certain Individual Ready Reserve Members; Order to Active Duty Other Than During War or National Emergency) (allowing the President to order National Guard troops to federal service without the request of the governor).

⁸ *JTF-CS Webpage*, *supra* note 6 (follow "FAQ" hyperlink).

⁹ *Id.*

¹⁰ *Id.* See also *id.* (follow "Unit Fact Sheet" hyperlink).

¹¹ The Unified Command Plan (UCP) establishes the missions and geographic areas of responsibilities of the unified combatant commands. The President, with the recommendation of the Chairman of the Joint Chiefs of Staff through the Secretary of Defense, periodically reviews the UCP. The UCP establishing JTF-CS was approved by President Clinton in September 1999.

¹² *JTF-CS Webpage*, *supra* note 6 (follow "Operational Focus of JTF-CS" hyperlink).

¹³ CBRNE is defined as a:

chemical, biological, radiological, nuclear, or high-yield explosives incident — An emergency resulting from the deliberate or unintentional release of nuclear, biological, radiological, or toxic or poisonous chemical materials, or the detonation of a high-yield explosive. Also called **CBRNE incident**.

DEPT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JOINT PUB. 1-02, at 85 (12 Apr. 2001).

¹⁴ *Id.* at 584. WMD is defined as:

weapons of mass destruction — Weapons that are capable of a high order of destruction and/or of being used in such a manner as to destroy large numbers of people. Weapons of mass destruction can be high-yield explosives or nuclear, biological, chemical, or radiological weapons, but exclude the means of transporting or propelling the weapon where such means is a separable and divisible part of the weapon. Also called **WMD**. See also **destruction; special operations**. (JP 3-28)

Id. See Seth W. Carus, *Defining "Weapons of Mass Destruction,"* CENTER FOR THE STUDY OF WEAPONS OF MASS DESTRUCTION, OCCASIONAL PAPER 4 (Jan. 2006).

¹⁵ JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, CIVIL SUPPORT II-9 (14 Sept. 2007) [hereinafter JOINT PUB. 3-28] (emphasizing that JTF-CS responds to CBRNE events, whether they incidents or accidents).

¹⁶ *JTF-CS Webpage*, *supra* note 6 (follow "Core Principles of JTF-CS" hyperlink).

¹⁷ JOINT PUB. 3-28, *supra* note 15, at I-9.

¹⁸ *Id.* *Terrorism Incident Law Enforcement and Investigation*, U.S. DEPARTMENT OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN, Dec. 2004, [hereinafter NAT'L RESPONSE PLAN], available at http://www.dhs.gov/xlibrary/assets/NRP_FullText.pdf (follow "Incident Annexes" hyperlink; then follow "Terrorism" hyperlink).

¹⁹ *JTF-CS Webpage*, *supra* note 6 (follow "Mission" hyperlink). See also *About: JTF-CS*, *supra* note 3 (follow "About" hyperlink).

In a consequence management mission, whether the JTF-CS responds to a CBRNE event or another joint task force responds to a natural disaster, the *effects* of the incident are the enemy, not the *cause* of the effects. Viewing the effects of the incident as the enemy is a significant shift in mindset for military personnel. Instead of focusing on finding and stopping what caused the CBRNE incident, consequence management focuses on determining and managing the potential effects, such as death, injuries, sickness, physical damage, and chemical, biological, nuclear, or radiological contamination.²⁰ For the JTF-CS, the concept of operations begins with gaining early situational awareness and planning. The command's ability to plan in advance of a CBRNE incident drives its ability to respond in the most timely manner, as it allows the JTF-CS to anticipate what types of DOD capabilities might be required to provide a tailored response to a CBRNE incident in a particular community depending on the type of incident. A timely and effective consequence management response requires anticipating the shortfalls in local, state, and federal response capabilities, predicting the requests for assistance to cover the shortfalls that may be directed to the DOD, and executing the missions assigned to the JTF-CS.

The JTF-CS mission can be seen as a subset of the larger DOD DSCA mission. The DSCA mission includes the broader scope of support that the DOD provides to states upon request, to include support to hurricane, wildland fire, earthquakes, and other natural disasters, through the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).²¹ The Stafford Act is the primary statutory authority for both the DOD DSCA mission and the JTF-CS CBRNE consequence management mission.²² In accordance with the principles of federalism embodied in the Stafford Act, DOD supports civil authorities during consequence management operations at the direction of the Secretary of Defense to support the lead federal agency (LFA).²³ The LFA responds to state governor requests to fill the shortfalls and gaps in state and local response capabilities.²⁴ The DOD can employ equipment, logistical support, and planning capabilities and has supported state and local communities for many years during natural disasters.²⁵

Posse Comitatus Act (PCA) Overview

Congress enacted the PCA²⁶ in 1878 to end the routine use of federal soldiers to enforce civil laws. Before the Civil War, the U.S. Attorney General affirmed the common law right of a sheriff or other ministerial official to the use federal military troops in a *posse comitatus* to enforce the Fugitive Slave Act, thereby subordinating federal military troops to local law enforcement officials.²⁷ During Reconstruction, federal soldiers were used to enforce the new voting laws in the South.²⁸ Concerned about the repeated routine use of federal military to enforce civil laws in contravention of the Founding Fathers' concern for restraints on a standing army, Congress restricted the routine use of federal military troops in the PCA.²⁹

²⁰ JOINT PUB. 3-28, *supra* note 15, at I-9.

²¹ 42 U.S.C. §§ 5121–5206 (2000).

²² U.S. DEP'T OF DEFENSE DIR., 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) para. 1.4 (15 Jan. 1993); *see also* JTF-CS Webpage, *supra* note 6 (follow "Legal Basis for Military Support to Civilian Authorities" hyperlink).

²³ JOINT PUB. 3-28, *supra* note 15, ch.1, para. 3.

²⁴ *Id.*

²⁵ A review of the Federal Emergency Management Agency (FEMA)'s website yields countless examples of DOD response to national disasters. One of the most recent being the California wildfires in fall 2007. *See, e.g.,* FEMA, *Federal Emergency Management Agency Coordinating National Response to California Wildfires*, Oct. 23, 2007, <http://www.fema.gov/news/newsrelease.fema?id=41428> ("DoD personnel in the affected area include nearly 300,000 servicemen and women, government employees and their families. The DoD can bring additional capabilities as part of a larger federal response when requested by the state and approved by the Secretary of Defense.").

²⁶ 18 U.S.C. § 1385 (2000). The Act provides:

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.

Id.

²⁷ 6 Op. Att'y Gen. 466, 473 (1854).

²⁸ Bonnie Baker, *Origins of the Posse Comitatus Act*, AIR & SPACE J. 1 (1 Nov. 1999).

²⁹ *Id.*

Even though the express language of the PCA only prohibits use of the Army and the Air Force, the DOD policy has extended the general prohibition of non-use to Navy and Marine Corps personnel.³⁰ The Secretaries of Defense and the Navy may grant exceptions to this policy on a case-by-case basis.³¹

The PCA's prohibitions do not apply to members of the National Guard when not in federal status.³² When National Guard members are acting under the control of their state governors, either pursuant to Title 32 or in state active duty, they are not subject to the PCA's restrictions.³³ The PCA does not apply to members of the Coast Guard since law enforcement is a primary function of the Coast Guard mission.³⁴

The PCA expressly provides for both constitutional and statutory exceptions to the general non-use prohibition. Article II, Section 2, the Commander-in-Chief Clause,³⁵ and Article IV, Section 4, Invasion and Republican Form of Government Clauses,³⁶ are both constitutional exceptions. When national security is at stake, the president may invoke these constitutional authorities to use the federal military to enforce civil laws.

Congress has also enacted several statutory exceptions to the PCA. The broadest exception is the Insurrection Act statutes,³⁷ which authorize the president to order the use of federal military forces to suppress domestic violence that hinders execution of state or federal law, or otherwise deprives citizens of their constitutional rights. This includes situations when a state governor requests assistance in quelling an insurrection against the state government,³⁸ or when the President determines that either unlawful obstructions or assemblages prevent the enforcement of federal law³⁹ or domestic violence interferes with individual civil rights.⁴⁰

³⁰ U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (20 Dec. 1989) [hereinafter DOD DIR. 5525.5].

³¹ U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS para. 8b(6) (26 Jan. 2006).

³² 18 U.S.C. § 1385 (2000). The statutory language of the PCA only includes Army and Air Force.

³³ National Guard in Title 10 status become members of the Army, and thus, fall under the restrictions of the PCA. Cong. Research Serv., Pub. No. 95-964 S, The Posse Comitatus Act & Related Matters: The Use of Military to Execute Civilian Law 42 (2000) (citing numerous cases). See also DOD DIR. 5525.5, *supra* note 30.

³⁴ 14 U.S.C. § 2 (2000). Title 14 of the United States Code details the duties of the U.S. Coast Guard, starting with "the Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States." *Id.*

³⁵ U.S. CONST. art. II, § 2. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

³⁶ *Id.* art. IV, § 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

³⁷ 10 U.S.C. §§ 331-334 (2000).

³⁸ *Id.* § 331. Provides:

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

Id.

³⁹ See *id.* § 332.

⁴⁰ See *id.* § 333. Provides:

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it –

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

Id.

Other statutory exceptions to the PCA allow for the federal military to be used in direct law enforcement in matters involving nuclear terrorism;⁴¹ in *limited* situations involving the use of chemical or biological agents;⁴² in the execution of certain, primarily maritime, quarantine, and health laws;⁴³ and in crimes involving members of Congress⁴⁴ or in protecting the President.⁴⁵

In construing the PCA, federal courts have articulated two common law exceptions: the military purpose doctrine and the indirect assistance doctrine. Under the military purpose doctrine, federal military personnel involved in law enforcement operations do *not* violate the PCA if the operations have a *specific military purpose*.⁴⁶ The military purpose doctrine permits federal military personnel to engage in the following types of activities without violating the PCA: force protection and law enforcement on military installations, traffic control points on main supply routes, and security at supply depots.⁴⁷

Federal courts have also construed the PCA to find that federal military personnel engaged in passive roles that may *indirectly* aid law enforcement do *not* violate the PCA.⁴⁸ Direct law enforcement includes searches for evidence for use in a criminal proceeding and seizures of suspected criminals; interdiction of vehicles, vessels, or aircraft; and pursuit, investigation, or interrogation of civilians.⁴⁹

Congress has authorized certain indirect law enforcement assistance for specific missions.⁵⁰ Indirect law enforcement includes the use of federal military facilities or equipment by law enforcement officials, training law enforcement officials on the use of proffered equipment, and equipment maintenance by federal military personnel. Additionally, in certain circumstances, active duty federal military personnel or DOD civilian employees may be provided to operate the equipment in support of civilian law enforcement.

Posse Comitatus Act Impact on the JTF-CS Mission

The question then arises, what impact do the restrictions of the PCA have on the mission of JTF-CS, or another unit in a DSCA mission? The question is best answered by analyzing potential JTF-CS missions. To gauge the impact of the PCA on a CBRNE consequence management mission, this article will examine whether the PCA prevents JTF-CS from conducting a required response to a biological incident or a naturally occurring pandemic.

After a biological incident, the JTF-CS may anticipate requests for strategic national stockpile (SNS) support, medical augmentation support, disease/bio-contamination support, and mortuary affairs support.⁵¹ The SNS support may encompass subtasks such as transporting the SNS to distribution sites and assisting with storage, and distributing medicine and supplies to trained medical personnel. Medical augmentation support includes providing tailored packages of medical personnel to augment existing care facilities and establishing additional assessment, treatment, or care capacity. Disease/bio-contamination support involves assisting the Department of Homeland Security and the Centers for Disease Control with

⁴¹ 18 U.S.C. § 831(d), (e) (2000).

⁴² 10 U.S.C. § 382(d).

⁴³ 42 U.S.C. §§ 97–98 (2000).

⁴⁴ 18 U.S.C. § 351(g).

⁴⁵ *Id.* § 3056.

⁴⁶ See *United States v. Hitchcock*, U.S. App. LEXIS 15726, 13 (9th Cir. 2002) (noting that military involvement in civil law enforcement activities is permissible if undertaken “for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities.” (quoting DOD DIR. 5525.5, *supra* note 30, § E4.1.2.1)); *United States v. Chon*, 210 F.3d 990, 994 (9th Cir. 2000) (holding that “NCIS agents’ activities were permissible because there was an independent military purpose for their investigation - the protection of military equipment.”); *Applewhite v. United States Air Force*, 995 F.2d 997, 1001 (10th Cir. 1993) (“Since there was an independent military purpose to OSI’s conduct, there was necessarily no willful use of any part of the Air Force as a posse to execute civilian laws [t]he agents went off base to ‘sting’ military personnel, not civilians.”).

⁴⁷ The military purpose exception to the PCA has been incorporated into DOD Dir. 5525.5. DOD DIR. 5525.5, *supra* note 30, at enclosure 4.

⁴⁸ See, e.g., *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975).

⁴⁹ DOD DIR. 5525.5, *supra* note 30, para. 4 (incorporating enclosures 2–7).

⁵⁰ 10 U.S.C. §§ 371–382 (2000) (discussing detection and monitoring, loan of equipment, maintenance, sharing information, training, and also cooperation on counter-drug missions).

⁵¹ NAT’L RESPONSE PLAN, *supra* note 18, Emergency Support Function (ESF) #8–4.

disease containment, conducting contact tracing, supporting isolation or quarantine efforts within DOD authority, and assisting with the administration of vaccination or other prophylaxis programs. Finally, mortuary affairs support involves collecting and transporting remains to temporary collection sites and designated storage facilities, identifying and cataloging remains, and mortuary affairs materiel resupply.

During response to a biological incident, quarantine and isolation support may be construed as requiring the military to perform direct law enforcement. State and local officials generally have the primary authority to declare and enforce a quarantine as an exercise of their public health and police powers.⁵² Some states have enacted criminal penalties for violating quarantine and isolation orders, thereby making enforcement of quarantine orders a law enforcement matter. Federal authority to declare a quarantine only exists in limited circumstances; namely entry to the sovereign territory of the U.S. and interstate movement of people and goods.⁵³ Support of a quarantine may be provided by JTF-CS forces within certain guidelines.

If asked by the LFA, JTF-CS forces may not enforce the quarantine by patrolling and enforcing a *cordon sanitaire*, as this is a direct law enforcement function and would violate the PCA.⁵⁴ However, federal troops may support the quarantine by working *within* the quarantined areas to provide critical life support functions such as dispersal of food, medication, and supplies, or essential transportation services. The presence of uniformed military members performing these functions within the quarantine areas might lead to the perception that Title 10 forces are enforcing the quarantine; however, that is not the case. Uniformed members enforcing the quarantine will very likely be members of the National Guard in a non-federal status under the command and control of their Governor.

Within the realm of providing medical services, there may be an additional need to protect the SNS and other medical assets from looting during consequence management operations. If the JTF-CS establishes a voluntary immunization and prophylaxis center within an affected area, there is sometimes a risk that individuals waiting for medication may riot or cause a civil disturbance in an effort to get medications more quickly. Normally, direct law enforcement functions necessary to protect the medical centers and the SNS supplies would fall to local and state authorities, including the National Guard in a non-federal status if the governor so orders. It would be an inefficient use of specialized medical resources, as well as a violation of the PCA, for JTF-CS personnel to provide the type of law enforcement that would be necessary to contain such incidents.

Next, reviewing potential missions and support requirements in response to a nuclear, radiological, chemical, or high yield explosive attack, the JTF-CS anticipates requests to perform search and rescue missions to extract injured citizens, then to triage, treat, and transport them to medical facilities.⁵⁵ Department of Defense assets might also be required to provide medical augmentation to increase treatment capacity, and extended care facilities.⁵⁶ Further, DOD assets might be tasked to survey, mark, and monitor the incident site, and decontaminate people and facilities.⁵⁷ The DOD might also be tasked to provide various forms of evacuee support, to include providing food, transportation, and temporary shelter.⁵⁸

Additionally, depending upon the type of attack, explosive ordinance disposal might be required to disable any lingering explosives. Some law enforcement functions that might arise out of providing this support might include securing buildings and sites to ensure curious bystanders and thrill-seekers do not enter contaminated or dangerous areas or weakened buildings. Normally, the LFA will look to local or state law enforcement that would already have this responsibility. Further, if the building is turned over to the federal military for decontamination or infrastructure protection, an argument may be made that securing the area has a military purpose and is, therefore, an exception to the PCA.

⁵² See generally 42 C.F.R. pts. 70, 71 (2006) (providing Department of Health and Human Services and Centers for Disease Control and Protection regulations for federal authority for quarantine).

⁵³ See generally *id.* pt. 70 (Interstate quarantine), pt. 71 (Foreign quarantine) (2006).

⁵⁴ DOD DIR. 5525.5, *supra* note 30.

⁵⁵ NAT'L RESPONSE PLAN, *supra* note 18, ESF #8-4.

⁵⁶ *Id.*

⁵⁷ *Id.* ESF #8-5.

⁵⁸ *Id.* ESF #10-5, ESF #14-2.

Finally, regardless of whether the consequence management operation is for a CBRNE incident or a DSCA mission, force protection is a command responsibility.⁵⁹ However, there is a presumption that the JTF-CS forces deployed to CBRNE incident sites will not carry arms.⁶⁰ Since Hurricane Katrina, the same is true for all DSCA missions.⁶¹ Therefore, in consequence management operations, the responsibility for providing security for DOD members and equipment rests *primarily* with state and local law enforcement authorities. As an exception, military members can generally act in self-defense if a commander has not restricted an individual's right of self-defense.⁶² Additionally, if a commander determines that there is a need to arm forces during consequence management operations, he can request arming authority from the Secretary of Defense through the Commander, U.S. Northern Command.⁶³ However, DOD forces are still restricted by the PCA from engaging in direct law enforcement even when such arming is required for force protection. A final caveat is when the need to arm DOD forces is based on widespread civil unrest, in which case the President can invoke the Insurrection Act as a statutory exception to the PCA.⁶⁴

Another issue raised concerning the restrictions of the PCA on the DOD was why the military could not enforce the law during the looting and apparent lawlessness in New Orleans in the aftermath of Hurricane Katrina. Television reports left the American public questioning why the military did not act.⁶⁵ This, however, is not the correct question. The question is whether the PCA prevented the DOD forces from conducting the mission requested by the Governor through the LFA.⁶⁶ The answer to this question is a resounding, "No." During Hurricane Katrina the Governor, through the LFA, asked the DOD to conduct various missions in support of disaster response, to include search and rescue, distributing supplies, and providing medical services.⁶⁷ The DOD accomplished those tasks within the bounds of the PCA and its exceptions. The DOD was not asked to stop the looting or enforce the law. The security mission was retained by the governor and was conducted by local law enforcement and state National Guard.⁶⁸ If the DOD had been asked to perform these missions it could only have done so if the state of lawlessness were such that it would have caused the President invoke the Insurrection Act.⁶⁹

Conclusion

The PCA, as currently enacted and construed, does not prevent the JTF-CS from performing its CBRNE consequence management mission. The JTF-CS mission is to provide support to civil authorities, not to engage in law enforcement. If JTF-CS personnel were asked to engage in law enforcement activities during a CBRNE consequence management operation mission, the Commander, JTF-CS must defer to state and local law enforcement authorities or advise the Commander, U.S. Northern Command to assign the law enforcement mission to another command in accordance with a recognized constitutional or statutory exception(s) to the PCA.⁷⁰

⁵⁹ U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para 2-5b (7 June 2006) (providing details of force protection responsibility for senior mission commanders, installation commanders, and garrison commanders).

⁶⁰ Message, 281832Z Apr 06, PTC Washington, D.C., subject: Defense Support to Civil Authorities Standing (DSCA) EXORD para. 9.0 [hereinafter DSCA EXORD].

⁶¹ *Id.*

⁶² JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (S)/STANDING RULES FOR THE USE OF FORCE FOR US FORCES (U) app. L-3 (13 June 2005).

⁶³ DSCA EXORD, *supra* note 60, at 17.

⁶⁴ 10 U.S.C. §331-335 (2000).

⁶⁵ William M. Arkin, *Rumsfeld to Katrina: "Thanks,"* WASH. POST, Sept. 20, 2005, http://blog.washingtonpost.com/earlywarning/2005/09/rumsfeld_to_katrina_thanks.html

⁶⁶ Letter from Governor Kathleen Babineaux Blanco, to President Bush (Sept. 2, 2005), *available at* <http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=792&printer=1>.

⁶⁷ *Id.*

⁶⁸ Press Release, Office of the Governor, Kathleen Babineaux Blanco, Task Force Pelican (Sept. 28, 2005), <http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&articleID=492> ("National Guard troops are working diligently to respond to the needs of citizens affected by Hurricane Katrina and those affected by Hurricane Rita").

⁶⁹ 10 U.S.C. § 331-335.

⁷⁰ 18 U.S.C. § 1385 (2000).

As outlined above, no change to the Posse Comitatus Act is necessary for JTF-CS to perform its CBRNE consequence management mission. Assuming that other DOD forces will have similar missions during DSCA operations, by analogy, the PCA does not unduly restrict any DOD force from conducting a DSCA mission. Even though the PCA may restrict DOD forces from performing routine law enforcement functions the PCA does not unduly restrict JTF-CS from performing its CBRNE consequence management mission. In the case of a CBRNE incident, JTF-CS is specifically directed and authorized to perform CBRNE consequence management in support of the LFA. Consequence management CBRNE missions are unique and JTF-CS is the only DOD unit tasked exclusively to provide support. It would be detrimental to divert JTF-CS's limited and specialized resources to law enforcement functions. The governor has the option and the flexibility to perform law enforcement functions by using the National Guard in a state active duty or Title 32 status. Maintaining this distinction between the federal and state roles for military forces is consistent with the republican form of government that was so important to America's Founding Fathers. Furthermore, if the situation deteriorates to chaos or civil unrest, the existing constitutional and statutory exceptions give the President adequate authority to use the DOD to perform law enforcement functions under Title 10 status. The PCA does not have a significant negative impact on the defense support of civil authority missions.