



State vs. Federal Power

by John D. Whitaker

I went to Virginia last summer to see where my father was born. I was surprised to hear that my grandparents were buried in a Confederate Cemetery in Fredericksburg, Va. As we traveled through the South talking to people, it occurred to me that this country is still trying to work through issues which have been around since the Civil War. This fact became painfully obvious as I watched the slow motion response of the federal government after hurricane Katrina. Why didn't the federal cavalry march into Louisiana at the first sign of trouble? Well, the answer is complicated.

Article I Section 8 of the U.S. Constitution gives the federal government the power to "suppress insurrections." This constitutional grant of authority was later followed by The Insurrection Act of 1807 which allows the Federal Army to take over state law enforcement functions if either one of two possible conditions exist. First, the president can order federal troops into a state where the state legislature or governor ask the president for help. If the state does not ask for help, the president still has the power to act without being asked, but he must only do so where federal civil rights are being denied to a class of people or the law is not being enforced by the local authorities.

An important limit on Federal power to enter a state came in response to fighting over the federal government's role in the reconstruction of the south after the civil war. The Posse Comitatus Act of 1878 prohibits the use of the military to aid civil authorities in enforcing the law or suppressing civil disturbances, except in cases and under circumstances expressly authorized by the Constitution or act of Congress. Posse Comitatus literally means the "power of the county," and this law essentially prohibits the Federal Army from becoming members of a local posse to enforce state law. This law was passed in part because the perception was that the Army was being used for political purposes during reconstruction. The southern democrats who were in control of the southern states wanted the federal government to get out of local politics, and this law



was passed to place additional restrictions on the Insurrection Act. Since that time a variety of new laws have been passed, blurring the line between the Army and law enforcement. The war on drugs is an example where the Coast Guard is used in conjunction with local law enforcement to stop illegal drugs from coming into the country.

Using the Army to enforce law and order in the states is a touchy subject, and nowhere was this more evident than in the south. Louisiana had significant federal intervention after the Civil War, but the troops were finally withdrawn in 1877, signaling the end of reconstruction. Both Presidents Eisenhower and Kennedy sent federal troops into the south without invitation to force integration. These military actions were not greeted with enthusiasm from the governors of the southern states involved, and a lot of the people in the south are still angry about it. The Civil War may have ended at Appomattox, but southern hostility and mistrust toward the federal government marches on.

I doubt that anyone would deny that hurricane Katrina produced a fair amount of insurrection in New Orleans. President Bush could have immediately ordered federal troops to Louisiana under the Insurrection Act without an invitation, but if he had done so it would probably have been perceived by the local authorities as heavy handed. Reports are that the President decided instead to wait for an invitation from Louisiana Governor Kathleen Blanco. An invitation that she refused to make presumably based upon her reluctance as a southern governor to admit that she had lost control of her state.

We should expect to see the debate over when and how the federal government should get involved in disasters like this playing out over the next several months. This analysis has already been characterized in the national media as the "blame game." Whoever takes the blame, it seems clear that our homeland is still not very secure. About all we know for sure is that our citizens in Louisiana were dying while this horrific turf battle took place between the local, state and federal governments over who was actually in charge. I think we should figure this out as a nation before it happens again.

The Wyoming State Bar does not certify any lawyer as a specialist or expert. Anyone considering a lawyer should independently investigate the lawyer's credentials and ability, and not rely upon advertisements or self-proclaimed expertise. This informative column is brought to you by John Whitaker who practices personal injury and criminal law throughout Wyoming. He can be reached at JDWTL@aol.com or by calling his office in Casper at 265-6204.