

# **Insurrection Act Restored: States Likely to Maintain Authority Over National Guard in Domestic Emergencies**

**A Monograph  
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| 14. ABSTRACT<br>Before 2006, the President had multiple legal bases available to authorize his use of federal military forces in a variety of law enforcement and natural disaster circumstances. Nevertheless, Congress amended the Insurrection Act in 2006 to create the Enforcement of the Laws to Restore Public Order. This statute stirred controversy as it arguably represented an unwarranted expansion of Presidential power. Additionally, while statute attempted to address the kind of lawlessness seen in New Orleans immediately following Hurricane Katrina in 2005, the provision arguably offered no improvement over the Insurrection Act in instances of lawlessness or the Stafford Act in instances of disaster. Without ever having been invoked, and in the face of strong opposition, the Enforcement of the Laws to Restore Public Order was repealed on January 28, 2008 and the previous Insurrection Act was restored. This monograph reviews the Enforcement of the Laws to Restore Public Order statute and concludes that it was prudent to repeal this legislation. Moreover, this monograph recommends that future laws and policies to improve disaster response across the whole-of-government and the private sector should be consistent with the principles in the 2008 National Response Framework, which advocates tiered response rather than a primarily federal response in most instances. The rare instances of catastrophic disaster that might require the President to shortcut tiered response and assume federal control at the outset of the situation should be clearly defined in law. |                    |                                  |                                       |                                                      |                                                                       |
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## Abstract

INSURRECTION ACT RESTORED: STATES LIKELY TO MAINTAIN AUTHORITY OVER NATIONAL GUARD DURING DOMESTIC EMERGENCIES by MAJ Mark M. Beckler, ARNG, 73 pages.

Early in the history of the Republic, the delegates to the Constitutional Convention and the members of the subsequent Congresses understood that the President required power to execute the laws of the land. Under authority of the Militia Clause, Congress enacted the Militia Act of 1792 and the subsequent Insurrection Act of 1807 to provide the President with authority to call forth the militia of the states to execute the laws and suppress insurrections. As recent as 1992, President George W. Bush relied upon the Insurrection Act to federalize much of the California National Guard and employ an additional force of approximately 4,000 active Army and Marine troops to suppress the Los Angeles Riots, which had flared up as the result of the controversial acquittal of white police officers who used force against an African American suspect.

In addition to the Insurrection Act, Congress enacted the 1974 Disaster Relief Act and subsequent 1988 Robert T. Stafford Disaster Relief and Emergency Assistance Act to provide the President with authority to act in response to natural or manmade disasters within the United States. On numerous occasions, the Stafford Act has been the basis for federal assistance, including military assistance, to affected areas during hurricanes, floods, forest fires, and other incidents.

In the majority of cases where the President has invoked the Insurrection Act or the Stafford Act, he has done so at the request of a governor. In most cases, the President's use of federal troops, including federalized National Guard troops, has been part of a tiered response of local, state, and federal responders. However, after Hurricane Katrina devastated the Gulf Coast in 2005, the response at all levels drew criticism from the media and the public at large.

In an attempt to improve disaster response efforts, Congress amended the Insurrection Act by broadening its applicability beyond instances of well-defined insurrection, rebellion, unlawful combination, and conspiracy, to include natural disasters. The amendment added that the President could act without a governor's request when he determined that it was beyond a state's capability to enforce the laws and maintain public order. The amendment was enacted in 2006 as the Enforcement of the Laws to Restore Public Order. This statute immediately stirred controversy as it arguably represented an unwarranted expansion of Presidential power. Additionally, while the 2006 statute attempted to address the kind of lawlessness seen in New Orleans immediately following Hurricane Katrina, the Enforcement of the Laws to Restore Public Order arguably offered no improvement over the Insurrection Act in instances of lawlessness or the Stafford Act in instances of disaster. Without ever having been invoked, and in the face of strong opposition, the Enforcement of the Laws to Restore Public Order was repealed on January 28, 2008 and the previous Insurrection Act was restored.

This monograph reviews the Enforcement of the Laws to Restore Public Order and recommends that future laws and policies to improve disaster response across the whole-of-government and the private sector should be consistent with the principles in the 2008 National Response Framework, which advocates tiered response rather than greater federal response in most instances. The rare instances of catastrophic disaster that might require the President to shortcut tiered response and assume federal control at the outset of the situation should be clearly defined in law.

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## Introduction

Under the authority of the Militia Clause of the United States Constitution, Congress can legislate to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions. Historically, Congress has legislated in this area and the President has federalized the militia on numerous occasions. In particular, Congress passed the Insurrection Act of 1807 to give the President authority to federalize the militia in instances of “insurrection, domestic violence, unlawful combination, or conspiracy.”<sup>1</sup> Although several subsequent laws have affected the President’s ability to federalize militia forces over the years, most notable the Insurrection of 1871, the gist of the Insurrection Act of 1807 remained largely unchanged until 2006 when public criticism of the federal and state response to Hurricane Katrina prompted federal legislators to amend the Insurrection Act. As a result, Section 1076 of the 2007 John Warner National Defense Authorization Act modified America’s longstanding Insurrection Act by adding the terms, “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition” to the four previously listed conditions from the Insurrection Act of 1807.<sup>2</sup> The language was added to the Insurrection Act in an attempt to streamline the federal government’s ability to directly intervene in domestic emergencies.

A key aspect of the amended law was that it appeared to encourage the President to federalize National Guard forces for domestic emergencies that were previously within the responsibility of the states. Specifically, the President was authorized to act in a state when he determined that the state and local authorities were incapable of maintaining order and managing the emergency themselves. How the President would have determined a state’s capability during an emergency was ill defined and remained open to speculation, which concerned the states. If

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<sup>1</sup> Insurrection Act of 1807, ch. 39, 2 Stat. 443 (codified at U.S. Code 10 (2000) §§ 331-335.

<sup>2</sup> National Defense Authorization Act of 2007, Public Law 109-364, 109th Cong., 2d sess. (October 17, 2006). The key provision is the “Enforcement of the Laws to Restore Public Order.”

the President routinely determined that states were incapable of controlling emergency situations within their borders, then increased federal control over these emergencies might have upset the balance of power between state and federal government within the United States federal framework.

On the other hand, some experts believe that although the 2006 law provided the President with the opportunity to declare a state's incapacity, the President would remain reluctant to intrude into a state's affairs for political reasons.<sup>3</sup> Before the 2006 amendment to the Insurrection Act, the President already had multiple legal bases available to authorize his use of federal military forces in a variety of law enforcement and natural disaster circumstances. In this sense, the President's authority was not significantly increased under the amended law. The amended law actually included several conditions that must be satisfied before the President could authorize the use of federal forces, including federalized National Guard forces, to take control of an emergency situation. The most important of these conditions was a showing of lawlessness in a state that sufficiently demonstrated the state's inability to enforce the laws and maintain public order. Instances in which a state cannot enforce the laws and maintain public order are rare, and therefore a President was not likely to use federal forces under the amended Insurrection Act any more frequently than he would use them under the previous Insurrection Act. However, even a slight or suggested increase in Presidential reliance upon federal forces to control the responses to domestic emergencies raised questions about the status of tiered response doctrine, which had worked for many years.

Tiered response builds upon the efforts of the first responders who are usually local. At a governor's discretion, these first responders may include state-level responders including National Guard or other state militia forces. When the President uses federal military forces,

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<sup>3</sup> Christine Wormuth, email to author, March 19, 2007. Christine Wormuth is a Senior Fellow, International Security Program, CSIS; she can be contacted at [cwormuth@csis.org](mailto:cwormuth@csis.org).

including federalized National Guard, to consolidate control of an emergency, the first-responders and state governor may be left out of the process. This represents a departure from America's longstanding reliance upon the tiered response approach to domestic emergencies, which is locally-initiated and managed at the lowest level possible. If the President, the Congress, the Department of Defense, or the Department of Homeland Security proposes a departure from tiered response, they should presumably explain their reasoning to the states and the citizenry at large. Limited departures from tiered response are acceptable in extremely large or serious emergencies, but tiered response remains the best way to approach most emergencies. Although unfavorable public perceptions about the government's response to Hurricane Katrina were bound to influence members of Congress, Congress should have avoided making a knee-jerk reaction at the expense of tiered response.

This monograph presents the practical question as to whether or not Congress should have amended the Insurrection Act in 2006. This question is broken down into three related inquiries. First, it is necessary to investigate the 2006 amendment to the Insurrection Act to determine whether the amended law increased, decreased, or had no impact upon the President's power to federalize National Guard forces. This paper traces the history of the Insurrection Act and examines the provisions of the Enforcement of the Laws to Restore Public Order statute, which briefly replaced the Insurrection Act in 2007. In addition to comparing the Insurrection Act and the Enforcement of the Laws to Restore Public Order, this paper will look at the actual statutory language to determine how the amendment affected the application of federal forces to domestic crises. Critics interpreted the changes in the law as an expansion of Presidential power while advocates asserted that it merely clarified the President's previously existing authority.<sup>4</sup>

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<sup>4</sup> Critics asserted the amendment to the Insurrection Act amounted to an expansion of Presidential power. See Editorial, "Making Marital Law Easier," *New York Times*, February 19, 2007. Supporters of law, on the other hand, asserted that the amendment was merely a clarification of existing Presidential authority. See Danielle Crockett, "The Insurrection Act and Executive Power to Respond with Force to

Although the Enforcement of the Laws to Restore Public Order statute did not expand presidential authority as much as many critics feared, it still suggested a departure from the tiered response concept.

Second, it is important to determine whether or not increasing the President's ability to federalize National Guard forces would improve the overall response to domestic emergencies in the United States. This second area of inquiry requires evaluation of the 2006 law within both the political context and the military operational context. The political context of federalism and dual sovereignty is significant. Operationally, first responders and federal authorities have traditionally relied upon the tiered response process under either the Insurrection Act in cases of civil disturbance or the Stafford Act in cases of natural disasters. The 2006 law departed from tiered response and instead attempted to streamline the federal government's ability to intervene directly into domestic emergencies with federal military forces.

Third, it is essential to determine whether or not the amendment should have been retained or repealed as it was when the National Defense Authorization Act for 2008 was enacted on January 28, 2008.<sup>5</sup> This third area of inquiry emphasizes that Congress must always consider the appropriate balance between federal and state authority when legislating for the use of federal military forces in domestic missions. Within the political context of federalism, states must be able to act as sovereigns protecting the well-being of their citizens. Traditional tiered response, in which the states initiate military civil support operations, comports with federalism. An appreciation of federalism should arguably shape future laws and policies governing the employment of military forces inside the United States. As any law or policy that is out of step

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Natural Disasters," *University of California Berkeley School of Law, Paper prepared for Law 224.9, Disasters & the Law*, Spring 2007, <http://www.law.berkeley.edu/library/disasters/Crockett.pdf>. (accessed September 4, 2007).

<sup>5</sup> National Defense Authorization Act of 2008, Public Law No. 110-181, 110th Cong., 1st sess. (January 28, 2008).

with the federalist framework is likely to have widespread repercussions, proposals should be discussed in the legislature and publicly debated before being enacted.

This monograph hypothesizes that the analysis of both political and operational concerns will lead to the conclusion that tiered response is preferable to a policy asserting more consolidated federal control over first responders including the National Guard. Thus, in 2008, Congress was correct to repeal the Enforcement of the Laws to Restore Public Order and revived the previous Insurrection Act.

## History and Statutory Language of the Insurrection Act

*“If it aint broke, don’t fix it” - idiom*<sup>6</sup>

The Insurrection Act governed presidential use of federal military force in the United States for most of the history of the Republic. In 2006, an amendment to the Insurrection Act in the 2007 National Defenses Authorization Act gave rise to a new Enforcement of the Laws to Restore Public Order statute. The statutory language must be examined to determine if the amendment actually increased, decreased, or had no impact upon the President’s power to federalize National Guard forces in response to a domestic emergency.

Observers who perceived an increase in presidential authority to federalize National Guard forces in a domestic emergency tended to focus on two aspects of the new legislation. First, the term “other conditions” in the Enforcement of the Laws to Restore Public Order statute is so broad that it provided the President with too much latitude in determining which situations fell within the scope of the statute. In other words, if the “other conditions” term was to serve as a virtually limitless *catch all* category for the President, then his power was arguably expanded over situations lying beyond the scope of the previous Insurrection Act. The second aspect of the

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<sup>6</sup> This phrase is “something that you say which means if a system or method works well there is no reason to change it” and “it is a mistake to try to improve something that works.” Free dictionary by Farlex, <http://idioms.thefreedictionary.com/if+it+ain't+broke,+don't+fix+it> (accessed May 12, 2008).

legislation that raised concern about increased presidential power was the President's authority to determine when an emergency situation was outside the capability of a state. By simply predicting that a crisis would spiral beyond the control of the affected state, the President could assert federal control over the situation and remove precious crisis response assets, namely the National Guard, from the governor's control. This may have been an unwarranted federal intrusion into state affairs.

Analysis of the statutory language reveals that the perceived increase in Presidential authority was largely illusory. The 2006 statute required that significant conditions had to be present before the President could federalize the National Guard. Even if the President relied upon the open ended "other conditions" language of the statute to intervene in a domestic emergency, he would have needed to present some type of plausible rationale for his decision to the public. The potential political backlash of an unpopular or poorly reasoned decision may have kept the President from liberally invoking the Enforcement of the Laws to Restore Public Order statute.<sup>7</sup> The legislative history in the Congressional record indicates that the Enforcement of the Laws to Restore Public Order statute was intended to merely clarify the President's existing authority without increasing it. This should rule out the possibility that the statute amounted to an increase in Presidential authority. However, comments from the legislature also touted the law as a tool that would enable the President to respond more quickly and forcefully to emergencies along the lines of Hurricane Katrina. The implication was that when the President encountered a problem with a state's governor, which occurred in Louisiana after Hurricane

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<sup>7</sup> If a President is not willing to bear the political cost of asserting federal control over an emergency without invitation from the governor of the affected state, then Enforcement of the Laws to Restore Public Order may not offer an improvement over the Insurrection Act or the Stafford Act. Defense policy analyst Christine Wormuth believes that having to invoke the Insurrection Act forced Presidents to think very carefully about the political cost of federalizing the National Guard. In fact, she believes this consideration was taken into account during the response to Hurricane Katrina. Wormuth, email to author.

Katrina, he could have easily asserted federal control over the situation and resolved matters to his satisfaction.

## **History of the Insurrection Act**

Both the President and the Congress derive their powers from the United States Constitution. Pursuant to the enumerated executive powers in Article II, section 3 of the Constitution, the President can do what is necessary to faithfully execute the laws of the Nation.<sup>8</sup> The extent of this inherent executive power appears to be broad, but most Presidents have nevertheless tended to exercise it with significant restraint. There is evidence that the first President of the United States, George Washington, relied at least in part upon his inherent executive power to execute the laws of the Nation when he federalized militia troops to suppress the Whiskey Rebellion in 1794.<sup>9</sup> However, President Washington also had Congressional authority to act.

Under the authority of the Militia Clause of the United States Constitution, Congress can legislate to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.<sup>10</sup> Relying on this constitutional authority, Congress legislated for use of the militia. In the “Uniform Militia Act of 1792,” Congress included a provision for calling forth the militia to execute the laws of the Union. Therefore, in addition to his constitutional power as the Executive, President Washington also relied upon this statutory authority when he called militia into federal service to put down the Whisky Rebellion.<sup>11</sup>

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<sup>8</sup> U.S. Constitution, art. 2, sec. 3.

<sup>9</sup> The Papers of George Washington Documents, The Whiskey Insurrection, <http://gwpapers.virginia.edu/documents/whiskey/index.html>, (accessed April 8, 2008).

<sup>10</sup> U.S. Constitution, art. 1, sec. 8, cl. 15.

<sup>11</sup> Louis Fisher, *Presidential War Power*, 2d ed. (Kansas: University Press of Kansas, 2004), 261.

With the Militia Act of 1792, Congress codified the power of the President's authority to call forth the armed forces to suppress an insurrection. The Militia Act permitted the President to call forth the militia in response to "an insurrection in any state, against the government thereof" upon the application of the legislature of the state, or of the executive if the legislature cannot be convened.<sup>12</sup> The Act permitted the President to call forth the militia "whenever the laws of the United States [are] opposed or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings."<sup>13</sup> In addition, if the militia of the state was unable or refused to comply, the Militia Act required the President to issue a proclamation commanding the insurgents to disperse and retire peaceably within a limited time before using the militia to suppress the insurrection.<sup>14</sup> Although the terms of the Militia Act initially limited its duration to two years, Congress subsequently extended the application of the Act until it was amended in 1795.<sup>15</sup> Subsequent laws followed.

In 1803, the Seventh U.S. Congress further legislated use of the militia with a law permitting the President, "on an invasion, or insurrection, or probable prospect thereof, to call forth such a number of militia . . . as he may deem proper."<sup>16</sup> This straightforward law permitted the President to federalize the militias to repel invasions and suppress insurrections. Subsequent provisions in the Insurrection Act of 1807 provided the President authority to federalize the militia in instances of "insurrection, domestic violence, unlawful combination, or conspiracy."<sup>17</sup>

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<sup>12</sup> Militia Act of 1792, ch. 28, 1 Stat. 264. (May 2, 1792), § 1.

<sup>13</sup> Ibid., § 2.

<sup>14</sup> Ibid., § 3.

<sup>15</sup> Ibid. The Act was amended on February 28, 1795 to the effect that the President could act without notifying an associate justice or district judge in advance. Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at U.S. Code 10 (2000) §§ 331-335. <http://www.ambrosevideo.com/resources/documents/242.pdf> (accessed March 10, 2008).

<sup>16</sup> Act of 1803, ch. 20, Stat. 2 (1803), § 24.

<sup>17</sup> Insurrection Act of 1807, ch. 39, Stat. 2, 443 (March 3, 1807). (modern version at U.S. Code 10 (2000) §§ 331-335).

The Insurrection Act of 1807 also expanded the President's power to include calling forth the Army and Navy as well as the state militias.<sup>18</sup>

In 1808, President Thomas Jefferson declared the Lake Champlain region to be in a state of insurrection based recurring on violations of the Embargo Act of 1806.<sup>19</sup> President Jefferson invoked the Insurrection Act to order the dispersal of and a military response to “persons combined, or combining and confederating together on Lake Champlain . . . for the purpose of forming insurrections against the authority of the laws of the United States, for opposing the same and obstructing the execution.”<sup>20</sup> Jefferson further concluded, “such combinations are too powerful to be suppressed in the ordinary course of judicial proceedings, or by the powers vested in the marshals by the laws of the United States.”<sup>21</sup> As the Insurrection Act adequately empowered Presidents to enforce the laws of the nation, it remained largely unchanged for many years.

New language found its way into the Insurrection Act as a consequence of the Civil Rights Act of 1871.<sup>22</sup> In many southern states after the Civil War, the Klu Klux Klan and other disgruntled groups interfered with public order. When Republican North Carolina Governor William Woods Holden called out the state militia against the Klan in 1870, the result was a local backlash culminating with his impeachment in 1871. To overcome the prejudice and indifference

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<sup>18</sup> Insurrection Act of 1807, Where it is lawful for the President to call forth the militia to suppress an insurrection or ensure that the laws of a State or of the United States are executed, the President may also employ the “land or naval forces of the United States” for the same purpose.

<sup>19</sup> As England and France waged war, President Jefferson pushed for the Embargo Act of 1806 to close American ports to British trade. In 1808, further measures tightened the Act to even prohibit exports by land. Smugglers frequently imported British goods across Lake Champlain from Canada to circumvent the embargo. The Embargo Act was repealed in January 1809 before President Jefferson left office.

<sup>20</sup> Proclamation by the President of the United States, American State Papers, 10th Cong., No. 258, April 19, 1808. Available from James D. Richardson, *Compilation of the Messages and Papers of the Presidents, 1789-189*, Washington, DC : U.S. Government Printing Office, 1897.

<sup>21</sup> Ibid.

<sup>22</sup> Insurrection Act of 1871, ch. 22, Stat. 17 , 13 (1871) (codified as amended at U.S. Code 18 (1988) § 241 and U.S.Code 42 (1988) §§ 1983, 1985(3)).

of southerners, one might have advocated the use of black state militiamen.<sup>23</sup> However, the employment of black militia in this tense environment was not feasible because it could have exacerbated the existing interracial violence. In April of 1871, South Carolina Governor Robert Kingston Scott requested assistance from the President to maintain order in the face of Klu Klux Klan activity.<sup>24</sup> In response to the Klu Klux Klan behavior, and the broader conditions of lawlessness throughout the South, Congress passed the Civil Rights Act. The relevant section of the Act reads as follows:

That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the constitution of the United States: and in all such cases ...it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppressions of such insurrection, domestic violence, or combinations...<sup>25</sup>

Echoing the Insurrection Act of 1807, the Civil Rights Act includes key provisions focused on the President's authority to employ the militia or the land and naval forces of the United States to suppress insurrection, domestic violence, or unlawful combinations. However, changes in the American political landscape after the U.S. Civil War prompted changes in the way the federal government would enforce the laws of the United States. Ratified in 1868, the Fourteenth Amendment afforded citizens "equal protection of the laws," and specifically prohibited the states

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<sup>23</sup> On 17 July 1862, Congress amended the Militia Act of 1795 by adding Chapter 1, Section 12, which authorized African Americans to serve in the Army and Militia of the United States. See <http://www.history.umd.edu/Freedmen/milact.htm> (accessed February 12, 2008).

<sup>24</sup> Editorial, *Harper's Weekly*, April 8, 1871, p. 306. <http://education.harpweek.com/KKKHearings/Article24.htm> (accessed November 4, 2007).

<sup>25</sup> Civil Rights Act of 1871, ch. 22, §§ 3-4, 17 Stat. 13, 14-15 (expired in part 1873 and current version at U.S. Code 10 (2006) § 333).

from infringing upon guaranteed federal rights.<sup>26</sup> To guarantee the new federally declared rights, privileges, and protections for all citizens, the Civil Rights Act authorized the President to use federal forces, including federalized militia forces, when it was justifiably necessary to protect a class of people when their state authorities failed or refused to secure those same rights, privileges, and protections.

## **Statutory Language**

From 1871 to 2006, the Insurrection Act remained largely unchanged. By 2006, the Insurrection Act was actually comprised of five sections within Title 10 of the United States Code. Each of the individual code sections prescribed the situations in which the President could have invoked the Insurrection Act.

Under section 331, upon a request from the State's legislature or of the State's governor if the legislature cannot convene, the President could call on the armed forces to suppress an insurrection.<sup>27</sup> This provision essentially reflected the gist of the Insurrection Act of 1807.<sup>28</sup> In this type of situation, however, it is important to note that the State authorities made their own determination as to whether or not they needed or wanted federal assistance. The initial decision therefore belonged to the state rather than the President.

Unlike section 331, section 332 permitted the President to act without a request from a state. Under section 332, the President could call for the use of the armed forces to enforce the laws of the United States or to suppress a rebellion where unlawful obstructions, combinations or assemblages, or rebellion against the authority of the United States made it impracticable to

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<sup>26</sup> U.S. Constitution, 14 amend., sec 1.

<sup>27</sup> U.S. Code 10 (2006) § 331.

<sup>28</sup> Matt Matthews, *The Posse Comitatus Act and the United States Army: A Historical Perspective*, Occasional Paper 14, (Combat Studies Institute Press: Fort Leavenworth, Kansas, 2006), 40.

enforce the laws of the United States by the ordinary course of judicial proceedings.<sup>29</sup> On its face, section 332 appears to be a reflection of the President’s constitutional duty under Article II, Section 3, to “take care that the laws be faithfully executed.”<sup>30</sup>

Section 333 may be considered as a direct successor to the Civil Rights Act of 1871.<sup>31</sup> Like section 332, section 333 permitted the President to act without a request from a state. Two conditions permitted the President to use military force.<sup>32</sup> The first condition was met where an insurrection, domestic violence, unlawful combination, or conspiracy hindered the execution of the laws of a state and the laws of the United States to the extent that the people were deprived of a right, privilege or immunity, or other named constitutional right, and where the authorities of the state failed, or were unable to protect that right, privilege or immunity.<sup>33</sup> The second condition was met where the insurrection, domestic violence, unlawful combination, or conspiracy opposed or obstructed the execution of the laws of the United States.<sup>34</sup> Thus, the first condition applied when a state merely denied its citizens equal protection under the laws while second condition applied to a situation where there was a more direct opposition or resistance to federal authority.

Section 334 required the President to issue a proclamation ordering the “insurgents or those obstructing the enforcement of the laws to disperse and retire peaceably to their abodes within a limited time.”<sup>35</sup> This longstanding provision was in force in 1794, when President Washington issued his famous notice to participants in Pennsylvania’s Whiskey Rebellion. This

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<sup>29</sup> U.S. Code 10 (2006) § 332.

<sup>30</sup> U.S. Constitution, art 2, sec. 3.

<sup>31</sup> Matthews, 40.

<sup>32</sup> U.S. Code 10 (2006) § 333.

<sup>33</sup> Ibid, § 333(1).

<sup>34</sup> Ibid, § 333(2).

<sup>35</sup> Ibid, § 334.

was essentially a safeguard provision to ensure that miscreants received the opportunity to desist from their unlawful activity before troops were deployed against them. Section 335 was essentially an administrative provision, which extends the coverage of the Insurrection Act over the territories of Guam and the Virgin Islands.<sup>36</sup>

## **Modern Applications of the Insurrection Act**

Presidents used the Insurrection Act on several occasions in the twentieth century. However, the executive orders of past Presidents have not always referenced specific provisions of the Insurrection Act. Therefore, in these cases, it is difficult to determine the particular statutory or constitutional authority upon which the President relied. For example, Presidents used the Insurrection Act to deploy troops to several southern states during the 1950s and 1960s to enforce desegregation and maintain order. In 1957, President Dwight D. Eisenhower relied on the Insurrection Act to remove obstructions of justice in respect to enrollment and attendance at public schools in the Little Rock, Arkansas.<sup>37</sup> Likewise, President John F. Kennedy invoked the Insurrection Act in 1962 and 1963 to send federal troops to Mississippi and Alabama, respectively, to enforce constitutionally protected civil rights threatened by local reactions to desegregation effort.<sup>38</sup>

Similar language in the executive orders issued by Eisenhower and Kennedy indicate reliance upon both sections 332 and 333 of the Insurrection Act. For example, the executive orders stated, “for the removal of obstructions to justice,” “to enforce all orders of the United States District Court,” and “to suppress unlawful assemblies, conspiracies, and domestic

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<sup>36</sup> U.S. Code 10 (2006) § 335.

<sup>37</sup> Exec. Order No. 10,730 (Sept. 24, 1957), *reprinted at* 22 Fed. Reg. 7628.

<sup>38</sup> Exec. Order No. 11,053 (Sept. 30, 1962), *reprinted at* 27 Fed. Reg. 9681; Exec. Order No. 11,111 (June 11, 1963), *reprinted at* 28 Fed. Reg. 5707; Exec. Order No. 11,118 (Sept. 10, 1963), *reprinted at* 28 Fed. Reg. 9863.

violence.”<sup>39</sup> Reference to the orders of the District Court indicate reliance on section 332, which requires the impracticability of enforcing state and federal laws “by the ordinary course of judicial proceedings,”<sup>40</sup> whereas reference to conspiracies and domestic violence indicate reliance on section 333. Thus, without hemming themselves into a particular provision of the Insurrection Act, Presidents loosely invoked multiple provisions of the Act to justify their use of federal military forces to enforce the laws.

In 1989, President George H.W. Bush likewise invoked the Insurrection Act to send troops to the Virgin Islands to stop the looting that followed Hurricane Hugo.<sup>41</sup> Without citing a particular provision of the Insurrection Act, Bush’s executive proclamation referred to “domestic violence and disorder . . . endangering life and property and obstructing execution of the laws.” As there was no judicial order to enforce, the reference to domestic violence most likely indicated reliance upon section 333 of the Insurrection Act to authorize military force.<sup>42</sup> Again in 1992, Bush invoked the Insurrection Act when he directed federal military forces to help restore law and order in the midst of the Los Angeles racial riots.<sup>43</sup> On May 1, 1992, at the request of the California Governor Pete Wilson, Bush issued an executive order authorizing the Secretary of Defense to use the armed forces to suppress “domestic violence and disorder . . . in Los Angeles. . . endangering life and property and obstructing execution of the laws . . . and to restore law and order.”<sup>44</sup> While the executive order did not identify a specific provision of the Insurrection Act, the fact that California’s governor requested the assistance, coupled with the language used in the

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<sup>39</sup> Exec. Order No. 11,053, *supra* note 29; Exec. Order No. 11,111, *supra* note 29; Exec. Order 11,118, *supra* note 29; see also *Alabama v. United States*, 373 U.S. 545 (1963) (indicating that President Kennedy had authority to send troops to the South under section 333 of the Insurrection Act).

<sup>40</sup> U.S. Code 10 (2006) § 332.

<sup>41</sup> Exec. Order No. 12,690 (Sept. 20, 1989), *reprinted at* 54 Fed. Reg. 39153.

<sup>42</sup> Crockett, 11.

<sup>43</sup> Exec. Order No. 12,804 (May 1, 1992), *reprinted at* 57 Fed. Register. 19359; see also Pres. Proc. No. 6,427 (May 1, 1992), *reprinted at* 57 Fed. Reg. 19381.

<sup>44</sup> Pres. Proc. No. 6,427 (May 1, 1992) *reprinted at* 57 Fed. Reg. 19359.

executive order and proclamation, indicated that Bush probably believed his authority derived from section 331, the only section of the Act specifically calling for a request from a state.<sup>45</sup> Following the President's directive, the Department of Defense employed Joint Task Force Los Angeles to quell the riots.<sup>46</sup>

As many past presidents did not, and were not always required to, attribute their employment of federal military forces in domestic operations to specific statutory or constitutional authorities, it remains difficult to determine how each particular provision of the Insurrection Act has actually been invoked. What remains clear, however, is that Presidents had ample authority to employ military forces in domestic law enforcement roles on numerous occasions with success. It would take the widely-publicized aftermath of Hurricane Katrina in 2005 to prompt federal lawmakers to attempt to change the longstanding Insurrection Act to clarify the President's authority.

## **Hurricane Katrina's Impact upon the Insurrection Act**

The Insurrection Act of 1807 and all subsequent versions of the Act permitted the President to use federal military forces, including militia forces, to respond to instances of "insurrection, domestic violence, unlawful combination, or conspiracy."<sup>47</sup> However, in reaction to Hurricane Katrina, Congress sought to clarify the President's authority to federalize the National Guard in response to domestic emergencies. For his part, President George W. Bush

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<sup>45</sup> Linda J. Dermaine and Brian Rosen, "Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act," *New York University Journal of Legislation and Public Policy* 9, (2006):167, n2. See also U.S. Code 10 (2006) § 331.

<sup>46</sup> The President used federal troops to suppress the riot after it exceeded the control of civilian police, but the military did not perform direct law enforcement duties. The JTF-LA Commander, Major General Covault scrutinized mission requests so that his troops could avoid performing any activities that constituted direct law enforcement. Major General Covault's refusal to perform law enforcement functions stemmed from his confusion over the limitations of the Posse Comitatus Act, which will be subsequently discussed in this monograph. Dermaine and Rosen, 172 (citing Christopher M. Schnaubelt, *Lessons in Command and Control from the Los Angeles Riots*, 27 *Parameters* 88, 101 (1997)).

<sup>47</sup> Ch. 39, 2 Stat. 443 (codified at U.S. Code 10 (2006) §§ 331-335.

actually suggested that he needed an increase in his authority to use federal military forces in response to disasters.<sup>48</sup>

In 2006, Section 1076 of the 2007 John Warner National Defense Act contained provisions to amend the Insurrection Act. Section 1076 was enacted as, “Enforcement of Laws to Restore Public Order,”<sup>49</sup> which emphasized the President’s power to federalize militia forces in four specified types of domestic emergencies and one *catch all* condition. While the four conditions from the 1807 Insurrection Act remained, new language added, “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition.” Even the name of the 2006 law, “Enforcement of the Laws to Restore Public Order,” indicated the intent to use federal forces to restore public order in response to a variety of circumstances beyond strict cases of insurrection. The provision for an “other condition” to justify the President’s federalization of National Guard forces was the *catch all* provision that alarmed critics. If the President had used this provision liberally, it could have amounted to an increase in Presidential authority over situations that were previously within the responsibility of state authorities. A New York Times editorial explained the concern surrounding amendment to the Insurrection Act in the following:

They [the new law provisions] shift the focus from making sure that federal laws are enforced to restoring public order. Beyond cases of actual insurrection, the President may now use military troops as a domestic police force in response to a natural disaster, a disease outbreak, terrorist attack or to any “other condition.”<sup>50</sup>

Unlike the critics who feared an increase in Presidential power, advocates of the Enforcement of the Laws to Restore Public Order asserted that the new provisions merely

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<sup>48</sup> President Bush said, “it is now clear that a challenge on this scale requires ... a broader role for the armed forces – the institution of our government most capable of massive logistical operations on a moments notice.” Office of the Press Secretary, *President Discusses Hurricane Relief in Address to the Nation*, Press Release, New Orleans, Louisiana, September 15, 2005, <http://whitehouse.gov/news/releases/2005/09/print/20050915-8.html> (accessed March 2, 2008).

<sup>49</sup> National Defense Authorization Act of 2007, Public Law 109-364, 109th Cong., 2d sess. (October 17, 2006).

<sup>50</sup> Editorial, “Making Martial Law Easier,” *New York Times*, February 19, 2007.

clarified the Presidential power without unduly expanding it. The Senate Armed Services Committee reasoned that the 2006 amendment served to, “clarify the President’s authority to use the armed forces, including the National Guard in federal service, to restore order and enforce the laws in cases where, as a result of a terrorist attack, epidemic, or natural disaster, public order has broken down.”<sup>51</sup> One legal commentator applauded the amendment as a clarification because it provided “explicit examples of situations that may lead to events of public disorder justifying the President’s invocation of the Act’s authority.”<sup>52</sup>

However, this clarification was illusory and irrelevant. It was illusory because the list of conditions included the *catch all* conditions “other serious public health emergency” and “other conditions,” which appeared to leave the President unrestricted.<sup>53</sup> The clarification was irrelevant because after the initial text in the Enforcement of the Laws to Restore Public Order statute enumerated the ten particular situations in which the President could order federalized forces to respond to a domestic emergency, the statute imposed a further condition upon the President. The condition was significant as it permitted the President to federalize the National Guard only in situations where “*domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order.*” Thus, even when the enumerated conditions were present, the decision to use federal troops, including federalized National Guard, still rested upon the singular determination as to whether or not state authorities were capable of maintaining public order. As the President got to make this determination without any obligation to even consider the wishes and intentions of the governor of the state affected by the emergency, this was perceived as an expansion of federal power at the

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<sup>51</sup> Senate Committee on the Armed Services, , (May 9, 2006), 109th Cong., 2d sess., S. Rep. No. 109-254.

<sup>52</sup> Crockett, 1.

<sup>53</sup> National Defense Authorization Act of 2007, Public Law 109-364, 109th Cong., 2d sess. (October 17, 2006).

expense of state sovereignty. Most striking about this perceived expansion of Presidential power was that it permitted, and perhaps even encouraged, the President to opine as to whether or not a given state authority was capable of maintaining order in a given situation. It was not unreasonable for many in the states to wonder how the President would use this power to initiate the federal response without the consent, or even over the objections of, a governor.

In cases of actual insurrection, domestic violence, unlawful combinations, and conspiracies, the President could rely upon the “Enforcement of the Laws to Restore Public Order” provisions in the same way that he could have relied upon the same provisions in the previous Insurrection Act.<sup>54</sup> At issue was whether the new provision specifically mentioning terrorist attack, epidemic, natural disaster, serious public issue, and other incidents provided the President with additional authority that he did not previously have under the Insurrection Act.

Both the constitutional executive power and statutory authorization from Congress in the form of the Insurrection Act were available to modern Presidents. Therefore, it does not appear that the presidential authority was significantly increased under the 2006 law.<sup>55</sup> Law professor and Insurrection Act scholar Stephen Dycus maintains that the Insurrection Act “gave the president just as much power as he has under the 2006 law.”<sup>56</sup> Army Colonel Gregory Martin, a Department of the Army Staff Officer working on the Quadrennial Defense Review (QDR) reinforced this conclusion when he wrote, “[e]xcept in cases of a national emergency declaration or for the narrow purposes of performing functions to restore order and execute the laws of the United States, the President’s authority to activate the [reserve component of the Army] to

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<sup>54</sup> National Defense Authorization Act of 2007, Public Law 109-364, 109th Cong., 2d sess. (October 17, 2006).

<sup>55</sup> Ibid.

<sup>56</sup> Eileen Sullivan, “Governors Back Bill Reclaiming Authority Over National Guard in Emergencies,” *Congressional Quarterly Homeland Security*, April 24, 2007, <http://public.cq.com/docs/hs/hsnews110-000002496845.html>, (accessed September 18, 2007).

respond to domestic natural disasters remains limited.”<sup>57</sup> While Martin appeared disappointed that Presidential power to federalize the reserve component in response to natural disasters did not actually increase, Professor Dycus concluded, “[u]nder either measure [old Insurrection Act or the 2006 law], I think the president has all the statutory power that he wants or that he could need to respond to a terrorist attack or to a natural disaster.”<sup>58</sup>

Although the response to Hurricane Katrina was problematic, it did not necessitate the 2006 change in the law. In other words, the laws in existence at the time of Hurricane Katrina were sufficient to authorize President Bush to act. Even without Louisiana Governor Kathleen Blanco requesting federal assistance in the aftermath of Hurricane Katrina, one legal commentator suggested that “other legal arguments could have supported federal assistance even without the Governor’s request.”<sup>59</sup> This commentator has correctly pointed out that Bush could have declared that the lawlessness in Louisiana was sufficient to constitute an insurgency, domestic violence, unlawful combination or conspiracy within the meaning of the Insurrection Act.<sup>60</sup> The commentator also pointed out that Bush could have possibly relied upon the Stafford Act as authority for greater federal action in Louisiana. Although Presidents have generally waited for a governor’s request for aid pursuant to section 5191(a) of the Stafford Act, section 5191(b) of the Stafford Act authorized the President to declare a federal emergency without such a request if “the primary responsibility for response rests with the United States.”<sup>61</sup> While the commentator admitted that using either the Insurrection Act or the “primarily federal loophole” of

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<sup>57</sup> U.S. Army DAPR-QDR Information Paper, Subject: Authority to Activate the Reserve Component for Domestic Natural Disaster, dated 22 March 2007, by Colonel Gregory M. Martin

<sup>58</sup> Sullivan.

<sup>59</sup> E.L. Gaston, “Taking the Gloves off of Homeland Security: Rethinking the Federalism Framework for Responding to Domestic Emergencies,” *Harvard Law and Policy Review* 7, no. 2, (Summer 2007), 526.

<sup>60</sup> U.S. Code 10 (2006) §§ 332, 333.

<sup>61</sup> U.S. Code 42 (2006) §5191(b). The primary responsibility for response rests with the United States when the emergency involves a subject area under the Constitution or laws of the United States for which the United States exercises exclusive or preeminent responsibility and authority.

the Stafford Act or might have been a “legal stretch” for President Bush, he was correct to examine the political will on the part of the President because this is central to any federal response.<sup>62</sup>

If a President lacked sufficient political will to act, sometimes over the objections of constituents and political opponents, the Enforcement of the Laws to Restore Public Order provision would not have provided a greater federal role in domestic emergencies. Defense policy analyst Christine Wormuth believed that the language in the Enforcement of the Laws to Restore Public Order, including the terms natural disasters, terrorist attacks, and other conditions may have been more palatable to the President than terms like insurgency, domestic violence, unlawful combination or conspiracy within the meaning of the previous Insurrection Act. While it is conceivable that this could have lowered the bar for federalizing the National Guard, Wormuth does not believe that this would have been the case, especially when the President faced opposition from a governor.<sup>63</sup> Wormuth predicted that the Enforcement of Laws to Restore Public Order would have done little to change how Presidents responded to disasters within the United States.<sup>64</sup>

## **Posse Comitatus Does Not Prevent Federal Emergency Response Efforts**

Before concluding that Presidents possessed sufficient authority to use federal military forces in domestic emergencies, it is worthwhile to discuss the Posse Comitatus law, which has long prohibited using federal military forces for domestic law enforcement. While Posse Comitatus represented a general prohibition against using federal military forces for law

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<sup>62</sup> Gaston, 526.

<sup>63</sup> “I think most Presidents are very cognizant of the significance of over-ruling a Governor and would not hurry in that direction.” Email from Wormuth.

<sup>64</sup> “In practice, I don’t think section 1076 [Enforcement of the Laws to Restore Public Order] makes a dramatic change to the powers of the President. Under the Insurrection Act, the President already has authority, as you know, to ‘federalize’ the Guard in a variety of circumstances.” Email from Wormuth.

enforcement, there are significant exceptions to this rule so that it never completely barred the military from augmenting civilian law enforcement. In 2000, Army Judge Advocate Major Craig Trebilcock went so far as to conclude that Posse Comitatus had become more of a “procedural formality than an actual impediment to the use of military forces in homeland defense.”<sup>65</sup>

Modern understanding of Posse Comitatus comes from the 1878 Posse Comitatus Act, which was passed with the intent of removing the Army from domestic law enforcement.<sup>66</sup> *Posse comitatus* means “the power of the county,” reflecting the inherent power of the Old West county sheriff to call upon a posse of male citizens to supplement law enforcement officers and thereby maintain the peace. Following the Civil War, the federal troops were used extensively throughout the South to enforce “Reconstruction” policies, maintain civil order, and ensure that the sentiment of rebellion was not rekindled. However, in order to reach these goals, the Army necessarily became involved in traditional police roles and in enforcing politically volatile Reconstruction-era policies. The stationing of federal troops at political events and polling places under the justification of maintaining domestic order became of increasing concern to Congress, which felt that the Army was becoming politicized and straying from its original mission of national defense.<sup>67</sup> The Posse Comitatus Act was passed to remove the Army from civilian law enforcement and to return it to its role of defending the nation against external threats.

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<sup>65</sup> Craig T. Trebilcock, *The Myth of Posse Comitatus*, October 2000, <http://www.homelandsecurity.org/journal/articles/Trebilcock.htm> (accessed on October 5, 2006).

<sup>66</sup> Matthews, 33. In 1877, Kentucky Congressman J. Proctor Knott introduced an amendment to the Army appropriations bill stating, “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.” The Knott Amendment was enacted on 18 June 1878. The gist of the Knott Amendment remains codified in U.S. Code, 18 (2006) § 1385, which reads, “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the 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.”

<sup>67</sup> Trebilcock.

To understand why Posse Comitatus has not unduly prohibited Presidents from using federal military forces in the United States, it is important to understand to whom the act applied and under what circumstances. The intent of the Act was to prevent the military forces of the United States from becoming a national police force or *guardia civil*.<sup>68</sup> The statutory language of the act, however, did not apply to all U.S. military forces. The Posse Comitatus Act, as originally passed, referenced only limitations upon the Army. After World War II, it was amended to include the Air Force.<sup>69</sup> By Department of Defense Directive, the limitations of the act have also been administratively adopted to apply to the Navy and Marine Corps as well.<sup>70</sup> Thus, at the time Hurricane Katrina occurred in 2005, the Posse Comitatus Act applied to the Army, Air Force, Navy, and Marines, including their federal reserve components; all of these federal military forces operated pursuant to Title 10 of the United States Code. The Posse Comitatus Act did not apply to the Coast Guard, which was part of the Department of Homeland Security. The Posse Comitatus Act also did not prohibit the National Guard from performing law enforcement duties pursuant to Title 32 of the United States Code.<sup>71</sup> In fact, one of the traditional missions of the National Guard has been to preserve the laws of the state during times of emergency when regular law enforcement assets proved inadequate.<sup>72</sup> Only if federalized by the President, would the National Guard have become subject to the limitations of the Posse Comitatus Act.<sup>73</sup> Thus, the general rule has long been that when the President federalized the National Guard, he has

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<sup>68</sup> Trebilcock.

<sup>69</sup> U.S. Code 18 (1956) §1385.

<sup>70</sup> Department of Defense, *Directive 5525.5*, (January 15, 1986), [http://www.fas.org/irp/doddir/dod/d5525\\_5.pdf](http://www.fas.org/irp/doddir/dod/d5525_5.pdf) (accessed on January 12, 2008).

<sup>71</sup> Lawrence Kapp, "Reserve Component Personnel Issues: Questions and Answers," *CRS Report for Congress*, Congressional Research Service, Library of Congress, Washington, DC, updated January 18, 2006.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.* If the National Guard is federalized under Stafford Act Authority, it is subject to Posse Comitatus; but if the National Guard is federalized under the Insurrection, it is not subject to Posse Comitatus restrictions because the Insurrection Act is a *statutory exception* to the Posse Comitatus Act.

frequently limited the role that the National Guard can play because they may be prohibited from directly performing law enforcement duties. In August 2006, when President George W. Bush sought to deploy six thousand National Guard troops along the U.S.-Mexican border to support the U.S. Border Patrol, the National Guard troops remained in Title 32 status and consequently, were not subject to Posse Comitatus limitations.<sup>74</sup> Following the infamous attacks of September 11, 2001, many Guardsmen serving in Title 32 status provided security at airports and other critical sites. These Guardsmen were likewise not prohibited from law enforcement.

As previously explained, the Insurrection Act permitted President to use military forces, both active and federalized National Guard forces, to enforce civilian laws under certain specified conditions. In this way, the Insurrection Act served as one of many statutory exceptions to the Posse Comitatus Act.

Another exception to Posse Comitatus has existed for federal military forces to interdict drugs and apprehend illegal aliens. In the United States “war on drugs,” the Reagan Administration recognized the inability of civilian law enforcement agencies to interdict the high volume of drugs being smuggled into the United States by air and sea. The Reagan Administration therefore directed the Department of Defense to use air and naval assets outside the borders of the United States to preempt the drug smugglers before they reached the shores of the United States. Congress expressly approved of this specific role for the U.S. military in counter-drug law enforcement in statutory law.<sup>75</sup> To reconcile these new military roles in law enforcement with the traditional Posse Comitatus prohibition, the military was directed to play an

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<sup>74</sup> Lieutenant General Clyde Vaughn, “Army National Guard Maintains Effectiveness Through Transitions,” *The Officer*, December 2006, 55, [http://www.arng.army.mil/Publications/2006DEC\\_ROA.pdf](http://www.arng.army.mil/Publications/2006DEC_ROA.pdf). (accessed November 15, 2007). See also Kapp.

<sup>75</sup> U.S. Code 10 §§ 371-381. See also Charles Doyle, “The Posse Comitatus Act and Related Matters: Use of the Military to Execute Civilian Law,” *CRS Report for Congress*, Congressional Research Service, Library of Congress, Washington, DC, updated June 1, 2000.

indirect, rather than a direct, role in law enforcement.<sup>76</sup> While the legal distinction between direct and indirect involvement in law enforcement kept military activities from becoming a recognized violation the Posse Comitatus Act, the practical distinction between indirect and direct roles has not always remained clear.

The conceptual difference between indirect (passive) involvement in law enforcement and direct (active) law enforcement has blurred in the face of tactical realities. In 1999, Joint Task Force-6, a federal agency coordinating counter-narcotics operations between the Border Patrol and the military, deployed a U.S. Marine corporal near the southern border of the United States. The Marine shot and killed a Texas teenager. Investigation revealed that while the boy was tending his sheep, he apparently fired a small caliber weapon in the direction of the well-camouflaged Marines, and so the Marines were within their rules of engagement when they returned fire. Nevertheless, in 1998, the Department of Defense granted a \$1.9 million settlement to the dead boy's family and suspended the military counter-drug patrols along the border.<sup>77</sup> This tragedy demonstrated that when armed troops are put in a position where they face potentially dangerous criminal activity, it is a mere semantic exercise to debate whether they are in an indirect or direct law enforcement role.<sup>78</sup>

Major Trebilcock has asserted that the previously discussed Posse Comitatus exceptions are broad enough "to encompass civil disturbance resulting from terrorist or other criminal activity."<sup>79</sup> However, these statutes did not specifically mention natural disasters. Therefore,

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<sup>76</sup> U.S. Code 10 §§ 371-381. See also Doyle.

<sup>77</sup> Aaron Glantz, "Texas Town Remembers Last Time U.S. Military was on the Border," published Published on Thursday, May 25, 2006 by OneWorld.net, <http://www.commondreams.org/cgi-bin/print.cgi?file=/headlines06/0525-07.htm> (accessed March 21, 2008).

<sup>78</sup> On Sept. 28, 2004, JTF-6 was renamed JTF North and its mission still includes providing support to the nation's federal law enforcement agencies. Any changes in the mission of JTF-North are presumably based on the liability of the slain United States civilian as no violation of the Posse Comitatus Act has been prosecuted.

<sup>79</sup> Trebilcock.

another statutory provision provided for use of federal military forces to alleviate natural disaster situations. Pursuant to the Stafford Act, federal military personnel could be employed in natural disaster relief efforts upon request from a state governor in valid need of assistance.<sup>80</sup> In such an instance, the Stafford Act permitted the President to declare a major disaster and send in military forces on an emergency basis for up to ten days to preserve life and property. Under Stafford Act authority, the federal military, which includes federalized National Guard troops, remained limited by Posse Comitatus, so it could only provide indirect support to law enforcement. However, National Guard troops working for their governors were free to perform direct law enforcement duties along with a variety of other duties as necessary.

While the Stafford Act did not permit federal military troops to perform direct law enforcement duties, it still represented a significant deviation from Posse Comitatus principles in the sense that federal military forces were permitted to operate within the borders of the United States and to perform functions typically done by civil authorities. Within the Department of Defense in 2005, Joint Task Force Civil Support (JTF-CS) was the federal force that would most likely be employed within the United States in response to a natural disaster.<sup>81</sup> The legal counsel within JTF-CS recently concluded that the Posse Comitatus Act “does not unduly impact JTF-CS’s ability to accomplish its mission” or “unduly hinder any DOD support to civil authorities during consequence management.”<sup>82</sup> Based on this assessment, it does not appear that Posse

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<sup>80</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988, as amended by Public Law 390, 106th Cong., 2d sess. (October 30, 2000); codified at U.S. Code 42 (2006) §§ 5121 et seq.

<sup>81</sup> In response to Hurricane Katrina, JTF-CS actually only provided only a joint CBRNE planning augmentation cell to Joint Task Force Katrina, which predominantly featured First Army staffers. Navy Newsstand, “U.S. Northern Command Supporting Hurricane Katrina Disaster Relief,” Story Number NNS050901-06, September 25, 2005, U.S. Northern Command Public Affairs, <http://www.globalsecurity.org/security/library/news/2005/09/sec-050901-nns01.htm>, (accessed October 14, 2007).

<sup>82</sup> Lieutenant Colonel Mary J. Bradley, Lieutenant Colonel Stephanie Stephens, Mr. Michael Shaw, “The Posse Comitatus Act: Does It Impact the Department of Defense during Consequence Management Operations?”, *The Army Lawyer*, Department of the Army, DA Pamphlet 27-50-413 (Charlottesville, VA , October 2007), 74.

Comitatus unduly restricted the President's use of federal military forces during the Hurricane Katrina response efforts.

Reaching a conclusion similar to JTF-CS, Major Trebilcock has concluded that the Posse Comitatus Act would not have presented a major barrier to the President's use of military forces in response to terrorist acts inside the United States.<sup>83</sup> For instance, if terrorists used weapons of mass destruction, both statutory and constitutional provisions permitted the President to use federal military forces as auxiliaries to civilian law enforcement when the military capabilities were needed. If foreign terrorists actually operated within the United States, Department of Defense Assistant Secretary for Homeland Defense Paul McHale explained, the United States has "U.S. Army units [and] sometimes U.S. Marine Corps units on alert for ground deployment in the United States, if high-end combat power is required to assure the safety of the American people within our own country in warfighting role."<sup>84</sup> The key is that if the President employed the military in a warfighting role rather than a law enforcement role, Posse Comitatus would not apply. Thus, the President has always had significant authority to defend the homeland from terrorist attacks.

Although the President had sufficient authority to use the federal military in domestic operations prior to 2006, Congress nevertheless inserted language into the 2007 National Defense Authorization Bill that purported to increase or at least clarify the President's authority to use federal military forces in the United States. The fact that the amendment was made in reaction to Hurricane Katrina is significant. Professor Dycus has suggested that the provision [section 1076]

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<sup>83</sup> Trebilcock.

<sup>84</sup> Elaine M. Grossman, "DOD Urged to Ready Troops Against Larger Terrorist Forces in the US," *Inside the Pentagon* (21 July 2005): 1, <http://ebird.afis.mil/e20050721380627.html>, accessed 10 July 2007. United States Department of Defense Assistant Secretary for Homeland Defense Paul McHale made his remarks during a speech at the Heritage Foundation in Washington, DC on 9 July, 2005.

“was probably stuck in [the 2007 National Defense Authorization Act] as a fig leaf to cover the president’s failures in responding to Hurricane Katrina.”<sup>85</sup>

## **Analysis of Increased Federal Authority Over Responders**

*“Contemporary justifications for presidential dominance must be examined closely to challenge explanations that initially may have superficial allure.” – Louis Fisher<sup>86</sup>*

Regardless of whether or not the Enforcement of the Laws to Restore Public Order provision actually amounted to a significant increase in Presidential authority, it is important to determine whether or not such an increase in the President’s ability to federalize National Guard forces would have improved the overall response to domestic emergencies in the United States. This second area of inquiry requires evaluation of the Enforcement of the Laws to Restore Public Order within the political context and the military operational context to determine whether the law presented an acceptable balance between state and federal authority.

### **The Political Context**

The political context was overwhelmingly important. There is an old saying among those in the legal profession that “hard cases make bad laws.” The difficult cases behind this maxim typically involved three elements: an appealing victim; a sympathetic judge or jury; and a lack of legal authority for helping out the aggrieved victim. The Hurricane Katrina situation in New Orleans presented all three elements: the impoverished population as the victim, the American people as the sympathetic jury, the federal officials pandering to public opinion played the role of sympathetic judge, and the Constitutional deference to State government created a perceived lack of legal authority for the federal government to help the local victims. In response to the political

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<sup>85</sup> Sullivan.

<sup>86</sup> Fisher, 261.

fallout over Hurricane Katrina, many elected civilian officials advocated change. At a Senate hearing on June 12, 2006, Senator Saxby Chambliss (R-GA), said the following:

In order to clarify the role and use of the Armed Forces for domestic use during natural disasters or other events, the bill [2007 National Defense Authorization Act] includes a provision [1076] that would update the Insurrection Act to make explicit the President's authority to use the Armed Forces to restore order and enforce Federal law in cases where public order has broken. In light of Hurricane Katrina and other hurricanes along the gulf coast last year, this provision is especially important in clarifying the role that Federal troops have in these situations.<sup>87</sup>

At the same hearing, Senator John Warner (R-VA) similarly said the following:

The bill includes a provision that would update the provision in Title 10 know as the Insurrection Act to clarify the President's authority to use the Armed Forces to restore order and enforce Federal laws in cases where, as a result of a terrorist attack, epidemic, or natural disaster, public order has broken down beyond the ability of local law enforcement or State Guard, or a combination thereof, to effectively bring about law and order.<sup>88</sup>

On September 29, 2006, Senator Edward Kennedy (D-MA) mentioned the devastation of Hurricane Katrina in New Orleans and described the pending 2007 NDAA as follows:

The amended statute now lists specific situations in which the troops can be used to restore public order. This includes natural disasters, epidemics or other serious public health emergencies, and terrorist attacks or incidents that result in domestic violence to such an extent that State authorities are unable to maintain public order. These were not mentioned specifically before. While the amendment does not grant the President any new powers, it fills an important gap in clarifying the President's authority to respond to these new types of emergencies. The amendment defines the kind of situations in which the President can employ the Armed Forces to restore public order. In our system, responsibility for law enforcement and the maintenance of public order normally lies with the State and local authorities. The Armed Forces can and should enter this arena only in extreme emergencies. The amendment explains that the trigger for the employment of the Armed Forces is a condition, which may result from a terrorist attack or a natural disaster, that makes it impossible for regular law enforcement agencies to enforce the laws.<sup>89</sup>

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<sup>87</sup> Senate Committee on the Armed Forces, National Defense Authorization Act for Fiscal Year 2007: Hearing on H.R. 5122, June 12, 2006.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

Taking the Senate comments at face value, one must conclude that the Enforcement of Laws to Restore Public Order provision was merely intended to clarify the President's preexisting authority to intervene in a state where public order has collapsed in the absence of law enforcement. The 2006 law defined the types of events that could have acted as a trigger for the President. Yet, as careful examination has already revealed, the enumerated types of emergencies, such as terrorist attack and natural disaster, could not actually trigger the President's authority to act without an additional factor. The only actual new trigger for the President was his own determination that an event exceeded a state's capability to preserve order.

Under the Insurrection Act, the President had the burden of identifying and declaring an insurrection in order to use federal force. Declaration of the insurrection or similar conspiracy effectively triggered the Presidential authority. Under the Stafford Act, the President was required to formally identify and declare a national disaster in order to employ the military as part of the disaster relief operation. Identification of the disaster was effectively the trigger for the Presidential authority. Under the Enforcement of Laws to Restore Public Order provision, a Presidential determination that a state's capability to preserve order has been exceeded can trigger Presidential authority to intervene with the federal military. Thus, under the laws prior to 2006, the President was required to specify a particular insurrection or disaster in order to use military forces in domestic operations. After Enforcement of Laws to Restore Public Order was enacted in 2006, previous requirements were replaced by a Presidential determination that a State could not maintain public order. Whether this was a mere clarification or an additional authority to the President is debatable. In any event, it begs the question as to how the President would have interpreted and used his authority to intervene in domestic crises if the Enforcement of Laws to Restore Public Order statute had not been repealed.

After the Enforcement of the Laws to Restore Public Order was enacted in 2006, the Bush Administration supported the legislation. In fact, when the 2008 National Defense

Authorization Act included a provision to repeal Enforcement of the Laws to Restore Public Order, the Bush Administration responded with the following statement:

The Administration opposes section 1022, which could be perceived as significantly restricting the statutory authority for the President to direct the Secretary of Defense to preserve life and property, and would imprudently limit the President's authority to call upon the Reserves. Such a result would be detrimental to the President's ability to employ the Armed Forces effectively to respond to the major public emergencies contemplated by the statute.<sup>90</sup>

Echoing the Bush Administration, the Department of Defense expressed its desired to retain the Enforcement of the Laws to Restore Public Order. After Senator Patrick Leahy (D-VT) introduced Senate Bill 513<sup>91</sup> on February 7, 2007 to repeal the Enforcement of the Laws to Restore Public Order and restore the previous Insurrection Act, Attorney William J. Haynes II of the Department of Defense General Counsel Office drafted a letter to the Chairman of the Senate Armed Services Committee stating the following statement:

If this legislation [Senate Bill 513] is enacted, it would affect the Department detrimentally by revoking a congressionally granted authority for the President to direct the Secretary of Defense to preserve life and property by limiting the president's authority to call upon the Reserves to restore order, repel invasions or suppress rebellions.<sup>92</sup>

Despite the Bush Administration and DOD's insistence on retaining the Enforcement of Laws to Restore Public Order, their cited reasons for keeping the law were suspect. After all, the President already had constitutional authority to use federal forces, including federalized National Guard troops, to repel invasions. Under the Insurrection Act, the President could also use federal forces against insurrections and to enforce the laws. Under the Stafford Act, the President could employ the military in domestic disaster situations to preserve life and property. Therefore, the

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<sup>90</sup> Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy: S.1547 – National Defense Authorization Act for Fiscal Year 2008*, July 10, 2007.

<sup>91</sup> Senator Patrick Leahy and Senator Christopher "Kit" Bond introduced Senate Bill 513 on February 7, 2007 to repeal the Enforcement of Laws to Restore Public Order and revive the previous Insurrection Act. While Senate Bill 513 was never enacted, the essence of the bill made its way into the 2008 NDAA, which was enacted in January 2008. Language in the 2008 NDAA effectively repealed the Enforcement of Laws to Restore Public Order and restored the previous Insurrection Act as law.

<sup>92</sup> Sullivan.

Bush Administration and DOD's proffered reasons do not demonstrate how the language in the 2006 law was beneficial.

Skeptics of the 2006 law, however, freely speculated how a President could conclude that an event is outside a particular State's capability. An obvious issue was whether this Presidential determination could or would be used as justification to override the governor and impose federal control over a natural disaster where the governor wanted to manage the event as a state-level emergency. If the President sought this level of additional authority to override a governor, then Congress should have expressly reviewed this issue and either granted or denied the requested Presidential power in clear terms. The American political landscape was such that any increase in Presidential authority was likely to generate debate. The Enforcement of Laws to Restore Public Order provision arguably sought to mask an increase in Presidential authority as a mere clarification of preexisting authority. For this reason, the law was problematic as it was likely to generate political and constitutional clashes between the governors and the President. Concerns over increased Presidential power were not based solely upon the implications of the Enforcement of Laws to Restore Public Order statute. Since 2001, the President has actually created a military structure to facilitate operations within the United States homeland.

Despite the historic trend of not employing the U.S. military to a large extent in the U.S. homeland, the United States Department of Defense created a Combatant Command for North America shortly after the terrorist attacks on September 11, 2001. United States Northern Command (USNORTHCOM) was created in 2002 to facilitate the use of federal forces in domestic emergencies and perform other key functions in North America.<sup>93</sup> Summarizing its

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<sup>93</sup> USNORTHCOM's Area of Responsibility (AOR) includes air, land and sea approaches and encompasses the continental United States, Alaska, Canada, Mexico and the surrounding water out to approximately 500 nautical miles. It also includes the Gulf of Mexico and the Straits of Florida. USNORTHCOM is composed of several standing Joint Task Forces (JTFs) previously assigned to United States Joint Forces Command (USJFCOM): Joint Force Headquarters National Capital Region, Joint Task Force-Civil Support, Joint Task Force Alaska, and Joint Task Force North. USNORTHCOM service components include U.S. Fifth Army/ARNORTH, AFNORTH/Air Combat

own “specific mission,” USNORTHCOM “anticipates and conducts Homeland Defense and Civil Support operations within the assigned area of responsibility to defend, protect, and secure the United States and its interests.”<sup>94</sup> As NORTHCOM’s mission largely overlapped the federal mission of the Department of Homeland Security and the state missions of the National Guard forces and other state and local entities, there were struggles to achieve coordination and avoid redundancy.<sup>95</sup> Of particular interest is NORTHCOM CONPLAN 2502-05, which was approved by Secretary of Defense Robert Gates on March 15, 2007, only months after the Enforcement of the Laws to Restore Public Order was enacted on October 17, 2006.<sup>96</sup> According to CONPLAN 2502-05, National Guard forces conducting civil disturbance operations in affected states “will likely be federalized” upon execution of the plan.<sup>97</sup> Washington State’s Adjutant General, Major General Timothy Lowenberg, was concerned that, “[o]ne key USNORTHCOM planning assumption is that the President will invoke the new Martial Law powers [Enforcement of the Laws to Restore Public Order] if he concludes state and/or local authorities no longer possess either the capability or the will to maintain public order.”<sup>98</sup> A newspaper editorial reinforced Lowenberg’s concern that “[s]hifting the power over the Guard to the president would make the states inordinately reliant on the federal government during an emergency and strip them of much

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Command, MARFORNORTH, and Fleet Forces Command. USNORTHCOM Official web site. at <http://www.northcom.mil/About/index.html>, (accessed February 16, 2008).

<sup>94</sup> Ibid.

<sup>95</sup> Christine E. Wormuth, *The Future of the National Guard and Reserves: The Beyond Goldwater-Nichols Phase III Report*, (Washington, DC: Center for Strategic and International Security Studies, 2006), 82.

<sup>96</sup> Senate Judiciary Committee, ‘The Insurrection Act Rider’ and State Control of the National Guard, Statement by Major General Timothy Lowenberg, The Adjutant General, Washington National Guard and Director, Washington Military Department. 110th Cong., 1st sess., 24 April 2007.

<sup>97</sup> Ibid.

<sup>98</sup> Lowenberg Testimony before Senate Judiciary Committee.

of their independence and flexibility.”<sup>99</sup> Thus, when CONPLAN 2502-05 was viewed in light of the Enforcement of the Laws to Restore Public Order, it became more plausible that the President might start to bypass the governors and manage more domestic incidents through NORTHCOM. Further evidence of this possibility was found in the White House Report on Hurricane Katrina, which suggests that the Department of Defense should “develop plans to lead the Federal response for events of extraordinary scope and nature.”<sup>100</sup> Although, NORTHCOM would have clearly been the appropriate organization to command and control military forces, including the National Guard, in the event of an attack on the United States homeland, there was not evident justification for NORTHCOM to command and control forces in other situations.

One might argue that if NORTHCOM had possessed special capabilities for domestic emergencies, then perhaps it would have been best suited to manage emergencies in some particular instances. However, NORTHCOM did not possess significant domestic response expertise or capabilities. For instance, when the Department of Defense sent forces to Hurricane Katrina, they did not rely heavily upon NORTHCOM to exercise its function as a combatant command. The U.S. Marine Corps complained that their Marine service component at NORTHCOM was skipped in the process of sending Marines to hurricane-devastated Louisiana.<sup>101</sup> Instead of NORTHCOM, it was USJFCOM that initiated the flow of many federal forces to Louisiana. Thus, three years after its inception, NORTHCOM did not prove its relevance in the aftermath of Hurricane Katrina.

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<sup>99</sup> Editorial, “Let the National Guard Be,” *The Hartford Courant*, 16 August 2006. <http://www.courant.com/news/opinion/editorials/hc-nationalguard.artaug16,0,4807627.story?coll=hc-headlines-editorials>, (accessed September 22, 2006).

<sup>100</sup> The White House, *The Federal Response to Hurricane Katrina: Lessons Learned*, February 23, 2006, 94. <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>, (accessed October 15, 2007).

<sup>101</sup> U.S. Marine Corps, *Humanitarian Assistance/Disaster Relief Lessons from a Hurricane, A Summary of Observations from Hurricane Katrina*, Marine Corps Center for Lessons Learned, March 24, 2006, 11.

Within the U.S. Army, U.S. Army Forces Command (FORSCOM) ordered elements of First Army, one of two Continental United States Armies (CONUSAs) to support civil authorities in Louisiana. In October 2005, the other CONUSA, Fifth Army, was designated as ARNORTH, the Army service component of NORTHCOM. Thus, after Hurricane Katrina, the question remained as to what, if anything would uniquely qualify ARNORTH or NORTHCOM to manage or coordinate an emergency situation within the homeland.

It should not be surprising that NORTHCOM and ARNORTH were slow to develop special competence in domestic operations. In his 2005 abstract for the U.S. Army War College, Lieutenant Colonel J.K. Chesney pointed to the lack of leader training for military assistance to civil authorities.<sup>102</sup> This largely remains the case today. While elective courses in homeland security may be available to military officers in the various military professional education programs, there has never been a special career track or specific functional specialization in homeland security within the armed forces.<sup>103</sup> Developing a cadre of officers with homeland security expertise would arguably have improved ARNORTH and NORTHCOM's ability to integrate with other federal and state agencies with primary responsibility for homeland security. Like the Department of Justice and the Department of Homeland Security, the Department of Defense has been required to operate within the bounds of applicable laws and policies. Although the Army and other armed services have not formally trained many officers to perform homeland security and disaster response missions, some private programs have improved the situation. For instance, the Command and General Staff College Foundation at Fort Leavenworth, Kansas requested a grant to operate in conjunction with civilian universities to create a Masters Degree

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<sup>102</sup> J.K. Chesney, "Military Assistance to Civil Authority: When and Where Should Leader Development Begin?" *U.S. Army War College Strategy Research Project*, Carlisle Barracks, Pennsylvania, March 18, 2005. <http://www.strategicstudiesinstitute.army.mil/pdf/files/ksil245.pdf> (accessed on 14 September 14, 2007).

<sup>103</sup> The Army, for instance, awards a career field identifier to officers with subject matter expertise in special operations, logistics, public affairs, strategic planning, and other areas, but it does not have an identifier for subject matter expertise in homeland security.

Program in homeland security studies for military officers and civilians.<sup>104</sup> If the Department of Defense properly educated more military officers in the complexities of operating within the homeland, the national responses to terrorist attacks and natural disasters could greatly improve.

Chesney also noted that the military culture is not typically amenable to accepting subordination to local authorities.<sup>105</sup> To overcome this during Hurricane Katrina relief operations, the National Guard proposed that federal forces could come under the command and control of a state's Adjutant General while working in that state. While the U.S. Marine Corps was open to the possibility, it did not happen.<sup>106</sup> The Army alternatively suggested that it would be better if a federal (Title 10) officer was sworn into the Louisiana National Guard so that he could command the state forces (Title 32) and thereby achieve unity of effort.<sup>107</sup> Recommending an interim step between these extremes, the Commission for Guard and Reserves<sup>108</sup> formally recommended that the deputy commander billet at NORTHCOM should always be filled by a National Guard general officer.<sup>109</sup> On January 28, 2008, the proposal for a Guardsman to fill the

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<sup>104</sup> Robert Ulin, interview with author April 22, 2008, Fort Leavenworth, Kansas. As President, of the Command and General Staff College Foundation, Inc., Mr. Ulin is working with the Honorable Representative Nancy Boyda (D-KS) to develop a program that leverages the training and exercise simulation tools available at Fort Leavenworth to educate military and civilian students in incident management.

<sup>105</sup> Chesney.

<sup>106</sup> U.S. Marine Corps, *Humanitarian Assistance/Disaster Relief Lessons from a Hurricane, A Summary of Observations from Hurricane Katrina*.

<sup>107</sup> Crockett, 11.

<sup>108</sup> The Independent Commission on the National Guard and Reserves was charged by Congress to recommend any needed changes in law and policy to ensure that the Guard and Reserves are organized, trained, equipped, compensated, and supported to best meet the national security requirements of the United States. The Commission was established by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. On January 31, 2008, the Commission delivered its final report to Congress and the Secretary of Defense. That report contains six major conclusions and 95 recommendations, supported by 163 findings. It was informed by 17 days of public hearings, involving 115 witnesses; 52 Commission meetings; more than 850 interviews; and the detailed analysis of thousands of documents. The Commission has now turned its findings, conclusions, and recommendations over to the legislative and executive branches of government. Commission on the National Guard and Reserves, "Transitioning the National Guard and Reserves into a 21st-Century Operational Force," Final Report to Congress and the Secretary of Defense January 31, 2008. <http://www.cngr.gov> (accessed on 12 May 2008).

<sup>109</sup> Wormuth, "The Future of the National Guard and the Reserves," 82.

NORTHCOM Deputy billet was enacted as law.<sup>110</sup> Though not likely to immediately resolve all the command and control issues between Guard and federal forces in domestic emergencies, this change should at least improve coordination, which is significant. For instance, National Guard input in the development of NORTHCOM's plans will prevent the type of state versus federal polarization that occurred after publication of CONPLAN 2502-05. Instead of assuming that federal control over state forces is desirable, other possibilities are likely to be considered. In the aftermath of 1992's Hurricane Andrew, for example, a coordinated effort between separate National Guard and federal military commands was adequate.

As Tropical Storm Andrew approached the southeast coast of Florida, the Adjutant General activated National Guard units in its forecasted path. Those Guardsmen living in the path of the storm were assembled at armories north of the projected storm track to provide a ready response force. Other units throughout the state were placed on alert. After Hurricane Andrew came ashore, the Governor of Florida called up almost half of Florida's Army and Air Guard personnel for tasks such as providing temporary shelters, removing debris, distributing food and water, and providing security. The National Guard performed its missions in its prescribed Title 32 state duty status. When Florida's immediate needs exceeded the state's capacity and resources, the Governor requested and received a presidential disaster declaration that entitled the state to obtain federal funding and assistance from federal agencies and the active military. Nearly 10,000 active duty soldiers, primarily from Forts Bragg, Lee, and Drum, joined approximately 7,000 Florida National Guard soldiers on the scene in Florida.<sup>111</sup> The geographic area in Florida was divided up with various military units each occupying a section. The active military was part of JTF Andrew while the National Guard continued to work under its own state

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<sup>110</sup> On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 (NDAA), Pub. L. 110-181, 110th cong. 2d sess., January 28, 2008.

<sup>111</sup> U.S. Army Quartermaster Corps, *Historian Report*, Fort Lee, Virginia. <http://www.qmmuseum.lee.army.mil/historyweek/19-25aug.htm> (accessed March 22, 2008).

authority.<sup>112</sup> During the first few days of relief operations, the National Guard provided security to prevent looting and rioting, provided medical treatment, cleared streets and highways, transported and distributed food, water, and medical supplies, and assisted in providing food and temporary shelter facilities for displaced families. As federal assistance began to arrive, many relief functions were transferred to JTF Andrew, allowing the governor to focus the National Guard efforts toward support of law enforcement.<sup>113</sup> Through frequent and continuous support to law enforcement agencies over the previous three years in counter-drug efforts, the Florida National Guard was able to respond immediately to the needs of those agencies. A key to success was the fact that support request procedures and liaison had been established and were operational before the arrival of Hurricane Andrew. Had similar support request procedures and liaison been in place during Hurricane Katrina, much of the frustration and negative publicity might have been avoided. Both national-level and state-level response plans should specify coordination procedures in order to maximize capabilities and minimize confusion.

## Local Responders Oppose the Enforcement of the Laws to Restore Public Order

To the extent that the Enforcement of the Laws to Restore Order suggests that federal oversight is better than local oversight during emergencies, local leaders and first responders are predictably united in opposition to the amendment to the Insurrection Act. Since the Enforcement of the Laws to Restore Public Order was voted into law in late 2006, many advocates of state and local governments voiced opposition to the law for several reasons.

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<sup>112</sup> Major John Robert Evans, "Task Force 1-22 Infantry from Homestead to Port Au Prince," U.S. Army Command and General Staff College, document RWP- 07-641-281, June, 2000.

<sup>113</sup> Global Security, [http://www.globalsecurity.org/military/library/report/call/call\\_93-6\\_chap9.htm](http://www.globalsecurity.org/military/library/report/call/call_93-6_chap9.htm). (accessed March 22, 2008)

In 2007, fifty governors expressly opposed the Enforcement of the Laws to Restore Public Order and requested that Congress repeal it.<sup>114</sup> The constitutional concern was that the 2006 law created a conflict between a governor's obligation to support the President and his obligation to serve the citizen's of his state. In this regard, North Carolina Governor Michael Easley cautioned that the Enforcement of Laws to Restore Public Order was likely to create a "tug of war between the governors and the president."<sup>115</sup> The governors raised the practical concern that when their National Guard forces were federalized, they experienced an "inability to respond to residents' needs" in domestic emergencies.<sup>116</sup> The National Conference of State Legislatures agreed with the governors and expressed concern that preempting the governors' control of the National Guard jeopardized public safety in the affected states.<sup>117</sup>

The Adjutants General Association, representing the senior National Guard officials in each of the 54 states and territories, stated that the Enforcement of Laws to Restore Public Order was "completely unnecessary."<sup>118</sup> Rather than turning over control of their National Guard personnel and resources to the federal military, Adjutants General preferred to retain control of their National Guard forces. As every state and territory possessed its own Joint Forces Headquarters, an Adjutant General or his designated officer, was able to exercise command and control over a situation within his state. Moreover, when the Adjutant General remained in

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<sup>114</sup> Letter from National Governors Association to the Honorable Ike Skelton and the Honorable Duncan Hunter, Committee of Armed Services, U.S. House of Representatives, February 6, 2007; Letter from National Governors Association to the Honorable Carl Levin and the Honorable John McCain, Committee of the Armed Services, United States Senate, February 6, 2007.

<sup>115</sup> Sullivan.

<sup>116</sup> Letter from National Governors Association to the Honorable Ike Skelton and the Honorable Duncan Hunter, Committee of Armed Services, U.S. House of Representatives, February 6, 2007; Letter from National Governors Association to the Honorable Carl Levin and the Honorable John McCain, Committee of the Armed Services, United States Senate, February 6, 2007.

<sup>117</sup> Letter from National Conference of State Legislatures to the Honorable Patrick Leahy and the Honorable Christopher "Kit" Bond, March 27, 2007. <http://leahy.senate.gov/issues/InsurrectionAct/NCSL%20National%20Guard--Senate%20Sponsors.pdf> (accessed April 2, 2008).

<sup>118</sup> Robert Kubey, "Asleep at the Wheel: Press ignores congressional OK for martial law," *Extra!* May/June 2007. <http://.fair.org/index.php?page=3118>. (accessed on September 18, 2007).

control, he could manage his forces. For instance, he could keep individual soldiers on duty for an extended period or he could rotate his troops during the crisis to ensure that none of the troops remained mobilized for an extended duration. When National Guard forces were federalized, the Adjutant Generals lost the flexibility to manage their personnel.

The National Sheriffs Association requested repeal of the Enforcement of the Laws to Restore Public Order. They based their concerns on “an unwarranted diminution of state and local power as governors and local law enforcement officials will lose their command structure and capabilities during times when the Act [Enforcement of Laws to Restore Order] is invoked.”<sup>119</sup> The sheriffs were not the only law enforcement officials to oppose the new law.

The national Fraternal Order of Police (FOP) similarly requested repeal of the 2006 law. In the FOP’s view, “short of an armed insurrection our military should not be used to displace state and local law enforcement.”<sup>120</sup> The FOP continued, “state and local law enforcement may work well with their National Guard counterparts, but if Guardsmen are federalized and called into service without the consultation or consent of the governor, or the State and local law enforcement authorities on the ground, the confusion which may occur could make a bad situation worse, not better.”<sup>121</sup> The FOP feared that the arrival of federal forces, including federalized National Guard forces, without thorough coordination may become “a hindrance, not a help, to State and local authorities who are trying to bring a crisis under control.”<sup>122</sup>

Beyond the opposition of law enforcement, state emergency managers also opposed federal military command and control over responders at the scene of a domestic crisis. The National Emergency Managers Association (NEMA), which is the professional association of

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<sup>119</sup> Letter from National Sheriffs’ Association to the Honorable Christopher “Kit” Bond and the Honorable Patrick Leahy, February 20, 2007.

<sup>120</sup> Letter from Fraternal Order of Police to the Honorable Patrick J. Leahy, Chairman, Committee on the Judiciary, United States Senate, April 30, 2007.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

state emergency management directors, opposed the Enforcement of Laws to Restore Public Order provision.<sup>123</sup> Recognizing that a robust network of first responders was critical, NEMA desired to ensure that adequate federal funding was available for state and local efforts. NEMA feared that if laws emphasized federal response options, funding for local and state responders might receive a low priority.<sup>124</sup> Any reductions in funding to state and local programs may reduce the effectiveness of many state and local organizations during an actual emergency.

### Politicization of the Military

The politicization of the military is an undesirable consequence of employing federal military leaders in domestic operations. Many military leaders and scholars accept Clausewitz's notion that "war cannot be divorced from political life."<sup>125</sup> Understanding war as a "continuation of political intercourse, with additional means" Clausewitz insists "war in itself does not suspend political intercourse or change it into something entirely different."<sup>126</sup> If one agrees with Clausewitz that war, which typically entails military operations against a foreign enemy, occurs without interrupting the conduct of politics, then one should expect that domestic military operations similarly occur without interrupting local political processes. In other words, it is not realistic to expect a complete suspension of civil government and political activity while the military conducts an operation to restore order or provide humanitarian assistance. Any domestic military operation will necessarily occur within the existing context of domestic politics. Even

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<sup>123</sup> National Emergency Managers Association, *Legislative Report*, 2007 Mid-Year Conference, 10-14 February 2007, Alexandria, Virginia. <http://www.nemaweb.org/?1790>. (accessed on March 1, 2008).

<sup>124</sup> NEMA's fears appear well founded. In February, 2008, the President's Fiscal Year 2009 Budget Proposal featured \$2.9 billion in budget cuts to state and local programs including Emergency Management Performance Grants, State Homeland Security Grants, and the Law Enforcement Terrorist Protection Program. NEMA, *Legislative Report*, 2008 Mid-Year Conference, 9-13 March 2008, Washington, DC. <http://www.nemaweb.org/?2221> (accessed on 5 April 2008).

<sup>125</sup> Carl Von Clausewitz, *On War*, ed. and trans. by Michael Howard and Peter Paret, (New Jersey: Princeton University Press 1976) 605.

<sup>126</sup> *Ibid.*

military activity as seemingly innocuous as routine training has come under public scrutiny when it disturbed endangered bird species or the health of the local citizens.<sup>127</sup>

When a military leader makes an operational decision within the United States, he is also probably making a *de facto* public policy decision. Similarly, when a military leader performs a mission that normally falls within the spheres of federal, state, and local civilian government, he is making a *de facto* entry into the political arena where everything from his motives to his competence are fair game for public debate and criticism. Civilian leaders, especially elected ones, are familiar with media and members of the opposing political party routinely operating to keep the political process transparent. Military leaders, however, work in a profession where planning and operations are seldom open for public debate. The military leaders may not be used to being held politically accountable in the same way that civilian officials are. To illustrate how a military leader can go from being revered as a hero to being scrutinized as political actor, one may recall the case of General Colin Powell. After the 1991 Gulf War victory, General Powell was such a popular figure that he represented a concern to political incumbents. When media or other parties suggested that Powell was suitable to fill the Presidency of the United States in 1995, Senator Alfonse D'Amato (R-NY) quickly criticized his fellow New York native saying, "I wonder whether Colin Powell has either the courage or convictions needed to lead the country."<sup>128</sup>

After Hurricane Katrina in 2005, Lieutenant General Russell Honoré, an Army officer who happened to be a Louisiana native, was ordered to New Orleans where he was in charge of

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<sup>127</sup> The Army entered into partnership with environmental agencies to accommodate endangered red-cockaded woodpeckers on the Fort Bragg and Camp Mackall military installations. See "Fort Bragg's Woodpeckers: Soldiers Wildlife Find Common Ground in North Carolina," *NPR News*, May 9, 2002. (accessed on December 4, 2007) <http://www.npr.org/programs/morning/features/2002/may/woodpecker/>. The Puerto Rican island of Vieques drew protests against the Navy's use of the area as a bombing range, which led to the Navy's departure in 2003. See "Puerto Rico, navy Readies for Closure of Vieques Bombing Range," *Greenwire*, November 26, 2002. <http://www.globalsecurity.org/org/news/2002/021126-navy01.htm>. (accessed December 7, 2007).

<sup>128</sup> Maureen Dowd, "Liberties; Alfonse Unplugged," *New York Times*, July 27, 1995.

Joint Task Force Katrina's support to the overall relief effort but was not directly answerable to state or local civilian authorities.<sup>129</sup> Sporting his locally inspired nickname "the Ragin' Cajun," the charismatic Honoré presented himself as a legitimate authority in New Orleans during numerous media appearances.<sup>130</sup> Although the mayor of New Orleans never objected to being upstaged by Honoré's dominant role in the media, Honoré's representations created a false perception in the minds of many citizens. Approximately 50,000 Guardsmen from several states supported Hurricane Katrina relief operations in Louisiana and Mississippi while federal military forces peaked at approximately 22,000, not including the U.S. Coast Guard because they were serving in their Department of Homeland Security role rather than their Department of Defense role.<sup>131</sup> Specifically, there were more than 30,000 National Guard troops and other first responders in Louisiana that were not represented when Honoré engaged the media.<sup>132</sup> Thus, "LTG Honoré commanded less than a third of the total military forces responding to the hurricane, yet most Americans – and perhaps most people watching the response on television worldwide – had the impression that he was the single man in charge."<sup>133</sup> Civilian leaders and concerned citizens should arguably remain vigilant so that an Army general does not create a false impression as to what is happening and who is in charge during an emergency. Lieutenant General Honoré's saturation of the media with news of JTF-Katrina may have ironically focused the public, including the critics, on the federal effort. Had the American public properly understood the role of the federal forces in accordance with tiered response doctrine, then perhaps

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<sup>129</sup> Erik Jonsson, "A Native Son Takes Charge in Gulf: Bluff general invigorates hurricane relief effort," *Christian Science Monitor*, September 09, 2005. <http://www.csmonitor.com/2005/0909/p01s01-usmi.html>. (accessed on March 23, 2008).

<sup>130</sup> Lieutenant General Honoré became "the man everybody wants to talk to, from Ted Koppel to Defense Secretary Rumsfeld." Jonsson, "A Native Son Takes Charge in Gulf."

<sup>131</sup> *2006 Quadrennial Defense Review Report*, 16.

<sup>132</sup> Major General Bennett C. Landreneau, "Letter from Leadership," *GX* 4, no. 2 (2007), 9.

<sup>133</sup> Wormuth, "The Future of the Guard and Reserves," 83.

the Bush Administration would not have endured the public outcry that prompted the change in the Insurrection Act. In any event, Lieutenant General Honoré's presence in New Orleans influenced nationwide public opinion and subsequent national policy. For a military officer to have such an impact on domestic policy is unusual.<sup>134</sup>

Many civilian leaders and constituents fear another problem when the military forces supplant normal civilian government agencies. Military leaders may not have sufficient information to manage the crisis. In the Los Angeles riots of 1992, Joint Task Force Los Angeles Commander, Major General Marvin Covault arguably did not have a correct understanding of the Insurrection Act as a statutory exception to the Posse Comitatus Act. Covault believed that JTF-LA was prohibited from law enforcement, when in fact, it was not.<sup>135</sup> Despite misunderstanding on part of the Major General Covault and his staff, the military effort to suppress the LA Riots is generally regarded as a success. However, there is no guarantee that this will always be the case. Representative Tom Davis (R-VA) has been critical of the federal military's attempt to assert control over state and local officials in the aftermath of the 2001 terrorist attacks and Hurricane Katrina.<sup>136</sup> Congressman Davis emphasizes, "Governors know best when and where and how to deploy the Guard within their borders, and only in the most extreme cases should this power be abridged."<sup>137</sup> The key is to define the types of extreme cases that will require citizens to rely

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<sup>134</sup> Despite his past public advocacy for the federal military response to Hurricane Katrina, in retirement Lieutenant General Honoré has ironically become an advocate of emergency preparedness at the local and individual levels. "In this new normal, with the possibility of terrorist attacks, natural disasters and industrial accidents, we need this culture of preparedness. A vast part of America still thinks, 'That couldn't happen here where I live.' And they are dead damn wrong." Retired Lieutenant General Russel Honoré, "Retiring General Aims to Create a Culture of U.S. Preparedness," Associated Press, 9 January 2008. *National Guard*, February 2008. page 12

<sup>135</sup> Matthews, 57. In their report, *The City in Crisis: A Report by the Special Advisor to the Board of Police Commissioners on the Civil Disorders in Los Angeles* (n.p. 1992), William H. Webster and Hubert Williams doubt that Major General Covault understood that Posse Comitatus did not apply.

<sup>136</sup> Rick Maze, "Congress Works to Undo Changes to Guard Law," *Air Force Times*, February 8, 2007.

<sup>137</sup> Ibid.

upon federal military authorities instead of their normal state and local leaders. Catastrophic emergencies seem to be the only incidents that warrant abridgement of state and local government authority.

Military officers may be politicized in another way as well. It may be politically expedient for elected civilian leaders to put a military face on their policies. Political leaders may stand to benefit from the credibility and reputation of particular officers. Civilian leaders may also seek to attribute a failure to an appropriate scapegoat. The case of General David Petraeus illustrates this phenomenon. When General Petraeus testified before the Senate for his confirmation hearing in January 2007, he was widely regarded as the quintessential military professional. He was a credible, independent voice who stood above the political fray.<sup>138</sup> However, when General Petraeus returned to Capitol Hill in September 2007 for hearings regarding the status of Iraq, he labored to retain that image. “Partisans sought to portray him either as a politicized officer carrying water for the White House or as the only possible savior of an increasingly unpopular war.”<sup>139</sup> Prior to the General Petraeus testimony, much of the onus for the United States campaign in Iraq was on the Bush Administration, especially Secretary of Defense Donald Rumsfeld. As one defense policy analyst points out, “[n]ow, for better or worse, it’s Dave’s war.”<sup>140</sup> General Petraeus has become a “political player” to the extent that his “powerful public image” is measured in the public approval ratings of Gallup-USA Today and Washington Post-ABC News polls.<sup>141</sup> In the American political system, most decision making is supposed to be transparent and leaders are supposed to be held accountable for their actions through the electoral process. When civilian policy makers use military leaders to *embody* as

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<sup>138</sup> Peter Baker and Thomas E. Ricks, “Petraeus Returns to War That Is Now His Own,” *Washington Post*, September 13, 2007, A01.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.* Quotation is from Dr. James Jay Carafano of the Heritage Foundation.

<sup>141</sup> *Ibid.*

well as implement their policies, it may remove some of the accountability and transparency from the democratic process. The potential for this occurrence cautions against a greater role of federal military leadership in domestic operations. If, for example, the military had played a more active role in the 1993 federal siege of the Branch Davidian compound in Waco, Texas, it could have become embroiled in the political controversy surrounding police procedures, judicial warrants, and civilian deaths that followed the operation.<sup>142</sup>

The Constitution provides that the States shall have the power to appoint the officers in their respective militias.<sup>143</sup> A National Guard Adjutant General is not the same as an active component flag officer. The Adjutant General is the senior military officer and *de facto* commander of a state's military forces, including the Army National Guard, the Air National Guard, and in the states that possess Naval Militia and State Defense Forces, the Adjutant General commands these forces, too. The Adjutant General is subordinated to the Chief Executive, which is normally a governor. As state authorities serving closely with their governors, the Adjutant Generals are more politically accountable to the citizens than are active component flag officers.<sup>144</sup> Allowing state leadership to function, even in a crisis, is a necessary part of the democratic process. Logic suggests that successful state leaders will be retained by their constituents while leaders who cannot meet the needs of their constituents will presumably be voted out of office at some point. When federal authorities overshadow state officials and commandeer a state's National Guard forces, it may distort the democratic process.

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<sup>142</sup> PBS News, [www.pbs.org/wgbh/pages/frontline/waco/home.html](http://www.pbs.org/wgbh/pages/frontline/waco/home.html) (accessed May 1, 2008).

<sup>143</sup> U.S. Constitution, art. 1., sec. 8, cl. 16. The power of appointment of militia officers, being constitutionally vested in the States, they determine their qualifications for commissions as a specially reserved authority. Otherwise it would be in the power of Congress to deprive the State militia of officers by making the qualifications such as could not be complied with and thus defeat the reserved authority of appointment.

<sup>144</sup> In forty-eight states, Puerto Rico, Guam, and the U.S. Virgin Islands, the Adjutant General is appointed by the Governor. The exceptions are Vermont, where the Adjutant General is appointed by the legislature, South Carolina, where they are elected by the voters, and the District of Columbia, where a commanding general is appointed by the President of the United States.

## Military Operational Context

The military operational context for domestic operations is also significant. When assessing the potential of a particular region of the world for military operations, the United States Army typically develops an understanding of what it calls the operating environment. The operating environment is “a composite of the conditions, circumstances, and influences that affect the employment of military forces and bear on the decisions of the unit commander.”<sup>145</sup>

## The Homeland Contemporary Operating Environment

When planning military operations, Army leaders and planners assess the relevant factors in the operating environment.<sup>146</sup> Analysis of the operating environment requires military planners to examine the interplay between several overlapping variables including the political variable and military variable. “The political variable describes the distribution of responsibility and power at all levels of governance.”<sup>147</sup> At least one goal of political analysis is to find suitable ways of achieving United States goals without upsetting or running into conflict with local governments and populations. It is often advantageous for the Army to work by, with, and through existing political institutions to achieve positive results with the least amount conflict and resource expenditure. For instance, the United States counterinsurgency strategy in Iraq and Afghanistan works through the political leadership of these allies. This approach is based upon the advice of British Lieutenant Colonel T.E. Lawrence, that it is “better to let the Arabs do it

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<sup>145</sup> Headquarters, Department of the Army, Field Manual 1-02, *Operational Terms and Symbols*. (Fort Monroe, VA: U.S. Army Training and Doctrine Command, 2004).

<sup>146</sup> Headquarters, Department of the Army, Field Manual 3-0, *Operations*, (Fort Monroe, VA: U.S. Army Training and Doctrine Command, 2008) 1-4

<sup>147</sup> *Ibid.*, 1-5.

tolerably than you do it for them.”<sup>148</sup> In working with allies, Army planners consider the military variable, which “should focus on each organization’s ability to field capabilities and use them domestically, regionally, and globally.”<sup>149</sup>

Counterinsurgency doctrine makes it clear why U.S. military forces must show respect and demonstrate patience while dealing with foreign allies, such as the fledgling governments of Iraq and Afghanistan. However, it may be less clear why a similar approach should be taken toward first responders in the homeland. It is tempting to assume that the United States military should be able to do whatever is necessary within the United States. However, a proper analysis of the operating environment will reveal that the military cannot sweep aside local actors and act directly to achieve its goals. The fifty States, four territories, and for some purposes the Native American tribes, retain their powers as limited sovereigns within the federal system. Consideration of the political variable for military operations in the United States requires an understanding of state sovereignty. State sovereignty has long been part of the political landscape in the United States. In his arguments for adoption of the Constitution, Alexander Hamilton wrote the following:

The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.<sup>150</sup>

As sovereign entities, states have duties to act on behalf of their citizens. The governor of each state is an executive charged with the governance and protection of the citizens of the

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<sup>148</sup> Headquarters, Department of the Army, Field Manual 3-24, *Counterinsurgency*, (Fort Monroe, VA: U.S. Army Training and Doctrine Command, 2006). Concepts of T.E. Lawrence are explained on pages 1-27 and 1-28.

<sup>149</sup> U.S. Army Field Manual 3-0, *Operations*, 1-6.

<sup>150</sup> Alexander Hamilton, James Madison and John Jay, Federalist No. 9, *The Federalist Papers*, ed. Garry Willis, (New York: Bantam Books, 1982).

state. Acknowledging state sovereignty, military operations in the United States should be conducted by, with, and through the states to the maximum possible extent.

Analysis of the military variable reveals that there are significant domestic response capabilities at the state level. Many of these capabilities reside within the National Guard. For instance, at least one Civil Support Team (CST) resides in each state to perform initial diagnosis at the outset of a potential nuclear, biological, or chemical incident.<sup>151</sup> A more robust capability for dealing with chemical, biological, radiological, nuclear, or high yield explosive (CBRNE) also exists in the form of the CBRNE Enhanced Response Force Package (CERFP), which can perform consequence management immediately after an incident, occurs.<sup>152</sup> The National Guard also possesses numerous other significant assets within their military force structure. The National Guard of each state works under a functional Joint Forces Headquarters and is capable of standing up a state-level Joint Task Force to command and control emergency response efforts.<sup>153</sup> When a state seeks additional resources in the face of an emergency, the governor may coordinate through the Emergency Management Assistance Compact to receive National Guard forces from the governors of other states.<sup>154</sup> In addition to National Guard forces, the governor

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<sup>151</sup> A CST assesses suspected Weapons of Mass Destruction (WMD) attacks, advises civilian responders on appropriate actions through on-site testing and expert consultation, and facilitates the arrival of additional state and federal military forces. National Guard Bureau, <http://www.ngb.army.mil/features/HomelandDefense/cst/index.html>. (accessed December 6, 2007).

<sup>152</sup> A CERFP responds to a chemical, biological, radiological, nuclear, or high yield explosive (CBRNE) incidents and supports local, state, and federal agencies managing the consequences of the event by providing capabilities to conduct casualty and patient decontamination, medical support, and casualty search and extraction.

<sup>153</sup> The Joint Forces Headquarters – State (JFHQ-State) provides command and control of all National Guard forces in the state or territory for the Governor, or in the case of the District of Columbia, the Secretary of the Army; can act as a joint services headquarters for national-level response efforts during contingency operations. The Joint Task Force – State (JTF-State) provides command and control of all state military assets deployed in support of civil authorities or a specific incident and facilitates the flow of information between the Joint Force Headquarters - State (JFHQ-State) and the deployed units. National Guard Bureau, <http://www.ngb.army.mil/features/HomelandDefense/cst/index.html>. (accessed December 6, 2007).

<sup>154</sup> EMAC is a national mutual aid partnership agreement that allows state-to-state assistance during governor or federally declared emergencies. EMAC is about governors helping fellow governors in

and the adjutant general also typically have state militia forces, state highway patrol, and state emergency management agencies working for them. Within each state, the political subdivisions, such as counties and cities, can also marshal significant resources.<sup>155</sup> It follows that governors typically use the means at their disposal to deal with emergencies and crises within their respective states. Two recent incidents illustrate how governors have used their own forces to respond to terrorist attacks and natural disasters within their states. First, responding immediately to the attack by foreign terrorists on September 11, 2001, many New York National Guardsmen on state active duty played critical roles at the Ground Zero site of the World Trade Center in Manhattan.<sup>156</sup> New York state officials immediately deployed elements of the National Guard without waiting for federal help. Second, immediately after Hurricane Ivan battered several southeastern states in 2004, the governors of the affected states relied upon their National Guard forces.<sup>157</sup> In Florida, the governor mobilized 2,000 Guardsmen to clear debris and open access to the devastated panhandle region.<sup>158</sup> Similar efforts to mitigate the post-hurricane humanitarian crisis occurred throughout the affected states. In subsequent days after landfall, the role of state-level responders changed. For example, the Louisiana National Guard set up distribution points

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times of need. National Guard Bureau. <http://www.ngb.army.mil/features/HomelandDefense/cst/index.html>. (accessed on 10 May 2, 2008). EMAC information is also available at the National Response Framework (NRF) Center, <http://www.fema.gov/NRF>.

<sup>155</sup> Adam M. Giuliano, "Emergency Federalism: Calling on the States in Perilous Times," *University of Michigan Journal of Law Reform*, 40, no. 2 (Winter 2007): 354.

<sup>156</sup> New York Congressional Representative Carolyn B. Maloney has acknowledged the National Guard service at Ground Zero in response to the 11 September 2001 attacks, "The National Guard was integral to the security and rescue effort in lower Manhattan after the terrorist attacks." Source is web site of Congresswoman Maloney. [http://www.maloney.house.gov/index.php?Itemid=69&id=1030&option=com\\_content&task=view](http://www.maloney.house.gov/index.php?Itemid=69&id=1030&option=com_content&task=view) (accessed September 20, 2007).

<sup>157</sup> A category 5 hurricane at its peak, Hurricane Ivan made landfall across Alabama, Florida, Louisiana, and Texas in September 2004. In addition to killing sixty-four people, Hurricane Ivan caused more than \$14 billion in damage, which makes it the fifth most costly storm to hit the United States. For more on Hurricane Ivan, see the event summary at the National Weather Service. <http://www4.ncsu.edu/~nwsfo/storage/cases/20040917/> (accessed on 8 April 2008).

<sup>158</sup> Kathleen Koch, Susan Candiotti, Rick Sanchez, Gary Tuchman and Sara Dorsey, "Ivan's stormy trek floods Southeast," *CNN*, <http://www.cnn.com/2004/WEATHER/09/16/hurricane.ivan/index.html>. (accessed on January 5, 2008).

for ice and water in St. Bernard and Plaquemines Parishes.<sup>159</sup> The contributions of state-level forces operating under state leadership are critical to most disaster response efforts in the United States. A proper analysis of the military variable of the operating environment would acknowledge this reality. More importantly, any national-level efforts, including military operations, should build upon the leadership and disaster response capabilities already functioning at the state level. This approach where the national response builds upon state efforts has evolved into the tiered response framework, which works well for most disasters in the United States.

## Tiered Response

Tiered response assumes that local and state officials will most likely be the first to respond to domestic crises within their jurisdictions. However, there is also a role for the federal government to play in domestic operations. A prominent defense policy analyst explains how the tiered response unfolds from local to national level as follows:

Most disasters, including terrorist attacks, can be handled by emergency responders. Only catastrophic disasters—events that overwhelm the capacity of state and local governments—require a large-scale response. In “normal” disasters, whether they are a terrorist strike like those on 9/11 or a natural disaster such as a flood or snow storm, a tiered response is employed. Local leaders respond first and turn to state resources when they are exhausted. States then turn to Washington when their means are exceeded. Both local and state leaders play a critical role in effectively communicating their requirements to federal officials and managing the response. In most disasters local resources handle things in the first hours and days until national resources can be requested, marshaled, and rushed to the scene. That usually takes days. With the exception of a few federal assets such as the Coast Guard and Urban Search and Rescue, teams don’t roll in until well after the response is under way.<sup>160</sup>

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<sup>159</sup> Louisiana Governor’s Office of Homeland Security and Emergency Preparedness (GOHSEP), *Hurricane Ivan Recovery Update*, 24 September 2004, GOHSEP web site. <http://www.ohsep.louisiana.gov/archive/ivanrecoveryupdatesep24.htm>. (accessed on 5 May 5, 2008).

<sup>160</sup> Jay James Carafano, “The Pentagon’s Inadequate Vision for Safeguarding U.S. Soil: What’s Needed from the Reserve Components,” (delivered March 16, 2006 and published as Heritage Foundation Lecture #975 on November 9, 2006). <http://www.heritage.org/Research/NationalSecurity/hl975.cfm>. (accessed September 20, 2007).

An important feature of tiered response is that an emergency is handled at the lowest possible level with the minimum amount of effort and expenditure that is necessary.<sup>161</sup> Due to the efficiency of tiered response, it has gained widespread acceptance.

## Formal Acceptance of Tiered Response

The Department of Homeland Security is the lead federal agency for incident management in the United States.<sup>162</sup> In the 2002 National Strategy for Homeland Security, the Department of Homeland Security acknowledged that “America’s first line of defense in the aftermath of any terrorist attack is its first responder community” while “[i]n a serious emergency, the federal government augments state and local response efforts.”<sup>163</sup> The 2008 National Response Framework expressly lists tiered response as the second of five key principles in its emergency response doctrine.<sup>164</sup> It is not surprising the National Response Framework embraces tiered response because this approach has been used on numerous occasions with positive results.

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<sup>161</sup> The analogy of a person treating a laceration may help to understand tiered response. In response to a cut in a blood vessel, the platelets in a person’s blood form a clot to stop the loss of blood. If the laceration is small, the clotting platelets will be sufficient to stop the bleeding. These platelets are analogous to local city-level responders in an emergency situation. If a laceration is more serious, platelets may not clot quickly enough to stop blood loss. Therefore, it may be advisable to apply direct pressure to the wound and to elevate the wounded area above the heart of the victim in order to stop the bleeding. These acts are analogous where county-level and perhaps some state-level responders fit into the tiered response. If direct pressure and elevation do not stop the bleeding of a laceration victim, then a bandage and perhaps stitches may be necessary. This is analogous to state-level assistance including use of the National Guard to assist responders. If the laceration is very severe or if it is accompanied by complications, then it may require surgery or even amputation. This is analogous to where national-level assistance typically occurs in the tiered response process.

<sup>162</sup> The White House, *National Strategy for Homeland Security*, July 2002, 43.

<sup>163</sup> *National Strategy for Homeland Security*, 41.

<sup>164</sup> Department of Homeland Security, *2008 National Response Framework*, published January 2008, effective March 2008, 10.

During Hurricane Jeanne in 2004, for instance, the tiered approach was successfully used in Florida.<sup>165</sup> After Florida's state-level response forces, including National Guard forces, assisted in the immediate rescue and relief operations after Hurricane Jeanne, the Federal Emergency Management Agency (FEMA) contributed vital housing to homeless people.<sup>166</sup> "This mission has been a tremendous success by any measure and concludes FEMA support for all 2004 victims," said Scott R. Morris, director of FEMA's Florida Long-Term Recovery.<sup>167</sup> It is significant that FEMA's press release also emphasizes, "FEMA works closely with state and local emergency managers, law enforcement personnel, firefighters and other first responders" because FEMA must ultimately transition from federal back to local control of the situation.<sup>168</sup>

A fundamental aspect of tiered response is that the response is scalable and flexible. This means that federal entities only stayed involved in the management of the emergency while conditions remain beyond the state's capability to cope with it. As soon as a state can manage the situation, the federal entities begin to withdraw. Illustrating how tiered response allows for the federal entities to hand the mission back to local officials after conditions have improved, Director Morris explained, "[w]e have passed the baton to county governments, non-profit associations and faith-based organizations, which took advantage of FEMA's policies to assume total case management and responsibility for more than 600 individuals and families."<sup>169</sup> Tiered response is not only applied to cases of natural disasters under the Stafford Act. Tiered response

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<sup>165</sup> Hurricane Jeanne made landfall near Port St. Lucie, Florida on September 25, 2004.

<sup>166</sup> FEMA web site. <http://www.fema.gov/news/newsrelease.fema?id=14363> (accessed September 20, 2007).

<sup>167</sup> FEMA, "FEMA Concludes 2004 Housing Transition Effort In Florida, FEMA passes the baton to county governments, non-profit associations, faith-based organizations," Press Release no. LTR-06-044, (November 2006). <http://www.fema.gov/news/newsrelease.fema?id=31219> (accessed September 20, 2007).

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

has also been used in the application of active military forces and federalized reserve and militia forces to execute the laws of the nation under the Insurrection Act.

The Los Angeles riots of 1992 provide an example of tiered response under the Insurrection Act. Following a white jury's acquittal of four white Los Angeles Police Department officers for beating black suspect Rodney King, chaos erupted in the Los Angeles area. As conditions worsened, Mayor Tom Bradley imposed a dusk-to-dawn curfew in an effort to prevent citizens from congregating into mobs of enough size to wrest control of the streets from law local law enforcement officers. California Governor Pete Wilson wanted to add "teeth" to the curfew, so he ordered 4,000 California National Guardsmen to assist the police in securing areas of known violence. Upon Governor Wilson's request, the National Guard units were federalized by President Bush and supplemented by another 4,000 Army and Marine troops with orders to "suppress the violence [...] and to restore law and order in and about the City and County of Los Angeles, and the other districts of California."<sup>170</sup> The curfew was lifted on the sixth day after the onset of the riots and the federal troops incrementally departed Los Angeles between fifteen and thirty days after the riots began. Thus, after the federal assistance was no longer needed, the federal troops quickly departed and left local authorities in control of the situation.

On the political level, tiered response is acceptable because it works within the federalist political framework, which recognizes state sovereignty in key areas. Each state can use its command its forces through its Joint Forces Headquarters without having to wait for federal

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<sup>170</sup> Exec. Order No. 12804. (May 5, 1992) *reprinted at* 57 Fed. Reg. 19361, "Providing for the restoration of law and order in the city and county of Los Angeles, and other districts of California,". See also "Three Days of Hell in Los Angeles," A Series of Reports prepared by the EmergencyNet News Service (ENN) in "real-time" as the events were unfolding, For Immediate Release-EmergencyNet News SVC.-05/01/92-2200CDT L.A. "Insurrection Surpasses 1965 Watts Riots, 38 Dead, More Than 1,200 Injured," By: Clark Staten, EMT-P, 1992, EmergencyNet NEWS Service, Emergency Response & Research Institute, 6348 N. Milwaukee Ave., Chicago, IL 60646 <http://www.emergency.com/la-riots.htm> (accessed September 20, 2007).

authorities to arrive at the site of an emergency to assert control.<sup>171</sup> In testimony before the Senate Judiciary Committee, Major General Timothy Lowenberg emphasized that “states need federal assistance, not federal takeover.”<sup>172</sup> As one national security expert has commented, “[t]he National Guard, as the state militia in the 54 states and territories, provides an infrastructure on which to build and is one that is controlled in most scenarios by the state governors – a key issue.”<sup>173</sup> A newspaper editorial highlighted that “[t]he first mission of the Guard is to react quickly to local crises, and governors have the local knowledge to do that, not the White House.”<sup>174</sup> Following the premise that local government is the most responsive, North Carolina Governor Michael Easley has complained that federal control of the governors’ National Guard forces “undermines our ability to protect the people we serve.”<sup>175</sup> In this regard, some feel that the Enforcement of the Laws to Restore Public Order statute amounted to a penalty imposed upon all the states because of reported problems on the part of Louisiana during relief efforts after Hurricane Katrina.<sup>176</sup> Regardless of whether or not increased federal authority over the National Guard was intended to punish the governors, federalizing the National Guard is likely to disrupt the tiered response to a disaster.

Another reason for the success of tiered response is its optimal use of the forces already on the ground at the scene of the emergency. Reliance upon first responders at local and state

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<sup>171</sup> Department of Defense, *2006 Quadrennial Defense Review Report*, (February 2006), 16. The National Guard is instructed to establish at JFHQ in each state.

<sup>172</sup> National Guard Association of the United States, press release, April 27, 2007.

<sup>173</sup> Wormuth, “The Future of the National Guard and Reserves,” 6.

<sup>174</sup> Editorial, “Hear the Governors: Don’t Federalize the National Guard,” *Palm Beach Post*, 21 August, 2006. [http://www.palmbeachpost.com/opinion/content/opinion/epaper/2006/08/21m14a\\_guard\\_edit\\_0821.html](http://www.palmbeachpost.com/opinion/content/opinion/epaper/2006/08/21m14a_guard_edit_0821.html) (accessed on August 21, 2006).

<sup>175</sup> National Guard Association of the United States, press release, April 27, 2007.

<sup>176</sup> *Hartford Courant*, “Let the National Guard Be.” One frustrated writer explains, “Even if you grant that federal, state, and local rescue efforts in New Orleans could have been better coordinated, one major blunder is not sufficient reason to alter a centuries-old relationship in which governors deploy the Guard for domestic emergencies and the president dispatches Guard units for foreign combat duty.”

level is akin to the United States' reliance upon "forward-deployed" military formations throughout the Cold War.<sup>177</sup> With the National Guard already distributed within and throughout the states and territories, its forces are effectively forward-deployed for domestic operations.

The operational environment in the United States homeland is suited for the tiered response approach as described in the National Response Framework. To the extent that the Enforcement of Laws to Restore Order provision may encourage the President or the Department of Defense to shortcut tiered response, it is likely to be disruptive and may even be counterproductive. Rather than displace the command and control structure in place in each state, federal assistance should feed into the existing framework to the maximum extent possible.

Only instances of what one policy analyst calls "catastrophic" disasters does tiered response seem to be inadequate.<sup>178</sup> In catastrophic disasters, "tens of thousands or hundreds of thousands of lives are immediately at risk."<sup>179</sup> Moreover, state and local resources may be exhausted from the onset and government leaders will have difficulty determining and communicating their priority needs. Another key aspect of a catastrophic disaster is that national resources will have to arrive on the scene within hours. Unlike a normal disaster, in which the national response can develop over time, the catastrophic disaster requires nearly immediate response on a massive level. The immediate national response in a catastrophic disaster serves two purposes. First, it addresses the unprecedented number of people and property interests at risk. Second, it serves to demonstrate that government is still functioning, which may allay public fears and promote resilience. It is logical to have the military play a prominent role in the

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<sup>177</sup> The forward-deployed forces in Europe and South Korea were positioned in locations where the United States wanted to achieve deterrence, and should deterrence fail, to win a war. Additional U.S. Navy and Marine Corps forces aboard ships at sea also provided the United States with significant forward presence around the world. While force projection enables the Marine Corps to frequently live up to its billing as America's "first to fight" around the globe, the National Guard's distribution throughout the United States makes it highly likely that Guardsmen will be among the first responders in the homeland.

<sup>178</sup> Carafano, "The Pentagon's Inadequate Vision for Safeguarding U.S. Soil."

<sup>179</sup> Ibid.

immediate response to catastrophic disasters as it would be ruinously expensive for other federal agencies, local governments, or the private sector to maintain the excess capacity and resources needed for immediate catastrophic response.<sup>180</sup> Furthermore, using military forces for catastrophic response could be done without violating constitutional principles. For instance, Congress could authorize the President to expressly declare a catastrophic disaster. Upon this declaration, which would by definition present a concern of overriding federal interest, the President could act using federal forces without a request from the affected governors. Unlike the Enforcement of Laws to Restore Order, which focused the President's determination as to when a state's capabilities were likely to be exceeded, the proposed catastrophic disaster declaration would instead focus on the magnitude of the incident and the compelling reasons for federal control of the response.

## **Restoration of the Insurrection Act and Future Policy Concerns**

*The very notion of a War on Terror suggests a unified, national response. Yet, though this massive effort may seek to prevent "another September 11," an overly dogged federal focus ignores a crucial lesson of Hurricane Katrina – when it comes to homeland security and emergency response, states matter." – Adam Giuliano<sup>181</sup>*

It is essential to determine whether or not Congress was correct to repeal the Enforcement of the Laws to Restore Public Order statute on January 28, 2008. The appropriate balance between federal and state authority is a significant issue, which Congress should consider in formulating any laws regarding the use of the military within the United States. Central to this balance are the Tenth Amendment and the related concept of federalism.

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<sup>180</sup> Carafano, "The Pentagon's Inadequate Vision for Safeguarding U.S. Soil."

<sup>181</sup> Giuliano, 354.

## The Tenth Amendment

The delegates to the Constitutional Convention in 1787 realized that the problems facing the nation demanded coordinated national action. Therefore, the federal government was given extensive powers, particularly over defense and foreign policy, and is authorized to do everything necessary and proper to exercise these powers.<sup>182</sup> The Tenth Amendment, added to the Constitution in 1791, assuages the concern that too much might be vested in the centralized federal government. The Tenth Amendment makes the obvious, yet politically necessary, claim that the federal government's powers are limited.<sup>183</sup> However, it is not always obvious how federal powers are limited. Establishing the proper balance between federal and state power is the essence of federalism.

## Federalism

As previously mentioned, Federalism is a system of political organization in which a union is formed of separate states or groups that are ruled by a central authority on some matters but are otherwise permitted to independently govern themselves.<sup>184</sup> As the Tenth Amendment states that the national government has only the powers that it has specifically been granted, any other governing powers are “reserved to” the state governments.<sup>185</sup> This was the view of Alexander Hamilton and James Madison.<sup>186</sup> A modern legal writer similarly concluded that

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<sup>182</sup> U.S. Constitution. Articles 1 and 2 describe the federal legislative and executive powers.

<sup>183</sup> U.S. Constitution, amend. 10.

<sup>184</sup> Paul A. Sracic, “Tenth Amendment,” in *The Constitution and its Amendments*, (New York: Macmillan, 1999): 135. [http://64.233.169.104/search?q=cache:AvwY8kmX10AJ:www.as.yasu.edu/~polisci/syracic\\_pap/Tenth%2520Amendment%2520\(from%2520The%2520Constitution%2520and%2520Oits%2520Amendments,%2520Macmillan,%25201999\).doc+Paul+A.+Sracic,+Tenth+Amendment&hl=en&ct=clnk&cd=2&gl=us](http://64.233.169.104/search?q=cache:AvwY8kmX10AJ:www.as.yasu.edu/~polisci/syracic_pap/Tenth%2520Amendment%2520(from%2520The%2520Constitution%2520and%2520Oits%2520Amendments,%2520Macmillan,%25201999).doc+Paul+A.+Sracic,+Tenth+Amendment&hl=en&ct=clnk&cd=2&gl=us). (accessed on 10 September 13, 2007).

<sup>185</sup> U.S. Constitution, amend. 10.

<sup>186</sup> Federalist No. 39, *The Federalist Papers*, Madison wrote that federal “jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.”

“the sovereign states possess distinct, geographically dispersed, and armed executive power outside of national control.”<sup>187</sup>

Regarding federalism, the majority view favors national, or federal, action in most matters.<sup>188</sup> This viewpoint is based upon an understanding of the Constitution as a supreme law established by the people rather than an interstate compact. On the other hand, however, states rights advocates favor action at the state and local levels. This viewpoint understands the Constitution as a treaty among sovereign states that created the central government and gave it carefully limited authority. Although this viewpoint has long been considered a minority view, it is not dead. In fact, it may be regaining support as Supreme Court Justice Clarence Thomas wrote in a dissenting opinion, “[t]he ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated similar people of the nation as a whole.”<sup>189</sup> As the United States enters the twenty-first century, the Supreme Court remains divided on the fundamental nature of the Constitution and the related concept of federalism. Former Chief Justice Rehnquist predicted that the Court would find opportunities to reevaluate the Tenth Amendment.<sup>190</sup> He may prove correct.

The most significant manifestation of states rights is perhaps the anti-commandeering doctrine articulated by the Supreme Court. In 1997, the Supreme Court decided the case *Printz v. United States*, which established the unconstitutionality of certain interim provisions of the Brady Handgun Violence Prevention Act.<sup>191</sup> The provisions at issue required the “chief law

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<sup>187</sup> Giuliano, 354.

<sup>188</sup> This position’s supporters include presidents Abraham Lincoln, Theodore Roosevelt, and Franklin Roosevelt; the position is also supported by Chief Justice John Marshall, and other Supreme Court justices. Scracic, “The Tenth Amendment,” 136.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid, 138.

<sup>191</sup> *Printz v. United States*, 521 U.S. 898 (1997). The Brady Handgun Violence Prevention Act of 1993 is codified at U.S. Code 18 (1993) §§921-922. The Act is named after James Brady, who was shot during an attempted assassination of President Ronald Reagan on March 30, 1981.

enforcement officer” of each local jurisdiction to conduct background checks.<sup>192</sup> The Court majority concluded that allowing the federal government to draft the police officers of the 50 states into its service would increase its powers far beyond what the Constitution intends. Thus, a precedent was set prohibiting the federal government from compelling a state to enforce a federal regulatory program. If the federal government cannot compel police and other state and local first responders to carry out federal directives, it will likely prove difficult for the federal government to oversee incident response efforts. While the federal government could presumably federalize National Guard forces, it would not be able to control the other state and local-level responders. This could lead to a poorly coordinated response effort.

Regardless of the immediate direction that the Supreme Court may take, history suggests that no reading of the Tenth Amendment will conclusively settle the longstanding argument over its meaning or the precise nature of the federal union. As the debate over federalism is not likely to end, Congress would do well to avoid drafting laws that exacerbate this constitutional conflict.

## **Constitutional Deference and Restraint**

Being aware of federalism, Congress should have foreseen that the Enforcement of Laws to Restore Public Order would disturb the precarious balance between the States and the federal government. To avoid federal versus states clashes, past Presidents have traditionally shown deference to the states by exercising federal authority with great restraint. Federal restraint in use of the federal military dates back to George Washington at the Whiskey Rebellion. Continued federal deference may offer the best way to proceed.

In the case of the Enforcement of the Laws to Restore Public Order statute, the President may not have always been best situated to assess a state’s situation or capability. For instance,

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<sup>192</sup> Printz v. United States.

initial reports of the looting and general lawlessness after Hurricane Katrina were exaggerated.<sup>193</sup> Exaggerated reports of this type could have led a reasonable President to prematurely take control of National Guard forces and thereby inadvertently usurp a governor. If the President has an antagonistic relationship with a governor, there may even be a motivation to act on dubious or unsubstantiated information.

Failure to account for EMAC assistance may have also led a President to incorrectly assess a state's capability. For example, when Mississippi Governor Haley Governor Barber requested disaster assistance from Delaware Governor Ruth Ann Minner for Hurricane Katrina, she sent her Air National Guard security police forces within twenty hours. Relying upon authority in the Delaware State Constitution, Governor Minner, made the decision to send Delaware National Guard forces to Mississippi without federal involvement.<sup>194</sup> If the President failed to allow EMAC to work before declaring a state's incapacity, he might have created redundancy and confusion within the response effort.

### **Federalization May Make the Situation Worse for Affected States**

There are reasons that a governor might prefer to voluntarily contribute forces to disaster relief efforts instead of being ordered to do so. For instance, under an EMAC request, Delaware's Governor Minner had the opportunity to weigh Mississippi's request for assistance against her own need for her National Guard forces within Delaware. When National Guard troops are federalized, a governor has no ability recall the troops for a disaster in her own state.

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<sup>193</sup> Andrew Gumbel, "After the storm, US media held to account for exaggerated tales of Katrina Chaos," *The Independent*, London, UK, September 25, 2005, <http://www.independent.co.uk/news/world/americas/after-the-storm-us-media-held-to-account-for-exaggerated-tales-of-katrina-chaos-508669.html>. (accessed May 13, 2008). See also Crockett, 13.

<sup>194</sup> According to the Delaware Constitution, the governor "shall be commander-in-chief of the army and navy of this State, and of the militia, except when they shall be called into the service of the United States." State of Delaware Constitution, art. 3, sec. 8. [http://delcode.delaware.gov/constitution/constitution-04.shtml#P359\\_46975](http://delcode.delaware.gov/constitution/constitution-04.shtml#P359_46975). (accessed April 2, 2008).

Governor Minner, sharing the view of many other governors, has concluded that, “[t]he governor should always have the opportunity to serve as commander-in-chief of our Delaware National Guard.”<sup>195</sup> Regarding the possibility that governors may not voluntarily provide enough troops for a significant national disaster, Governor Minner stated, “I cannot imagine any governor turning down the president where there is a real need.”<sup>196</sup> Even if the governors do not voluntarily provide National Guard forces to the extent predicted by Governor Minner, the President is not without options. Presumably, if the President has a significant need for forces, he will declare a disaster so as to bring the situation within the scope of his Stafford Act authority.

For years, the Insurrection Act permitted Presidents to federalize the National Guard in a variety of circumstances. All of these cases, however, presented compelling justifications for using federal military or federalized National Guard forces in domestic operations. In the famous civil rights cases, for example, it was obvious that enforcing Supreme Court desegregation decisions amounted to executing the law of the land.<sup>197</sup> The burden has been upon the President to either declare a national disaster sufficient to invoke the Stafford Act or to show sufficient lawlessness or rebellion to invoke the Insurrection Act. Presidents have invoked the Stafford Act several times in the past twenty years.<sup>198</sup> The Stafford Act has been invoked without the request of an affected on governor on only three occasions.<sup>199</sup> According to the Fraternal Order of Police

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<sup>195</sup> J.L. Miller, “Minner, governors fight to keep authority over National Guard,” *The News Journal*, August 20, 2006.

<sup>196</sup> *Ibid.*

<sup>197</sup> In 1957, Governor Orval Faubus used the Arkansas National Guard to bar black students from a school. President Eisenhower responded by deploying federal forces to Arkansas and by federalizing the Arkansas National Guard. <http://encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=102>. (accessed March 3, 2008).

<sup>198</sup> The Robert T. Stafford Disaster Relief and Emergency Assistance Act, PL 100-707, signed into law November 23, 1988, amended the Disaster Relief Act of 1974, PL 93-288. These Acts provided the statutory authority for most Federal disaster response activities especially as they pertain to FEMA and FEMA programs.

<sup>199</sup> Under the Stafford Act, U.S. Code 42 (2006) §5191(b), the President can declare a federal “emergency,” but not a “major disaster” without state consent. However, a review of the Federal Register

analysis, presidents have invoked the Insurrection Act only ten times in the past fifty years.<sup>200</sup>

For the past forty years, each of the uses of the Insurrection Act came at the request of a governor.<sup>201</sup> Like the Stafford Act, the Insurrection Act has primarily been used by presidents to support the requests of governors. To the extent that the Insurrection Act has served as authority for the President to act without the consent of an affected governor, it has served as a narrow authority in instances where state and local authorities resisted or ignored lawful orders. Expanding Presidential authority to act without the request of a governor may therefore be unnecessary as well as unwarranted.

### **Federal Policy Should not Discourage Local First Responders**

Restraint on the part of federal authorities keeps state disaster response capabilities from atrophying.<sup>202</sup> As federal military forces and other federal assets may be committed elsewhere, each state and local government should strive to support its constituency to the greatest extent possible without external assistance. In addition to planning for worst-case contingencies where little or no federal help is available, local and state officials should also know how to coordinate with federal authorities for federal assistance when it is available.<sup>203</sup> Citizens should primarily

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reveals only three situations where a §501(b) *emergency* has been declared: (1) the emergency conditions relating to the loss of the Space Shuttle Columbia on February 1, 2003, over the states of Texas and Louisiana; (2) the fires and explosions on September 11, 2001, in Virginia; and (3) the explosion at the federal courthouse in Oklahoma City, on April 19, 1995.<sup>199</sup> In all three instances, the declarations were made, in part, because of the federal property or programs at issue.

<sup>200</sup> Fraternal Order of Police Letter, 30 April 2007.

<sup>201</sup> Ibid.

<sup>202</sup> James Jay Carafano and Matt Mayer, “FEMA and Federalism: Washington is Moving in the Wrong Direction,” *Heritage Foundation Backgrounder #2032*, (8 May 2007), 5. <http://www.heritage.org/Research/HomelandDefense/bg2032.cfm>. (accessed on 13 May 13, 2008). “If the federal government is going to release its assets for every fire, drought, freeze, snowstorm, tornado, landslide, or tropical storm that occurs in America, then expect state and local leaders to divert their finite resources away from disaster response preparedness to other more pressing needs like education and health care.”

<sup>203</sup> Jeb Bush, “Think Locally On Relief,” *The Washington Post*, September 30, 2005, A19, [www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092901636.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092901636.html) (accessed April 6,

make their State and local governments accountable for their performance of these critical public safety duties. However, when the federal government provides funding or conducts training and evaluation exercises with state agencies, the federal government should ensure that these state agencies successfully perform their emergency response functions.<sup>204</sup>

Within the framework of federalism, each state has the opportunity to develop the best policies for its constituents. Robert Latham, Executive Director for the Mississippi Emergency Management Agency and Office of Homeland Security stated that “it is important to realize that ‘one size does not fit all’.”<sup>205</sup> Therefore, Latham suggests that “States should be allowed the flexibility within DHS guidelines, to utilize the funds to meet” their needs. States with large cities will have particular concerns, such as terrorist attack. Other states with significant coastline will likely feel the need to prepare for hurricanes and tropical storms. The states will not wait for the federal government to develop and impose top-down solutions. Instead, the states can be expected to innovate and borrow ideas from each other to arrive at a system that works. This practice of idea borrowing and experimentation is critical to develop the best policy for each locality. It is unrealistic to think that the federal government can develop a uniform emergency management approach that is best for every state, but the federal government can learn about the local plans and assist in the sharing of information. In addition to compiling data and sharing information, the Department of Homeland Security and the Department of Defense can help to fund and participate in state disaster response plans. The recent 2007 Vigilant Guard disaster simulation exercise involving the military and other agencies was exemplary. During this two-

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2007). “Furthermore, when local and state governments understand and follow emergency plans appropriately, less taxpayer money is needed from the federal government for relief.”

<sup>204</sup> Jeb Bush. “Before Congress considers a larger direct federal role, it needs to hold communities and states accountable for properly preparing for the inevitable storms to come.”

<sup>205</sup> Robert R. Latham Jr., Executive Director, Mississippi Emergency Management Agency and Office of Homeland Defense, Testimony before the House Subcommittee for Emergency Preparedness and Response of the House Select Committee for Homeland Security, October 16, 2003.

week exercise at the national level, several local-level exercises were also occurring to exercise both federal and state responders.<sup>206</sup> This type of simultaneous exercise at national and state/local levels is perhaps the best way for federal and state authorities to improve disaster response.<sup>207</sup> In addition to funding and conducting large exercises of this nature, FEMA could perhaps hold more frequent but smaller exercises at regional interagency training centers including the Joint Interagency Training Center – West in California and the Joint Interagency Training Center – East in West Virginia. These types of exercises are only limited by creativity and funding on the part of the FEMA and other agencies.

### **Law and Policy Process Must be Open**

Since its proposal in 2006, the Enforcement of the Laws to Restore Public Order has drawn many critics and opponents. One basis for continuing criticism is the way the law was introduced without debate.<sup>208</sup> President of the National Institute for Military Justice, Eugene Fidell, further laments that to date, no one has admitted to actually inserting the provision into the 2007 National Defense Authorization Act.<sup>209</sup> A New York Times editorial summarizes the concern with the legislative process behind the Enforcement of the Laws to Restore Public Order as follows:

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<sup>206</sup> Staff Sergeant Kimberly Snow, “2007 Vigilant Guard: Specialized Ohio National Guard Units Test First Response Capabilities,” *Buckeye Guard*, Spring/Summer 2007, 8.

<sup>207</sup> FEMA’s Mobile Emergency Response Support (MERS) team set up critical satellite links for television, phones and e-mail communications. Specialist William E. Henry, “FEMA team creates vital communications link during domestic crises,” *Blackanther Military News*, May 16, 2007 [http://www.blackanther.com/News/U\\_S\\_Military\\_19/FEMA\\_team\\_creates\\_vital\\_communications\\_link\\_during\\_domestic\\_crises6715.shtml](http://www.blackanther.com/News/U_S_Military_19/FEMA_team_creates_vital_communications_link_during_domestic_crises6715.shtml). (accessed on 13 May 13, 2008).

<sup>208</sup> “A disturbing recent phenomenon in Washington is that laws that strike to the heart of American democracy have been passed in the dead of night. So it was with a provision quietly tucked into the enormous defense bill at the Bush administration’s behest that makes it easier for a president to override local control of law enforcement and declare martial law.” Editorial, “Making Marital Law Easier,” *New York Times*, February 19, 2007.

<sup>209</sup> Eugene Fidell stated that “[a] provision that no one will defend is a provision that doesn’t belong in the U.S. Code.” Sullivan.

Changes of this magnitude should be made only after a thorough public airing. But these new presidential powers were slipped into the law without hearings or public debate. The president made no mention of these changes when signed the measure, and neither the White House nor Congress consulted in advance with the nation's governors.<sup>210</sup>

After the Enforcement of the Laws to Restore Public Order was enacted as law in 2006, opposition quickly moved to repeal the law and restore the former Insurrection Act. Only a few months after the law was enacted Senators Patrick Leahy (D-VT) and Christopher "Kit" Bond (R-MO) introduced Senate Bill 513 to repeal the Laws to Restore Public Order provision and thereby restore the previous Insurrection Act.<sup>211</sup> In the House of Representatives, Representative Tom Davis (R-VA) introduced H.R. 869, which similarly sought to restore the Insurrection Act.<sup>212</sup> Although these two bills were never enacted as law, the gist of these bills was incorporated into other legislation. Specifically, language in section 1068 of the National Defense Authorization Act for Fiscal Year 2008 effectively repealed the Enforcement of the Laws to Restore Public Order and restored the previous Insurrection Act.<sup>213</sup> On January 28, 2008, President Bush signed the NDAA for 2008 into law, which repealed the Laws to Restore Public Order statute and restored the Insurrection Act as it had existed prior to 2006.

## Conclusion

Although Enforcement of the Laws to Restore Public Order pandered to the critics of Hurricane Katrina, the actual statutory provisions in the 2007 Warner Defense Authorization Act interpreted in light of other relevant laws probably would not have increased the President's ability to federalize the National Guard in most instances. Even if the President could have used the Enforcement of Laws to Restore Public Order provision to more easily federalize Guard

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<sup>210</sup> *New York Times*, "Making Marital Law Easier."

<sup>211</sup> Govtrack, <http://www.govtrack.us/congress/bill.xpd?bill=s110-513> (accessed August 2, 2007).

<sup>212</sup> Govtrack, <http://www.govtrack.us/congress/bill.xpd?bill=h110-869> (accessed August 2, 2007).

<sup>213</sup> National Defense Authorization Act of 2008, Public Law No. 110-181, 110th Cong., 1st sess. (January 28, 2008) section 1068.

forces, it has not been show how this will improve overall governmental responsiveness in most domestic emergencies. While certain catastrophic disasters may so overwhelming as to require extensive federal contribution and even federal control without request of the affected governor, these situations were not adequately defined in the Enforcement of Laws to Restore Public Order. A law defining “catastrophic” disaster and requiring the President to declare one in order to assert control seems to be an appropriate trigger for the President.

To the extent that the Enforcement of Laws to Restore Public suggested that federal oversight should be used in normal, non-catastrophic, disasters it was an ill-conceived deviation from the tiered response framework. Any law permitting the President to more easily federalize the National Guard without the consent of the governors is likely to shift the delicate balance state and federal government within the federal system. Rather than stir controversy over federalism, the National Response Framework has embraced tiered response because it is operationally sound and it already fits within the larger American political context of federalism.<sup>214</sup> Future laws and policies could presumably do likewise.

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<sup>214</sup> *National Response Framework*, 8. “Response doctrine is rooted in America’s Federal system and the Constitution’s division of responsibilities between Federal and State governments. Because this doctrine reflects the history of emergency management and the distilled wisdom of responders at all levels, it gives elemental form to the *Framework*.”

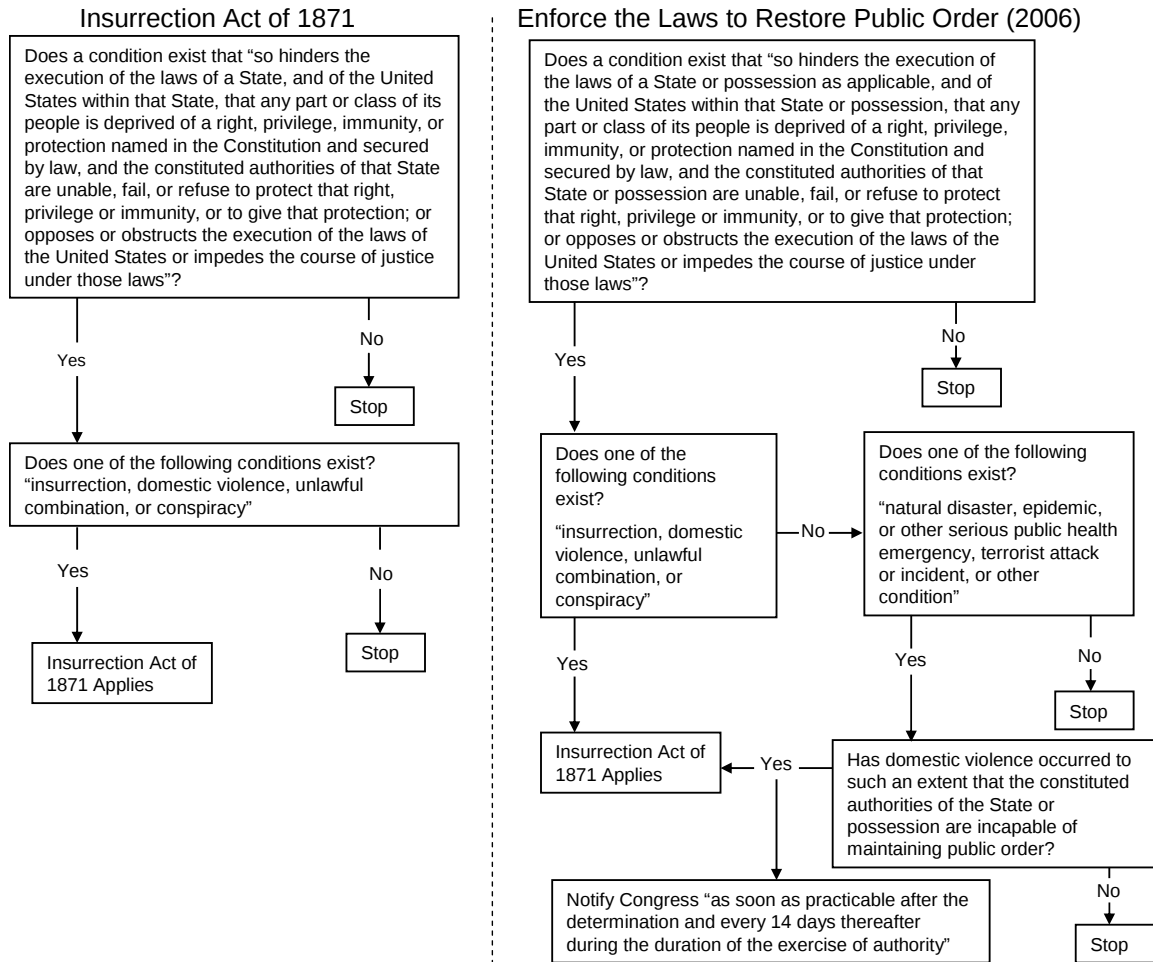
# APPENDIX

## Statutory Language Comparison

| Insurrection Act of 1871                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Enforcement of Laws to Restore Public Order (2006)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
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| <p><b>§ 331. Federal aid for State governments</b><br/>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.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <p><b>§ 331. No Change</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <p><b>§ 332. Use of militia and armed forces to enforce Federal authority</b><br/>Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                              | <p><b>§ 332. No Change</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <p><b>§ 333. Interference with State and Federal law</b><br/>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—</p> <p>(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</p> <p>(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.</p> <p>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.</p> | <p><b>§ 333. Major public emergencies; interference with State and Federal law</b></p> <p>(a) <b>USE OF ARMED FORCES IN MAJOR PUBLIC EMERGENCIES.--</b></p> <p>(1) The President may employ the armed forces, including the National Guard in Federal service, to--</p> <p>(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--</p> <p>(i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and</p> <p>(ii) such violence results in a condition described in paragraph (2); or</p> <p>(B) suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2).</p> <p>(2) A condition described in this paragraph is a condition that--</p> <p>(A) so hinders the execution of the laws of a State or possession, as applicable, and of the United States within that State or possession, 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 or possession are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or</p> <p>(B) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.</p> <p>(3) In any situation covered by paragraph (1)(B), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.</p> <p>(b) <b>NOTICE TO CONGRESS.--</b><br/>The President shall notify Congress of the determination to exercise the authority in subsection (a)(1)(A) as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of the authority.</p> <p><b>§ 334. Proclamation to disperse</b><br/>Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.</p> <p><b>§ 335. Words "or possession" added after each instance of "State" in § 333.</b></p> |

A direct comparison of statutory language between the Insurrection Act of 1871 and the Enforcement of Laws to Restore Public Order (2006) reveals what was changed.

## Insurrection Act vs. Enforcement of Laws to Restore Public Order



The flowchart illustrates how Presidential Authority under the Insurrection Act of 1871 compares with authority under the Enforcement of the Laws to Restore Public Order provisions of 2006-07. Since January 28, 2008, the language from the Insurrection Act of 1871 has been restored as law.

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