

Did The Founding Fathers Do “A Heckuva Job”?
Constitutional Authorization for the Use of Federal Troops to Prevent the
Loss of a Major American City
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“Brownie, you’re doing a heckuva job.”²

President Bush’s compliment to FEMA’s Michael Brown on September 2, 2005

Introduction

As the one year anniversary of the landfall of Hurricane Katrina on the Gulf Coast passed, the highly critical reports of the Bush Administration’s mismanagement of the response to that catastrophe continued to mount.³ Indeed, while the difficulties with the Administration’s mired military venture in Iraq has been viewed as central to the President’s present record low approval ratings and the Democratic takeover of both Houses of Congress in the 2006 midterm elections,⁴ there can be little doubt that the initial misstep leading to the President’s and the Republican Party’s fall from grace was the mishandling of, and haunting human suffering from,

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² See, e.g., Andrew Zajac & Andrew Martin, *Top FEMA Leaders Short on Experience*, CHIC. TRIB., Sept. 7, 2005.

³ See, e.g., Eric Lipton & Scott Shane, *Leader of Federal Effort Feels the Heat*, N.Y. TIMES, Sept. 2, 2005, at A17; see also Richard W. Stevenson, *After Days of Criticism, Emergency Director Resigns*, N.Y. TIMES, Sept. 13, 2005, at A26; see also Jennifer Steinhauer & Eric Lipton, *FEMA, Slow to the Rescue, Now Stumbles in Aid Effort*, N.Y. TIMES, Sept. 17, 2005, at A1 (“Nearly three weeks after Hurricane Katrina cut its devastating path, FEMA . . . is faltering in its effort to aid hundreds of thousands of storms victims” and “serious problems remain throughout the affected region.”); FRANCES FRAGOS TOWNSEND, THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 69 (Feb. 2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf> (“ . . . [T]he Federal response to Hurricane Katrina demonstrated that the energy and professionalism of DHS personnel was not enough to support the Department’s role as the manager of the Federal response.”).

⁴ See, e.g., *Exit Polls: Bush, Iraq Key to Outcome*, CNN.COM, Nov. 8, 2006; Dan Balz & Jon Cohen, *Independent Voters Favor Democrats by 2 to 1 in Poll: Iraq War Cited Most Often as Top Issue for Elections*, WASH. POST, Oct. 24, 2006, at A1.

the Katrina affair, an event repeatedly drummed into the American psyche by non-stop newscasts in late August and early September 2005.

There is, however, a high irony in the Katrina failure. Central to the criticism of the Bush Administration was its multi-day indecisiveness after the Hurricane made landfall about whether to deploy the overwhelming military assets of the Federal government to rescue and protect Gulf Coast citizens overwhelmed by one of the country's worst natural disasters.⁵ As will be shown in greater detail below,⁶ the President failed to act decisively at that time because of a perceived lack of Constitutional authority to override Louisiana Governor Kathleen Babineaux Blanco's refusal to allow the Federal government to have ultimate control over the deployment of those troops and related Federal assets.

Karl Rove, the then White House Deputy Chief of Staff, is reported to have said, "[t]he only mistake we made with Katrina was not overriding the local government."⁷ Yet, it is noteworthy that this Constitutional uncertainty emanated from the very same Administration which has, as its most prominent hallmark, made breathtaking claims of broad inherent Presidential authority to act unilaterally in the War on Terror.⁸

Indeed, in a telling criticism of the lack of support from the Federal government, including the military, Michael Brown, testifying before a Senate committee, noted that if it had been "confirmed that a terrorist ha[d] blown up the 17th Street Canal levee, then everybody

⁵ See, e.g., TOWNSEND, *supra* note 3, at 54; see also Donald F. Thompson, *Terrorism and Domestic Response: Can DOD Help Get It Right*, JOINT FORCE Q., Jan. 1, 2006.

⁶ See *infra* notes 67-79 and accompanying text.

⁷ *Rove Off the Record*, THE HUFFINGTON POST, Sept. 17, 2005, at http://www.huffingtonpost.com/2005/09/17/rove-off-the-record-on-ka_n_7513.html.

⁸ See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, § 4.6.4 ("Presidential power and the war on terrorism") (3d ed. 2006); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005); see also, generally, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (challenging the indefinite holding of a suspected enemy combatant); Hamdan v. Rumsfeld, 126 S. Ct. 2749 (challenging the President's establishment of military commissions for the trial of individuals suspected to be involved in the 9/11 attacks).

would have jumped all over that and been trying to do everything they could.”⁹ However, because the event was a natural phenomenon, the Bush Administration’s first instinct was to follow the usual template for response to natural disasters, i.e., to rely on the States and cities involved to take the lead, and, in the event of inadequacies at those levels of governments, to take over the governmental response only if invited to do so.¹⁰

Confronted with the prospect of effectively losing a major American city to a hurricane, what was the basis for this surprising and deadly hesitation by the Executive Branch? Most of the Bush Administration’s claims of broad executive power concerning the War on Terror are premised on the Commander-in-Chief Clause, which, in turn, contemplates war efforts.¹¹ Again, because there was no attack or invasion causing the Katrina disruptions, the sturdy foundation of Article II’s war powers was almost certainly viewed as an unavailable rationale to the Administration. Moreover, confronted with Governor Blanco’s refusal to turn over authority for the Hurricane response to the military, worries about unilateral action infringing on State sovereignty, especially the Police Power prerogatives of the State, had to be paramount in the eyes of the Administration. The Rehnquist Court’s rulings contracting the Commerce Clause beginning in 1995,¹² as well as its related expansion of Tenth Amendment jurisprudence,¹³ must have inspired a natural reflex of legal hesitancy for purposes of Federal intervention with Federal troops¹⁴ when confronted with State resistance to a Federal takeover.

⁹ Eric Lipton, *Ex-FEMA Leader Faults Response by White House*, N.Y. TIMES, Feb. 11, 2006.

¹⁰ As we show below, this highly deferential approach is deemed to be constitutionally required by many public health law academics, who view emergency response as a primary element of the Police Powers which cannot be trumped by federal authority. See *infra* note 103 and accompanying text.

¹¹ U.S. Const. art. II, § 2.

¹² *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); see also Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1, 9 (2002).

¹³ See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

¹⁴ Note, throughout this article, the term “Federal troops” refers to both the armed forces and the federalized National Guard.

Indeed, the indecision surrounding the use of Federal troops was doubtless aggravated by the paralyzing effect of a single Reconstruction era Federal statute: the Posse Comitatus Act (“PCA”). That statute provides that “except in cases and under circumstances expressly authorized by the Constitution or Act of Congress,” Federal troops may not be used for domestic law enforcement.¹⁵ As is shown below, the Bush Administration by the end of 2004 had already worked out and publicly announced that the bar within the PCA would not prevent it from using Federal troops to respond to a massive natural disaster such as Katrina.¹⁶ Yet, that resolution somehow was mystifyingly forgotten after Katrina hit. Federal lawyers pondered for days after landfall whether there were exceptions to the PCA that would allow introduction of Federal troops.¹⁷

On October 17, 2006, however, all doubt about the President’s authority to use Federal troops to respond to a catastrophic natural disaster, even over the objection of the affected State, was resolved. That day the President signed into law the John Warner National Defense Authorization Act for Fiscal Year 2007.¹⁸ A key provision within this legislation (“the Warner Amendment”) amends the Insurrection Act to allow the President unilaterally, i.e., without the consent of the States involved, to deploy Federal troops, to respond to natural disasters and other major domestic emergencies.¹⁹ The amendment, therefore, creates the kind of statutory exception recognized as trumping the military prohibition within the PCA. The Warner

¹⁵ 18 U.S.C. § 1385 (2000).

¹⁶ See *infra* notes 124-129 and accompanying text.

¹⁷ See, e.g., Eric Lipton et al., *Storm and Crisis: Military Response; Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1.

¹⁸ See, e.g., Libby George and John M. Donnelly, *HR 5122 – Fiscal 2007 Defense Authorization*, CQ BILL ANALYSIS, Oct. 19, 2006; John Warner National Defense Authorization Act for Fiscal Year 2007, Ch. 15, sec. 1042, § 333, Pub. L. No. 109-364 (2006).

¹⁹ *Id.*; see also George Cahlink, *Governors ‘Disappointed’ With Expanding Federal Role of National Guard*, CQ TODAY, Oct. 6, 2006.

Amendment became law over the bi-partisan objection of all State Governors, who claimed it trampled upon State sovereignty.²⁰

The question remains, however, whether there is a Constitutional justification for the Warner Amendment, especially in situations where the State in question is resisting Federal control of the disaster response with Federal troops. It is the thesis of this article that Constitutional justifications for the Warner Amendment can be found within the relatively obscure Insurrection and Guarantee Clauses of the Constitution, as well as a careful reading of even those Commerce Clause cases which have given the greatest deference to State sovereignty. Moreover, as we show below,²¹ Justice Scalia has recently emphasized the Necessary and Proper Clause as a supporting foundation for Congressional reliance on the aforementioned Clauses.

If, however, there is uncertainty about these Constitutional justifications, it is argued below that Congress could remove all Constitutional doubt on this question by conditioning the considerable Federal aid that is given States to respond to severe natural disasters on the ability of the President to determine that Federal troops must be in control where the President finds, as was the case in Katrina, that the State is incapable of taking charge of the response.²²

As will also be shown below,²³ the extraordinary power contemplated by the Warner Amendment must be understood in context. The legislative history of the Amendment, as well as repeated Executive Branch doctrine, makes it clear that the conventional expectation will be that States and localities will control responses to natural disasters, even severe ones. In those instances, the Federal government will supplement, not take over, State and local resources.

²⁰ *Id.*; see also *Gov. Napolitano Urges Removal of Provisions in Federal Legislation Usurping Governors' Control of National Guard*, U.S. STATE NEWS, Sept. 20, 2006 [hereinafter *Napolitano*]; see also Press Release, Office of Senator Leahy, Hill's National Guard Advocates Hold News Conference to Protest DOD Bill's Proposed Decisions on National Guard (Sept. 19, 2006), available at <http://leahy.senate.gov/press/200609/091906a.html>; see also *Governors Association Opposes Senate Authorization Measure*, INSIDE THE ARMY, Sept. 4, 2006 [hereinafter *NGA*].

²¹ See *infra* notes 163-165 and accompanying text.

²² See *infra* notes 176-185 and accompanying text.

²³ See *infra* notes 130-133 and accompanying text.

However, in those rare instances where the State and localities are unable to respond, as was true in Katrina, the Constitution, in Justice Jackson's apt phrase, should not be turned "into a suicide pact."²⁴ In those dire instances, where the State cannot act, the Federal government has not only the authority, but, indeed, the Constitutional duty to lead the response.

To place these points in context, it will be helpful first to review the magnitude of the Katrina disaster both in terms of the human suffering it caused and of the inability of Louisiana and New Orleans to mount a response.²⁵ Second, not only must the impact of the PCA be reviewed, but also consideration will be given below to the widespread and inaccurate myths that surround that statute, thereby causing a reflexive and unnecessary hesitation to use Federal troops when States are overwhelmed.²⁶ Third, the Warner Amendment will be addressed, including the Congressional emphasis that, only in circumstances such as Katrina where States and localities are overwhelmed, will Federal troops lead the response.²⁷ Finally, the Constitutional underpinning of the Warner Amendment will be addressed, especially in light of the fact that all of the Nation's Governors have viewed it as an infringement on State Constitutional prerogatives.²⁸

Hurricane Katrina and the Absence of Government

It is now universally recognized that Hurricane Katrina was an unprecedented disaster that virtually destroyed a major U.S. city. During the days following its landfall, chaos reigned in the Gulf Coast region, particularly in New Orleans. In Louisiana, State and local governments were incapable of acting in areas affected by the hurricane, and desperation grew as the public

²⁴ *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (lamenting that the decision of the Court, in its broad interpretation of the First Amendment, was effectively choosing "anarchy" over "liberty with order," thus "convert[ing] the constitutional Bill of rights into a suicide pact.").

²⁵ See *infra* notes 29-63 and accompanying text.

²⁶ See *infra* notes 80-82, 105-107 and accompanying text.

²⁷ See *infra* notes 130-133 and accompanying text.

²⁸ See *infra* notes 140-166 and accompanying text.

sector “seemed unable to meet its basic compact with its citizens.”²⁹ Evacuations were ordered that could not be executed.³⁰ Basic civil services were nil: the power was out, the roads were not navigable, communication was all but nonexistent,³¹ fires burned untended,³² and rescue efforts were “a fugue of improvisation.”³³ In short, the sheer magnitude of the catastrophe effectively shut down the State and local government insofar as New Orleans was concerned.

Hurricane Katrina impacted almost 93,000 square miles across 138 parishes and counties.³⁴ Its official death toll is 1,697.³⁵ It is estimated that property damage as a result of Katrina is approaching the \$100 billion mark, making Katrina the most costly disaster in U.S. history.³⁶ In addition to Katrina’s fatalities, about 770,000 people were displaced from their homes.³⁷ Even a year after Katrina, most public schools are still closed, hospitals are crippled, the court system is dysfunctional, and power outages are a regular event.³⁸

In its immediate aftermath, the destruction sent thousands of victims across State borders in search of food and shelter and required delivery of relief workers and supplies from across the Nation.³⁹ Major national industries were closed or their operations dramatically cut back.⁴⁰ The

²⁹ Brandon Bain, *Escape from New Orleans*, NEWSDAY, Sept. 10, 2005 at A7; Susan B Glasser & Michael Grunwald, *The Steady Buildup to a City’s Chaos; Confusion Reigns at Every Level of Government*, WASH. POST, Sept. 11, 2005 at A1.

³⁰ *Id.*

³¹ *Id.*

³² James Janega & Angela Rozas, *Progress, with Limits; Death, Disease Still a Threat as Downtown Clears*, CHI. TRIB., Sept. 4, 2006, at 1.

³³ Glasser, *supra* note 29.

³⁴ TOWNSEND, *supra* note 3, at 5.

³⁵ Associated Press, *True Katrina Toll Over 2,000 Scientist Says*, TORONTO STAR, Oct. 28, 2006.

³⁶ TOWNSEND, *supra* note 3, at 5.

³⁷ *Id.* at 8.

³⁸ Jennifer Moses, *Hurry Up and Wait*, WASH. POST, Aug. 29, 2006.

³⁹ See James Dao, *Off the Map; No Fixed Address*, N.Y. TIMES, Sept. 11, 2005, at 41 (discussing “resettling evacuees” from the Gulf Coast who fled to other States after Katrina); Kirk Johnson et al., *President Visits as New Orleans Sees Some Gains*, N.Y. TIMES, Sept. 12, 2005, at A1 (describing the extent of relief efforts from all over the nation); Robert D. McFadden & Ralph Blumenthal, *Bush Sees Long Recovery for New Orleans; 30,000 Troops in Largest Relief U.S. Relief Effort*, N.Y. TIMES, Sept. 1, 2005, at A1 (illustrating evacuation attempts for the city of New Orleans as well as New Orleans’s Mayor C. Ray Nagin’s fear that the hurricane might have killed thousands in his city).

⁴⁰ See, e.g., *Prices for Energy Futures Soar in the Wake of Hurricane Katrina*, N.Y. TIMES, Aug. 31, 2005, at C2,

hurricane severely impaired substantial portions of the country's oil refineries and curtailed offshore production of oil and gas.⁴¹ As a result, the Nation experienced a sharp and immediate spike in gasoline prices.⁴²

In the absence of a State and local governmental presence, lawlessness consumed the city of New Orleans. It was widely reported that:

- “Looting was widespread, sometimes in full view of outnumbered police and often unarmed [Louisiana] National Guard troops;”⁴³
- “[R]apes were reported in the Convention Center, where some officers were beaten by an angry crowd;”⁴⁴
- “[R]eports of carjackings, shootings, lootings and rapes reached authorities, who admitted that much of New Orleans ha[d] slipped from their control;”⁴⁵ and
- “The police themselves may have helped trigger the lawlessness, as reports that some of their own had engaged in looting swept through the city.”⁴⁶

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Economists warned that Katrina was likely to leave a deeper mark on the national economy than previous hurricanes because of its profound disruption to the Gulf of Mexico's complex energy supply network The airline industry felt the delayed brunt of Hurricane Katrina, with some airports running low on jet fuel and carriers canceling hundreds more flights.

41 Jad Mouawad & Simon Romero, *Gas Prices Surge as Supply Drops*, N.Y. TIMES, Sept. 1, 2005, at A1.

42 Some States reached higher gas prices than they had ever experienced pre-Katrina. See Associated Press, *Gasoline Pricing Violations*, N.Y. TIMES, Sept. 11, 2005, at 14NJ-6 (“New Jersey’s gasoline prices hit their highest levels ever on Labor Day, averaging \$3.16 a gallon for regular. . . .”); Jad Mouawad, *Storm Stretches Refiners Past a Perilous Point*, N.Y. TIMES, Sept. 11, 2005, at 27 (“The hurricane also knocked off a dozen refineries at the peak of summer demand, sending oil prices higher and gasoline prices to inflation-adjusted records.”); Mouawad & Romero, *supra* note 41, at A1 (“While gasoline averaged \$2.60 a gallon earlier in the week [of Aug. 29 to Sept. 2], unleaded regular gas was selling [on Aug. 31] at \$3.09 at stations in West Palm Beach, Fla.; \$3.49 in Indianapolis; and \$3.25 in San Francisco. Premium fuel was going for up to \$3.89 a gallon in Chicago.”).

⁴³ *Id.*

⁴⁴ Douglas Birch et al., *Ruined City Turns Violent; Thousands of Guard Troops Try to Restore Order; In New Orleans, Looting in Streets, Rapes at Shelter and Bodies on Sidewalks; Katrina’s Wake*, BALTIMORE SUN, Sept. 2, 2005, at 1A.

⁴⁵ Lee Hancock & Michael Grabell, *‘Desperate SOS’ Amid Hunger, Thirst and Lawlessness, Frustrations Boil Over in New Orleans*, DALLAS MORNING NEWS, Sept. 2, 2005, at 1A.

⁴⁶ Evan Thomas, *The Lost City*, NEWSWEEK, Sept. 12, 2005, at 42.

This lawlessness contributed to the sub-human conditions experienced at the New Orleans Superdome and Convention Center. The following include some descriptions of the havoc within these structures in which refugees were forced to seek shelter during Katrina: “horrible prison;” “the darkest hole in the world;” “the place I want to forget;” and “hell.”⁴⁷ The Superdome had been designated by New Orleans as a shelter of last resort, never meant to hold storm refugees for long.⁴⁸ Nonetheless, it housed about 20,000 people between August 29 and September 4, 2005.⁴⁹ Even having designated the Superdome as a shelter of last resort, neither the State nor the city had plans to stock the facility with food and water.⁵⁰ Lost power meant no air conditioning and backed up toilets.⁵¹ The stench was so bad that medical workers wore masks, and thousands of retching people had to be moved outside the dome.⁵²

One advantage that refugees at the Superdome enjoyed, however, was that those entering that facility had been searched for weapons.⁵³ Such precautions were not taken at the Ernest N. Morial Convention Center.⁵⁴ Consequently, violence at the Convention Center exceeded even that at the Superdome.⁵⁵ The Convention Center was never intended to hold refugees, even as a last resort.⁵⁶ Yet, this structure held 15,000 people during those fateful days.⁵⁷ Also without power and swelteringly hot, the situation at the Center was described by Captain Winn, the head

⁴⁷ Paul Salopek & Deborah Horan, *How Places of Refuge Went to Hell*, CHIC. TRIB., Sept., 15, 2005, at 1.

⁴⁸ *Id.*

⁴⁹ Holbrook Mohr et al., *Blanco Says Evacuation Buses on the Way to N.O.*, NEW ORLEANS TIMES-PICAYUNE, Aug. 31, 2005, available at http://www.nola.com/newslogs/breakingtp/index.ssf?/mtlogs/nola_Times-Picayune/archives/2005_08_31.html#075326; Salopek, *supra* note 47; Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at 1.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*; Salopek, *supra* note 47.

⁵³ Lipton, *supra* note 49.

⁵⁴ *Id.*

⁵⁵ *Id.*; Salopek, *supra* note 47.

⁵⁶ *Id.*

⁵⁷ *Id.*

of the police SWAT team, as “completely lawless.”⁵⁸ Gunfire was routine.⁵⁹ There were several reports of women being dragged off by groups of men and gang-raped.⁶⁰ Captain Winn found a corpse with multiple stab wounds in the building.⁶¹ The beleaguered eighty to ninety New Orleans police officers, already at a severe disadvantage of numbers, could only rush into the darkness with flashlights after seeing muzzle flashes.⁶² Even when culprits were caught, no temporary holding cells had been set up to hold them.⁶³

As early as August 19 (or ten days before Katrina made land fall on the Gulf Coast) , the Secretary of Defense delegated authority to deploy Department of Defense (“DOD”) assets to the United States Northern Command (“NORTHCOM”) in anticipation of the hurricane’s arrival on the Florida Atlantic coast.⁶⁴ On August 24, NORTHCOM Operations Directorate began conducting teleconferences between entities such as FEMA, the First and Fifth Armies (the U.S. Army forces east and west of the Mississippi River, respectively), and the supporting commands of the Navy, Marine Corps, and Air Force.⁶⁵ On August 30, the day after Katrina made landfall, the Deputy Secretary of Defense informed NORTHCOM’s Commander that he had a “blank check” for DOD resources he believed were necessary for the response effort.⁶⁶

The evening of Monday, August 29, the day of Katrina’s landfall in Louisiana, Governor Blanco made her now infamous plea for President Bush to send “everything you have got.”⁶⁷ Over the next two days, Governor Blanco specified her request by asking for troops from the

⁵⁸ Lipton, *supra* note 49.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Salopek, *supra* note 47.

⁶² Lipton, *supra* note 49.

⁶³ *Id.*

⁶⁴ S. COMM. ON HOMELAND SEC., HURRICANE KATRINA: A NATION STILL UNPREPARED 26-13 (May 2006), available at http://hsgac.senate.gov/_files/Katrina/FullReport.pdf.

⁶⁵ *Id.* at 26-15.

⁶⁶ *Id.* at 26-12.

⁶⁷ *Id.* at 26-30.

President at least two more times, one time asking for 40,000 Federal troops.⁶⁸ President Bush promised 7,200 Federal troops on Saturday, five days after landfall.⁶⁹ Although Governor Blanco “wouldn’t have turned down federal troops,” she did not want a Federal takeover of the disaster relief effort.⁷⁰ She wished to retain primary reliance on State National Guard troops, while using Federal troops under Louisiana control for traditional disaster relief tasks that do not amount to law enforcement.⁷¹ Yet, given the state of chaos in the Gulf Coast, Pentagon and military officials were hesitant to send in Federal troops under Governor Blanco’s control, especially if those troops did not have law enforcement authority.⁷²

Both President Bush and White House Chief of Staff Card pressed Governor Blanco to request a Federal takeover of the relief effort so that Federal troops could be deployed to restore law and order.⁷³ Governor Blanco balked at the suggestion, concerned that it was tantamount to a Federal declaration of martial law.⁷⁴ The Bush administration then sent Governor Blanco a proposed legal memorandum asking her to request a Federal takeover, which she rejected.⁷⁵ She also rejected a more modest proposal for a hybrid command structure, under which a three-star general who had been sworn into the Louisiana National Guard would command all troops – both State and federalized National Guard and armed services troops.⁷⁶

⁶⁸ *Id.* at 26-46.

⁶⁹ *Id.*

⁷⁰ Glasser, *supra* note 29.

⁷¹ S. COMM. ON HOMELAND SEC., *supra* note 64, at 26-48. Some typical disaster relief tasks that do not amount to law enforcement include “search and rescue, clearing roads, delivering supplies, and providing medical assistance.” Steve Bowman et al., *Hurricane Katrina: DOD Disaster Response*, CONG. RESEARCH SERVICE, CRS REPORT RL33095, Sept. 19, 2005, at CRS-7 n. 21, available at <http://www.fas.org/sgp/crs/natsec/RL33095.pdf>.

⁷² Eric Lipton et al., *Why Troops Weren’t Sent Right Away*, PITTSBURGH POST-GAZETTE, Sept. 9, 2005, at A1.

⁷³ Glasser, *supra* note 29.

⁷⁴ Manuel Roig-Franzia and Spencer Hsu, *Many Evacuated, but Thousands Still Waiting*, WASH. POST, Sept. 4, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090301680.html>; Glasser, *supra* note 29.

⁷⁵ Roig-Franzia, *supra* note 74.

⁷⁶ See Lipton, *supra* note 17.

These appeasing measures at that stage of crisis were thought to be necessary because the Bush administration then believed that the PCA barred deployment of troops to restore order. The investigation into the legality of invoking the Insurrection Act, an exception to the PCA that would allow Federal troops to enforce civil law, led to “a flurry of meetings at the Justice Department, the White House and other agencies,”⁷⁷ and erupted into “a fierce debate.”⁷⁸ The White House instructed the Justice Department’s Office of Legal Counsel (“OLC”) to resolve the issue. The OLC finally “concluded the federal government had authority to move in even over the objection of local officials.”⁷⁹

The Posse Comitatus Act

As the discussion above demonstrates, the Posse Comitatus Act (“PCA”) has been a jurisprudential force to be reckoned with concerning introduction of Federal troops for the purposes of enforcing law. “[E]xcept in cases and under circumstances expressly authorized by the Constitution or Act of Congress,” the PCA prohibits using the Federal troops for this purpose.⁸⁰ Enacted in 1878, the PCA was a response to the imposition of Federal martial law upon the former Confederate States to maintain civil order.⁸¹ Congress was concerned that this use of the U.S. military caused that institution to become increasingly politicized and to stray from its traditional non-civilian function.⁸² However, Congress also clearly recognized that, by virtue of Constitutional authority or statutory authorization, exceptions to the general bar would be required in extraordinary circumstances to preserve law and order.

⁷⁷ *Id.*

⁷⁸ Glasser, *supra* note 29.

⁷⁹ See Lipton, *supra* note 17; see also Glasser, *supra* note 29.

⁸⁰ 18 U.S.C. § 1385 (2000).

⁸¹ Craig T. Trebilcock, *The Myth of Posse Comitatus*, J. HOMELAND SEC., Oct. 2000, at <http://www.homelandsecurity.org/newjournal/articles/trebilcock.htm>.

⁸² *Id.*

In the context of this discussion, it is important to understand the distinctions between the active armed forces and the National Guard. Members of the armed forces are in the active military service of the Army, Navy, Air Force, Marine Corps, or Coast Guard.⁸³ With the exception of the Coast Guard, members of the armed forces are constrained by the PCA.⁸⁴ As Commander-in-Chief of the Armed Forces, the U.S. Constitution grants the President control of the operation of the armed forces.⁸⁵

Members of the National Guard simultaneously are members of their respective State militias and the Army Federal reserve.⁸⁶ The National Guard traditionally operates under the control of the State and territorial Governors.⁸⁷ In this State capacity, members of the National Guard are not constrained by the PCA and may perform civilian law enforcement functions.⁸⁸ However, National Guard personnel may be called into Federal service (or “federalized”) by the President.⁸⁹ While under Federal status, National Guard members may perform typical disaster relief tasks (such as search and rescue, clearing roads, delivering supplies, and providing medical assistance), but, when federalized, members of the Guard are subject to the PCA, and they may not perform law enforcement functions unless pursuant to a PCA exception.⁹⁰

On April 17, 2002, President Bush authorized the establishment of the NORTHCOM to provide command and control of DOD defense efforts and coordinate defense support of civil

⁸³ 10 U.S.C. § 101(a)(4) (1998 & Supp. 2006).

⁸⁴ Linda J. Dermaine & Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 167, 174-78 (2006).

⁸⁵ U.S. Const. art. II, § 2.

⁸⁶ See Bowman, *supra* note 71, at CRS-6-7.

⁸⁷ *Id.* at CRS-7.

⁸⁸ *Id.* National Guard personnel may also have “Title 32” (32 U.S.C. 502(f) (2000)) status, meaning they are still under control of their governor, but receive federal pay and benefits. Bowman, *supra* note 71, at CRS-8. National Guard personnel under Title 32 status are not constrained by the PCA. *Id.*; see also U.S. Northern Command, The Posse Comitatus Act, http://www.northcom.mil/about_us/posse_comitatus.htm (last visited Oct. 26, 2006).

⁸⁹ Bowman, *supra* note 71, at CRS-9.

⁹⁰ *Id.* at CRS-7, n. 21 and CRS-9; see U.S. Northern Command, *supra* note 88.

authorities within the United States.⁹¹ NORTHCOM's assigned area of responsibility 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.⁹² NORTHCOM assumed its official responsibilities on October 1, 2002.⁹³ The creation of NORTHCOM was the first time since the Civil War that the U.S. Armed Forces had operational command for domestic purposes.⁹⁴

We discuss in detail below the statutory provisions that had, even prior to Katrina, been recognized as constituting the express Congressional exceptions contemplated by the PCA, thereby almost certainly authorizing the very action the Bush Administration equivocated over for days before OLC finally and belatedly weighed in blessing the introduction of Federal troops and assets within Louisiana.⁹⁵ The confusion over the scope of the PCA after Katrina's onset is even more astounding, because in December 2004, thirty-two Federal officials, under the leadership of the Department of Homeland Security ("DHS"), promulgated the National Response Plan ("NRP") designed to provide federally directed coordination of responses to natural and manmade disasters amounting to "Incidents of National Significance."⁹⁶ The NRP expressly provides that facing "imminently serious conditions," the military may be called upon to take any and all action necessary "to save lives, prevent human suffering, or mitigate property damage." Neither the White House, DHS, nor the remaining thirty-one agencies who signed on to the NRP realized in late August and early September 2005 that, as of December 2004, the

⁹¹ U.S. Northern Command, U.S. Northern Command, http://www.northcom.mil/about_us/about_us.htm, http://www.northcom.mil/about_us/history.htm (last visited Oct. 31, 2006).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Laura K. Donohue, *Home Front Becomes Military Target*, L.A. TIMES, May 18, 2006.

⁹⁵ See *infra* notes 108-129 and accompanying text.

⁹⁶ See U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE PLAN v-viii, 4 (Dec. 2004), available at http://www.dhs.gov/xlibrary/assets/NRP_FullText.pdf.

Federal government was expressly on record as authorizing the kind of Federal leadership that was so disastrously delayed after Katrina's landfall.

Even more confounding is that, even after OLC recognized that PCA did not pose a bar to Federal action even in the face of State opposition, the leadership of the Justice Department and DOD nevertheless urged President Bush not to take command of the relief effort due to fears that Governor Blanco would refuse surrendering control, thereby causing a political backlash.⁹⁷

One senior administration official, speaking anonymously, questioned,

[c]an you imagine how it would have been perceived if a president of the United States of one party had pre-emptively taken from the female governor of another party the command and control of her forces, unless the security situation made it completely clear that she was unable to effectively execute her command authority and that lawlessness was the inevitable result?⁹⁸

One only has to ask what the "political" response would have been throughout the Nation if the President had immediately deployed the military and all Federal resources to rescue, for example, those trapped in the Superdome and the Convention Center or those many elderly patients trapped by the flooding in hospitals and elder care facilities. It does not take us too far afield to speculate that had the President so acted, even in the face of Governor Blanco's opposition, the public response to the Federal handling of Katrina would have been enthusiastically supportive.

Ultimately (but belatedly), on " September 7, DOD assets in the affected area included 42,990 National Guard personnel, 17,417 active duty personnel, 20 U.S. ships, 360 helicopters, and 93 fixed wing aircraft."⁹⁹ A week and a half after the hurricane made landfall, 50,000 National Guard troops and 22,000 active duty troops were on the ground in the Gulf Coast

⁹⁷ Lipton, *supra* note 17.

⁹⁸ *Id.*

⁹⁹ Bowman, *supra* note 71, at CRS-6.

region, constituting the largest deployment of troops within the United States since the Civil War.¹⁰⁰

On September 15, 2005 in his speech at Jackson Square in New Orleans, President Bush stated, “[i]t is now clear that a challenge on this scale requires greater Federal authority and a broader role for the armed forces”¹⁰¹ Shortly thereafter, on October 19, 2005, Governors Michael Huckabee (D-Ark.) and Janet Napolitano (D-Ariz.), then Chair and Vice Chair of the National Governors Association, respectively, directly contradicted President Bush’s sentiment, stating “[s]tate and local governments are in the best position to prepare for, respond to, and recover from disaster and emergency.”¹⁰²

Traditional Exceptions to the Posse Comitatus Act

Even before the Warner Amendment’s October 17, 2006 enactment unmistakably authorized the use of Federal troops in these circumstances, there was an abundance of authority, as the NRP expressly stated in December 2004, that, when confronted with overwhelmed State and local entities in a disaster of nationwide consequence, the Federal government may deploy Federal troops to lead the response to the incident even in the face of State and local opposition. In so stating, it bears repeating that, when, as is usually true, the State and local governments are capable of mounting a response and maintaining law and order, State and local institutions should, both as a matter of law and policy, retain the lead role.¹⁰³ In those instances, the Federal

¹⁰⁰ S. COMM. ON HOMELAND SEC., *supra* note 64, at 26-1.

¹⁰¹ Press Release, The White House, President Discusses Hurricane Relief in Address to the Nation (Sept. 15, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html>.

¹⁰² *Federalism and Disaster Response: Examining the Roles and Responsibilities of Local, State, and Federal Agencies: Hearing Before the H. Comm. on Homeland Security*, 109th Cong. 2 (2005) (statement of Janet Napolitano, Governor of Arizona), available at <http://www.homelandsecurity.az.gov/documents/101905~GovernorsTestimony.pdf>.

¹⁰³ For example, the Robert T. Stafford Disaster Relief and Emergency Assistance Act is the most prominent statutory program authorizing Federal supplemental aid to States and localities during disasters and emergencies. 42 U.S.C. §§ 3231-35, 5121-22, 5131-34, 5141, 5143-44, 5147-65, 5170-74, 5176-77, 5179-89, 5191-93, 5195-97, 5201, 5205 (2003 & Supp. 2006).

government, where properly requested, should supplement, not take over, the State and local command structure. Given the size of Katrina, however, the only level of government with the assets to handle the incident was the Federal government, acting through, *inter alia*, military deployments. Katrina and disasters of that magnitude present “security situation[s that] ma[k]e it completely clear that [States are] unable to effectively execute . . . command authority and that lawlessness [is] the inevitable result.”¹⁰⁴

To be sure, prior the Warner Amendment, the PCA had been viewed in many quarters as being “riddled with uncertainty and complexity.”¹⁰⁵ Much of this uncertainty arose because lay observers, especially military commanders and first responders at all levels of government, focused almost exclusively on the prohibition within the PCA, while simply overlooking the fact that there may be statutory or Constitutional exceptions that the statute would recognize.¹⁰⁶ Confusion has also often arisen as to which exceptions apply, when they apply, and what their scope is.¹⁰⁷ This paper discusses two critically important PCA exceptions – the Insurrection Act and the Homeland Security Act of 2002, which pre-date the passage of the Warner Amendment and are the basis of the scholarship underpinning the NRP’s recognition that Federal troops may be deployed in response to a natural catastrophe in the face of overwhelmed State capacity.

The Insurrection Act

Even prior to the Warner Amendment’s clarification, the Insurrection Act permitted the use of Federal troops to enforce civilian laws in response to insurrections and similar types of

¹⁰⁴ See Lipton, *supra* note 17 (quoting anonymous senior administration official)..

¹⁰⁵ Dermaine, *supra* note 84, at 170.

¹⁰⁶ In addition to Constitutional exceptions to the PCA, one commentator has identified at least twenty-six statutory exceptions to the PCA. See Charles Doyle, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, CONG. RESEARCH SERVICE, CRS REPORT 95-964 S, June 1, 2000, at CRS-21 n.48, available at <http://www.fas.org/sgp/crs/natsec/95-964.pdf>.

¹⁰⁷ Dermaine, *supra* note 84, at 170-71.

civil disturbance.¹⁰⁸ For example, in 1992, President H.W. Bush used Federal troops to quell the Los Angeles riots upon the request of California's Governor pursuant to the Insurrection Act's first provision that states:¹⁰⁹

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.¹¹⁰

While this provision requires the request of a Governor or State legislature, the next two provisions of that statute do not. For example, section 332 states:

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 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.¹¹¹

Thus, section 332 permits the President to decide unilaterally to deploy Federal troops, even in the absence of State request, to restore the ability to enforce Federal law. Under an early version of this provision, President Washington, in 1794, used the military to suppress the Whiskey Rebellion in Pennsylvania to enforce a Federal excise tax on liquor even without the active support of that State's Governor.¹¹²

Moreover, Section 333 of the Insurrection Act provides:

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

¹⁰⁸ *Id.*, at 193-94.

¹⁰⁹ See, e.g., Nicholas Lemann, *Comment: Insurrection*, THE NEW YORKER, Sept. 9, 2005, available at http://www.newyorker.com/talk/content/articles/050926ta_talk_lemann.

¹¹⁰ 10 U.S.C. § 331 (1998).

¹¹¹ 10 U.S.C. § 332 (1998 & Supp. 2006).

¹¹² See, e.g., The Papers of George Washington Documents, *The Whiskey Insurrection*, available at <http://gwpapers.virginia.edu/documents/whiskey/index.html> (last visited Oct. 27, 2006). Then Pennsylvania Governor Thomas Mifflin "was reluctant to use military forces," but "pledged to cooperate with any action the President decided to take." Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 110 (2005).

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.¹¹³

This provision therefore permits the President to use Federal troops, even in the absence of State request, to ensure citizens are provided with the protections of Federal Constitutional or statutory law when the “constituted authorities of that State are unable” to enforce State and/or Federal law. Under this provision, Presidents Eisenhower and Kennedy, in 1957 and 1963 respectively, determined unilaterally to send troops into the Southern States to enforce Constitutionally protected civil rights through desegregation.¹¹⁴

Thus, even before the recent passage of the Warner Amendment, sections 332 and/or 333 of the Insurrection Act were deemed to be important exceptions to the PCA, permitting the President to use Federal troops to restore law and order when State governments were neither able nor desirous of doing so.

The Homeland Security Act of 2002.

The Homeland Security Act of 2002 (“HAS”)¹¹⁵ was signed into law on November 25, 2002.¹¹⁶ This sweeping legislation created the Department of Homeland Security (“DHS”) whose duties were to “analyze threats, [] guard our borders and airports, protect our critical infrastructure, and coordinate the response of our nation for future emergencies.”¹¹⁷ Under Title

¹¹³ 10 U.S.C. § 333 (1998).

¹¹⁴ See, e.g., Lemann, *supra* note 109.

¹¹⁵ 5 U.S.C. §§ App.3 8J, 1401-02, 3319, 3321, 3323-25 (1996); 6 U.S.C. §§ 101-03, 111-13, 121-22, 131-34, 141-45, 161-65, 181-93, 201-03, 211-18, 231-38, 251-56, 271-79, 291-98, 311-21, 331, 341-46, 361, 381, 391-95, 411-13, 421-28, 441-44, 451-68, 481-84, 491-96, 511-12, 521-22, 531-33, 541-43, 551-57 (2002); 18 U.S.C. § 3051 (2000); 44 U.S.C. § 3537-38 (1991 & Supp. 2006); 49 U.S.C. § 44921 (1997).

¹¹⁶ Press Release, The White House, President Bush Signs Homeland Security Act (Nov. 25, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/11/20021125-6.html>.

¹¹⁷ *Id.*

V of the HSA, entitled “Emergency Preparedness and Response,” the Act broadly defines the roles of the Secretary of Homeland Security, acting through the Under Secretary of Homeland Security for Emergency Preparedness and Response, as including “helping to ensure the effectiveness of emergency response providers to terrorist attacks, major disasters, and other emergencies;” “managing . . . the Federal government’s response to terrorist attacks and major disasters;” “aiding the recovery from terrorist attacks and major disasters;” “building a comprehensive national incident management system with Federal, State, and local government personnel, agencies, and authorities, to respond to such attacks and disasters;” and “consolidating existing Federal government emergency response plans into a single, coordinated national response plan.”¹¹⁸

In response to the HSA, the President issued Homeland Security Presidential Directive 5 (“HSPD-5”),¹¹⁹ assigning the DHS Secretary the responsibility of developing a National Incident Management System (“NIMS”) to provide a “nationwide approach for Federal, State, and local governments to work effectively and efficiently together to prepare for, respond to and recover from domestic incidents, regardless of cause, size, or complexity.”¹²⁰ HSPD-5 also implemented HSA’s mandate that “a coordinated national response plan,” i.e., the NRP, be developed to “integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all-hazards plan.”¹²¹

Under the authority of the HSA and HSPD-5, the NRP¹²² commits every signatory to it, including (but not limited to) each member of the Federal executive Cabinet, to “[s]upport[] NRP

¹¹⁸ 6 U.S.C. § 312(1), (3)(A), (4)-(6) (2006).

¹¹⁹ Press Release, The White House, Homeland Security Presidential Directive/HSPD-5 (Feb. 28, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/02/20030228-9.html>.

¹²⁰ *Id.* at (15).

¹²¹ *Id.* at (16).

¹²² See U.S. DEP’T OF HOMELAND SEC., *supra* note 96.

concepts, processes, and structures and carrying out their assigned functional responsibilities to ensure effective and efficient incident management”¹²³

The NRP is activated when the DHS Secretary declares an incident to be an “Incident of National Significance.”¹²⁴ It further defines *catastrophic events* as the most severe Incidents of National Significance:

A catastrophic event is [an] . . . incident . . . that results in extraordinary levels of mass casualties, damage or disruption severely affecting the population, infrastructure, environment, economy, national morale, and/or government functions . . . result[ing] in sustained national impacts over a prolonged period of time; almost immediately *exceed[ing] resources normally available to State, local, tribal and private-sector authorities in the impacted area*; and *significantly interrupts governmental operations and emergency services to such an extent that national security could be threatened*¹²⁵

In an event that “exceeds resources normally available to State [and] local . . . authorities,” “[t]he primary mission is to save lives; protect critical infrastructure, property, and the environment; contain the event; and preserve national security.”¹²⁶ In addition, “[s]tandard procedures regarding requests for assistance may be expedited or, under extreme circumstances, suspended in the immediate aftermath of an event of catastrophic magnitude,”¹²⁷ and any “coordination process[es] must not delay or impede the rapid deployment and use of critical resources.”¹²⁸ Recognizing that the NRP, as derived from the HSA and HSPD-5, mandates “immediate action to save lives, prevent human suffering, or mitigate property damage,” the plan provides that, when facing

[i]mminently serious conditions resulting from any civil emergency . . . and time does not permit approval from higher headquarters, *local military commanders and responsible officials from DOD components and agencies are authorized by*

¹²³ *Id.* at i.

¹²⁴ *Id.* at 4.

¹²⁵ *Id.* at 43 (emphasis added).

¹²⁶ *Id.*

¹²⁷ *Id.* at 44.

¹²⁸ *Id.*

*DOD directive and pre-approval by the Secretary of Defense, subject to any supplemental direction that may be provided by their DOD component, to take necessary action to respond to requests of civil authorities consistent with the Posse Comitatus Act (18 U.S.C. § 1385). All such necessary action is referred to as “Immediate Response.”*¹²⁹

In sum, the NRP contemplated that there would not always be adequate time to deploy the active military and that “DOD components and agencies are authorized [in advance] to take necessary action” or “[i]mmediate [r]esponse” to quell the emergency. Therefore, “subject to any [DOD] supplemental direction that may be provided,” Federal troop deployment orders are “pre-approv[ed]” under the NRP. To be sure, that response must be at the “request of civil authorities,” but, because the NRP coordinates all levels of government and imposes response obligations on dozens of civil Federal agencies, it is clear that the “request” could be from the Federal, and not necessarily State or local, civil authorities.

In light of the HSA (and HSPD-5, and the NRP which derive from it), the deep and widespread lawlessness that occurred in New Orleans during Katrina would have justified the President in using the military to aid law enforcement to save lives and contain the event.

The Recent Clarifying Warner Amendment

Of course, the recent passage of the Warner Amendment removes all doubt about the President’s statutory authority to decide unilaterally to use Federal troops to respond to a massive disaster such as that experienced as a result of Hurricane Katrina. Following Katrina there were a series of Congressional and White House reports, each of which made it clear that the President must use Federal troops to prevent and respond to natural disasters of this kind. During the Warner Amendment’s consideration, the Senate Committee on Armed Services pointed to “the lack of explicit [statutory] references to such situations as natural disasters or terrorist attacks

¹²⁹ *Id.* at 42-43 (emphasis added).

[that] may have contributed to a reluctance to use the armed forces in situations such as Hurricane Katrina.”¹³⁰ The House Committee on Armed Services similarly noted “that there are a number of areas where [DOD] could have improved the execution of military support during Hurricane Katrina.”¹³¹ These Congressional sentiments echoed White House concerns expressed in its Lessons Learned, which recommended that, in the future, DHS and DOD “should jointly plan for [DOD’s] support of Federal response activities as well as those extraordinary circumstances when it is appropriate for the [DOD] to lead the Federal response.”¹³²

In response to these broad based concerns, Congress amended the Insurrection Act to make it clear that the President, when he determines during, *inter alia*, a “natural disaster, epidemic, or other serious public health emergency . . . [that] the constituted authorities of the State . . . are incapable of maintaining public order,” he may “employ the armed forces, including the National Guard in Federal service.”¹³³

¹³⁰ S. REP. NO. 109-254 (2006) (Title X, subtitle E, § 1042).

¹³¹ H.R. REP. NO. 109-452, AT 370 (2006).

¹³² See TOWNSEND, *supra* note 3, at 54-55.

¹³³ John Warner National Defense Authorization Act for Fiscal Year 2007, Ch. 15, sec. 1042, § 333(1)(A), Pub. L. No. 109-364 (2006). The amendment states in full:

(1) The President may employ the armed forces, including the National Guard in Federal service, to--

(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--

(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

(ii) such violence results in a condition described in paragraph (2); or

(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).

(2) A condition described in this paragraph is a condition that--

(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

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

The Constitutional Underpinnings of the Warner Amendment

Federal vs. State Power

All fifty Governors opposed the Warner Amendment.¹³⁴ In August 2006, the National Governors Association, led by its Chair, Governor Janet Napolitano (D-Ariz.), sent a series of letters to lawmakers and to then Defense Secretary Rumsfeld, asking for removal of the “federalization” amendment from the Defense Authorization Act within which it was included.¹³⁵ Governor Napolitano argued that Congress’ “proposals represent[] a dramatic expansion of Federal authority during natural disasters that could cause confusion in the command-and-control of the National Guard and interfere with States’ ability to respond to natural disasters within their borders.”¹³⁶ Governor Mike Huckabee (R-Ark.) complained that the “provision was drafted without consultation or input from governors and represents an unprecedented shift in authority from governors as Commanders and Chief of the Guard to the Federal government.”¹³⁷

However, this criticism overlooks the principal controlling caveat within the amendment. It is not triggered until the President makes a finding, as clearly could have been made in Katrina, that the States are “unable” to respond to the disaster. As has been historically true, even serious natural disasters will normally stay within the control of the States when they

¹³⁴ See Letter from Mike Huckabee, Arkansas Governor, et al., to Bill Frist [sic], U.S. Senate Majority Leader, et al. (Aug. 6, 2006), *available at* <http://www.nga.org/portal/site/nga/menuitem.cb6e7818b34088d18a278110501010a0/?vgnextoid=1ffb60a812ffc010VgnVCM1000001a01010aRCRD>; see also Jennifer Steinhauer, *51 Governors Resist Authority Over Guard*, N.Y. TIMES, Aug. 15, 2006, at A14.

¹³⁵ See NGA, *supra* note 20; NGA, NGA Home, <http://www.nga.org/portal/site/nga/menuitem.b14a675ba7f89cf9e8ebb856a11010a0> (last visited Oct. 31, 2006); Napolitano, *supra* note 20.

¹³⁶ See Letter from Janet Napolitano, Arizona Governor, et al., to Bill Frist, U.S. Senate Majority Leader, et al. (Aug. 31, 2006), *available at* <http://www.nga.org/portal/site/nga/menuitem.cb6e7818b34088d18a278110501010a0/?vgnextoid=0a05e362c5f5d010VgnVCM1000001a01010aRCRD>.

¹³⁷ See Huckabee Letter, *supra* note 134; see also Napolitano, *supra* note 20.

maintain the ability to sustain or restore order. This is reflected in the default rule within the NRP, i.e., that disasters should be dealt with at the lowest level of government possible. Stated most pointedly, this measure does not interfere with State sovereignty because it is only triggered with there is no sovereignty within the State.

Moreover, in the “real” world, or, perhaps put more accurately in light of Katrina, in a less dysfunctional environment, adroit handling of these crises by Federal officials may eliminate any conflict between the State and the Federal governments even in situations where the State has difficulty handling the disaster. The NRP contemplates a coordinated, constant, and real time response among all levels of government.¹³⁸ If Federal leadership is operating in a unified collective fashion (which did not happen in response to Katrina), it should be in real time and constant communications with State and local leadership concerning the management of the disaster (which also did not happen). As problems arise, the Federal government may skillfully be able to offer Federal assistance under the guise of supplementing the State response without having to embark on the formality of officially declaring a Federal takeover with Federal troops.

One can well imagine that at least a part of the Governors’ objection to the Warner Amendment is the horrifying and humiliating prospect of being formally and publicly told by the Federal government to step aside in the midst of a disaster. Despite the mandates of the NRP, the responsible Federal officials not only did not regularly meet collectively during Katrina; they never met. Moreover, they only communicated with Louisiana and New Orleans in a sporadic and haphazard manner.¹³⁹ This haphazard management style (which defies the basic principles underlying emergency response to catastrophes) allowed the New Orleans situation to spin out of control quickly, thereby necessitating the President’s sudden and dramatic insistence that

¹³⁸ See *generally False Conflict*, *supra* note 1, at 2-3.

¹³⁹ See Lipton, *supra* note 17.

Governor Blanco surrender her control. If the spirit of the NRP is followed and if the crisis is managed on a real time basis with continuous communication, only in a worst-case scenario would the Federal government find it necessary to direct and supervise the relief effort officially.

In any event, the Constitution not only authorizes Congress to maintain order during a catastrophe of national significance when the States are incapable of doing so, it requires it. Four Constitutional provisions provide Congress with this authority and responsibility: the Insurrection, Guarantee, Commerce, and the Necessary and Proper Clauses.

The Insurrection and Guarantee Clauses.

The Founding Fathers had an abiding interest in ensuring the safety and the democratic stability of the State governments. At the time of the founding, not only were many States surrounded by hostile external forces, but many residents within the States were resistant to abiding by State and Federal law, especially concerning the collection of taxes.¹⁴⁰ One of the key events stoking this concern on the part of the Constitutional drafters was the January 1787 Shays' Rebellion, during which Daniel Shays, a former officer in the Continental Army, led a farmers' insurrection against high taxes levied by Massachusetts to pay its Revolutionary War debts.¹⁴¹ Shays' insurgents seized a Federal arsenal in Springfield, which led to a violent and deadly skirmish with a private militia force financed by wealthy Boston creditors. Massachusetts ultimately quelled the insurrection. However, events such as these pointed out the fragility of State institutions, including the uncertainty of upholding laws within those jurisdictions.¹⁴²

As a result of this concern, two provisions of relevance here were included within the Constitution to ensure that the Federal government, *inter alia*, had an obligation to maintain the

¹⁴⁰ See, e.g., Mazzone, *supra* note 112, at 40-55; see also generally, Brian C. Brook, Note, *Federalizing the First Responders to Acts of Terrorism via the Militia Clauses*, 54 DUKE L. J. 999 (2005); Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

¹⁴¹ Mazzone, *supra* note 112 at 47-48.

¹⁴² *Id.* at 37-38, 47-48.

governmental integrity of, and enforce Federal law within, the States. The Insurrection Clause affords Congress the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”¹⁴³ The Guarantee Clause provides that the “United States shall guarantee to every State in this Union a Republican Form of Government . . .”¹⁴⁴ Again, these provision did not merely grant authority for the Federal government to act; they imposed an affirmative obligation on it. Moreover, the plain language and historical reliance on these Clauses makes clear that, where, because of public disorder, the guarantees of Federal law are in jeopardy or the democratic structure of State government is in peril, the Federal government must fulfill its Constitutional duty even if uninvited by the State to do so.

These two provisions form the Constitutional basis for the Insurrection Act, the first version of which was passed in 1792. As noted above, that Act, in its various incarnations, authorized the deployment of Federal troops or State militia under Federal control to quell: the Whiskey Rebellion; disorders in the South enforcing Federal desegregation orders; and, most recently, the Rodney King riots in Los Angeles.¹⁴⁵ In each of these situations, the affected State either recognized that it was incapable of maintaining order, or the President unilaterally determined that was the case and Federal troops were used to maintain the peace.

¹⁴³ U.S. Const. art. I, § 8, cl. 15. Prior to the Constitutional Convention, the term “militia” was often defined to mean undisciplined and poorly regulated forces. Wiener, *supra* note 140, at 183. By the Twentieth Century, however, the term, for all intents and purposes, became well understood as referring to federalized National Guard. *Id.* 201-206.

¹⁴⁴ *Id.* at art. IV, § 4. That clause goes on to provide that the United States “shall protect each [State] from invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” The latter clause has been viewed as the Protection Clause and it has been deemed to be separate from the assurance of a Republican Form of Government (*see, e.g.,* Mazzone, *supra* note 112, at 35-36, 61), i.e., that problems may arise with the stability of the state democratic processes caused neither by an invasion or domestic violence. Under that circumstance, the United States has the obligation to intervene to stabilize democratic processes.

¹⁴⁵ *See supra* notes 108-114 and accompanying text.

As discussed above, the complete breakdown of orderly State and local governmental services within New Orleans during Katrina, and the chaos that ensued, clearly invited use of the Insurrection Act under the auspices of the Insurrection and Guarantee Clauses insofar as neither the State nor local governments were able to protect even the most basic civil rights of New Orleans residents.¹⁴⁶ Even prior to the passage of the Warner Amendment, and even in cases where the States have not invited Federal intervention, there has never been a serious argument advanced that it is unconstitutional to use Federal troops when the States and localities are wholly incapable of enforcing law and maintaining order.

The Commerce and Necessary and Proper Clauses

Finally, as noted above,¹⁴⁷ Katrina also imposed a substantial adverse impact on interstate commerce. Thousands crossed State lines in search of refuge through choked lines of egress.¹⁴⁸ Goods and services necessary for survival and safety were brought into the region inconsistently and in a disorganized manner, or not at all.¹⁴⁹ On a nationwide basis, industrial services and manufacturing were cut back or terminated. The price of commodities soared throughout the Nation, most noticeably the price of gasoline.

To the extent the Warner Amendment affords the President the right to unilaterally insert Federal troops to restore order within an area devastated by a catastrophic event, that action should also be justified as appropriate under the Commerce Clause,¹⁵⁰ as it almost certainly mitigates the substantial adverse impact on interstate commerce.

While some respected public health law academics have argued that recent Commerce Clause jurisprudence substantially limits Congressional intrusion on the States' Constitutional

¹⁴⁶ See *supra* notes 29-63 and accompanying text.

¹⁴⁷ See *supra* notes 39-42 and accompanying text.

¹⁴⁸ See, e.g., Dao, *supra* note 39.

¹⁴⁹ See, e.g., Steinhauer, *supra* note 3.

¹⁵⁰ U.S. Const. art. I, § 8, cl. 3.

Police Powers affecting the health of its citizens,¹⁵¹ even the arguably stricter Commerce Clause tests would support the use of the Warner Amendment to deal with incidents such as Katrina. In that vein, there can be no doubt that statute could properly be used to “regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.”¹⁵²

Moreover, in *Pierce County v. Guillen*,¹⁵³ the Court upheld a Federal statute barring disclosure in State courts of federally required road safety studies by emphasizing that these studies protect “the channels of interstate commerce . . .”¹⁵⁴ It is certainly the case that introduction of Federal troops in a Katrina-like catastrophe has as its principle mission to open up “the channels of interstate commerce,” thereby bringing the Warner Amendment well within *Guillen*-like Commerce Clause doctrine.

Doubts about the scope of the Commerce Clause in this regard should also be reduced by the recent case of *Gonzales v. Raich*.¹⁵⁵ In *Raich*, the Supreme Court, on a 6-3 vote, ruled that Congress, through the Controlled Substances Act (“CSA”),¹⁵⁶ could regulate entirely intrastate commerce in the growth, distribution, and sale of marijuana for medicinal purposes, and preempt State legislation supporting such commerce. It reasoned that the Commerce Clause was properly invoked, because the production in question contravened the CSA’s objective of “controll[ing] substance[s] hav[ing] a substantial and detrimental effect on the health and general welfare of

¹⁵¹ See, e.g., Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 HEALTH MATRIX 265, 289- 91 (2001) (relying, *inter alia*, on *Lopez*, 514 U.S. at 549-50); see also *Morrison*, 529 U.S. at 602. But see Wendy E. Parmet, *After September 11: Rethinking Public Health Law Federalism*, 30 J.L. MED. & ETHICS 201, 201-02 (2002); Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. TIMES, Sept. 30, 2001, at 14.

¹⁵² *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *United States v. Morrison*, 529 U.S. 598, 609 (2000); see also, CHEMERINKSY, *supra* note 8, at 272 (concluding that, even post-*Lopez* and *Morrison*, “Congress, under the Commerce Clause may regulate . . . activities which have a substantial affect on interstate commerce.”).

¹⁵³ 537 U.S. 129 (2003)

¹⁵⁴ *Id.* at 146-47.

¹⁵⁵ 545 U.S. 1 (2005).

¹⁵⁶ Controlled Substances Act, 84 Stat. 1242 (codified as amended in scattered sections of 21 U.S.C.).

the American people,”¹⁵⁷ thus affecting interstate commerce by endangering the Nation’s public health.¹⁵⁸ In so ruling, it rejected the argument that “Congress has encroached on States’ traditional Police Powers to define the criminal law and to protect the health, safety, and welfare of their citizens”¹⁵⁹

To be sure, Justice Stevens in *Raich*, writing for himself and four others, emphasized that “the activities regulated by the CSA are quintessentially economic.”¹⁶⁰ It might be argued that, if the Federal government is relying only on the Commerce Clause (as opposed, for example, on the Insurrection and Guarantee Clauses), the introduction of Federal troops to restore public order may go beyond a strictly economic purpose.¹⁶¹

However, Justice Stevens rested his opinion not only on the Commerce Clause, but also cited the Necessary and Proper Clause to justify the Court’s ruling.¹⁶² That reference proved to be important, because Justice Scalia concurred separately in *Raich* to make clear he wished to avoid an isolated “substantial effects” test and instead stressed the importance of the Necessary and Proper Clause in reaching his result. In so doing, he said: “Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.”¹⁶³ He therefore concluded that even noneconomic activity may be prohibited “as a necessary part of a larger regulation,”¹⁶⁴ and “thus agree[d] with the Court that, however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective

¹⁵⁷ 21 U.S.C. 821 (2) (emphasis added).

¹⁵⁸ *Raich*, 545 U.S. at 29-32.

¹⁵⁹ *Id.* at 64 (Thomas, J., dissenting).

¹⁶⁰ *Id.* at 25.

¹⁶¹ See, e.g., CHEMERINSKY, *supra* note 8, at 272.

¹⁶² *Id.* at 5, 58 (Thomas, J., dissenting).

¹⁶³ *Id.* at 34.

¹⁶⁴ *Id.* at 40.

of prohibiting marijuana from the interstate market ‘could be undercut’ if those activities were excepted from its general scheme of regulation.”¹⁶⁵

As discussed above, both in the immediate and extended aftermath of Hurricane Katrina, interstate commerce was dramatically imperiled.¹⁶⁶ Considering *Raich*’s confirmation of Federal authority over State regulation of even purely local activities if they have a substantial effect on interstate commerce, any major domestic catastrophic incident such as Katrina is likely to be considered a proper use by Congress if its commerce powers are supplemented by the Necessary and Proper Clause. Indeed, it would be a high irony if a Governor elected by the citizens of a single State is unable to mount an effective governmental response while simultaneously tying the hands of the Federal government’s attempt to mitigate hugely damaging commercial impacts severely affecting the citizens of the other forty-nine States, none of whom have elected the resisting Governor.

In sum, the force of the Insurrection, Guarantee, Commerce, and Necessary and Proper Clauses form a sturdy Constitutional foundation to support Presidential action under the Warner Amendment even in the face of State resistance.

The Spending Clause

As we have noted above,¹⁶⁷ Congress, in passing the Warner Amendment, erased any doubt over the question whether the President has statutory authority to invoke Federal primacy

¹⁶⁵ *Id.* at 42. *Gonzales v. Oregon*, 126 S.Ct. 904 (2006), does not alter the above conclusion. In that case, the Supreme Court on a 6-3 vote held that the CSA did not preempt the Oregon Death With Dignity Act (ODWDA), which allowed physicians to prescribe a lethal dose of drugs covered by CSA upon the request of a terminally ill patient. In *Oregon*, however, the federal prohibition came, not from the CSA itself, but from Attorney General Ashcroft’s “interpretive rule,” which the Court found did not have the force of law and therefore had no preemptive effect. Interestingly, Chief Justice Roberts joined the *Oregon* dissent that would have found preemption (*id.* at 926), thereby indicating that Justice O’Connor’s dissent in *Raich* (disfavoring preemption) would have been replaced by a Roberts vote for preemption had he been on the Court when *Raich* was decided. Justice Thomas dissented in *Oregon*, claiming that *Raich* was inconsistent and therefore the Oregon assisted suicide statute should have had preemptive effect. *Id.* at 939-40. His bow to stare decisis here may bode well for the federal government were he to vote on the lawfulness of the Warner Amendment under the Commerce Clause.

¹⁶⁶ See *supra* notes 39-42 and accompanying text.

¹⁶⁷ See *supra* notes 130-133 and accompanying text.

through the use of Federal troops to restore disorder caused by a natural disaster. As we have shown immediately above,¹⁶⁸ the Constitution almost certainly justifies that legislation in cases of catastrophes overwhelming State and local governments. As was true of the statutory situation, however, Congress could add clarity to the Constitutional questions by using the Spending Clause to condition the substantial Federal aid afforded States during catastrophes on the State turnover of response authority to the Federal government upon a Presidential finding of State incapability.

In this regard, it is a high irony that the Nation's Governors were so quick to oppose the passage of the Warner Amendment, because these same Governors repeatedly call upon the President to provide vast amounts of Federal aid and resources when confronted with serious natural disasters. Indeed, Hurricane Katrina presented the President with the thirtieth occasion in 2005 where he was requested by the States under the Stafford Act to provide Federal financial assistance and resources in response to major natural disasters.¹⁶⁹

The Stafford Act authorizes the President to declare an emergency or major disaster at the request of a State Governor and release Federal funds and assistance to the State for use in the disaster response.¹⁷⁰ The Stafford Act defines an "emergency" as "any occasion or instance for which . . . Federal assistance is needed to supplement State and local efforts and capabilities . . . or to lessen or avert the threat of a catastrophe. . . ."¹⁷¹ A "major disaster" is defined as "any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal

¹⁶⁸ See *supra* notes 140-166 and accompanying text.

¹⁶⁹ Forty-eight major disasters were declared under the Stafford Act in 2005, six of which were related to Hurricanes Katrina and Rita. Emergency and major disaster declarations combined totaled 115 for 2005. See FEMA, 2005 Federal Disaster Declarations, <http://www.fema.gov/news/disasters.fema?year=2005> (last visited November 30, 2006).

¹⁷⁰ 42 U.S.C. § 5121 (2006). See specifically *id.* at §§ 5170a & 5170b.

¹⁷¹ *Id.* § 5122 (1).

wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion.”¹⁷²

Two types of assistance may be utilized if the President declares a major disaster: general Federal assistance, which includes the use of Federal equipment, supplies, personnel, as well as technical and advisory assistance; and essential assistance, which includes all assistance needed to meet “immediate threats to life and property” resulting from the disaster, including use of DOD resources.¹⁷³ The Governor of the State in which the disaster occurred may also request the use of DOD resources, and the President may grant the request if use of DOD resources for emergency work is essential to preserving life and property.¹⁷⁴ The “emergency work” DOD may perform is limited to “clearance and removal of debris and wreckage and temporary restoration of essential public facilities and services.”¹⁷⁵ While the Federal government may offer technical advice to States and localities regarding disaster management, the statute does not now grant the Federal government primary control of the response coordination.¹⁷⁶

The provisions of the Stafford Act, as they now exist, predicate Federal assistance upon a State’s request for aid and the State’s inherent recognition that the required response exceeds its own resources. If, however, a State is overwhelmed, even after Federal assistance is given, but unwilling to relinquish control of the response effort, leading to a breakdown of government services, the Federal government faces a scenario (as it did in Katrina) where it is arguably precluded from controlling the response even when presented with the possibility of unmitigated human suffering. Amending the Stafford Act and conditioning a State’s acceptance of Stafford Act funds upon Federal takeover of the response where the President finds the State unable to

¹⁷² *Id.* § 5122 (2).

¹⁷³ *Id.* § 5170a (1)-(4), 5107b.

¹⁷⁴ *Id.* § 5170b (c)(1).

¹⁷⁵ *Id.* § 5170b (c)(6)(B).

¹⁷⁶ *Id.* § 5170b (a)(3)(H).

respond to the disaster emphatically resolves this potential problem and makes the Constitutional defense of the Federal actions considerably easier.

*South Dakota v. Dole*¹⁷⁷ is the lead case here. In that case, a Federal statute authorized the Secretary of Transportation to withhold certain Federal highway funds from States unwilling to raise the minimum drinking age to twenty-one.¹⁷⁸ The Court sustained the statute as a valid exercise of the spending power by outlining a four-part test for determining a condition's Constitutionality. The condition had to: 1) be stated clearly; 2) serve the general welfare; 3) be reasonably related to the purpose for which the Federal funds have been allocated; and 4) not induce the States to violate an independent Constitutional bar.¹⁷⁹

The proposed amendment to the Stafford Act would certainly comply with the first three criteria. The provision could unambiguously condition the receipt of funds upon a Federal takeover of the response in situations where the President determined that the State was overwhelmed and unable to make effective use of the Federal resources; the condition would not only serve the general welfare, but would be created solely for that purpose; and the condition would clearly relate to the purpose for which the Federal funds were allocated: effective disaster response designed to save lives and property, and reduce human suffering.

The fourth condition is slightly more complicated in that the Tenth Amendment could present a limitation on Congressional interference with State affairs.¹⁸⁰ As mentioned earlier, all

¹⁷⁷ 483 U.S. 203 (1987). For a more detailed discussion of the Spending Power, see also JOHN E. NOWAK AND RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* 114-16 (Thomson West 2d ed. 2005) and NORMAN REDLICH ET AL., *UNDERSTANDING CONSTITUTIONAL LAW* 105-07 (LexisNexis Publishing 3d ed. 2005).

¹⁷⁸ *Id.* at 206.

¹⁷⁹ *Id.*

¹⁸⁰ The "independent bar condition" has not been difficult to overcome in past cases, and most recently, was not an obstacle to a statutory condition implicating the First Amendment. See *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003) (holding that prohibiting public libraries from receiving assistance for internet technology unless they install filtering software to block obscene images is a constitutional condition that does not induce libraries to violate the First Amendment).

fifty Governors opposed the Warner Amendment, as an unnecessary interference with the States' Police Powers.¹⁸¹

South Dakota v. Dole addressed any ostensible Tenth Amendment limitation by finding there that the State was free to disregard the condition by refusing Federal funds.¹⁸² However, the Court did recognize that a “financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”¹⁸³

A condition on Stafford Act assistance should not be viewed as coercive, despite the backdrop of a major disaster. First, States have the option of gaining disaster assistance in accordance with numerous inter-jurisdictional mutual aid agreements such as the Emergency Management Assistance Compact (“EMAC”), under which 20,000 civilian and 46,500 National Guard personnel were deployed to the Gulf Coast region to respond to Hurricanes Katrina and Rita.¹⁸⁴ Resources exist outside of Stafford Act assistance, and therefore a condition on Stafford Act funds would not constitute economic coercion because the Federal government does not monopolize emergency response resources. Second, and even more telling, the condition upon which assistance would be based would only be activated if the President finds a State is completely unable to respond to the disaster. In that situation, it is hardly coercion to allow the Federal government to predicate the dispersal of its own substantial funds and resources, including military personnel, on its takeover of the response, because the State is not being compelled to acquiesce involuntarily, rather, it is incapable of acting altogether. Unlike imposing an affirmative obligation upon the State, e.g., conditioning Federal funds on a State

¹⁸¹ See *supra* note 134-137 and accompanying text.

¹⁸² *Dole*, 483 U.S. at 210 (noting that, “a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants.”).

¹⁸³ *Id.* (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

¹⁸⁴ Press Release, National Emergency Management Association, NEMA Releases After-Action Report for Hurricanes Katrina and Rita (Oct. 5, 2006), *available at* <http://www.continuitycentral.com/news02832.htm>.

establishing radioactive waste disposal sites,¹⁸⁵ the Federal government is merely giving the State the option to accept Federal assistance contingent upon Federal control of the response during a catastrophe so large that traditional State and local disaster management mechanisms are rendered useless.

The Stafford Act is a critical part of Federal emergency management, and amending it in this way would clarify the Federal infrastructure for disaster response and mitigate damage and human suffering by allowing a Federal takeover of the response in a situation as dire as the one presented during the Gulf Coast hurricanes.

Conclusion

The recent passage of the Warner Amendment creates a bright line for determining the appropriate use of Federal troops during major domestic natural disasters. The amendment clarifies that, under extreme circumstances when local and State governments are overwhelmed by response efforts to a catastrophic natural disaster, the Federal government may use and stay in charge of Federal troops to restore public order. Although this power was widely recognized to pre-date the amendment, the confusion surrounding the law resulted in delays and inaction during Hurricane Katrina that may have cost many lives and imposed great suffering on those who survived.

Similarly, the collective force of the Insurrection, Guarantee, Commerce, and Necessary and Proper Clauses should provide an adequate Constitutional underpinning for the Warner Amendment as applied to a major catastrophe that disables State and local response mechanisms. Congress could remove all Constitutional doubt, however, by conditioning the receipt of major disaster Federal aid under the Stafford Act on the right of the Federal government to control the

¹⁸⁵ See *New York v. United States*, 505 U.S. 144 (1992) (holding that the grant of federal funds to states meeting the condition of creating certain waste facilities is a constitutional exercise of the spending power).

response, if and only if, the President determines that, even with Federal assistance, the disaster has overwhelmed the capabilities of the affected State and local governments.

At the close of this article, it is also worth stressing once again certain fundamental practicalities that would doubtless govern questions of legality in these instances. First, in most instances, not only are the States and localities fully capable of leading an effective response with supplemental assistance provided by the Federal government, but that is the way in which the Federal government would vastly prefer these responses be handled. Even leaving aside the fact that so many Federal resources are now deployed abroad in Iraq and Afghanistan, the Federal government, in the best of circumstances, does not have the assets and funding to take charge of every serious natural disaster occurring within the United States. Second, with adroit Federal supervision, the issue of “who is in charge” need never be formally addressed. If the Federal government acts in accordance with its own National Response Plan, a unified command structure involving all relevant officials at every level of government communicating on a constant and real time basis should encourage collaboration and cooperation and remove the need for declarations of primacy.¹⁸⁶ Third, even when the worst case scenario must be confronted, as was the case in Katrina, it defies all logic that the Federal courts would not squarely support actions that avoid the kind of wide scale human suffering, loss of property, and displacement that occurred, and is now occurring, in New Orleans. Katrina-like situations are the one occurrence where a President who acts decisively and unilaterally will win the widespread approval of the American people and the Federal courts.

¹⁸⁶ See *supra* note 120 and accompanying text.