

Yes, Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City from a Devastating Natural Catastrophe

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As the one year anniversary of the landfall of Hurricane Katrina on the Gulf Coast passed, the reports of the Federal government's ineffective and delayed response to that catastrophe continued to mount.² Central to the criticism of the Federal government was its indecisiveness about deploying 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.³ That indecisiveness was caused by the paralyzing effect of a single Reconstruction era Federal statute: the Posse Comitatus Act. That statute provides that "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress," the armed forces or federalized National Guard may not be used for domestic law enforcement.⁴ While the United States faced the emasculation of, *inter alia*, one of the South's largest and most prominent cities,⁵ Federal lawyers pondered for days whether there were constitutional or

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² 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.").

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

⁴ 18 U.S.C. § 1385 (2000).

⁵ Infoplease.com, Top 50 Cities in the U.S. by Population and Rank, <http://www.infoplease.com/ipa/A0763098.html> (last visited Oct. 31, 2006) (estimating populations on July 1, 2005, pre-Hurricane Katrina).

statutory exceptions to the Posse Comitatus Act that would allow the introduction of Federal troops.⁶

On October 17, 2006, all doubt about that question was resolved. That day the President signed into law the John Warner National Defense Authorization Act for Fiscal Year 2007 (“DAA 2007”).⁷ A key provision within this legislation 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.⁸ The provision was signed over the bi-partisan objection of all State governors, who claimed it trampled upon State sovereignty.⁹

Rather than diminishing the power of the States, however, the law merely codifies and clarifies Federal power that existed prior to the DAA 2007. In this regard, even before passage of the DAA 2007, the Federal government’s power to decide unilaterally to use the armed forces in devastating natural disasters was well established. Unfortunately, however, the use of that power has been consistently misunderstood.¹⁰ In particular, confusion existed as to when this power comes into affect. It is thus important to stress that this power is only properly triggered in circumstances when a catastrophic event has overwhelmed State and local governments. The Federal government, therefore, has repeatedly acknowledged that, “[m]ost [natural catastrophes

⁶ 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.

⁷ 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).

⁸ *Id.*; see also George Cahlink, *Governors ‘Disappointed’ With Expanding Federal Role of National Guard*, CQ TODAY, Oct. 6, 2006.

⁹ *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].

¹⁰ See notes 95-98 *infra*, and accompanying text.

should be] handled on a daily basis at the local level,”¹¹ because, in most instances, State and local governments are fully capable in taking the response lead.

The fact that natural disaster response should usually be under State or local control is a key premise of the Federal government’s National Response Plan, which outlines inter-governmental coordination and planning during Incidents of National Significance – major domestic incidents, the responses to which are often beyond the capabilities of States and localities alone.¹² However, as is shown in detail below, in those very rare instances when States and localities are unable to respond, Congress may properly exercise its constitutional powers to authorize that the Federal government take charge, including sanctioning deployment of Federal troops even without State or local consent.

The Posse Comitatus Act

“[E]xcept in cases and under circumstances expressly authorized by the Constitution or Act of Congress,” the Posse Comitatus Act (PCA) prohibits using the military to enforce domestic law.¹³ Enacted in 1878, the PCA was a response to the imposition of martial law upon the former Confederate States to maintain civil order.¹⁴ 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.¹⁵ 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.

¹¹ See, e.g., Press Release, FEMA, Joint State/Federal Transportation Exercise Tests Response Plans (May 5, 2005), available at <http://www.fema.gov/news/newsrelease.fema?id=17420> (quoting Federal Emergency Management Agency (FEMA) Regional Director John Pennington).

¹² See U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE PLAN (Dec. 2004), available at http://www.dhs.gov/interweb/assetlibrary/NRP_FullText.pdf.

¹³ 18 U.S.C. § 1385 (2000).

¹⁴ Craig T. Trebilcock, *The Myth of Posse Comitatus*, J. HOMELAND SEC., Oct. 2000, at <http://www.homelandsecurity.org/newjournal/articles/trebilcock.htm>.

¹⁵ *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.¹⁶ With the exception of the Coast Guard, members of the armed forces are constrained by the PCA.¹⁷ As Commander in Chief of the Armed Forces, the U.S. Constitution grants the President control of the operation of the armed forces.¹⁸

Members of the National Guard simultaneously are members of their respective State militias and the Army Federal reserve.¹⁹ The National Guard traditionally operates under the control of the State and territorial governors.²⁰ In this State capacity, members of the National Guard are not constrained by the PCA and may perform civilian law enforcement functions.²¹ However, National Guard personnel may be called into Federal service (or “federalized”) by the President.²² 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.²³

On April 17, 2002, President Bush authorized the establishment of the United States Northern Command (“NORTHCOM”) to provide command and control of Department of Defense (DOD) defense efforts and coordinate defense support of civil authorities within the

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

¹⁷ Linda J. Dermaine and 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).

¹⁸ U.S. Const. art. II, § 2.

¹⁹ Steve Bowman et al., *Hurricane Katrina: DOD Disaster Response*, CONG. RESEARCH SERVICE, CRS REPORT RL33095, Sept. 19, 2005, at CRS-6-7, available at <http://www.fas.org/sgp/crs/natsec/RL33095.pdf>.

²⁰ *Id.* at CRS-7.

²¹ *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 19, 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).

²² Bowman, *supra* note 19, at CRS-9.

²³ *Id.* at CRS-7, note 21 and CRS-9; see U.S. Northern Command, *supra* note 21.

United States.²⁴ 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.²⁵ NORTHCOM assumed its official responsibilities on October 1, 2002.²⁶ The creation of NORTHCOM was the first time since the Civil War that the United States Armed Forces had operational command for domestic purposes.²⁷

If Federal troops are deployed domestically, NORTHCOM has operational authority.²⁸ NORTHCOM will designate a Defense Coordinating Officer (DCO) to the incident area to serve as the DOD point of contact for other Federal agencies and State and local authorities.²⁹ If necessary, NORTHCOM will establish a Joint Task Force to coordinate the response of participating branches of the military.³⁰ As DOD assistance is usually only required during emergencies that exceed the capabilities of local, State, and Federal agencies, once the lead agency (typically the Federal Emergency Management Agency (FEMA)³¹) can again assume full control and management of the incident, NORTHCOM is required relinquish operational control.³²

²⁴ 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).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Laura K. Donohue, *Home Front Becomes Military Target*, L.A. TIMES, May 18, 2006.

²⁸ U.S. GEN. ACCOUNTING OFFICE, HOMELAND DEFENSE: DOD NEEDS TO ASSESS THE STRUCTURE OF U.S. FORCES FOR DOMESTIC MILITARY OPERATIONS, GAO-03-670, at 5-7 (July 2003) (Report to the Chairman, Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform, House of Representatives).

²⁹ See Bowman, *supra* note 19, at CRS-3.

³⁰ *Id.*

³¹ *Id.*

³² See U.S. Northern Command, *supra* note 24.

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 sector “seemed unable to meet its basic compact with its citizens.”³³ Evacuations were ordered that could not be executed.³⁴ Basic civil services were nil: the power was out, the roads were unnavigable, communication was all but nonexistent,³⁵ fires burned untended,³⁶ and rescue efforts were “a fugue of improvisation.”³⁷ In short, the sheer magnitude of the catastrophe effectively shut down the government.

Hurricane Katrina impacted almost 93,000 square miles across 138 parishes and counties.³⁸ Its official death toll is 1,697.³⁹ 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.⁴⁰ In addition to Katrina’s fatalities, about 770,000 people were displaced from their homes.⁴¹ Even a year after Katrina, most public schools are still shuttered, hospitals are crippled, the court system is dysfunctional, and power outages are a non-event.⁴²

³³ 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 Reigned at Every Level of Government*, WASH. POST, Sept. 11, 2005 at A1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ James Janega & Angela Rozas, *Progress, with Limits; Death, Disease Still a Threat as Downtown Clears*, CHI. TRIB., Sept. 4, 2006, at 1.

³⁷ Glasser, *supra* note 33.

³⁸ TOWNSEND, *supra* note 2, at 5.

³⁹ Associated Press, *True Katrina Toll Over 2,000 Scientist Says*, TORONTO STAR, Oct. 28, 2006.

⁴⁰ TOWNSEND, *supra* note 2, at 5.

⁴¹ *Id.* at 8.

⁴² Jennifer Moses, *Hurry Up and Wait*, WASH. POST, Aug. 29, 2006.

Commerce was affected throughout the Nation as result of the hurricane. 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.⁴³ Major national industries were closed or their operations dramatically cut back.⁴⁴ The hurricane severely impaired substantial portions of the country's oil refineries and curtailed offshore production of oil and gas.⁴⁵ As a result, the Nation experienced a sharp and immediate spike in gasoline prices.⁴⁶

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;”⁴⁷
- “A hospital crew in the midst of moving a patient was fired on by a sniper, and the police chief said rapes were reported in the Convention Center, where some officers were beaten by an angry crowd;”⁴⁸

43. 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).

44. See *Prices for Energy Futures Soar in the Wake of Hurricane Katrina*, N.Y. TIMES, Aug. 31, 2005, at C2, C4 (“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.”).

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

46. 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 45, 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.”).

⁴⁷ *Id.*

- “[R]eports of carjackings, shootings, lootings and rapes reached authorities, who admitted that much of New Orleans ha[d] slipped from their control;”⁴⁹ 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.”⁵⁰

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.”⁵¹ The Superdome had been designated by New Orleans as a shelter of last resort, never meant to hold storm refugees for long.⁵² Nonetheless, it housed about 20,000 people between August 29 and September 4, 2005.⁵³ 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.⁵⁴ As such, FEMA provided the facility with 90,000 liters of water and 43,776 military meals, but these supplies were inadequate, and while they lasted, lines for food were two hours long.⁵⁵ The desperation and violence that occurred at the Superdome was aggravated by “horrendous” conditions.⁵⁶ Lost

⁴⁸ 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.

⁴⁹ 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.

⁵⁰ Evan Thomas, *The Lost City*, NEWSWEEK, Sept. 12, 2005, at 42.

⁵¹ Paul Salopek & Deborah Horan, *How Places of Refuge Went to Hell*, CHICAGO TRIBUNE, Sept., 15, 2005, at 1.

⁵² *Id.*

⁵³ 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 51; Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at 1.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*; Adam Nossiter, *New Orleans Police Abandon Rescue Efforts as Looting Escalates*, SAN DIEGO UNION TRIBUNE, Sept. 1, 2005.

power meant no air conditioning and backed up toilets.⁵⁷ The stench was so bad that medical workers wore masks, and thousands of retching people had to be moved outside the dome.⁵⁸

One advantage that refugees at the Superdome enjoyed, however, was that those entering that facility had been searched for weapons.⁵⁹ Such precautions were not taken at the Ernest N. Morial Convention Center.⁶⁰ Consequently, violence at the Convention Center exceeded even that at the Superdome.⁶¹ The Convention Center was never intended to hold refugees, even as a last resort.⁶² Yet, this structure held 15,000 people during those fateful days.⁶³ Also without power and swelteringly hot, the situation at the Center was described by Captain Winn, the head of the police SWAT team, as “completely lawless.”⁶⁴ Gunfire was routine.⁶⁵ There were several reports of women being dragged off by groups of men and gang-raped.⁶⁶ Captain Winn found a corpse with multiple stab wounds in the building.⁶⁷ 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.⁶⁸ Even when culprits were caught, no temporary holding cells had been set up to hold them.⁶⁹

In summary, Katrina was a catastrophe of such magnitude that State and local resources were completely overwhelmed and the respective governmental institutions were diminished to the point of nonexistence.

⁵⁷ *Id.*

⁵⁸ *Id.*; Salopek, *supra* note 51.

⁵⁹ Lipton, *supra* note 6.

⁶⁰ *Id.*

⁶¹ *Id.*; Salopek, *supra* note 51.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Lipton, *supra* note 6.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Salopek, *supra* note 51.

⁶⁸ Lipton, *supra* note 6.

⁶⁹ *Id.*

The Military Response to Hurricane Katrina

As early as August 19, the Secretary of Defense delegated authority to deploy DOD assets to NORTHCOM, in anticipation of the hurricane's arrival on the Florida Atlantic coast.⁷⁰ 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.⁷¹ 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.⁷²

The evening of Monday, August 29, the day of Katrina's landfall in Louisiana, Governor Kathleen Babineaux Blanco made her now infamous plea for President Bush to send "everything you have got."⁷³ Over the next two days, Governor Blanco specified her request by asking for troops from the President at least two more times, one time asking for 40,000 Federal troops.⁷⁴ President Bush promised 7,200 Federal troops on Saturday, five days after landfall.⁷⁵ Although Governor Blanco "wouldn't have turned down federal troops," she did not want a Federal takeover of the disaster relief effort.⁷⁶ 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.⁷⁷ Yet, given the state of chaos in the Gulf Coast,

⁷⁰ 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.

⁷¹ *Id.* at 26-15.

⁷² *Id.* at 26-12.

⁷³ *Id.* at 26-30.

⁷⁴ *Id.* at 26-46.

⁷⁵ *Id.*

⁷⁶ Glasser, *supra* note 33.

⁷⁷ S. COMM. ON HOMELAND SEC., *supra* note 70, at 26-48. For a list of typical disaster relief tasks that do not amount to law enforcement, see *supra* note 23 and accompanying text.

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.⁷⁸

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.⁷⁹ Governor Blanco balked at the suggestion, concerned that it was tantamount to a Federal declaration of martial law.⁸⁰ The Bush administration then sent Governor Blanco a proposed legal memorandum asking her to request a Federal takeover, which she rejected.⁸¹ 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.⁸²

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,”⁸³ and erupted into “a fierce debate.”⁸⁴ 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.”⁸⁵

⁷⁸ Eric Lipton et al., *Why Troops Weren't Sent Right Away*, PITTSBURGH POST-GAZETTE, Sept. 9, 2005, at A1.

⁷⁹ Glasser, *supra* note 33.

⁸⁰ 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 33.

⁸¹ Roig-Franzia, *supra* note 80.

⁸² See Lipton, *supra* note 6.

⁸³ *Id.*

⁸⁴ Glasser, *supra* note 33.

⁸⁵ See Lipton, *supra* note 6; see also Glasser, *supra* note 33.

All of this confusion over the scope of the PCA reigned despite the fact that 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.”⁸⁶ 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 NPR realized in late August and early September 2005 that, as of December 2004, the Federal government was on record as authorizing the kind of Federal leadership that was so disastrously delayed for five days after landfall.

Even after OLC authorized, *inter alia*, the sending in of Federal troops, the leadership of the Justice Department and DOD urged the 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.⁸⁷ 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?⁸⁸

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.”⁸⁹ 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

⁸⁶ See U.S. DEP’T OF HOMELAND SEC., *supra* note 12, at v-viii, 4.

⁸⁷ Lipton, *supra* note 6.

⁸⁸ *Id.*

⁸⁹ Bowman, *supra* note 19, at CRS-6.

region, constituting the largest deployment of troops within the United States since the Civil War.⁹⁰

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”⁹¹ 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.”⁹²

Catastrophic Natural Disasters Warrant Federal Troop Deployment

Even before the clarifying language within the DAA 2007 was enacted on October 17, 2006, there was an abundance of authority, as the NRP so clearly stated in December 2004, that, when confronted with overwhelmed state and local entities amounts, in a disaster of nationwide consequence, the Federal government may deploy Federal troops 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, the latter institutions retain governmental leadership of a catastrophic response.⁹³ In such instances, the Federal government, where properly requested, should

⁹⁰ S. COMM. ON HOMELAND SEC., *supra* note 70, at 26-1.

⁹¹ 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>.

⁹² *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>.

⁹³ 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).

supplement, not take over, the State and local command structure. As the NRP repeatedly states, the lowest level of government that can handle a disaster should retain leadership over the response. 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.”⁹⁴ Thus, as we show below, even before DAA 2007, and now certainly after it, the President assuredly has the power to federalize a relief effort by deploying Federal troops.

Exceptions to the PCA

Despite the seemingly clear expression of Congressional intent, the PCA has been “riddled with uncertainty and complexity.”⁹⁵ Much of this uncertainty concerns the PCA’s exceptions which authorize Federal troop deployment through the Constitution or Federal statute.⁹⁶ Confusion arises often as to which exceptions apply, when they apply, and what their scope is.⁹⁷ This legal uncertainty was most prominent during Katrina as the Bush administration scrambled to determine whether the President could federalize the response effort, especially through deployment of Federal troops, even in the face of state opposition.⁹⁸ This paper discusses two critically important PCA exceptions – the Insurrection Act and the Homeland Security Act of 2002, as well as their constitutional underpinnings.

⁹⁴ *Id.*

⁹⁵ Dermaine, *supra* note 17, at 170.

⁹⁶ 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>.

⁹⁷ Dermaine, *supra* note 17, at 170-71.

⁹⁸ See *supra* notes 83-85, and accompanying text.

The Insurrection Act

Even prior to the recent clarifying amendment within DAA 2007, the Insurrection Act permitted the use of the Federal military (including the armed forces and federalized National Guard – collectively referred to hereinafter as “Federal troops”) to enforce civilian laws in response to insurrections and similar types of civil disturbance.⁹⁹

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:¹⁰⁰

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.¹⁰¹

While this provision of the Insurrection Act 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.¹⁰²

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

⁹⁹ See, e.g., Dermaine, *supra* note 17, at 193-94.

¹⁰⁰ 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.

¹⁰¹ 10 U.S.C. § 331 (1998).

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

of this provision, President Washington, in 1794, used the military to suppress the Whiskey Rebellion to enforce a Federal excise tax on liquor.¹⁰³

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-- (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.¹⁰⁴

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. In 1957 and 1963, under this provision, Presidents Eisenhower and Kennedy, respectively, unilaterally sent troops into the Southern States to enforce constitutionally protected civil rights through desegregation.¹⁰⁵

Therefore, even before its recent amendment by DAA 2007, 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 are not able to do so.

¹⁰³ 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).

¹⁰⁴ 10 U.S.C. § 333 (1998).

¹⁰⁵ See, e.g., Lemann, *supra* note 100.

The Homeland Security Act of 2002.

The Homeland Security Act of 2002 (HSA)¹⁰⁶ was signed into law on November 25, 2002.¹⁰⁷ This sweeping legislation created 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.”¹⁰⁸ Under Title 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.”¹⁰⁹

In response to the HSA, the President issued Homeland Security Presidential Directive 5 (HSPD-5),¹¹⁰ 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

¹⁰⁶ 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).

¹⁰⁷ 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>.

¹⁰⁸ *Id.*

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

¹¹⁰ 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>.

from domestic incidents, regardless of cause, size, or complexity.”¹¹¹ 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.”¹¹²

Under the authority vested in the HSA and HSPD-5, the NRP¹¹³ commits every signatory to it, including (but not limited to) each member of the Federal executive Cabinet, to “[s]upport[] NRP concepts, processes, and structures and carrying out their assigned functional responsibilities to ensure effective and efficient incident management”¹¹⁴

The NRP is activated when the DHS Secretary declares an incident to be an “Incident of National Significance.”¹¹⁵ 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*¹¹⁶

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.”¹¹⁷ In addition, “[s]tandard procedures regarding requests for assistance may be expedited or, under extreme circumstances,

¹¹¹ *Id.* at (15).

¹¹² *Id.* at (16).

¹¹³ See U.S. DEP’T OF HOMELAND SEC., *supra* note 12.

¹¹⁴ *Id.* at i.

¹¹⁵ *Id.* at 4.

¹¹⁶ *Id.* at 43 (emphasis added).

¹¹⁷ *Id.*

suspended in the immediate aftermath of an event of catastrophic magnitude,”¹¹⁸ and any “coordination process[es] must not delay or impede the rapid deployment and use of critical resources.”¹¹⁹ Recognizing that the NRP, as derived from the HSA and HSPD-5, mandates expedited and effective response to a catastrophic event causing massive loss of life and destruction to property, accompanied by a breakdown of State and local government, it therefore, unsurprisingly, expressly that DOD should “take necessary action to respond to requests of civil authorities consistent with the Posse Comitatus Act.”¹²⁰

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 Amendment to the Insurrection Act

The recent amendment to the Insurrection Act within DAA 2007 removes all doubt about the President’s ability 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 DAA 2007’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 [that] may have contributed to a reluctance to use the armed forces in situations such as Hurricane Katrina.”¹²¹ 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

¹¹⁸ *Id.* at 44.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 43.

¹²¹ S. REP. NO. 109-254 (2006) (Title X, subtitle E, § 1042).

Katrina.”¹²² 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.”¹²³

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.”¹²⁴

¹²² H.R. REP. NO. 109-452 (2006) (at 370).

¹²³ See TOWNSEND, *supra* note 2, at 54-55.

¹²⁴ 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.

Federal vs. State Power

All fifty governors opposed the DAA 2007 amendment.¹²⁵ In August 2006, the National Governors Association, led by its Chair, Janet Napolitano (D-Ariz.), sent a series of letters to lawmakers and to Defense Secretary Rumsfeld, asking for removal of the “federalization” provision from the DAA 2007.¹²⁶ 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.”¹²⁷ 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 in Chief of the Guard to the Federal government.”¹²⁸ Senator Patrick Leahy (D-Vt.) voiced Congressional concerns supporting the Governors’ position by arguing that “[w]e can deal with a range of situations at home if the people and resources of the National Guard remain regularly under the control of the officials who are closest to managing these situations.”¹²⁹

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,

¹²⁵ 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/?vgnnextoid=1ffb60a812ffc010VgnVCM1000001a01010aRCRD>; see also Jennifer Steinhauer, *51 Governors Resist Authority Over Guard*, N.Y. TIMES, Aug. 15, 2006, at A14.

¹²⁶ See NGA, *supra* note 9; NGA, NGA Home, <http://www.nga.org/portal/site/nga/menuitem.b14a675ba7f89cf9e8ebb856a11010a0> (last visited Oct. 31, 2006); Napolitano, *supra* note 9.

¹²⁷ 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/?vgnnextoid=0a05e362c5f5d010VgnVCM1000001a01010aRCRD>.

¹²⁸ See Huckabee Letter, *supra* note 125; see also Napolitano, *supra* note 9.

¹²⁹ See Leahy Press Release, *supra* note 9.

even serious natural disasters will stay within the control of the States when they 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.¹³⁰ Stated most pointedly, this measure does not interfere with State sovereignty, because it is only triggered when there is no sovereignty within the State.

Moreover, the Constitution clearly authorizes Congress to maintain order during a catastrophe of national significance when the States are incapable of doing so. Three Constitutional provisions provide Congress with this authority: the Insurrection Clause, the Republican Form of Government Clause, and the Commerce Clause,¹³¹

The Insurrection Clause.

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.”¹³² It is the source of authority for the Insurrection Act and that statute’s recent amendment within DAA 2007. As noted above, the Act, even prior to the recent amendment, has been deployed to quell the Whiskey Rebellion, disorders in the South enforcing desegregation orders, and, most recently, to quell the Rodney King riots in Los Angeles.¹³³ 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 restore order. As discussed above, Katrina clearly invited use of the Insurrection Act insofar as neither the State nor local governments were able to protect even the most basic civil rights of the residents of

¹³⁰ Indeed, the NRP “contemplates a coordinated, real time response with the states and localities working together with the federal government, deploying federal assets as a supplement to state and local supervision of an emergency response. Only in a worst-case scenario would the federal government find it necessary to direct and supervise the relief effort.” Michael Greenberger, *False Conflict: Who’s in Charge of National Public Health Catastrophes*, 31 ADMIN. & REG. L. NEWS 2, 2-3 (2006).

¹³¹ U.S. Const. art. 1, § 8, cl. 15; art. IV, § 4; and art. I, § 8, cl. 3, respectively.

¹³² U.S. Const. art. 1, § 8, cl. 15.

¹³³ See *supra* notes 100-105, and accompanying text.

New Orleans.¹³⁴ Even prior to the passage of DAA 2007, and even in cases where the States have not invited Federal intervention, there has never been a serious constitutional argument advanced that it is unconstitutional to use Federal troops when the States and localities are incapable of enforcing law and maintaining order.

The Guarantee of a Republican Form of Government

The complete breakdown of orderly governmental services within New Orleans also triggers the Constitutional guarantees provided in the Republican Form of Government Clause, which provides: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) *against domestic Violence*.”¹³⁵ Faced with lawlessness and disorder in the immediate wake of Katrina, there was not only a failure of the Louisiana and New Orleans to provide a “republican form of government,” to the citizens of New Orleans, but there was a failure to provide *any* form of government. Any effort by the President to intervene to restore order and governmental services to New Orleans to end the havoc and chaos experienced there can be fully justified by this constitutional responsibility assigned to the Federal government. That Constitutional provision is a further basis for fully supporting the unilateral decision to introduce Federal troops in the face of a lack of ability to act by the State and the City. Again, it is self-evident that Federal actions necessary to preserve a “republican form of government” cannot be impeded by a claim of State and/or local sovereignty when the State and locality cannot act to limit the kind of widespread suffering Katrina imposed.

¹³⁴ See *supra* notes 34-69, and accompanying text.

¹³⁵ U.S. Const. art. IV, § 4 (emphasis added). For an in depth look at the Republican Form of Government Clause, see generally, Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29 (2005).

The Commerce Clause

Finally, as we have highlighted above,¹³⁶ Katrina also imposed a substantial adverse impact on interstate commerce throughout the Nation. Thousands crossed state lines in search of refuge through choked lines of egress.¹³⁷ Goods and services necessary for survival and safety were brought into the region inconsistently and in a disorganized manner, or not at all.¹³⁸ 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

The Commerce Clause provides that Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹³⁹ To the extent the Insurrection Act affords the President the right to unilaterally insert Federal troops to restore order within an area devastated by a catastrophic event, that action can also be justified as appropriate under the Commerce Clause, as it almost certainly mitigates the adverse impact on interstate commerce. To that extent, it is clear that that statute would be used to “regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.”¹⁴⁰

While some have argued that recent Commerce Clause jurisprudence substantially limits Congressional intrusion on the States’ constitutional police powers,¹⁴¹ even the Commerce Clause tests enunciated therein would support the use of the Insurrection Act to deal with incidents such as Katrina.¹⁴² However, all doubts about the scope of the Commerce Clause in

¹³⁶ See *supra* notes 43-46, and accompanying text.

¹³⁷ See, e.g., Dao, *supra* note 43.

¹³⁸ See, e.g., Lipton, *supra* note 53.

¹³⁹ U.S. Const. art. I, § 8, cl. 3.

¹⁴⁰ United States v. Lopez, 514 U.S. 549, 558-59 (1995); United States v. Morrison, 529 U.S. 598, 609 (2000).

¹⁴¹ 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. see also Lopez, 514 U.S. at 549-50). See also Morrison, 529 U.S. at 602.

¹⁴² See *supra* note 140, and accompanying text.

confronting a Federal response to a public health crisis have been removed by the recent case of *Gonzales v. Raich*.¹⁴³ That case strongly suggests that such events will almost always be deemed to “substantially affect interstate commerce,” and thus subject to Federal regulation. In *Raich*, the Supreme Court ruled that Congress, through the Controlled Substances Act,¹⁴⁴ could regulate entirely intrastate commerce in marijuana and preempt State legislation supporting such commerce, because the production in question affected interstate commerce by endangering the Nation’s public health.¹⁴⁵ As discussed above, both in the immediate and extended aftermath of Hurricane Katrina, interstate commerce was dramatically imperiled.¹⁴⁶ Considering *Raich*’s confirmation of Federal authority over State regulation of even purely local economic 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’ of its commerce powers.¹⁴⁷ Indeed, it would be a high irony if a single Governor unable to mount an effective governmental response could simultaneously tie the hands of the Federal government’s attempt to mitigate hugely damaging commercial impacts adversely affecting the entire Nation.

In short, just as the Justice Department’s OLC concluded during Katrina, the President did have the authority to federalize the response effort at the time by using federal troops.¹⁴⁸ With the force of the Constitution’s Insurrection Clause, Republican Form of Government Clause, and Commerce Clause, the President could have invoked the second or third clauses of the Insurrection Act as exceptions to the PCA. Unfortunately, confusion and politics stayed the

¹⁴³ 125 S. Ct. 2195 (2005).

¹⁴⁴ 21 U.S.C. §§ 801–802, 811–814, 821–830, 841–844a, 846–853, 854–864, 871–881, 882–887, 889–904 (2005).

¹⁴⁵ *Id.* at 2204-05.

¹⁴⁶ See *supra* notes 43-46, and accompanying text.

¹⁴⁷ See Michael Greenberger, *The Alfonse and Gaston of Governmental Response to National Public Health Emergencies: Lessons Learned from Hurricane Katrina for the Federal Government and the States*, 58 ADMIN. L. REV. ____ (forthcoming 2006).

¹⁴⁸ See *supra* note 85, and accompanying text.

President's hand in using this power when it was needed during Katrina.¹⁴⁹ The amendment to the Insurrection Act clarifies the power so that neither confusion nor politics need do so again in the future.

Conclusion

In summary, the recent amendment to the Insurrection Act 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 major event such as a natural disaster, the Federal government may use Federal troops to restore public order. Although this power was widely recognized to pre-date the amendment, the confusion surrounding the legality of its use resulted in delays and inaction during Hurricane Katrina that may have cost many lives and imposed great suffering on those who survived. The amendment neither adds to the President's power, nor detracts from the power of the States. It merely ensures that should an event like Katrina occur again, the uncertainty surrounding these powers will not cause similar delays and/or inaction.

¹⁴⁹ See *supra* notes 87-88, and accompanying text.