

## NOTE

### KATRINA, FEDERALISM, AND MILITARY LAW ENFORCEMENT: A NEW EXCEPTION TO THE POSSE COMITATUS ACT

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*In the days following Hurricane Katrina, as lawlessness and violence spread throughout New Orleans, the White House considered invoking the Insurrection Act so that members of the U.S. military could legally perform law enforcement functions inside the flooded city. This Note contends that the White House’s decision not to invoke the Act was substantially driven by federalism concerns—in particular, concerns about intruding on Louisiana’s sovereignty. But, this Note further contends, in focusing so heavily on these state sovereignty concerns, the White House largely ignored the other side of the “federalism coin”—namely, enabling the federal government to act where national action is desirable. To address future situations where the president may desire to deploy troops domestically for law enforcement functions but may be hesitant to do so for fear of intruding on a state’s sovereignty, this Note urges Congress to create a procedural mechanism whereby the president may go to a specially-created judicial body and seek a “warrant” to deploy members of the military for domestic law enforcement. This procedural mechanism would not be entirely new—indeed, the Second Congress of the United States imposed a similar “judicial certification” requirement on the president’s ability to deploy the military domestically for law enforcement functions. The procedure suggested here, however, would supplement and not replace the president’s current Insurrection Act powers.*

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\* J.D. Candidate, May 2010. I would like to dedicate this Note to the memory of Tony Snow, for whom I first conducted research on the Posse Comitatus Act; he was and remains a role model. I would additionally like to thank my family, my friends, Kate Stamell, Amie Medley, and the entire Notes Office of Volume 108 of the *Michigan Law Review*.

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## INTRODUCTION

The Posse Comitatus Act (“PCA”) bars members of the U.S. military from enforcing domestic laws.<sup>1</sup> The PCA prevents members of the military from performing those law enforcement tasks that are traditionally handled by police and other domestic law enforcement officials—tasks like conducting investigations into alleged criminal activity and arresting suspected criminals. For example, if an Army captain witnesses a person within the United States commit a robbery, the captain may not arrest that person, even if the captain is standing inches away from the perpetrator as the crime occurs.<sup>2</sup>

The language of the PCA specifically authorizes Congress to create exceptions to the Act as it sees fit.<sup>3</sup> The most notable exception to the PCA is the Insurrection Act,<sup>4</sup> which authorizes the president, when certain conditions have been met, to deploy the military inside the United States to perform traditional law enforcement functions. When the Insurrection Act has been invoked, the PCA’s restrictions are lifted and members of the military, under the command of the president, are free to arrest U.S. citizens for violations of state and federal law. Thus, when the president has invoked the

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1. 18 U.S.C. § 1385 (2006). The phrase “posse comitatus” is Latin for “power of the county,” and refers to a sheriff’s common law authority to gather and command able-bodied citizens to enforce the law. See Brian L. Porto, *Annotation, Construction and Application of Posse Comitatus Act (18 U.S.C.A. § 1385), and Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute Laws*, 141 A.L.R. FED. 271, § 2(a) (1997). The Posse Comitatus Act is so called because it forbids the use of “any part of the Army or . . . Air Force as a posse comitatus.” 18 U.S.C. § 1385. Members of the military cannot join the sheriff’s “posse” to enforce domestic law.

2. It is possible that the Army captain, just like any other citizen, could attempt a “citizen’s arrest” of the alleged robber. But the practice of citizen’s arrest is outside the scope of this Note, since the authority to effectuate such an arrest is derived from citizenship, not from a position in the armed forces. For more on the practice of citizen’s arrest, see Alvin Stauber, *Citizen’s Arrest: Rights and Responsibilities*, 18 MIDWEST L. REV. 31 (2002).

3. 18 U.S.C. § 1385.

4. 10 U.S.C. §§ 331–333 (2006).

Insurrection Act, the hypothetical Army captain may legally arrest the hypothetical robber.

The PCA is rooted in federalism.<sup>5</sup> Federalism, in the words of the U.S. Supreme Court, is the constitutional principle under which “the [n]ational [g]overnment, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the [s]tates.”<sup>6</sup> Federalism is concerned with striking the appropriate balance between, on the one hand, respecting state sovereignty and state authority; and, on the other, “enabling the federal government to act where national action is desirable.”<sup>7</sup> In the American system, this balance between state and federal power has traditionally been struck through the political process.<sup>8</sup> James Madison envisioned a system in which the state and federal governments kept each other in check by competing for the affections of the people through the political process.<sup>9</sup> Today, concepts of federalism “shape government, law and politics.”<sup>10</sup> Indeed, the Court has noted that “[f]ederalism serves to assign political responsibility, not to obscure it.”<sup>11</sup> Thus, while the precise nature and scope of American federalism remains subject to great debate, the term is used throughout this Note to refer broadly to the set of legal and political considerations that underlie the allocation of power between the federal government and the sovereign states.

The PCA and the Insurrection Act implicate opposite sides of the federalism coin: the PCA is concerned with preserving state authority, while the Insurrection Act is concerned with promoting federal power. Law enforcement is principally the province of the states, and when the U.S. military intrudes on this province, the authority of the states is compromised. The PCA prevents this intrusion and “preserves federalism by making state and local governments responsible for most law enforcement.”<sup>12</sup> The Insurrection Act, as an exception to the PCA, recognizes that in certain circumstances the national interest is best promoted by the federal military performing law enforcement functions within the states.

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5. See *infra* notes 81–88 and accompanying text.

6. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

7. Larry Kramer, *What's a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, 46 CASE W. RES. L. REV. 885, 920 (1996).

8. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

9. THE FEDERALIST NO. 46 (James Madison); see also *U.S. v. Lopez*, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring) (“If, as Madison expected, the Federal and State Governments are to control each other, see The Federalist No. 51, and hold each other in check by competing for the affections of the people, see The Federalist No. 46, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.”).

10. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954).

11. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

12. Gregory E. Maggs, *Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action*, 80 TEMP. L. REV. 661, 670 (2007).

Despite serving opposite sides of the federalism coin, the PCA and the Insurrection Act have coexisted in relative harmony for more than a century. The Insurrection Act carves out a narrow exception to the PCA, invoked only where an insurrection has arisen within a state, and where the local and state law enforcement agents are incapable of quelling the insurrection.<sup>13</sup> The Insurrection Act authorizes the president to deploy troops for domestic law enforcement either when the state government requests such assistance or when the president makes an independent determination that the military is required to enforce federal law. In the latter instance, the president may deploy troops regardless of whether the state desires such assistance; indeed, he may deploy troops even when the state government expressly opposes such a move. In this instance, the federalism concerns are highest. But since the Civil War, the Insurrection Act has been invoked almost exclusively upon request by state governments. In the post-Civil War era, the president has deployed troops absent a state government's request for only one purpose—to integrate southern schools in the 1950s and 1960s.<sup>14</sup> Because the Insurrection Act remains a narrow exception to the PCA, and because the Act is rarely invoked without a state government's request, the limits of the Insurrection Act and the PCA have gone mostly untested for more than a century.

That all changed in late August 2005, when Hurricane Katrina (“Katrina”)—the third most powerful hurricane to strike the United States in recorded history<sup>15</sup>—made landfall on the Gulf Coast.<sup>16</sup> While the eye of the hurricane made landfall some seventy miles east of New Orleans,<sup>17</sup> it was in that city, in the hours and days after Katrina struck, that the limits of the Insurrection Act and the PCA were tested. The inability of local and state officials to stop rampant looting in and around New Orleans created a security vacuum that some believe should have been filled by members of the U.S. military.<sup>18</sup> Had Louisiana Governor Kathleen Blanco requested federal assistance under the Insurrection Act, or had President Bush invoked the Act unilaterally, the military could have filled this security vacuum. But for a variety of reasons neither official took such action, and as a result the PCA prevented military personnel already in Louisiana for rescue and relief efforts from performing law enforcement functions.

This Note argues that federalism concerns substantially motivated President Bush's decision not to invoke the Insurrection Act after Katrina. It

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13. See 10 U.S.C. § 331–333 (2006).

14. Eric Lipton et al., *Storm and Crisis: Military Response: Political Issues Snarled Plans For Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1 [hereinafter Lipton, *Military Response*].

15. Discovery Channel: Surviving Katrina: Facts About Katrina, <http://dsc.discovery.com/convergence/katrina/facts/facts.html> (last visited Feb. 5, 2010).

16. See *infra* notes 20–25 and accompanying text.

17. *Id.*

18. See, e.g., Nicholas Lemann, Comment, *Insurrection*, NEW YORKER, Sep. 26, 2005, at 67, 67, available at [http://www.newyorker.com/archive/2005/09/26/050926ta\\_talk\\_lemann](http://www.newyorker.com/archive/2005/09/26/050926ta_talk_lemann) (“Whatever its failings before the hurricane hit, the federal government could have greatly lessened the disaster if it had acted immediately afterward as a direct enforcer of the law. People suffered and died because it did not.”).

further argues that the PCA and the Insurrection Act should be changed to give the president greater flexibility to deploy troops to perform law enforcement functions when faced with similar federalism constraints in future catastrophes. Part I details the role the Insurrection Act and the Posse Comitatus Act played in the state and federal response to Katrina. Part I further discusses the federalism concerns that underlie the Insurrection Act, the PCA, and the Stafford Act—the Act that governs the federal disaster and emergency relief system. Part II argues that the Bush Administration’s decision not to invoke the Insurrection Act was substantially driven by federalism—in particular, concerns about intruding on Louisiana’s authority without the state’s consent. Part II then contends that Congress strengthened the “federalism check”<sup>19</sup> on the president’s Insurrection Act powers in the years after Katrina, and that by strengthening this federalism check, Congress ignored important federal interests that underlie the Insurrection Act. Part III borrows an idea from the founding generation and suggests that Congress create a new statutory exception to the PCA, whereby the president may go to a judicial body to seek authority—a sort of warrant—to deploy military personnel domestically to enforce the laws. This exception would supplement and *not* replace the president’s existing Insurrection Act powers. Part III defines the contours of this new judicial body and offers several justifications for its creation.

#### I. HURRICANE KATRINA AND MILITARY LAW ENFORCEMENT

As federal and state officials worked to respond to the devastation Katrina wreaked on the Gulf Coast, one key question that led to protracted debate and confusion centered on what role, if any, the federal military should play in performing domestic law enforcement functions inside New Orleans. Part I.A discusses the effects Katrina had on New Orleans, and documents the lawlessness that gripped the city in the days after the storm. Part I.B details the debate between state and federal officials over the military’s role inside New Orleans following Katrina. Part I.B also identifies the crucial roles the PCA and Insurrection Act played in that debate. Part I.C traces the historical and theoretical development of the PCA, the Insurrection Act, and the Stafford Act, and identifies the federalism concerns that underlie this triad of laws.

##### *A. Katrina: Landfall and a City in “Anarchy”*

On Saturday, August 27, 2005, as Hurricane Katrina churned through the Gulf of Mexico, Dr. Jeff Masters, the overseer of a popular online tropical weather community, made the following observation:

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19. Throughout this Note, the term “federalism check” will be used to refer to the considerations of state sovereignty that militate against invoking the Insurrection Act without a state government’s consent.

I'd hate to be an Emergency Management official in New Orleans right now. Katrina is pretty much following the [National Hurricane Center] forecast, and appears likely to pass VERY close to New Orleans. I'm surprised they haven't ordered an evacuation of the city yet. While the odds of a catastrophic hit that would completely flood the city of New Orleans are probably 10%, that is way too high in my opinion to justify leaving the people in the city. If I lived in the city, I would evacuate NOW! There is a very good reason that the Coroner's office in New Orleans keeps 10,000 body bags on hand. . . . GO! New Orleans needs a full 72 hours to evacuate, and landfall is already less than 72 hours away.<sup>20</sup>

By the following day, Sunday the 28th, Katrina had strengthened into a Category 5 hurricane, with winds exceeding 160 miles per hour.<sup>21</sup> On Monday, August 29, at 10 a.m. (CDT), Katrina's "eyewall"—the spot within a hurricane where the most damaging winds and intense rainfall are found<sup>22</sup>—made landfall along the Louisiana-Mississippi border.<sup>23</sup> Although Katrina had weakened to a Category 3 storm by landfall,<sup>24</sup> the damage she inflicted on the Gulf Coast was catastrophic, killing at least 1400 people and leaving behind an estimated \$80 billion in property damage.<sup>25</sup>

As Dr. Masters had predicted two days prior to landfall, Katrina did not directly strike New Orleans, the eye wall coming ashore some seventy miles east of the city. But despite avoiding a direct hit, New Orleans was not spared Katrina's wrath. On the morning of Tuesday, August 30, the front page of the *New Orleans Times-Picayune* contained the following report underneath a headline reading "CATASTROPHIC":

Hurricane Katrina struck metropolitan New Orleans on Monday with a staggering blow, far surpassing Hurricane Betsy, the landmark disaster of an earlier generation. The storm flooded huge swaths of the city, as well as Slidell on the north shore of Lake Pontchartrain, in a process that appeared to be spreading even as night fell.

A powerful storm surge pushed huge waves ahead of the hurricane, flooding much of St. Bernard Parish and New Orleans' Lower 9th Ward, just as Betsy 40 years ago. But this time the flooding was more extensive,

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20. Wunder Blog: Weather Underground, *New Orleans to Pensacola at high risk from Katrina*, <http://www.wunderground.com/blog/JeffMasters/comment.html?entrynum=78> (Aug. 27, 2005, 16:05 GMT).

21. Wunder Blog: Weather Underground, *Katrina: Category 5*, <http://www.wunderground.com/blog/JeffMasters/comment.html?entrynum=80> (Aug. 28, 2005, 12:24 GMT).

22. University of Illinois Weather World 2010 Project, *The Eye Wall: A Hurricane's Most Devastating Region*, <http://ww2010.atmos.uiuc.edu/%28Gh%29/guides/mtr/hurr/stages/cane/wall.rxml> (last visited Feb. 5, 2010).

23. Wunder Blog: Weather Underground, *Category 3 Katrina pounding Gulf coast*, <http://www.wunderground.com/blog/JeffMasters/comment.html?entrynum=80> (Aug. 29, 2005, 15:17 GMT).

24. *See id.*

25. Jeff Franks & Russell McCulley, *Update 1—New Orleans dead remembered on Katrina anniversary*, REUTERS, Aug. 29, 2007, available at <http://www.reuters.com/article/bondsNews/idUSN2937322420070829>.

spreading upriver as well to cover parts of the Bywater, Marginy and Treme neighborhoods.

As with Betsy, people scrambled into their attics or atop their roofs, pleading for help from the few passers-by.<sup>26</sup>

As the floodwaters spread, looters began taking to the city streets. Early reports indicated that the looting centered around essentials like food, water, and ice. On Wednesday, August 31, two days after Katrina had made land-fall, a reporter in New Orleans noted that a crowd had stormed a pharmacy and emerged carrying “so much ice, water and food that it dropped from their arms as they ran. The street was littered with packages of ramen noodles and other items.”<sup>27</sup> Noting that the looting had started after citizens trapped within the flooded city had run out of food, New Orleans Mayor C. Ray Nagin commented: “[Y]ou can’t really argue with that too much.”<sup>28</sup>

By Wednesday evening, however, reports suggested that the looting had taken a more nefarious turn. Mayor Nagin himself acknowledged that the looting had “escalated to this kind of mass chaos where people are taking electronic stuff and all that.”<sup>29</sup> Looters honed in on a variety of goods—jeans, tennis shoes, TV sets, “trunkloads of beer.”<sup>30</sup> In one incident, a New Orleans police officer was wounded when he and several other officers confronted two men looting a convenience store, and the two men opened fire on them.<sup>31</sup> In another incident, police officers themselves were accused of joining in on the looting of a Cadillac dealership and a Wal-Mart.<sup>32</sup> Car stereos and batteries were stolen from the parking garage of a city hospital.<sup>33</sup> Residents of a nursing home were forced to evacuate after bands of looters drove by the home, threatening the residents and shouting, “Get out!”<sup>34</sup> At New Orleans’ Charity Hospital, as nurses rushed to evacuate critically ill patients, a sniper hidden in a nearby high-rise opened fire and forced the

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26. Bruce Nolan, *CATASTOPRHIC: Storm Surge Swamps 9th Ward, St. Bernard*, TIMES-PICAYUNE, Aug. 30, 2005, at A1, available at [http://www.nola.com/katrina/pages/083005/083005\\_a01a02.pdf](http://www.nola.com/katrina/pages/083005/083005_a01a02.pdf).

27. John Esterbrook, *New Orleans Fights To Stop Looting: Police Ordered To Halt Rescues; Governor Asks For Federal Help*, CBSNEWS.COM, Aug. 31, 2005, <http://www.cbsnews.com/stories/2005/08/31/katrina/main808193.shtml>.

28. *Id.*

29. *Id.*

30. *Id.*; Associated Press, *New Orleans mayor orders looting crackdown: Thousands feared dead from Katrina’s wrath; stadium evacuation begins*, MSNBC.COM, Sept. 1, 2005, <http://www.msnbc.msn.com/id/9063708>.

31. Brendan McCarthy, *2 Caught in Katrina Police Shooting*, TIMES-PICAYUNE, Oct. 19, 2008, available at 2008 WLNR 19879944.

32. Julia Reed, *Dodging Bullets: How New Orleans coped after Gustav—and readied for its heirs*, NEWSWEEK, Sept. 6, 2008, <http://www.newsweek.com/id/157485>.

33. Esterbrook, *supra* note 27.

34. *Id.*

staff and patients back into the hospital.<sup>35</sup> More than 600 firearms were looted from area pawnshops and gun dealerships following the storm.<sup>36</sup> The *New Orleans Times-Picayune* reported that the gun section at a new Wal-Mart had been “cleaned out by looters.”<sup>37</sup> By Wednesday evening, according to New Orleans’ homeland security director, police had received numerous reports of gangs of armed men roaming the city and robbing people in the neighborhoods most damaged by Katrina.<sup>38</sup> Mayor Nagin, recognizing that looters “are starting to get closer to heavily populated areas,” ordered 1500 police officers to abandon their search-and-rescue missions and return to the streets in an effort to stop the looting.<sup>39</sup>

For a variety of reasons, the New Orleans Police Department (“NOPD”) proved unable to stop the looting as it spread throughout the city. First and foremost, members of the NOPD had other and arguably more pressing concerns—rescue-and-relief efforts aimed at saving the lives of those trapped within the flooded city. As New Orleans Police Captain Marlon De-fillo said two days after the storm, “We’re multitasking right now . . . . Rescue, recovery, stabilization of looting, we’re trying to feed the hungry.”<sup>40</sup> Second, as if this range of responsibilities weren’t challenging enough, the NOPD faced an internal problem: desertions. In the immediate aftermath of the storm, the NOPD was unable to account for some 240 members of its 1450-member force.<sup>41</sup> Not all of the unaccounted-for members were deserters, but fifty-one were eventually fired for deserting after Katrina hit. Another fifteen resigned when investigations into their alleged desertions began.<sup>42</sup> Third, because of the severe flooding in certain parts of the city, the NOPD was unable to reach many of the most lawless areas.<sup>43</sup>

As will be discussed in greater detail below,<sup>44</sup> members of a state’s national guard, when acting under the command and control of the state governor, are not constrained by the PCA, and thus are free to perform traditional law enforcement functions. Prior to the storm, Louisiana Governor Kathleen Blanco activated 3500 of the state’s 10,000-member Guard.<sup>45</sup> But

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35. Ellen Barry et al., *In Katrina’s Aftermath: Chaos and Survival: New Orleans Slides Into Chaos*, L.A. TIMES, Sept. 2, 2005, at 1.

36. Michael Perlstein & Trymaine Lee, *Looters Continue to Prey on Storm Victims Even as Flooded Homes are Being Rebuilt*, TIMES-PICAYUNE, Jan. 22, 2006.

37. Esterbrook, *supra* note 27 (citing a TIMES-PICAYUNE report).

38. Michael Perlstein & Trymaine Lee, *As Evidence Floods, Criminal Cases Likely to Collapse: Court basement also housed thousands of appeals*, TIMES-PICAYUNE, Sept. 1, 2005, at A6.

39. Esterbrook, *supra* note 27.

40. *Id.*

41. Associated Press, *N.O. Police Fire 51 for Desertion*, FOXNEWS.COM, Oct. 30, 2005, <http://www.foxnews.com/story/0,2933,173879,00.html>.

42. *Id.*

43. Perlstein & Lee, *supra* note 36.

44. *See infra* text accompanying notes 77–80.

45. John M. Broder, *Hurricane Katrina: Rescue Efforts; Guard Units’ New Mission: From Combat To Flood Duty*, N.Y. TIMES, Aug. 30, 2005, at A13.

only 2800 of the guardsmen had reached New Orleans by Thursday (three days after landfall),<sup>46</sup> and like the police, this initial deployment had more on its plate than just security; food distribution, debris removal, power generation, and other tasks were also part of the Guard's post-Katrina mission, and often took precedence over security.<sup>47</sup> The Guard's efforts were further hampered when its New Orleans barracks flooded.<sup>48</sup> As a result, the Guard lost twenty vehicles designed to carry soldiers through flooded streets and was forced to abandon much of its most advanced communications equipment.<sup>49</sup> Additionally, more than 5000 members of the Guard were deployed in Iraq at the time Katrina hit, making them unavailable for duty within the state.<sup>50</sup> Other resources, too, were in the Middle East—after Katrina, the Louisiana Guard had only one satellite phone for use on the entire Gulf Coast, because the others were in Iraq.<sup>51</sup>

The end result of the violence and the lack of security was a city in “anarchy,” as one Louisiana state representative labeled New Orleans in the days following Katrina.<sup>52</sup> Even in the Superdome and the Convention Center, where city officials had instructed those unable to leave New Orleans to gather during and after the storm, the situation was “completely lawless,” with numerous reports of murders, rapes, and robberies.<sup>53</sup>

### B. Debate Over the Military's Role

As the lawlessness spread, state and federal officials began debating whether New Orleans was a job for the United States military. On the evening of Tuesday, August 30, the Pentagon established a special command center at Camp Shelby, Mississippi, to coordinate the military's rescue and relief efforts along the Gulf Coast.<sup>54</sup> As will be discussed below, the military, pursuant to the Stafford Act, is authorized to perform a host of rescue-and-relief tasks after a natural disaster.<sup>55</sup> The special command center, called

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46. Tom Bowman, *La. governor requests 40,000 Guard troops: Soldiers would provide security in New Orleans*, BALT. SUN, Sept. 2, 2005, at 6A; see also Carl Hiaasen, *Guard's in Iraq, but it's needed here*, MIAMI HERALD, Sept. 4, 2005, at L1.

47. Broder, *supra* note 45.

48. Eric Lipton et al., *Storm and Crisis: Government Assistance; Breakdowns Marked Path From Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at 1 [hereinafter Lipton, *Government Assistance*].

49. *Id.*

50. See Hiaasen, *supra* note 46.

51. Gene Healy, *What of 'Posse Comitatus'?: Soldiers don't make very good police officers*, AKRON BEACON J., Oct. 7, 2005 at B2.

52. Paul Purpura & Ed Anderson, *Blanco demands thousands of troops*, TIMES-PICAYUNE, Sept. 2, 2005, at A1 (quoting State Representative Jim Tucker).

53. See Lipton, *Government Assistance*, *supra* note 48.

54. Eric Lipton & Eric Schmitt, *Hurricane Katrina: Emergency Responders: Navy Ships and Maritime Rescue Teams Are Sent to Region*, N.Y. TIMES, Aug. 31, 2005, at A14.

55. See *infra* notes 100–108 and accompanying text.

“Joint Task Force Katrina,”<sup>56</sup> was headed by Louisiana native and three-star Army Lt. General Russel L. Honore.<sup>57</sup> General Honore was charged with directing federal assets—equipment, troops, rations—in support of the Federal Emergency Management Agency (“FEMA”) and Louisiana state officials, including the Louisiana National Guard. When President Bush ordered 7000 active-duty military members to Louisiana on September 3, those troops were under General Honore’s command.<sup>58</sup> Their mission included search and rescue; transporting medical equipment to hospitals; delivering water, fuel and food to those who needed it; and evacuating citizens from New Orleans and other hard-hit areas.<sup>59</sup> But the mission explicitly did not include performing law enforcement functions. General Honore later noted in his memoir that the PCA restricted his troops from performing law enforcement functions: “[A]ctive-duty troops are able to assist and provide support to civil authorities in times of disaster . . . . [T]hey cannot do law enforcement.”<sup>60</sup>

But behind the scenes, the White House was considering invoking the Insurrection Act so that members of the military, in addition to performing rescue-and-relief operations, could also directly participate in law enforcement efforts inside New Orleans. On Wednesday, August 31, in an hour-long meeting at the White House, President Bush and his senior aides discussed at length the looting and law enforcement problems in New Orleans, and considered invoking the Insurrection Act to give the military a direct role, under the command of the president, in restoring order.<sup>61</sup> While the meeting adjourned with the group deciding not to take such a step, the Pentagon did put active-duty troops on alert, ready to be deployed to New Orleans to perform law enforcement tasks if the need arose.<sup>62</sup>

Discussions between the White House and the Blanco Administration about whether the military was needed for law enforcement continued throughout the week, culminating in a series of intense discussions on Friday and Saturday, including a face-to-face meeting between the president and the governor aboard Air Force One on Friday afternoon.<sup>63</sup> Professor Greenberger provides the following account of the ongoing discussions between Washington and Baton Rouge:

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56. See Jan Moller & Robert Travis Scott, *Appeals for Troops Unheeded for Days*, TIMES-PICAYUNE, Sept. 9, 2005, at A1, available at <http://www.nola.com/katrina/pages/090905/1.pdf>.

57. See CNN.com, *Lt. Gen. Honore a ‘John Wayne Dude’*, Sept. 3, 2005, <http://www.cnn.com/2005/US/09/02/honore.profile/index.html>.

58. See Moller & Scott, *supra* note 56.

59. *Transcript of Special Defense Department Briefing with Commander of Joint Task Force Katrina* (Sept. 1, 2005), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1955>.

60. Russel L. Honore, *Survival: How a Culture of Preparedness Can Save You and Your Family From Disasters* 15–16 (2009).

61. Richard W. Stevenson, *Hurricane Katrina: Federal Response: Administration Steps up Actions, Adding Troops and Dispatching Medical Supplies*, N.Y. TIMES, Sept. 1, 2005, at A21.

62. *Id.*

63. Moller & Scott, *supra* note 56.

Both President Bush and White House Chief of Staff Andy 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. . . . 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 . . . led to “a flurry of meetings at the Justice Department, the White House and other agencies” and erupted into a “fierce debate.” The White House instructed the Justice Department’s Office of Legal Counsel . . . to resolve the issue. The OLC finally “concluded that the federal government had authority to move in even over the objection of local officials.”<sup>64</sup>

Despite this conclusion from the Office of Legal Counsel (“OLC”) that the president had legal authority to invoke the Insurrection Act over the objections of Governor Blanco, the Bush Administration chose not to do so, and the PCA continued to bar the military from engaging in law enforcement. As will be discussed in greater detail in Part II, federalism concerns played a substantial role in the White House’s decision not to invoke the Act unilaterally.

### *C. The Federalism Concerns Behind the PCA, the Insurrection Act, and the Stafford Act*

The following subsections briefly trace the historical roots of the triad of laws that governs the military’s involvement in natural disaster response: the PCA, the Insurrection Act, and the Stafford Act. The subsections also identify the core federalism concerns that underlie each of these laws.

#### *1. The Posse Comitatus Act*

This subsection proceeds in three parts—first, it discusses the historical background of the PCA; then, it defines the scope of the PCA; and lastly, it explores the policy rationale behind the Act.

##### *a. The History of the PCA*

Prior to the PCA’s passage in 1878, there was no clear legal barrier to using the military to enforce domestic laws.<sup>65</sup> Indeed, between the ratification of the Constitution in 1789 and the passage of the PCA almost ninety years later, the use of the Army and other military personnel for domestic

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64. Michael Greenberger, *Yes, Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City from a Devastating Natural Catastrophe*, 26 *MISS. C. L. REV.* 107, 114–15 (2006) (footnotes omitted).

65. Susan W. Brenner, “*At Light Speed*”: *Attribution and Response to Cybercrime/Terrorism/Warfare*, 97 *J. CRIM. L. & CRIMINOLOGY* 379, 442–43 (2007).

law enforcement purposes was commonplace.<sup>66</sup> Before the Civil War, for example, the Fugitive Slave Law of 1850 authorized the use of military personnel to enforce the law's mandate that fugitive slaves be returned to their masters.<sup>67</sup> Following the Civil War, under the terms of the 1871 Ku Klux Klan Act, the military was granted virtually unrestrained power to combat the Klan and intervene in areas where it gained a significant foothold.<sup>68</sup> Military law enforcement reached its apex during Reconstruction when, in the former Confederate states, Union soldiers performed tasks ranging from tax collection to labor conflict suppression, to preventing illegal liquor production.<sup>69</sup>

By 1876, however, southern states had grown weary of the military's ubiquitous presence in day-to-day life. Even northerners were outraged when, on three separate occasions, federal troops occupied the Louisiana State Legislature, "marching into the hall and expelling members at the point of the bayonet."<sup>70</sup> The presidential election of 1876 proved the death knell for military law enforcement. Republican Rutherford B. Hayes defeated Democrat Samuel J. Tilden, winning the electoral votes of three key southern states: Florida, Louisiana, and South Carolina.<sup>71</sup> In all three of those states, thousands of U.S. military troops had been deployed by incumbent Republican president, Ulysses S. Grant, to "preserve peace and prevent intimidation of the voters"—which to many in the South was merely a euphemism for voter fraud on behalf of Hayes.<sup>72</sup> On the same day that Hayes, after a long dispute, was awarded the presidency, southern Democrats in Congress attached an amendment to an Army appropriations bill, prohibiting military funds from being used in "support . . . of any state government or office thereof."<sup>73</sup> That particular amendment stalled in

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66. Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL'Y 99, 109–10 (2003); see also Sean J. O'Hara, Comment, *The Posse Comitatus Act Applied to the Prosecution of Civilians*, 53 U. KAN. L. REV. 767, 771–72 (2005) (discussing the federal military's role in enforcing the Fugitive Slave Law, and the large-scale military law enforcement presence in the Reconstruction South from 1865 to 1877); Isaac Tekie, Note, *Bringing the Troops Home to a Disaster: Law, Order, and Humanitarian Relief*, 67 OH. ST. L.J. 1227, 1232 (2006) ("[B]efore the PCA, U.S. Marshals across the country had the power to summon army members in their territory to arrest criminals and carry out other law enforcement activities.").

67. Canestaro, *supra* note 66, at 111; see also O'Hara, *supra* note 66, at 771.

68. Canestaro, *supra* note 66, at 112.

69. *Id.*

70. *Id.* (quoting ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION: 1863–77* 234 (1990)).

71. *Id.* at 113; see also H.W.C. Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 94–95 (1960).

72. Canestaro, *supra* note 66, at 113 (quoting Furman, *supra* note 71, at 95); see also Jason Mazzone, *The Commandeerer in Chief*, 83 NOTRE DAME L. REV. 265, 288 (2007) (noting that the PCA was enacted "out of opposition to federal troops' activities (including guarding polling stations) in the South during Reconstruction").

73. Canestaro, *supra* note 66, at 113 (quoting John D. Gates, *Don't Call Out the Marines: An Assessment of the Posse Comitatus Act*, 13 TEX. TECH L. REV. 1467, 1473 (1982)).

committee, but two years later, Congress passed the Posse Comitatus Act, and it was signed into law by President Hayes on June 18, 1878.<sup>74</sup>

### b. *The Scope of the PCA*

Because the PCA was passed as an amendment to the Army Authorization Act, it has been interpreted to apply only to the Army and Air Force, although Defense Department rules effectively apply the restrictions to the Navy as well.<sup>75</sup> The Coast Guard is exempt from the Act and routinely performs traditional law enforcement functions.<sup>76</sup>

The PCA's application to the National Guard is more complex. When an individual enlists in a particular state's guard, that individual enlists simultaneously in the U.S. National Guard.<sup>77</sup> Under this "dual enlistment" provision, a member of the Guard can be acting either in service of the member's state or in federal service.<sup>78</sup> When acting in the former capacity, the Guard member is under the command and control of the state governor; when acting in the latter capacity, the member is under the command and control of the president.<sup>79</sup> When a Guard member is called into federal service, the member is relieved of his or her status in the State Guard.<sup>80</sup> The PCA applies to members of the National Guard only when the members are operating in federal service; it does not apply to members when operating under the command and control of a state governor. Thus, Governor Blanco could legally deploy members of the Louisiana National Guard to New Orleans to arrest looters. Had those same members of the Guard been called into federal service, under the command and control of President Bush, they would *not* have been authorized to arrest looters, unless they had been federalized as part of a declaration of insurrection.

### c. *The Policy Rationale Behind the PCA*

The PCA is partly founded on the idea that military personnel are trained to act in circumstances where defeat of the enemy, rather than the protection of constitutional freedoms, is the paramount concern; and that applying such a mindset to domestic law enforcement would be a significant

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74. *Id.* at 113–14.

75. Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 100–01 (1975); see also DANIEL A. FARBER & JIM CHEN, *DISASTERS AND THE LAW* 40–41 (2006).

76. Canestaro, *supra* note 66, at 124 n.183.

77. *Pepich v. Dep't. of Def.*, 496 U.S. 334, 345 (1990).

78. *Id.* at 346.

79. See William C. Banks, *The Normalization of Homeland Security After September 11: The Role of the Military in Counterterrorism Preparedness and Response*, 64 LA. L. REV. 735, 764–65 (2004).

80. *Pepich*, 496 U.S. at 346.

“danger” to the rights of Americans.<sup>81</sup> Or, as it has been more bluntly put: “[L]aw enforcement personnel search and capture, while the military search and destroy.”<sup>82</sup> The Fourth Circuit recently declared the restriction on military intrusion into civilian affairs an “American tradition” to be violated only when “Congress has recognized a special need for military assistance.”<sup>83</sup>

But, as evidenced by its origins in the Reconstruction South, federalism is the real bedrock of the PCA. By making state and local governments responsible for law enforcement, and excluding members of the military from usurping that responsibility, the PCA preserves and protects the independence of the states and their police powers.<sup>84</sup> Indeed, much of the scholarly literature discussing the PCA has, in no uncertain terms, recognized the core federalism concerns that underlie the Act. The Act has been described as a “symbol of federalism”;<sup>85</sup> as Congress’s “expression of constitutional law regarding federalism”;<sup>86</sup> as a “central tenet of democratic federalism”;<sup>87</sup> and as a bulwark against “the degradation of our treasured checks and balances and the very concepts of federalism and freedom.”<sup>88</sup>

## 2. *The Insurrection Act*

As noted above, the PCA authorizes Congress to create express statutory exceptions to the Act, empowering Congress to define situations in which the military may be used to perform traditional law enforcement functions. The most notable statutory exception is the Insurrection Act. Congress passed the Insurrection Act in 1807, pursuant to its power under Article I, Section 8 of the Constitution, to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>89</sup> Through the Insurrection Act, Congress empowered the president to both

81. *United States v. McArthur*, 419 F. Supp. 186, 193–94 (D.N.D. 1975) (“It is the nature of their primary mission that military personnel must be trained to operate under circumstances where the protection of constitutional freedoms cannot receive the consideration needed in order to assure their preservation. The posse comitatus statute is intended to meet that danger.”).

82. MARK C. WESTON, U.S. ARMY WAR COLLEGE STRATEGY RESEARCH PROJECT, REVIEW OF THE POSSE COMITATUS ACT AFTER HURRICANE KATRINA 1, 16 (2006), <http://www.docstoc.com/docs/2409683/REVIEW-OF-THE-POSSE-COMITATUS-ACT-AFTER-HURRICANE-KATRINA>.

83. *United States v. Johnson*, 410 F.3d 137, 146–47 (4th Cir. 2005).

84. Maggs, *supra* note 12, at 670.

85. Daniel J. Sennott, *Interpreting Recent Changes to the Standing Rules for the Use of Force*, ARMY LAW., Nov. 2007, at 52, 75.

86. Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 MIL. L. REV. 86, 167 (2003).

87. Tekie, *supra* note 66, at 1232.

88. Christopher H. Lytton, *America’s Borders and Civil Liberties in a Post-September 11th World*, 12 J. TRANSNAT’L L. & POL’Y 197, 204 (2003).

89. U.S. CONST. art. 1, § 8.

deploy members of the U.S. military and federalize members of a state's national guard under certain circumstances.<sup>90</sup>

The Insurrection Act recognizes three circumstances under which the president may take such steps. The first occurs when the state government, through either the legislature or the governor, expressly requests that the president do so.<sup>91</sup> The second occurs when the president determines that forces within a state have made it “impracticable to enforce the laws of the United States.”<sup>92</sup> The third occurs when citizens of a state are “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.”<sup>93</sup> Only the first circumstance requires the state government to request federal assistance; in the other two, the president invokes the Act unilaterally.<sup>94</sup> While invocation of the Act is rare, more rare is invocation without a request from the state government. The last time the Act was invoked was in 1992, when at the request of California Governor Pete Wilson, President George H.W. Bush dispatched 4000 soldiers and Marines to Los Angeles to quell the Rodney King riots.<sup>95</sup> President Bush also used the Act in September 1989, when the

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90. 10 U.S.C. §§ 331–33 (2006).

91. The language of § 331 reads, in full:

§ 331. Federal aid for State governments[:] 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.

10 U.S.C. § 331.

92. The language of § 332 reads, in full:

§ 332. Use of militia and armed forces to enforce Federal authority[:] 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.

10 U.S.C. § 332.

93. The language of § 333 reads, in full:

§ 333. Interference with State and Federal law: The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

10 U.S.C. § 333.

94. See *infra* notes 123–127 and accompanying text.

95. FARBER & CHEN, *supra* note 75, at 47; Robert Burns, *U.S. Looks at Role for Military; Some Want to Change Law to Permit Using Soldiers in Disasters*, CHI. SUN TIMES, Sept. 18, 2005, at 15.

governor of the Virgin Islands requested military help to put down looting that broke out following Hurricane Hugo (in a situation that closely paralleled post-Katrina New Orleans).<sup>96</sup> But since the Civil War, the Insurrection Act has only been invoked without the request of a state's government for one purpose—to effectuate school desegregation in the South in the 1950s and 1960s.<sup>97</sup>

The PCA implicates federalism by protecting the states' authority to perform domestic law enforcement functions; the Insurrection Act implicates the other side of the federalism coin by allowing the military to intrude into the state's law enforcement sphere when the national interest so demands. Congress, in passing the Insurrection Act, recognized that in certain situations the necessity of military law enforcement overrides the state sovereignty considerations underlying the PCA.<sup>98</sup> As the Fourth Circuit Court of Appeals wrote, “[I]n certain circumstances, military preservation and enforcement of civilian law is appropriate; the policy consideration underlying the Posse Comitatus Act is not absolute.”<sup>99</sup>

### 3. *The Stafford Act*

The Robert T. Stafford Disaster and Relief Emergency Act (“Stafford Act”)<sup>100</sup> defines the federal government's role in disaster relief efforts. Passed by Congress in 1974, the Act aims “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters.”<sup>101</sup> Under the terms of the Stafford Act, the governor of a state affected by a natural disaster may request that the president declare a “major disaster area” or a state of “emergency.”<sup>102</sup> Once the governor makes such a request, and once the president acquiesces, a panoply of federal assistance becomes available to the state, including money, food, medical supplies, health and safety infor-

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96. *Hearing on the Readiness of the Army and Air National Guard Before the S. Judiciary Comm.*, 110th Cong. (2007) (testimony of Lt. Gen. H. Steven Blum, National Guard Bureau), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=2713&wit\\_id=6391](http://judiciary.senate.gov/hearings/testimony.cfm?id=2713&wit_id=6391).

97. Lipton, *Military Response*, *supra* note 14. President Eisenhower used the Insurrection Act in 1957 to enforce school desegregation in Little Rock, Arkansas, and President Kennedy used the Act in 1962 and 1963 to enforce desegregation in Mississippi and Alabama, respectively. Siobhan Morrisey, *Should the Military be Called in for Natural Disasters?*, TIME.COM, Dec. 31, 2008, <http://www.time.com/time/nation/article/0,8599,1869089,00.html>.

98. See Jessica DeBianchi, Note, *Military Law: Winds of Change—Examining the Present-Day Propriety of the Posse Comitatus Act After Hurricane Katrina*, 17 U. FLA. J.L. & PUB. POL'Y 473, 488–89 (2006).

99. *United States v. Walden*, 490 F.2d 372, 377 n.11 (4th Cir. 1974).

100. 42 U.S.C. § 5121 (2006).

101. *Id.* § 5121(b).

102. Christina E. Wells, *Katrina and the Rhetoric of Federalism*, 26 MISS. C. L. REV. 127, 132 (2006); see also Deborah F. Buckman, Annotation, *Construction and Application of Robert T. Stafford Disaster Relief and Emergency Act (Stafford Act)*, 42 U.S.C.A. §§ 5121 *et seq.*, 14 A.L.R. FED. 2d 173 (2006).

mation, and search-and-rescue personnel and equipment.<sup>103</sup> FEMA is the federal agency responsible for funneling this assistance to the affected states and localities.<sup>104</sup>

Part of the panoply of federal assistance that becomes available to a state after the “emergency” or “disaster” declaration has been made is military assistance. The Stafford Act authorizes the Department of Defense (“DOD”) to provide local authorities with “personnel, equipment, supplies, facilities, and managerial, technical and advisory services.”<sup>105</sup> Thus, because Governor Blanco requested federal help under the Stafford Act before Katrina hit,<sup>106</sup> members of the military under General Honore’s command were able to assist in evacuations, deliver food and water, and perform search and rescue missions.<sup>107</sup> But the Stafford Act is *not* an exception to the PCA, and so military personnel deployed to a disaster area under its terms are prohibited from engaging in law enforcement.<sup>108</sup> Put differently, a governor’s request for assistance under the Stafford Act is *not* a request for military assistance with law enforcement. If the governor wants military help with law enforcement, she must make that request under Section 331 of the Insurrection Act.

Like the PCA and the Insurrection Act, the Stafford Act is animated by federalism principles. The Act places the primary responsibility for disaster recovery on the states.<sup>109</sup> As Richard Falkenrath, a former homeland security adviser to President George W. Bush, noted, “The basic federal compact . . . is that the state and local agencies are responsible for disaster relief and management, and the federal government is just there to help as asked.”<sup>110</sup> By granting state and local governments primary authority for disaster relief, and by placing limitations on the powers of the federal government within the disaster-relief sphere, the “language and structure of the [Stafford Act] clearly embody federalism principles.”<sup>111</sup> Congress itself recognized

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103. Wells, *supra* note 102, at 133.

104. *Id.*

105. Christopher B. Walters, *Responding to National Disasters and Emergencies: A Contract and Fiscal Law Primer*, ARMY LAW., Oct. 2007, at 35, 37.

106. Joshua M. Samek, Note, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act of a Case for Learning the Law?*, 61 U. MIAMI L. REV. 441, 460 (2007).

107. *See supra* notes 55–59 and accompanying text.

108. *See* Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 82 (2000) (“The Stafford Act is not an exception to the Posse Comitatus Act, primarily because actions taken under the Stafford Act should not involve law enforcement activities.”); Samek, *supra* note 106, at 459 (“Although the Stafford Act authorizes the use of the military to respond to both major disasters and emergencies even before they may be declared, the Stafford Act does not constitute an exception to the Posse Comitatus Act.”).

109. Susan L. Waysdorf, *Returning to New Orleans: Reflections on the Post-Katrina Recovery, Disaster Relief, and the Struggle for Social Justice*, 12 UDC/DCSL L. REV. 3, 37 (2009).

110. Interview by PBS Frontline with Richard Falkenrath, Former Deputy Homeland Security Advisor, Department of Homeland Security (Sept. 27, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/storm/interviews/falkenrath.html>.

111. Wells, *supra* note 102, at 132; *see also* Ross C. Paolino, *Is it Safe to Chevron “Two-Step” in a Hurricane? A Critical Examination of How Expanding the Government’s Role in*

these federalism principles in the Stafford Act's Congressional Findings: "[E]mbedded in the Stafford Act are principles of federalism and dual sovereignty. With rare exception, the management of a disaster is reserved to the affected state, unless and until the state actively seeks federal assistance."<sup>112</sup>

## II. THE FEDERALISM CHECK ON THE PRESIDENT'S INSURRECTION ACT POWERS

Part II makes two arguments: first, in Part II.A., that the Bush Administration, despite having the legal authority to invoke the Insurrection Act after Katrina, decided against doing so because of federalism concerns; and second, in Part II.B, that the changes Congress made to the Insurrection Act in the years after Katrina reinforced the federalism check on the president's Insurrection Act powers.

### A. Katrina and Federalism Concerns

In the days following Katrina, federalism concerns were prominent in the debate between the White House and Governor Blanco's office over what role, if any, the U.S. military should play in policing New Orleans. And while other factors played a role,<sup>113</sup> the Bush Administration's decision not to invoke the Insurrection Act was substantially driven by federalism concerns. In particular, the Bush Administration feared that invoking the Act without Governor Blanco's consent would be—or at least would appear to be—an unwarranted intrusion on Louisiana's sovereignty.

As the security situation in New Orleans deteriorated, and as it became evident that local police were incapable of maintaining law and order inside the city,<sup>114</sup> the Bush Administration began to press Governor Blanco to re-

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*Disaster Relief Will Only Exacerbate the Damage*, 76 GEO. WASH. L. REV. 1392, 1398–99 (2008) (identifying the "federalism-based 'pull' model of disaster relief"); Mary J. Bradley, et al., *The Posse Comitatus Act: Does it Impact the Department of Defense during Consequence Management Operations?*, ARMY LAW., Oct. 2007, at 68, 70 (recognizing the "principles of federalism embodied in the Stafford Act").

112. Robert H. Jerry, II & Steven E. Roberts, *Regulating the Business of Insurance: Federalism in an Age of Difficult Risk*, 41 WAKE FOREST L. REV. 835, 858 (2006) (citing 42 U.S.C. §§ 5170, 5191(b) (2000)).

113. It should be noted that there were important logistical concerns that factored into the White House's thinking. Some in the White House, for example, believed that active duty military would not arrive in New Orleans until after members of the Louisiana National Guard and guardsmen from other states. See Lipton, *Military Response*, *supra* note 14. But, according to one report in the *New York Times*, a senior army officer "expressed puzzlement that active-duty troops were not summoned sooner, saying 82nd Airborne troops were ready to move out from Fort Bragg, N.C." on the Sunday before Katrina hit. *Id.* Either way, by Saturday, September 3, more than 4500 active duty federal military troops were in the Gulf Coast. That number increased to more than 7000 by Sunday, September 4. See *id.* Other federal officials worried that members of the military were not adequately trained to handle law enforcement functions inside New Orleans. Lipton, *Government Assistance*, *supra* note 48 (quoting a Pentagon official noting that members of the military were untrained in the law enforcement techniques that would have been required in New Orleans).

114. See *supra* notes 40–51 and accompanying text.

quest a law enforcement role for the military.<sup>115</sup> Under the terms of the Insurrection Act, a request from a state government allows the military to operate outside the confines of the PCA and perform traditional law enforcement functions.<sup>116</sup> But such a request would have required the Louisiana National Guard to be federalized and placed under the command of President Bush. According to multiple reports, Governor Blanco was unwilling to cede control of the Guard to the president;<sup>117</sup> she was particularly concerned with undermining the authority of Major General Landreneau, who was leading the Louisiana Guard's response to Katrina.<sup>118</sup> The governor's office also feared that by ceding authority to the president, the Louisiana state government would be blamed for the failed response to Katrina. According to one of the governor's aides: "Quite frankly, if [the Bush Administration had] been able to pull off taking it from the locals, they then could have blamed everything on the locals."<sup>119</sup>

With the Bush Administration hesitant to act without the governor's request, and the governor reluctant to give up control of the Louisiana National Guard, discussions between the two sides became a "battle[] over federalism."<sup>120</sup> Both sides were sensitive to issues of state authority—the Bush Administration reluctant to intrude on that authority, the governor's office seeking to preserve it. Four days after Katrina hit, these concerns were manifest at a meeting aboard Air Force One attended by President Bush, Governor Blanco, Mayor Nagin, Homeland Security Director Chertoff, and several members of Louisiana's congressional delegation. According to Mayor Nagin, the crux of the discussion between state and federal officials was "'who has ultimate authority' and whether the federal government is going to come in and impinge upon the state's authority."<sup>121</sup> And it was Mayor Nagin—whose city remained in chaos while the governor and the president debated the issue of state authority—who brought that debate to a head aboard Air Force One. According to one account:

Everyone at the meeting was aware of the tension between the president and the governor over the troops issue. Perhaps Ray Nagin saw his role as that of the stick of dynamite that could break the logjam, because the mayor . . . lost his temper, slammed his hand down on the table, and insisted that a chain of command needed to be established. . . . [H]e had forced the president and governor to resolve their differences. Bush and

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115. Greenberger, *supra* note 64, at 114.

116. *See supra* Section I.C.1.

117. *See* Lipton, *Military Response*, *supra* note 14; Moller & Travis, *supra* note 58.

118. Moller & Scott, *supra* note 56.

119. MICHAEL ERIC DYSON, COME HELL OR HIGH WATER 104 (2006) (quoting Manuel Roig-Franzia & Spence Hsu, *Many Evacuated, but Thousands Still Waiting: White House Shifts Blame to State and Local Officials*, WASH. POST, Sept. 4, 2005, at A1).

120. Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 164 (2006).

121. *Interview by PBS Frontline with Ray Nagin*, Mayor, New Orleans (Oct. 26, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/storm/interviews/nagin.html>.

Blanco repaired to a separate section of the plane, and the governor, still concerned with state-versus-federal distinctions, agreed to respond within 24 hours [to requests to federalize the National Guard].<sup>122</sup>

As this debate unfolded, the Bush Administration was also considering its other option under the Insurrection Act: deploying troops to perform law enforcement functions without the governor's request.<sup>123</sup> In 1827, twenty years after the Insurrection Act became law, the U.S. Supreme Court held that the president's legal authority under the Insurrection Act is plenary, writing that "the authority to decide whether [an] exigency has arisen, belongs exclusively to the President, and . . . his decision is conclusive upon all other persons."<sup>124</sup> This holding, combined with the plain language of the statute<sup>125</sup> and previous historical usage of the Act,<sup>126</sup> suggest that the president has clear authority to invoke the Act without a request from the state government. Following Katrina, the OLC concluded that the president had the legal authority to invoke the Act "even over the objections of local officials."<sup>127</sup> Indeed, even in cases where a state has not requested that the Act be invoked, "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."<sup>128</sup> And the conditions on the ground in New Orleans seemed to justify invocation of the Act.<sup>129</sup>

By Saturday morning, Governor Blanco decided that she would not request a federal military law enforcement presence.<sup>130</sup> This left the Bush Administration with a decision: invoke the Insurrection Act unilaterally or forgo the military law enforcement presence in New Orleans that it had been pressing Governor Blanco to accept. The White House chose the latter; con-

122. Douglas Brinkley, *How New Orleans Drowned*, VANITY FAIR, June 2006 (excerpting DOUGLAS BRINKLEY, *THE GREAT DELUGE* (2006)), [http://www.vanityfair.com/politics/features/2006/06/Brinkley\\_excerpt20060](http://www.vanityfair.com/politics/features/2006/06/Brinkley_excerpt20060).

123. Greenberger, *supra* note 64, at 114–15; 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 (describing internal White House discussions, in the days after Katrina, over invoking the Act without Governor Blanco's request).

124. *Martin v. Mott*, 25 U.S. 19, 30 (1827).

125. *See supra* notes 91–93.

126. *See supra* note 97 and accompanying text.

127. *See supra* note 64 and accompanying text.

128. Michael Greenberger, *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*, 87 B.U. L. REV. 397, 418 (2007).

129. *Id.* ("The complete breakdown of orderly state and local government services within New Orleans during Katrina, and the chaos that ensued, 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 New Orleans residents."); *see also* E.L. Gaston, *Taking the Gloves off of Homeland Security: Rethinking the Federalism Framework for Responding to Domestic Emergencies*, 1 HARV. L. & POL'Y REV. 519, 526 (2007) ("Given the deteriorating public order in New Orleans, the President could also have relied on the Insurrection Act . . . to send federal troops to help restore order and provide emergency assistance.").

130. Moller & Scott, *supra* note 56.

cerns over the legal and political fallout that a unilateral invocation of the Act would have generated played a substantial and perhaps dispositive role in this choice.<sup>131</sup> Despite the conclusions of the OLC opinion, the Bush Administration remained concerned that an invocation of the Act would disrupt the constitutionally prescribed balance between the state and federal governments. Homeland Security Secretary Chertoff articulated those concerns two days after Katrina made landfall: “Under the Constitution, state and local authorities have the principal first line of response obligation. . . . [T]he federal government does not supersede the state and local government.”<sup>132</sup> Secretary of Defense Rumsfeld later echoed that sentiment: “The way it’s arranged under our Constitution . . . state and local officials are the first responders.”<sup>133</sup> At least ostensibly, the Bush Administration was concerned about the constitutional implications of overriding Louisiana’s authority.

But as noted above, federalism is both a legal and a political principle.<sup>134</sup> Federalism leaves it to the people, through the political process, to determine whether the federal government has exceeded its authority and impinged on the authority of the states.<sup>135</sup> And, as it considered whether or not to invoke the Insurrection Act without Governor Blanco’s request, the Bush Administration appeared to be acutely aware that an uninvited intrusion on Louisiana’s sovereignty might be a politically unpopular move.<sup>136</sup> Paul McHale, the assistant secretary of defense for homeland security, described the administration’s concerns in the following way: “Could we have physically moved combat forces into an American city, without the governor’s consent, for purposes of using those forces . . . for law enforcement duties? Yes. . . . Would you have wanted that on your conscience?”<sup>137</sup> Another senior administration official, speaking anonymously to the *New York Times* in the days after the storm, asked, “Can you imagine how it would have been perceived if a president of the United States of one party had preemptively taken from the female governor of another party the command and control of her forces . . . ?”<sup>138</sup> One journalist, writing shortly after Katrina, suggested that the Bush Administration’s decision not to invoke the Act may have been informed by “a political calculation that many Republicans,

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131. See Gaston, *supra* note 129, at 525 (stating that a “hesitancy to erode federalism” drove the choice).

132. Mazzone, *supra* note 72, at 269.

133. Lipton, *Government Assistance*, *supra* note 48.

134. See *supra* notes 5–11 and accompanying text.

135. See *supra* note 9.

136. Lipton, *Government Assistance*, *supra* note 48 (“Pentagon, White House and Justice officials debated for two days whether the president should seize control of the relief mission from Governor Blanco. But they worried about the political fallout of stepping on the state’s authority, according to officials involved in the discussions.”).

137. *Id.*

138. Lipton, *Military Response*, *supra* note 14.

especially Southerners, would not react happily to the sight of troops entering Louisiana over the objections of local officials.”<sup>139</sup>

Ultimately, the Bush Administration decided against invoking the Insurrection Act. Whatever the Administration’s exact motives, it is clear that federalism played a central role in this decision. The Administration’s unwillingness to invoke the Act, and the state’s unwillingness to request its usage, both sprang from an overriding concern for state sovereignty. Federalism’s other concern—enabling the federal government to act when national action is desired—was subjugated, even as local and state officials proved unable to protect “the most basic civil rights of New Orleans residents.”<sup>140</sup>

### B. Congress Strengthens the Federalism Check

Within weeks of Katrina, both the White House and members of Congress began suggesting that changes needed to be made to the PCA and the Insurrection Act. President Bush, speaking to the nation from New Orleans’ Jackson Square two weeks after Katrina made landfall, declared that “a challenge on this scale requires greater federal authority and a broader role for the armed forces.”<sup>141</sup> Two days prior, Senator Warner, at the time the chairman of the Senate Armed Services Committee, spoke on the Senate floor and argued that the PCA needed to be changed to better meet “a contingency of the nature we have experienced.”<sup>142</sup>

A little over a year later, in September 2006, Congress passed legislation that amended the Insurrection Act to give the president explicit authority to deploy the military for law enforcement purposes following a natural disaster, with or without a governor’s consent (“Warner Amendment”). Under the Warner Amendment’s new language, the president was granted the explicit authority to both deploy federal military forces and federalize members of a state’s national guard when, “as a result of a natural disaster . . . the President determines that . . . domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order.”<sup>143</sup>

Supporters of the Warner Amendment contended it did not expand the president’s Insurrection Act powers; rather, it simply made explicit that the Act could be invoked following a natural disaster. When the Warner Amendment reached the Senate floor for debate, Senator Ted Kennedy labeled it a gap filler: “While the [A]mendment does not grant the President any new powers, it fills an important gap in clarifying the President’s au-

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139. Lemann, *supra* note 18.

140. See Greenberger, *supra* note 128.

141. Greenberger, *supra* note 64, at 116.

142. 151 CONG. REC. S9945–47, (daily ed. Sept. 13, 2005) (remarks of Sen. Warner).

143. 10 U.S.C. § 333(a)(i) (2006) (amended 2006).

thority to respond to these new kinds of emergencies.”<sup>144</sup> Scholars have subsequently endorsed this view that the Warner Amendment merely “codifie[d] and clarifie[d] the federal power that existed prior to its enactment.”<sup>145</sup> But not everyone agreed with this interpretation. Senator Leahy—the Warner Amendment’s most outspoken critic before and after its passage—blasted it as a “raw expansion of Presidential power . . . There is certainly something going on that is far more than a clarification.”<sup>146</sup>

Whether or not the Warner Amendment actually expanded the president’s Insurrection Act powers, Senator Leahy is correct that it “change[d] the way we perceive the law and the way it could be interpreted.”<sup>147</sup> Indeed, the Warner Amendment created a perception that issues of state sovereignty and authority should be subordinated to federal power on occasions where invocation of the Insurrection Act might be appropriate. This perception fueled criticism of the Warner Amendment by groups representing state interests. “Governors need to be focused on assisting their citizens during an emergency instead of looking over their shoulders to see if the federal government is going to step in,” said the homeland security adviser to the National Governor’s Association.<sup>148</sup> The National Sheriff’s Association—the largest association of law enforcement professionals in the United States—called the Warner Amendment “an unwarranted diminution of state and local power.”<sup>149</sup>

The backlash against the Warner Amendment, led by governors and state and local law enforcement groups, was motivated in large measure by a desire to preserve state authority.<sup>150</sup> This sentiment also motivated efforts to repeal the Amendment. Senator Leahy ascended to the chairmanship of the Senate Judiciary Committee after the Democratic Party won a congressional majority in the 2006 midterm elections.<sup>151</sup> Calling the Warner Amendment “bad policy” that made it more likely “that the military will be inserted into domestic situations,” Senator Leahy held a number of hearings aimed at

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144. 152 CONG. REC. S10806, (daily ed. Sept. 29, 2006) (remarks of Sen. Kennedy).

145. E.g., Greenberger, *supra* note 64, at 108.

146. “*The Insurrection Act Rider*” and *State Control of the National Guard: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 38 (2007) (prepared opening statement of Sen. Leahy, Chairman, Senate Comm. on the Judiciary).

147. *Id.*

148. Kavan Peterson, *Governors lose in power struggle over National Guard*, STATELINE.ORG., Jan. 12, 2007, <http://www.stateline.org/live/details/story?contentId=170453>.

149. Letter from Ted Kamatchus, President, National Sheriff’s Association, to Senators Patrick Leahy and Christopher Bond (Feb. 20, 2007) (on file with author).

150. James G. Hodge, Jr. & Evan D. Anderson, *Principles and Practice of Legal Triage During Public Health Emergencies*, 64 N.Y.U. ANN. SURV. AM. L. 249, 289 (2008) (“[T]he strong reaction from the states and the subsequent demise of the [Warner Amendment] illustrate the vibrancy of the federalism concerns in this arena.”).

151. John M. Broder, *Democrats Take Senate*, N.Y. TIMES, Nov. 10, 2006, at A1.

repealing the Warner Amendment.<sup>152</sup> On January 30, 2008, President Bush signed a bill that included language repealing the Warner Amendment, less than a year and a half after its passage.<sup>153</sup> The Warner Amendment's repeal was a rejection of what was perceived to be the federal government's encroachment on state power. It was, in essence, a victory for states' rights. Whether or not the Warner Amendment actually expanded the president's authority, the mere perception that the Amendment made it easier for the president to deploy troops domestically stoked the federalism concerns that underlie the PCA. The Warner Amendment, by advancing this perception, diluted the "federalism check" on the president's Insurrection Act power—that is, the Amendment diluted the considerations of state sovereignty that militate against invoking the Insurrection Act without a state government's consent.

In repealing the Warner Amendment and rejecting the theory behind it, Congress reinforced this federalism check on the president's power. But there remains no "bright line for determining the appropriate use of federal troops during major domestic natural disasters,"<sup>154</sup> and, consequently, future disaster response efforts may suffer from the same sort of confusion and delay that occurred after Katrina. While the repeal of the Warner Amendment recognized the state sovereignty side of the federalism coin, it ignored the important federal interests that underlie the Insurrection Act. A new approach that balances issues of state sovereignty against the advantages of a more flexible role for military law enforcement in times of crisis is needed.

### III. A NEW STATUTORY EXCEPTION TO THE PCA

Katrina exposed a failure in the United States' disaster relief system. The storm made landfall on Monday morning; it wasn't until Saturday that the federal government made up its mind about whether or not to use the military for law enforcement purposes inside New Orleans. Because of the objections of Governor Blanco and the overriding state sovereignty concerns, the Bush Administration decided against invoking the Insurrection Act and using the military as police. Whether or not that decision was correct is largely irrelevant to this Note. More relevant is the flawed process by which the Administration came to its decision—a process which slowed the government's response to Katrina and negatively affected its quality.<sup>155</sup>

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152. "The Insurrection Act Rider" and State Control of the National Guard: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 2 (2007) (opening statement of Sen. Leahy, Chairman, Senate Comm. on the Judiciary) (on file with author).

153. Press Release, Statement from Sen. Patrick Leahy, Bush Signs Bill Enacting Leahy's National Guard Empowerment Reforms, and Leahy's Repeal of the Insurrection Act Rider (Jan. 30, 2008) (on file with author).

154. Greenberger, *supra* note 128, at 424.

155. William Banks, *Who's in Charge: The Role of the Military in Disaster Response*, 26 MISS. C.L. REV. 75, 93 (2006).

Article I, Section 8 of the U.S. Constitution empowers Congress to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>156</sup> This Clause gives Congress the power to establish rules for deploying troops domestically to suppress insurrections. The core argument in Part III of this Note is that Congress should use this power to create another statutory exception to the Posse Comitatus Act, whereby the president can appeal to a specially created federal judicial body (the “PCA Court”) for a “warrant” to deploy troops domestically for the purposes of performing law enforcement functions. The PCA Court would grant the warrant if the conditions on the ground satisfied the requirements of the Insurrection Act. The warrant, if issued, would authorize the president to deploy the military for law enforcement purposes for a specified period of time, within a broad geographic region. This exception would neither limit the president’s authority to invoke the Insurrection Act unilaterally nor expand his current Insurrection Powers;<sup>157</sup> rather, it would provide the president an alternate procedural mechanism for deploying troops domestically.

Part III.A outlines the operational and structural contours of the proposed PCA Court. Part III.B argues that the PCA Court appropriately addresses the federalism concerns raised during and after Katrina. Part III.C draws on historical material to justify the creation of this new court, recalling the “judicial certification” requirement that the Second Congress of the United States imposed on the president’s ability to deploy troops domestically and applying the logic of the early Congresses to the current proposal. Part III.D offers further policy justifications for the system proposed here.

#### *A. The Structural and Operational Contours of the PCA Court*

An appropriate model for the structural and operational contours of the new PCA Court is the court created by the Foreign Intelligence Surveillance Act (“FISA”). Congress passed FISA in 1978 to regulate the government’s

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156. U.S. CONST. art. I, § 8.

157. The repeal of the Warner Amendment did not change the provisions of the Insurrection Act authorizing the president to invoke the Act, without a request from a state government, when he adjudges that an insurrection makes it “impracticable to enforce” federal law, 10 U.S.C. 332 (2006), or when the insurrection deprives citizens of any right, privilege or immunity protected by the Constitution, 10 U.S.C. 333. The repeal of the Warner Amendment restored the Insurrection Act to its pre-Katrina state. As Professor Greenberger notes:

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.

Greenberger, *supra* note 128, at 418. Indeed, this power to invoke the Act without a state government’s request is required to protect constitutional rights when a state government intentionally obstructs those rights, as was the case when Presidents Eisenhower and Kennedy invoked the Act to effectuate school integration in the South, over the active opposition of Southern governments. *See supra* note 97 and accompanying text.

use of electronic surveillance of foreign intelligence assets.<sup>158</sup> The goal of FISA was to “balance the public’s concern about an unfettered government with the executive branch’s need to collect foreign intelligence quickly and in secret.”<sup>159</sup> FISA is offered as a model here because the PCA Court would have a similar goal—balancing the public’s concern about an unfettered federal government against the executive branch’s need to quickly deploy troops to perform domestic law enforcement functions in times of insurrection.

FISA requires that the government obtain a warrant from a statutorily created FISA court (“FISC”) before performing surveillance on suspected foreign intelligence agents.<sup>160</sup> FISC is staffed by eleven U.S. district court judges appointed by the Chief Justice of the Supreme Court.<sup>161</sup> In order to obtain a warrant, the government must meet certain criteria and make certain showings. Requests to FISC must be in writing and under oath, and must be personally reviewed and approved by the attorney general.<sup>162</sup> The warrant will only be approved if the FISC judge finds probable cause that the target is a foreign power, or an agent of a foreign power, and that foreign intelligence information is being sought.<sup>163</sup> The FISC hearings are held in secret and ex parte, and the decisions are usually not published.<sup>164</sup>

While the U.S. Supreme Court has not addressed the constitutionality of FISA, the statute and the court it created have withstood numerous constitutional challenges in the lower courts.<sup>165</sup> These courts have consistently rejected claims that FISC is not a properly constituted Article III court, and claims that because of its ex parte proceedings, it fails to meet the case or controversy requirement of Article III.<sup>166</sup>

The basic contours of the FISA court could effectively be transferred to the PCA Court proposed in this Note. The court could be staffed by an appropriate number of U.S. district court judges, appointed by the Chief Justice of the United States. Because warrant petitions would normally originate in Washington, D.C., a large percentage of the judges on the PCA Court should sit in districts within a short distance of that city, or on the

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158. Ellen C. Yaroshefsky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 203, 219 (2006).

159. Daniel L. Pines, *The Central Intelligence Agency’s “Family Jewels”: Legal Then? Legal Now?*, 84 IND. L.J. 637, 662 (2009).

160. Yaroshefsky, *supra* note 158, at 219.

161. Jeffrey F. Addicott & Michael T. McCaul, *The Protect America Act of 2007: A Framework for Improving Intelligence Collection in the War on Terror*, 13 TEX REV. L. & POL. 43, 47–48 (2008).

162. *See* Pines, *supra* note 159, at 663.

163. *Id.*

164. *Id.*

165. *See* William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 90 (2000).

166. *Id.*

D.C. District Court.<sup>167</sup> At least one judge would be “on call” for a specific period of time—say six weeks of the year—and while on call would be prepared to hear an application at a moment’s notice. Expedience would be a central feature of the court, since it would only be effective if it could quickly authorize or reject the warrant petition.

The president—or the attorney general or another agent of the executive branch—would be authorized by statute to petition the court. A hearing would be conducted as quickly as possible. The proceeding would be *ex parte*—only the executive branch would be represented. As in FISA proceedings, the burden would be on the government to demonstrate probable cause that the state or local government in question is no longer capable of enforcing the laws. If the government meets its burden, the judge would then issue a warrant authorizing military personnel to perform traditional law enforcement functions within the specified disaster area. If rejected, the option of deploying troops under the warrant would be foreclosed, but the president would still have recourse to a unilateral invocation of the Insurrection Act.

The standard that the PCA judge should apply when determining whether or not to issue a warrant for the domestic deployment of troops is the standard announced in the Insurrection Act itself: whether a disruption within a state “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 authorities within the state are unable or unwilling to protect those rights and privileges.<sup>168</sup> In other words: are state and local officials no longer capable of enforcing the law? FISA’s probable cause standard could be imported here. If the PCA Court finds probable cause to believe that state and local officials are incapable of enforcing the law, then the warrant petition should be granted; if not, it should be denied.

### *B. The PCA Court and Federalism Concerns*

The PCA Court is designed to give the president a greater range of options when deciding whether to deploy troops domestically to perform traditional law enforcement functions during a natural disaster or crisis of similar scope. If the president believes that conditions within a state warrant the deployment of troops for law enforcement, but the state government refuses to request invocation of the Insurrection Act, the president would have two options: 1) invoke the Insurrection Act unilaterally and deploy troops

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167. The Patriot Act imposed a similar requirement on FISA judges; now, at least three of the FISA court’s eleven judges must reside within twenty miles of Washington, D.C. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 283 (codified in scattered titles and sections of the U.S.C.); see U.S. Courts Educational Outreach, The Foreign Intelligence Surveillance Court and The Court of Final Review, <http://www.uscourts.gov/outreach/topics/fisa/courtofreview.html>.

168. 10 U.S.C. § 333 (2006).

into the state, or 2) seek a warrant from the PCA Court and, if granted, deploy troops into the state. The theory behind the second option is that the president might be more willing to deploy troops over the objections of a state government if the deployment comes with a judicial stamp of approval.<sup>169</sup> The president might be less concerned with offending states' rights if his decision to deploy troops is backed by the federal judiciary. The warrant, in essence, gives him greater political cover.

Instinctively, making it *easier* for the president to deploy troops into states for the purpose of performing traditional law enforcement functions seems inconsistent with federalism concerns. But as has been discussed throughout this Note, there are two sides to the federalism coin—one side concerned with empowering the national government to act when necessary, the other with protecting the states against unwarranted federal intervention. “There are . . . and always have been, two sides to federalism: not just preserving state authority, but also enabling the federal government to act where national action is desirable.”<sup>170</sup> Federalism is offended not only when the federal power is needlessly expanded, but also when it is unduly limited.<sup>171</sup>

This understanding of federalism is crucial to the proposed PCA Court. Certainly, the states have a compelling interest in preventing the federal military from performing law enforcement functions within their borders, and the PCA protects that interest. But the Constitution explicitly empowers the federal government to “suppress [i]nsurrections.”<sup>172</sup> Federal action to quell insurrections is not only “desirable”—in fact, it is expressly authorized by the Constitution. Thus, if federalism is as concerned with empowering the national government to act as it is with protecting state autonomy, then making it easier for the president to deploy troops to put down an insurrection is entirely appropriate. In those rare instances of insurrection, federalism is best served by providing the federal government the ability and tools to suppress the insurrection. The PCA Court provides the federal government with another tool to do so.

Furthermore, the system proposed here would not expand the president's substantive powers under the Insurrection Act. It would simply create a new procedural mechanism by which the president could exercise those powers. This procedural mechanism would aid the federal government in properly exercising its constitutionally granted power to “suppress [i]nsurrections.”<sup>173</sup> Its principal purpose would be to facilitate the president's ability to exercise this power when appropriate. But, where the PCA judge refuses to issue a warrant on the grounds that the probable cause standard has not been met,

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169. See *infra* notes 185–193 and accompanying text.

170. Kramer, *supra* note 7, at 920.

171. *Id.* (“If circumstances changed in a way that enlarged the number of problems falling within the purview of Congress, an interpretation that limited federal power to deal with them was every bit as problematic as one needlessly expanding federal power.”).

172. U.S. CONST., art. I, § 8, cl.15.

173. *Id.*

this procedure might have the ancillary effect of protecting state sovereignty by dissuading the president from unilaterally invoking the Act. Thus, both sides of the federalism coin are served.

### C. A Historical Justification for the Proposed PCA Court

While the idea of involving the judiciary in the president's decision to deploy troops seems foreign, it is not: the idea originated with the Second Congress of the United States. In 1792, the Second Congress passed the Calling Forth Act ("CFA"), which governed the president's authority to deploy state militias during domestic emergencies.<sup>174</sup> The CFA was passed pursuant to Congress's constitutional power to "provide for calling forth the [m]ilitia to . . . suppress [i]nsurrections and repel [i]nvasions," the same constitutional power on which the Insurrection Act now rests.<sup>175</sup> The CFA created a "sliding scale" of authority under which the president could deploy state militias during domestic emergencies. "When the country was facing invasion, the President's discretionary authority was at its apex; however, when it came to enforcing the laws, the President's authority was at its lowest ebb, requiring judicial authorization before it could be triggered . . . ."<sup>176</sup> For purposes of enforcing domestic laws, the president could only deploy troops after an associate Justice of the Supreme Court or federal district judge found that enforcement of the laws was being obstructed by "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers invested in the marshals."<sup>177</sup> Thus, before the president could deploy troops, the CFA required a member of the judicial branch to certify that conditions on the ground warranted deployment.<sup>178</sup>

Shortly after the CFA was passed, President Washington invoked it to deploy federal troops to respond to a collection of farmers in Pennsylvania refusing to pay a whiskey excise tax.<sup>179</sup> On August 7, 1794, in his "Whiskey Rebellion Proclamation," President Washington declared that Justice Wilson had certified that "in the counties of Washington and Allegheny, in Pennsylvania, laws of the United States are opposed and the execution thereof obstructed by combinations too powerful to be suppressed" by local officials.<sup>180</sup> Washington then led the federalized militia into Pennsylvania and

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174. Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to Use the Military in Domestic Emergencies*, 91 MARQ. L. REV. 1027, 1057–58 (2008).

175. U.S. CONST., art. I, § 8, cl.15.

176. Gardina, *supra* note 174, at 1057.

177. *Id.* at 1058.

178. Mazzone, *supra* note 72, at 309 ("Before the militia could be used for this purpose, the Act required that a district judge or a Supreme Court Justice certify that this condition existed.").

179. Candidus Dougherty, *"Necessity Hath No Law": Executive Power and the Posse Comitatus Act*, 31 CAMPBELL L. REV. 1, 10 (2008).

180. G. Washington, *A Proclamation (Whiskey Rebellion Proclamation)*, CLAYPOOLE'S DAILY ADVERTISER, Aug. 11, 1794, available at <http://www.earlyamerica.com/earlyamerica/milestones/whiskey/text.html>.

successfully put down the rebellion.<sup>181</sup> In part because President Washington had deployed the militia without abusing his discretion,<sup>182</sup> and in part because Congress wanted to enhance the president's authority to deploy the militia domestically, Congress removed the requirement for judicial authorization in 1795.<sup>183</sup> The certification requirement was viewed as an impediment to the president's ability to deploy troops domestically; its removal gave the president near-unitary authority over domestic troop deployment.<sup>184</sup>

The creation of the PCA Court by today's Congress would be consistent with the goals of the 1795 Congress that deleted the judicial certification requirement—namely, removing impediments to the president's ability to deploy troops domestically to suppress insurrections. Today, the president would seek judicial certification only if he decided such certification would facilitate his ability to deploy troops. Since it would be entirely within the president's discretion whether or not to initiate proceedings at the PCA Court, and since a rejection of the warrant would still leave the president the option of invoking the Insurrection Act unilaterally, the proposal offered here presents no new impediments to the president's authority. Quite the contrary—the proposal here would assist the president in overcoming the “federalism check” that might otherwise prevent him from invoking the Insurrection Act.

#### D. *The Warrant as Political Cover*

The question remains: why would the president initiate proceedings at the PCA Court, when he retains the plenary legal authority to invoke the Insurrection Act unilaterally? The answer, as noted above, is that the warrant would provide the president an added layer of political cover against criticisms of infringing on states' autonomy. Scholars have noted that, in various fields of decision making, the president will often “forego the opportunity to act unilaterally because doing so reduces their political risk.”<sup>185</sup> As Professors Stephenson and Nzelibe note, there are occasions when the president “can reduce his political risk by seeking and obtaining the approval of another government branch, but will dramatically increase his political risk if he acts unilaterally.”<sup>186</sup> Thus, in order to diffuse the possible negative conse-

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181. Dougherty, *supra* note 179, at 10.

182. *Id.*

183. Gardina, *supra* note 174, at 1059 n.214.

184. See Dougherty, *supra* note 179, at 10 (discussing President Jefferson's use of the “broader calling forth power”).

185. Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 622 (2010) (discussing political incentives for the president to avoid acting unilaterally).

186. *Id.* at 640.

quences of a decision, presidents often have “strong electoral incentives to share power.”<sup>187</sup>

This power-sharing incentive often motivates presidents to seek congressional approval before deciding to use military force abroad. While the Constitution entrusts Congress with the authority to declare war, presidents have initiated large-scale military operations abroad without express congressional authorization since the Korean War.<sup>188</sup> Since then, the executive branch has asserted wide authority to use military force abroad without specific congressional authorization.<sup>189</sup> And yet, despite this asserted authority, presidents frequently seek congressional authorization for the use of force abroad anyway. President George H.W. Bush, for example, sought congressional authorization before using military force against Iraq in 1991, despite his contention that such authorization wasn’t needed. Likewise, President George W. Bush sought and received congressional approval for the use of force against Iraq, despite claiming, like his father, that such authorization was unnecessary.<sup>190</sup> Professors Stephenson and Nzelibe offer the following account for this behavior:

[A]lthough Presidents sometimes act unilaterally [in use-of-force decisions], they frequently seek congressional approval, and when they do, the adverse political fallout from interventions that go bad is lessened. Of course, seeking congressional authorization does not ensure that a president and his party will not suffer any backlash from a failed military engagement . . . . Nonetheless, presidents typically suffer much more adverse political consequences from unpopular military engagements when the President initiated the engagement without congressional support.<sup>191</sup>

The same basic logic applies to the president’s decision to deploy troops domestically to perform law enforcement functions. If the president deploys troops unilaterally under the Insurrection Act, the adverse consequences of that decision flow solely to the president. On the other hand, if the president has sought and received judicial approval before deploying troops domestically, some of the adverse consequences are deflected by the fact that a federal court approved of the president’s decision *ex ante*.<sup>192</sup> After Katrina,

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187. *Id.* at 638; see also David J. Samuels & Matthew Soberg Shugart, *Presidentialism, Elections and Representation*, 15 J. THEORETICAL POL. 33, 51 (2003).

188. Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2291 (2006).

189. *Id.*

190. See Saikrishna Bangalore Prakash, *Imperial and Imperiled: The Curious State of the Executive*, 50 WM. & MARY L. REV. 1021, 1039–40 (2008); Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1219–20 (2006).

191. Nzelibe & Stephenson, *supra* note 185.

192. Congress could, of course, require that the president seek express congressional authorization before invoking the Insurrection Act. Congress could also retain for itself the power to decide when the Act should be invoked. But Congress delegated that authority to the president. The president can respond to insurrections more quickly than Congress. For this same reason—the ability to act quickly—a federal court is better suited than Congress to “approve” a president’s decision to invoke the Act.

the Bush Administration was concerned with “how it would have been perceived” if the president had invoked the Insurrection Act and “preemptively taken from the female governor of another party the command and control of her forces.”<sup>193</sup> This concern with “perception” might have been mitigated had the Bush Administration’s decision been blessed by a federal court; such a blessing might have convinced the administration to send troops into New Orleans. Either way, providing the president with the option to seek such a blessing would have accelerated and improved the process by which the administration decided whether or not to deploy troops.

#### CONCLUSION

Hurricane Katrina is the exception that proves the rule—typically states are well equipped to handle disaster-relief operations, and almost never are state and local law enforcement officials incapable of maintaining order in a natural disaster’s aftermath. But as Katrina demonstrated, neither the federal government nor the state government was prepared to handle a disaster of such magnitude, and the looting and lawlessness in New Orleans following the storm created an environment where effective disaster relief became an impossibility. A military law enforcement presence might have restored order to New Orleans more quickly than actually occurred, but federalism concerns slowed and ultimately foreclosed this option. Whether or not the decision not to deploy troops to New Orleans for law enforcement purposes was correct is less important today; what is important is putting in place a process that will better and more quickly answer that question the next time a natural disaster of Katrina’s scope befalls the United States. The PCA Court proposed here would help create a more effective disaster response process by giving the president greater flexibility when deciding whether or not to deploy troops domestically for law enforcement purposes.

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193. *Supra* note 138 and accompanying text.