

*The Insurrection Act and Executive Power to Respond with Force to Natural Disasters*

**ABSTRACT**

In the wake of Hurricane Katrina, Congress amended the Insurrection Act of 1807. The Act enables the President to deploy the military “to suppress, in any State, any insurrection, domestic violence, unlawful combination, or conspiracy.” The amended Act expands the language of the original Act to include natural disasters, epidemics, or other serious public health emergencies, terrorist attacks or incidents, or other conditions. Opponents of the amendment, most notably all fifty governors, criticize the amendment as a presidential power grab aimed at suppressing the power of the states and increasing the role of the military in domestic affairs.

This paper argues that the amendment to the Insurrection Act does not affect the President’s existing powers to deploy the military domestically. Instead, this paper argues that the amendment merely clarifies the situations that justify the use of the military to respond to domestic disorder. An analysis of the historical use of the Act and the Act’s language indicates that justification for presidential action prior to the amendment focused on the extent, rather than the source of the domestic disorder. The changes made in October of 2006 provide explicit examples of situations that may lead to events of public disorder justifying the President’s invocation of the Act’s authority. In addition, political and historical limitations, along with limitations in the Act itself, will restrict presidential abuse of the power. Thus, the uproar over the recent changes to the Insurrection Act and the fears of martial law are unfounded.

## Introduction

Hurricane Katrina raised serious questions about the power of the President to use federal troops to respond to natural disasters. During the hurricane, security concerns, both real and perceived, delayed the disaster response and detracted from the primary focus of saving lives. For example, on August 31, 2005, the New Orleans police force was called off its search and rescue missions to respond to looting.<sup>1</sup> As the White House Report on the Federal Response to Hurricane Katrina stated, “[s]ecurity concerns suspended search and rescue missions, delayed the restoration of communications infrastructure, and impeded medical support missions.”<sup>2</sup>

Ultimately, the number of troops who responded to Hurricane Katrina constituted the largest domestic deployment since the Civil War.<sup>3</sup> By September 15, 2005, nearly 15,000 active duty personnel had been deployed to the disaster area.<sup>4</sup> Despite the widespread reports of looting and general lawlessness, federal law limited the role of the active duty troops to rescue and evacuation activities; emergency treatment of casualties; emergency restoration of power; debris removal; food distribution; roadway control; and emergency communications.<sup>5</sup>

During the crucial hours that followed the hurricane’s landfall, Governor Blanco asked President Bush to “send everything you have got.”<sup>6</sup> However, the Governor refused to relinquish control of the state National Guard troops to the President.<sup>7</sup> Moreover, Governor Blanco did not want federal troops entering the area to assist with law enforcement.<sup>8</sup> In response, the Bush

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<sup>1</sup> THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED, at 40 (Feb. 2006), *available at* <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> S. COMM. ON HOMELAND SEC., HURRICANE KATRINA: A NATION STILL UNPREPARED, at 13 (May 2006), *available at* [http://hsgac.senate.gov/\\_files/Katrina/FullReport.pdf](http://hsgac.senate.gov/_files/Katrina/FullReport.pdf).

<sup>4</sup> THE FEDERAL RESPONSE TO HURRICANE KATRINA, *supra* note 1, at 43.

<sup>5</sup> *Id.*

<sup>6</sup> S. COMM. ON HOMELAND SEC., HURRICANE KATRINA, *supra* note 3, at 491.

<sup>7</sup> See STEVE BOWMAN et al., HURRICANE KATRINA: DOD DISASTER RESPONSE, CRS Rep. No. RL 33095, at 11 (Sept. 19, 2005), *available at* <http://www.fas.org/sgp/crs/natsec/RL33095.pdf>.

<sup>8</sup> *Id.*

Administration scrambled to discern whether it had the authority to send federal troops to carry out law enforcement in Louisiana despite the Governor's opposition.<sup>9</sup> After much debate, the Department of Justice's Office of Legal Counsel concluded that it did have authority to send troops, but, for political reasons, the Administration opted not to take control away from the Governor.<sup>10</sup>

An old and much-debated law, the Posse Comitatus Act, was responsible for the Administration's confusion and the limited role that the military played during Hurricane Katrina. The Act is the most notable limitation on both the President and Congress' power to deploy the military to enforce civil law, and is a reflection of the long-standing Anglo-American distaste for military involvement in civilian affairs.<sup>11</sup> The Act prohibits the use of federal troops to "execute the laws" unless there is an express constitutional or statutory exception.<sup>12</sup> One longstanding exception, and the subject of this paper, is the Insurrection Act of 1807.<sup>13</sup>

A little over a year after Hurricane Katrina, Congress amended the Insurrection Act and changed the Act's name to "Enforcement of the Laws to Restore Public Order."<sup>14</sup> The amendment met with widespread criticism, from commentators and state governors alike.<sup>15</sup> Critics argued that the amendment enables the President to declare martial law too easily and that the amendment gives a power traditionally reserved for the states to the President.<sup>16</sup> This paper questions the validity of this criticism and argues that the amendment merely clarifies a power

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<sup>9</sup> Eric Lipton, Eric Schmitt and Thom Shanker, *Storm and Crisis: Military Reponse; Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1.

<sup>10</sup> Id.

<sup>11</sup> See CHARLES DOYLE, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW, CRS Rep., Order Code 95-964, Updated June 1, 2000.

<sup>12</sup> See 18 U.S.C. § 1035.

<sup>13</sup> 10 U.S.C. §§ 331-335.

<sup>14</sup> See John Warner Defense Authorization Act for Fiscal Year 2007, H.R. 5122, 109th Cong. (2006) (enacted).

<sup>15</sup> See e.g. George Cahlink, *Governors 'Disappointed' with Expanding Federal Role of National Guard*, CQ TODAY, Oct. 6, 2006.

<sup>16</sup> Id.

that the President already possessed. Part I looks at the history of the Insurrection Act, the circumstances surrounding its amendment, and responses to the amendment. Part II considers the Posse Comitatus Act and its constitutional and statutory exceptions. Part III looks at the source of the President's power to respond with force to instances of domestic disorder.

Next, Part IV considers the effect of the amendment on the President's power under the Insurrection Act. First, Part IV discusses the meaning of several of the terms used in the Insurrection Act. Part IV then concludes that based on the history and language of the Act, prior to the Act's amendment, the President had the authority to employ the military to enforce civil law in response to civil disorder caused by natural disasters. Finally, Part V considers the limits of the President's power to invoke the Act and the specific actions the Act authorizes the troops to take.

This paper raises a number of significant issues, including the source of the President's power to respond to disorder domestically and the meaning and application of martial law. Politicians, the courts, and commentators have debated many of these issues for centuries and continue to do so today. While this paper discusses the various arguments relating to these issues, time and space constraints prohibit an in depth analysis and attempted resolution of all of these issues. Instead, the purpose of this paper is to respond to the concerns raised by the Insurrection Act's critics who argue that the amended Insurrection Act gives the President sweeping powers to deploy the military domestically.

Considering the historical use of the Act and the Act's language, this paper argues that justification for presidential action prior to the amendment focused on the extent, rather than the source of the domestic disorder. Before the Act's amendment, the Act pointed to no specific situations that might lead to the type of civil disorder justifying the use of the military permitted

by the Act. The changes made in October of 2006 provide explicit examples of situations that may lead to events of public disorder justifying the President's invocation of the Act's authority. In addition, political and historical limitations, along with limitations in the Act itself, will restrict presidential abuse of the power. Thus, the uproar over the recent changes to the Insurrection Act and the fears of martial law are unfounded.

## **I. Introduction to the Insurrection Act**

### **A. The History and Language of the Insurrection Act**

Congressional recognition of the power of the President to call forth the armed forces to suppress an insurrection first appeared in the Militia Act of 1792.<sup>17</sup> The Militia Act permitted the President to call forth the militia in response to “an insurrection in any state, against the government thereof” upon the application of the legislature of the state, or of the executive (when the legislature cannot be convened).<sup>18</sup> Section 2 permitted the President to call forth the militia “whenever the laws of the United States [are] opposed or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings.”<sup>19</sup> In addition, if the militia of the state was unable or refused to comply, Section 3 of the Militia Act required the President to issue a proclamation commanding the insurgents to disperse and retire peaceably within a limited time before using the militia to suppress the insurrection.<sup>20</sup> Although the terms of the Militia Act limited the duration of the Act to two years following the end of the next session of Congress, Congress later extended the application of the Act.<sup>21</sup>

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<sup>17</sup> Ch. 28, 2nd Cong. (May 2, 1792).

<sup>18</sup> *Id.* at § 1.

<sup>19</sup> *Id.* at § 2.

<sup>20</sup> *Id.* § 3.

<sup>21</sup> *Id.* § 10.

Although the Insurrection Act is known as the “Insurrection Act of 1807,” the Seventh Congress enacted a similar, although less specific, law in 1803. The 1803 law permitted the President, “on an invasion, or insurrection, or probable prospect thereof, to call forth such a number of militia . . . as he may deem proper.”<sup>22</sup>

The 1807 version of the Insurrection Act expanded the President’s power to include the power to call forth the army and navy, rather than just the state militias.<sup>23</sup> That version states that where it is lawful for the President to call forth the militia to suppress an insurrection or ensure that the laws of a State or of the United States are executed, the President may also employ the “land or naval forces of the United States” for the same purpose.<sup>24</sup>

In 1808, President James Madison invoked the Insurrection Act to order the dispersal of and a military response to “persons combined, or combining and confederating together on Lake Champlain . . . for the purpose of forming insurrections against the authority of the laws of the United States, for opposing the same and obstructing the execution.”<sup>25</sup> The President further concluded, “such combinations are too powerful to be suppressed in the ordinary course of judicial proceedings, or by the powers vested in the marshals by the laws of the United States.”<sup>26</sup>

The language found in the contemporary Insurrection Act emerged in the Civil Rights Act of 1871.<sup>27</sup> In April of 1871, the Governor of South Carolina made a request to the President for assistance in maintaining order in South Carolina in response to actions taken by the Klu Klux Klan.<sup>28</sup> In response to the behavior of the Klu Klux Klan and the widespread lawlessness

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<sup>22</sup> Ch. 20, § 24, 7th Cong. (1803).

<sup>23</sup> Ch. 39, 9th Cong. (March 3, 1807).

<sup>24</sup> *Id.*

<sup>25</sup> Proclamation By the President of the United States, American State Papers, 10th Cong., No. 258, April 19, 1808.

<sup>26</sup> *Id.*

<sup>27</sup> Ch. 22, 17 Stat. 13 (1871) (codified as amended at 18 U.S.C. § 241, 42 U.S.C. §§ 1983, 1985(3), 1988).

<sup>28</sup> HARPER’S WEEKLY, at 306 (Editorial), April 8, 1871, *available at* <http://education.harpweek.com/KKKHearings/Article24.htm>.

throughout the South, Congress passed the Civil Rights Act. The relevant section of the Act reads as follows:

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

The Insurrection Act<sup>29</sup> as it stands today is a series of five pieces of legislation contained in 10 U.S.C. §§ 331 – 335. Under section 331, upon a request from the State’s legislature or of the State’s governor if the legislature cannot convene, the President may call on the armed forces to suppress an insurrection.<sup>30</sup>

Unlike section 331, section 332 permits the President to act without a request from the State. Under section 332 the President may call for the use of the armed forces to enforce the laws of the United States or to suppress a rebellion where unlawful obstructions, combinations or assemblages, or rebellion against the authority of the United States make it impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings.<sup>31</sup> On its face, section 332 appears to be a reflection of the President’s constitutional duty under Article II,

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<sup>29</sup> Unless noted, hereinafter I will refer to previous versions of the present-day Insurrection Act collectively as the Insurrection Act.

<sup>30</sup> 10 U.S.C. § 331.

<sup>31</sup> 10 U.S.C. § 332.

Section 3, to “take care that the laws be faithfully executed.”<sup>32</sup> The President used this constitutional power to suppress the Whiskey Rebellion in 1794.<sup>33</sup>

Section 333, the primary portion of the Act amended in October 2006, permits the President, without a request from a State, to authorize the armed forces to suppress insurrection, domestic violence, unlawful combination, or conspiracy in a State under certain conditions.<sup>34</sup> Under the pre-amendment version of the Act, these conditions are twofold. First, where the insurrection, domestic violence, unlawful combination, or conspiracy hinders the execution of the laws of a State and the laws of the United States to the point where the people are deprived of a right, privilege or immunity, or other named constitutional right, and where the authorities of the State fail, or are unable to protect that right, privilege or immunity, the President may use the military to suppress the insurrection, domestic violence, unlawful combination, or conspiracy.<sup>35</sup> Second, where the insurrection, domestic violence, unlawful combination, or conspiracy opposes or obstructs the execution of the laws of the United States, the President may employ the military to suppress it.<sup>36</sup>

Finally, section 334 requires the President to issue a proclamation ordering the “insurgents or those obstructing the enforcement of the laws to disperse and retire peaceably to their abodes within a limited time.”<sup>37</sup> Section 335 of the amended Act extends the provisions of the Insurrection Act to cover Guam and the Virgin Islands.<sup>38</sup>

It is difficult to discern the circumstances under which presidents have utilized specific provisions of the Insurrection Act because executive orders enacted under the authority of the

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<sup>32</sup> U.S. Const. art. II, § 3.

<sup>33</sup> The Papers of George Washington Documents, *The Whiskey Insurrection*, available at <http://gwpapers.virginia.edu/documents/whiskey/index.html>.

<sup>34</sup> 10 U.S.C. § 333 (1998).

<sup>35</sup> 10 U.S.C. § 333(1) (1998).

<sup>36</sup> 10 U.S.C. § 333(2) (1998).

<sup>37</sup> 10 U.S.C. § 334.

<sup>38</sup> 10 U.S.C. § 335.



Act fail to specify which section of the Act upon which they rely. For example, presidents used the Insurrection Act to deploy troops to the South during the 1950s and 1960s to enforce desegregation and maintain order. In 1957, President Dwight D. Eisenhower relied on the Insurrection Act to remove obstructions of justice in respect to enrollment and attendance at public schools in the Little Rock, Arkansas School District.<sup>39</sup> Likewise, President Kennedy invoked the Insurrection Act in 1962 and 1963 to send federal troops to Mississippi and Alabama, respectively, to enforce constitutionally protected civil rights threatened by reactions to desegregation.<sup>40</sup>

The language of the executive orders indicates that the presidents relied on both section 332 and section 333. For example, the executive orders state, “for the removal of obstructions to justice,” “to enforce all orders of the United States District Court,” and “to suppress unlawful assemblies, conspiracies, and domestic violence.”<sup>41</sup> Reference to the orders of the District Court indicate reliance on section 332, which requires the impracticability of enforcing state and federal laws “by the ordinary course of judicial proceedings,”<sup>42</sup> whereas reference to conspiracies and domestic violence indicate reliance on section 333.

President George Bush Sr. used the Insurrection Act to authorize the armed services to restore law and order in response to the Los Angeles riots.<sup>43</sup> On May 1, 1992, at the request of the Governor of California, President Bush issued an executive order authorizing the Secretary of Defense to use the Armed forces to suppress “domestic violence and disorder . . . in Los Angeles

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<sup>39</sup> Exec. Order No. 10,730 (Sept. 24, 1957), *reprinted at* 22 Fed. Reg. 7628.

<sup>40</sup> Exec. Order No. 11,053 (Sept. 30, 1962), *reprinted at* 27 Fed. Reg. 9681; Exec. Order No. 11,111 (June 11, 1963), *reprinted at* 28 Fed. Reg. 5707; Exec. Order No. 11,118 (Sept. 10, 1963), *reprinted at* 28 Fed. Reg. 9863.

<sup>41</sup> See Exec. Order No. 11,053, *supra* note 40; Exec. Order No. 11,111, *supra* note 40; Exec. Order 11,118, *supra* note 40; see also *Alabama v. United States*, 373 U.S. 545 (1963) (indicating that President Kennedy had authority to send troops to the South under section 333 of the Insurrection Act).

<sup>42</sup> 10 U.S.C. § 332.

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

. . . endangering life and property and obstructing execution of the laws . . . and to restore law and order.”<sup>44</sup> While the executive order does not identify a specific provision of the Act, the fact that California’s governor requested the assistance, coupled with the language used in the executive order and proclamation, indicate that the President believed his authority derived from section 331, the only section of the Act specifically calling for request from the State.<sup>45</sup>

It is important to note that in Los Angeles, despite the President’s reliance on the Insurrection Act, the military was not in fact used to enforce the law.<sup>46</sup> Instead, the Joint Task Force commander prohibited the troops from enforcing the law and required each request for assistance to be subject to a test to determine whether the requested activity constituted law enforcement.<sup>47</sup> If the activity did constitute law enforcement, the commander prohibited the military from engaging in the activity.<sup>48</sup> The commander’s refusal to allow the troops to act in a civil law enforcement role stemmed from his confusion over the limitations of the Posse Comitatus Act, which I discuss in detail below in Part III.<sup>49</sup>

Finally, President George Bush Sr. also invoked the Insurrection Act to send troops to the Virgin Islands to stop looting that followed Hurricane Hugo in 1989.<sup>50</sup> In the executive proclamation, President Bush referred to “domestic violence and disorder . . . endangering life and property and obstructing execution of the laws,” which local law enforcement was unable to suppress to restore law and order. Again, while the President does not explicitly state which provision of the Insurrection Act upon which he relied, his reference to domestic violence and

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

<sup>45</sup> Linda J. Dermaine and Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 N.Y.U. J. LEGIS & PUB. POL’Y 167, n2 (2006); 10 U.S.C. § 331.

<sup>46</sup> Dermaine and Rosen, *supra* note 45, at 171.

<sup>47</sup> *Id.* at 172 (citing Christopher M. Schnaubelt, *Lessons in Command and Control from the Los Angeles Riots*, 27 PARAMETERS 88, 101 (1997)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Exec. Order No. 12,690 (Sept. 20, 1989), *reprinted at* 54 Fed. Reg. 39153.

the absence of a judicial order commanding the looters to disperse indicate that he most likely relied on section 333.

## **B. The Insurrection Act and Hurricane Katrina**

As demonstrated above, Presidents have used the Insurrection at various times throughout history to put down lawlessness, insurrection, and rebellion. Since Hurricane Katrina, various sections of the Act have been pointed to as having provided the President the authority to deploy the troops to enforce the law during the hurricane.<sup>51</sup> Governor Blanco requested President Bush to send “everything you’ve got,” and specifically requested federal troops on several occasions.<sup>52</sup> However, she did not want a federal takeover of the disaster relief effort and instead wanted the State National Guard troops to retain primary responsibility, with federal troops focusing on disaster relief tasks other than law enforcement.<sup>53</sup>

Because Governor Blanco would not request federal assistance, Bush Administration officials sought other ways of circumventing the limitations of the Posse Comitatus Act (“PCA”).<sup>54</sup> For example, officials proposed that a Title 10 officer be sworn into the Louisiana National Guard.<sup>55</sup> As a commander of both Title 10 troops and the State National Guard, the commander would have been able to control both groups. Governor Blanco rejected this proposal.<sup>56</sup>

Knowing that a request from the Governor was unlikely, Bush Administration, Department of Defense and the Department of Justice officials began investigating other possible

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<sup>51</sup> See 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; John Yoo, *Trigger Power*, L.A. TIMES, Oct. 2, 2005.

<sup>52</sup> S. COMM. ON HOMELAND SEC., HURRICANE KATRINA, *supra* note 3, at 491.

<sup>53</sup> See Bowman, *supra* note 7, at 11.

<sup>54</sup> Lipton et al., *supra* note 8.

<sup>55</sup> See Bownam, *supra* note 7, at 11.

<sup>56</sup> *Id.*

ways of evading the limits of the PCA, mainly the Insurrection Act.<sup>57</sup> While the portion of the Act upon which the Administration chose to rely is unclear, Administration officials reportedly concluded that the President had the authority under the Act to send in federal troops over Governor Blanco's objection.<sup>58</sup>

For example, Department of Defense officials argued that section 332 provided justification for the President to use the military to enforce the law in New Orleans.<sup>59</sup> Under this argument, the unrest that followed Hurricane Katrina constituted an unlawful obstruction, combination, or assemblage that made it impracticable to enforce the laws of the United States, bringing the unrest under section 332 of the Insurrection Act.<sup>60</sup> While it is unclear exactly which federal laws the unrest made impracticable to enforce, one former Department of Justice official cited laws "protecting mail, telecommunications or interstate commerce and travel."<sup>61</sup>

Reports to the Department of Homeland Security ("DHS") conveyed the sense of urgency and chaos caused by the hurricane and perhaps provided the justification for the Administration's belief that the inability to enforce federal laws made the Insurrection Act applicable to the situation in New Orleans. For example, the CEO for BellSouth, a telephone and internet service provider, requested immediate security assistance from DHS, reporting that the main office was being overrun by a mob as the office attempted to evacuate and that BellSouth employees might be in physical danger.<sup>62</sup> Similarly, the grain industry reported that security concerns were prohibiting all operations at main grain facilities.<sup>63</sup> Additionally, reports indicated that fuel and

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<sup>57</sup> Lipton et al., *supra* note 8.

<sup>58</sup> *Id.*

<sup>59</sup> Burns, *supra* note 51.

<sup>60</sup> Dermaine and Rosen, *supra* note 45 at 239.

<sup>61</sup> Yoo, *supra* note 51.

<sup>62</sup> THE FEDERAL RESPONSE TO HURRICANE KATRINA, *supra* note 1, at ch. 5, n42, citing Homeland Security Operations Center Spot Report #33, 31 Aug. 05 at 1123 hrs.

<sup>63</sup> *Id.* citing U.S. Department of Homeland Security, "Hurricane Katrina DHS SITREP #15," Sept. 2, 2005.

security for deliveries was a concern<sup>64</sup> and that security risks affected the agriculture, food processing, distribution, services, and retail industries.<sup>65</sup> Although the reports of looting and general lawlessness were later proved to be largely exaggerated,<sup>66</sup> these reports potentially support DOD officials' belief that the primary authority for invocation was section 332 or section 333. Both of these sections require civil disorder that prevents the enforcement of federal laws, which in this case would be laws relating to interstate commerce.

Others argue however, that enforcement of federal law, a requirement of section 332, would have been the pretext, not the purpose for the use of federal troops during Hurricane Katrina.<sup>67</sup> As one commentator states, “[r]ather, the purpose of using troops would have been to quell unrest and protect human life and property in a situation in which civil authorities proved incapable of doing so.”<sup>68</sup> As a result, section 332 would not have provided the President with the authority to send the armed forces to New Orleans to enforce civil law.<sup>69</sup>

### **C. The Amendment to the Insurrection Act**

As noted above, confusion over the President's authority to employ federal troops to enforce civil law during Hurricane Katrina prompted a debate over the need for an amendment to the Insurrection Act. In a speech on September 15, 2005, President Bush stated, “It is now clear that a challenge on this scale requires greater federal authority and a broader role for the armed forces—the institution of our government most capable of massive logistical operations in a moment's notice.”<sup>70</sup>

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<sup>64</sup> Id. citing U.S. Department of Homeland Security, “Hurricane Katrina DHS SITREP #18,” Sept. 4, 2005.

<sup>65</sup> Id. citing U.S. Department of Homeland Security, “Hurricane Katrina DHS SITREP #19,” Sept. 4, 2005.

<sup>66</sup> Id.

<sup>67</sup> Dermaine, *supra* note 45, at 239.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Press Release, Office of the Press Secretary, President Discusses Hurricane Relief in Address to the Nation, , New Orleans, LA (Sept. 15, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/print/20050915-8.html>.

Likewise, the White House Report on the Federal Response to Hurricane Katrina criticized the current limitations on the Department of Defense's ability to use "military capabilities during domestic incidents."<sup>71</sup> Specifically, the report pointed to the requirement of requests for assistance from local governments, which resulted in a slow response by the armed forces, and a lack of coordination between National Guard forces and active duty military.<sup>72</sup> While the White House Report did not specifically point to the Posse Comitatus Act or the Insurrection Act as limitations that affected the efficacy of the federal government's response to Hurricane Katrina, the Report noted "limitations under Federal law and DOD policy."<sup>73</sup> In light of these concerns, President Bush approached Congress and asked Congress to consider whether "there [is] a natural disaster – of a certain size – that would enable the Defense Department to become the lead agency in coordinating the response effort."<sup>74</sup>

The Department of Defense indicated that it was hesitant to take control of major natural disaster situations from the Department of Homeland Security out of concern over Americans traditional opposition to military police presence on domestic soil and because of strained military resources caused by the war in Iraq.<sup>75</sup> Russ Knock, a spokesman for the Department of Defense, emphasized that the DOD was not considering a complete military takeover of disaster operations.<sup>76</sup> Instead, he pointed to situations in which local resources and other federal agencies are overwhelmed, and limited the military's role to maintaining social stability, providing search and rescue support, and assessing damage.<sup>77</sup>

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<sup>71</sup>THE FEDERAL RESPONSE TO HURRICANE KATRINA, *supra* note 1, at ch. 5.

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Jim VandeHei and Josh White, *Bush Urges Shift in Relief Responsibilities*, WASH. POST, Sept.26, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/25/AR2005092501224.html>.

<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Id.

On April 6, 2006, Representative Duncan Hunter introduced the John Warner National Defense Authorization Act for Fiscal Year 2007 (“Defense Authorization Act” or “Act”). That Act is largely an appropriations bill, authorizing over four hundred and fifty billion dollars for defense programs in 2007.<sup>78</sup> More specifically, the Act’s primary provisions aim to achieve the following: to provide the Department of Defense with the resources and authority necessary to win the war on terrorism; to enhance the DOD’s homeland defense capabilities; to increase congressional oversight of operations in Iraq and Afghanistan; to improve the quality of life for members of the armed services and their families; to continue to modernize the military; and to increase congressional oversight of United States policy concerning North Korea.<sup>79</sup>

In general, Congress framed the bill as one in support of the men and women of the armed forces.<sup>80</sup> However, the Act also includes the amendment to the Insurrection Act, leaving many to believe that the amendments were purposefully “hidden” within the larger bill.<sup>81</sup> In addition, critics point to the fact that the President’s Statement on the Defense Authorization Act makes no mention of the changes to the Insurrection Act as further proof of the secretive nature of the amendment.<sup>82</sup>

The Senate Armed Service Committee characterized the amendment to the Insurrection Act as a “provision that would update the Insurrection Act to clarify the President's authority to use the armed forces, including the National Guard in federal service, to restore order and enforce federal laws in cases where, as a result of a terrorist attack, epidemic, or natural disaster,

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<sup>78</sup> Press Release, Office of Senator John Warner, Bill Summary, National Defense Authorization Act for Fiscal Year 2007 (Sept. 29, 2006), *available at* <http://www.senate.gov/~warner/pressoffice/pressreleases/20060929a.htm>.

<sup>79</sup> *Id.*

<sup>80</sup> H. RPT. NO. 109-452, COMM. ON THE ARMED SERVICES (May 4, 2006).

<sup>81</sup> See John Warner National Defense Authorization Act for Fiscal Year 2007, S. REP. NO. 109-254 (Conf. Rep.), (Sept. 29, 2006) (remarks by Senator Leahy).

<sup>82</sup> See President’s statement on H.R. 5122 (Oct. 17, 2007).

public order has broken down.”<sup>83</sup> Similarly, the Senate Committee report on the amendments stated that the prior Insurrection Act “grant[ed] the President broad powers to use the armed forces in situations of public disorder . . . .”<sup>84</sup> However, “the antique terminology and the lack of explicit reference to such situations as natural disasters or terrorist attacks may have contributed to a reluctance to use the armed forces in situations such as Hurricane Katrina.”<sup>85</sup> The Committee “emphasized that this authority is temporary, to be employed only until the state authorities are again capable of maintaining order.”<sup>86</sup> In addition, the amendment requires the President to notify Congress of his decision to deploy the military as soon as practical, and every two weeks thereafter for the duration of his exercise of the authority.<sup>87</sup>

As amended, section 333 reads as follows:

§ 333. Major public emergencies; interference with State and Federal law

(a) Use of armed forces in major public emergencies.

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

(A) restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that--

(i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and

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

(B) suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2).

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

(A) so hinders the execution of the laws of a State or possession, as applicable, and of the United States within that State or possession, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State or possession are unable, fail, or refuse to protect that right, privilege, or immunity,

<sup>83</sup> S. REP. NO. 109-254, COMM. ON THE ARMED SERVICES (May 9, 2006).

<sup>84</sup> S. Rep. No. 109-254.

<sup>85</sup> Id.

<sup>86</sup> Id.

<sup>87</sup> Id.



or to give that protection; or

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

(3) In any situation covered by paragraph (1)(B), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

(b) Notice to Congress. The President shall notify Congress of the determination to exercise the authority in subsection (a)(1)(A) as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of that authority.

The primary changes to the Act involve the addition of language in section (a)(1)(A) and the restructuring of the Act. First, section (a)(1)(A) adds to the previous version that the President may use the armed forces to restore public order resulting from domestic violence caused by a “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition.” The previous version of the Act contained no similar specification of instances that could lead to the civil disorder. In addition, section (a)(1)(A) identifies domestic violence, as opposed to insurrection, unlawful combination or conspiracy, as the condition that will be caused by the natural disaster, terrorist attack, or other specified trigger.

The second important thing to note about the amendment is that under section (a)(3), in the event of insurrection, domestic violence, unlawful combination, or conspiracy, the State will be considered to have denied its citizens the equal protection of the laws. As a result, in any instance of insurrection, domestic violence, unlawful combination, or conspiracy, section (a)(2)(A) will be satisfied and the Insurrection Act will apply. Significantly, as noted above, for the President to invoke the Act under section (a)(1)(A), the natural disaster, terrorist attack, or other event must lead to domestic violence. The inclusion of “domestic violence” in section (a)(1)(B) indicates that whenever a natural disaster or other named event leads to domestic violence, then section (a)(1)(3) will apply. The State will be deemed to have denied its citizens equal protection of the laws, and the requirements of the Insurrection Act satisfied. This

indicates that the distinction between section (a)(1)(A) and (a)(1)(B) is largely structural, rather than substantive. In part IV, I will discuss the meaning of domestic violence and the significance of these changes.

Finally, it is interesting to note that Congress chose to amend section 333 of the Act, rather than section 332 of the Act. As discussed above, Bush Administration officials, along with several commentators, appear to believe that section 332 provided the President with the authority to send federal troops to New Orleans during Hurricane Katrina.<sup>88</sup> Considering the fact that section 333 stemmed from the Fourteenth Amendment it seems as though it is directed at preventing the “dangers of widespread and unchecked oppression of minority groups,” rather than ensuring the enforcement of federal law.

However, nor does section 332 necessarily appear to have been intended for the type of situation created by a natural disaster. Unlike section 333, section 332 applies in situations where the laws of the United States cannot be enforced “by the ordinary course of judicial proceedings.”<sup>89</sup> This situation occurred in the early 1960s when President Kennedy sent troops to the South to enforce the court’s desegregation orders.<sup>90</sup> Following Hurricane Katrina there was no such judicial order requiring the rioters and looters to disperse. While the language of section 332 does not state that a judicial order is a prerequisite for invocation of the Act, the section does seem to require some showing that using regular judicial proceedings to resolve the disorder is impracticable. This might occur when the courts are suspended, as during martial law, or, as in the 1960s, when people do not adhere to the judiciary’s orders. Neither of these

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<sup>88</sup> See See John A. McCarthy, Randall Jackson, and Maeve Dion, *Posse Comitatus and the Military’s Role in Disaster Relief*, in A.B.A HURRICANE KATRINA TASK FORCE SUBCOMM. REP. 22, 29 (2006) (quoting language from section 332); Yoo, *supra* note 51; Dermaine, *supra* note 45, at 238.

<sup>89</sup> 10 U.S.C. § 332.

<sup>90</sup> See Exec. Order No. 11,053 (Sept. 30, 1962), *reprinted at* 27 Fed. Reg. 9681; Exec. Order No. 11,111 (June 11, 1963), *reprinted at* 28 Fed. Reg. 5707; Exec. Order No. 11,118 (Sept. 10, 1963), *reprinted at* 28 Fed. Reg. 9863.

situations occurred during Hurricane Katrina, indicating that the President could not have accurately relied on section 332 for authority to send troops to New Orleans.

Senator Patrick Leahy (D-Vermont), along with all fifty governors, strongly opposed the Act's amendment. In the Conference Report for the Defense Authorization Act, Senator Leahy voiced his objection to the amendment, which he referred to as "incredible."<sup>91</sup> Senator Leahy stated, the amendment "subverts solid, longstanding posse comitatus statutes that limit the military's involvement in law enforcement, thereby making it easier for the President to declare martial law."<sup>92</sup> Senator Leahy also argued that the amendment takes a power traditionally reserved and well suited for the National Guard and gives it to other military forces.<sup>93</sup> In addition, Senator Leahy maintained that the Nation's governors are best able to determine how to use the National Guard during natural disasters. "There is good reason for the constructive friction in existing law when it comes to martial law declarations."<sup>94</sup> Calling the triggers "automatic," Senator Leahy stated, "[i]t seems the changes to the Insurrection Act have survived the Conference because the Pentagon and the White House want it."<sup>95</sup> On February 7, 2007, Senator Leahy introduced legislation that would repeal the amendment to the Insurrection and reinstate the Act's previous language.<sup>96</sup> That legislation is currently before the Armed Services Committee.

Similarly, on October 25, 2006, Representative Cynthia McKinney (D- Georgia) introduced a Concurrent Resolution "reaffirming the importance and continued application of the

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<sup>91</sup> John Warner National Defense Authorization Act, *supra* note 81.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> S. 513, 110th Cong. Representative Tom Davis introduced an identical bill in the House, which was subsequently referred to the House Committee on Armed Services.

Posse Comitatus Act.”<sup>97</sup> The Resolution specifically refers to the Insurrection Act, along with the Stafford Act, as providing the President with “broad powers that may be invoked in the event of domestic emergencies, including an attack against the Nation using weapons of mass destruction, and these laws specifically authorize the President to use the Armed Forces to help restore public order.”<sup>98</sup> The Resolution was referred to the House Committee on the Judiciary Subcommittee on Crime, Terrorism and Homeland Security on February 2, 2006.<sup>99</sup>

The language used in the Representative McKinney’s resolution mirrors the language used in the Homeland Security Act of 2002, which likewise reaffirmed Congress’s commitment to the Posse Comitatus Act.<sup>100</sup> In discussing the Resolution, Representative McKinney made the following comments:

President Bush has ample authority under provisions of existing laws on disaster response to mobilize and command any and all federal assets, including military forces. State directed National Guard units have always worked in conjunction with federal troops without being put under federal control themselves. Both National Guard and regular military forces are authorized under federal and state laws to use force to protect lives, property and public safety during a declared emergency. Police functions have been wisely left to local police and state National Guard forces, except when the situation was so dire they could not function.<sup>101</sup>

## **II. The Posse Comitatus Act**

To understand the implications of the amendments to the Insurrection Act, it is important to consider the constitutional and statutory powers of the President prior to the Act’s amendment. While the Insurrection Act grants the President authority to use the military in a domestic law enforcement capacity, it is an exception to the fundamental Anglo-American belief in the

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<sup>97</sup> H. Con. Res. 274, 109th Cong..

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Pub. Law. 107-296 § 886, 107th Cong.; see also H.R. 5005 § 780 (Nov. 25, 2002).

<sup>101</sup> H. REP. NO 109-452, COMM. ON THE ARMED SERVICES (May 4, 2006) (comments by Rep. Cynthia McKinney\_.

exclusion of the military from civilian affairs.<sup>102</sup> In America, this anti-military sentiment expresses itself in the Posse Comitatus Act of 1897 (“PCA”).<sup>103</sup>

The PCA arose during the Reconstruction era in response to suspicion that federal troops in the South had improperly influenced the outcome of the 1876 presidential election.<sup>104</sup> Following the Civil War, the Army was used throughout the South to maintain civil order and enforce the laws of the Reconstruction era, taking on traditional police functions.<sup>105</sup> After allegations of the Army’s improper influence on the outcome of the presentational election, Congress’s preexisting concern with the Army’s role in the South led them to pass the PCA.<sup>106</sup>

Translated literally, “posse comitatus” means “the power of the county.”<sup>107</sup> The phrase reflects the traditional power of the sheriff to call upon citizens to help maintain the peace or conduct rescue operations.<sup>108</sup> In the absence of an explicit statutory or constitutional exception, the PCA prohibits the use of the military to “execute the laws.” In full, the Act reads as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>109</sup>

While the PCA criminalizes the prohibited conduct, no one has ever been successfully prosecuted under the PCA.<sup>110</sup> Instead, the PCA is generally asserted as a defense in cases where the lawfulness of government conduct is an element of the charged offense. For example, in United States v. Red Feather, the court admitted evidence of the military’s conduct where the

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<sup>102</sup> Doyle, *supra* note 10.

<sup>103</sup> 18 U.S.C. § 1035.

<sup>104</sup> Dan Bennett, *The Domestic Role of the Military in America: Why Modifying or Repealing the Posse Comitatus Act Would Be a Mistake*, 10 LEWIS & CLARK L. REV. 935, 941 (Winter 2006).

<sup>105</sup> Craig T. Trebilcock, *The Myth of the Posse Comitatus* (Oct. 2003), available at <http://www.homelandsecurity.org/newjournal/articles/trebilcock.htm>.

<sup>106</sup> *Id.*

<sup>107</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>108</sup> See Bennett, *supra* note 104, at 937.

<sup>109</sup> 18 U.S.C. § 1035

<sup>110</sup> Trebilcock, *supra* note 105.

defendants attempted to disprove an element of the charged offense by asserting that the military acted unlawfully during a period of civil disorder.<sup>111</sup>

There has been considerable debate and confusion over to whom the PCA applies and what functions the PCA prohibits.<sup>112</sup> Expressly, the PCA applies only to the Army and the Air Force. However, courts have generally held that statutes and Department of Defense regulations and policy have extended the PCA's application to the Navy and the Marine Corps, but not to the Coast Guard.<sup>113</sup>

In addition, the PCA applies to the National Guard, but only when the Guard has been "federalized."<sup>114</sup> Typically, the National Guard operates under the control of individual state governors.<sup>115</sup> When the National Guard is under this state status, the limitations of the PCA do not apply, and the National Guard is free to assist in enforcing the law.<sup>116</sup> However, the President may place the National Guard into federal service.<sup>117</sup> When it is in federal service, the National Guard is an active part of the Armed Forces under Title 10. As a result, the limitations of the PCA apply.<sup>118</sup>

In terms of activities prohibited by the PCA, the PCA forbids members of the military from "execut[ing] the laws." As such, the military is free to assist civil authorities and perform activities that do not constitute civil law enforcement. In general, courts have made a distinction between active and passive activities in determining what activities are permissible under the PCA.<sup>119</sup> Thus, permissible activities include providing civil law enforcement authorities use of

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<sup>111</sup> 392 F. Supp. 916 (D.S.D. 1975).

<sup>112</sup> See Dermaine and Rosen, *supra* note 45, at 170-71; see also 10 U.S.C. § 375.

<sup>113</sup> See Dermaine and Rosen, *supra* note 45, at 174-75.

<sup>114</sup> *Id.* at 176.

<sup>115</sup> *Id.* at 177.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 176-77.

<sup>118</sup> *Id.*

<sup>119</sup> Trebilcock, *supra* note 105.

military equipment and facilities, training and advising law enforcement officials, and sharing information collected during the normal course of military training or operations.<sup>120</sup> For disaster relief, permissible military activities include debris removal, search and rescue, providing emergency medical care, moving persons or supplies, clearing roads, and disseminating public information on health and safety measures.<sup>121</sup>

### **A. Exceptions to the Posse Comitatus Act**

As noted above, if there is a constitutional or statutory exception, the PCA's general prohibition against the military's involvement in civil law enforcement does not apply. I will first consider the PCA's statutory exceptions and then move to the constitutional exceptions.

#### **1. Statutory Exceptions**

Congress created numerous statutory exceptions to the PCA. While the Insurrection Act is the most notable statutory exception, other statutory exceptions include the use of the military to respond to violations of laws pertaining to nuclear and radiological materials,<sup>122</sup> to respond to violations of laws relating to chemical and biological weapons,<sup>123</sup> and to intercept vessels and aircraft suspected of being involved in transporting controlled substances or persons or as a part of counterterrorism operations.<sup>124</sup>

Many of the statutory exceptions that commentators point to are not in fact exceptions. Instead, the so-called exceptions create a role for the military in domestic law enforcement that is limited to "passive" involvement rather than the "active" involvement that the PCA prohibits. For example, some commentators point to the Stafford Act as an exception to the PCA. While

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<sup>120</sup> See Dermaine and Rosen, *supra* note 45, at 189.

<sup>121</sup> *Id.*

<sup>122</sup> 18 U.S.C. § 831.

<sup>123</sup> 18 U.S.C. § 832. However, the statute prohibits the military from making arrests except where military action is necessary to protect from a immediate threat.

<sup>124</sup> 10 U.S.C. §§ 124, 374(b)(2)(D).

the Stafford Act permits the President to declare major disasters and to send in military forces for up to ten days to preserve life and property, the military's role is limited to passive activities.<sup>125</sup> Thus, the Stafford Act does not permit the military to "execute the law" within the meaning of the PCA.<sup>126</sup>

Others have pointed to Department of Defense regulations as providing exceptions to the PCA.<sup>127</sup> For example, Department of Defense regulations provide that the U.S. Government has an inherent right "to ensure the preservation of public order and to carry out governmental operations within its territorial limits, or otherwise in accordance with applicable law, by force, if necessary."<sup>128</sup> In addition, under the Department of Defense's Immediate Response Authority, commanders may provide resources and assistance, including law enforcement, when a disaster overwhelms the capabilities of state authorities and requires an immediate response.<sup>129</sup>

However, the PCA's requirement of "an Act of Congress" indicates that the Department of Defense does not have the authority to create exceptions to the PCA. In fact, the Department of Defense Manual itself states that it is not to be relied upon as a source of authority and instead should be viewed as providing guidance.<sup>130</sup> Moreover, the Manual identifies the Posse Comitatus Act as a limitation on the military's role in disaster response.<sup>131</sup> Finally, the Department of Defense regulations explicitly state that only the President (or the Attorney

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<sup>125</sup> See 42 U.S.C. § 5121.

<sup>126</sup> See McCarthy et al, *supra* note 88, at 24.

<sup>127</sup> See JENNIFER K. ELSEA, *The Use of Federal Troops for Disaster Assistance: Legal Issues*, at 3 (Sept. 16, 2005), CRS Rep. for Cong., Order Code RS22266.

<sup>128</sup> DOD Directive 5525 § E4.1.2.3 (1989).

<sup>129</sup> DOD Directive 3025.1 § 4.5 (1993); 32 C.F.R. § 215.4(c)(2)(ii).

<sup>130</sup> DOD Directive 3025.1-M, C8.5, at 109 (June 1994).

<sup>131</sup> DOD Directive 3025.1-M, C8.5.2.4.1.3. at 113 (June 1994); see also 32 C.F.R. § 185.2(f) (stating that the regulations do not cover military support to civil law enforcement); 32 C.F.R. § 215.9(a)(2).



General if authorized by the President) may request the use of active duty military forces in response to domestic disturbances.<sup>132</sup>

## 2. Constitutional Exceptions

The Constitution does not contain a provision that grants the President the authority to use the military to enforce the law. The fact that the PCA requires “express” constitutional authorization has led some to argue that, because there is no explicit exception to the PCA in the Constitution, no constitutional exception exists.<sup>133</sup> These commentators argue that the inclusion of constitutional exceptions in the PCA was a “face saving compromise” that should be ignored.<sup>134</sup> Others argue that the requirement of express constitutional authorization in the PCA is a reference to the President’s constitutional powers, both express and inherent.<sup>135</sup> The legislative history of the PCA reflects this conflict between supporters and critics of the PCA. The history indicates that when the phrase “express Constitutional exception” was added, those who opposed the PCA believed that the Constitution gave the President inherent or implied powers to use the armed forces to enforce the laws domestically.<sup>136</sup> Those who supported the PCA maintained that the President had no such inherent power.<sup>137</sup>

Whether the PCA’s constitutional exceptions include instances where the President is acting under inherent or implied constitutional power turns largely on whether Congress has the authority to limit the inherent power of the President.<sup>138</sup> Some commentators have argued that no statute can limit the explicit or implicit constitutional power of the President.<sup>139</sup> Under this

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<sup>132</sup> DOD Directive 3025.15 4.7.4 (Feb. 18, 1997). However, note that where the President is unable to make such a request, DOD regulations permit the Department to respond with force. See DOD Directive 3025.12 4.2.2.

<sup>133</sup> Doyle, *supra* note 10, at 16-17.

<sup>134</sup> *Id.* at 17.

<sup>135</sup> *Id.* at 1.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 19-20.

<sup>139</sup> *Id.*

argument, Congress overstepped its authority when it passed the PCA. However, the answer to this question remains unclear.<sup>140</sup> The following section will address the President's constitutional powers to respond to domestic emergencies and the powers of Congress to limit that power.

### **III. The Source of the President's Power to Respond to Domestic Disorder**

Unlike governments in England and much of Europe, the founders of the American Constitution constructed the Constitution in such a way as to specifically define each branches' roles and powers, creating a system under which each branch has limited and separate powers.<sup>141</sup> However, in the arena of military affairs, the roles of Congress and the President often overlap. The Insurrection Act demonstrates the interplay between these overlapping roles, and the recent Amendment to the Insurrection Act raises two primary issues regarding presidential and congressional power. First, what constitutional authority does the President have to respond with force to civil disorder resulting from natural disasters? Second, to what extent can Congress expand or contract any constitutional power that the President possesses?

Scholars have asserted two primary sources of the President's authority to employ the military to restore order during domestic disturbances. First, the more prominent argument is that, while the Constitution does not explicitly provide the President with the authority to use the military to restore order following an emergency, the President possesses at least some inherent powers to use force to restore order. Under this argument, the President's authority stems from Article II, section 3, which states, the President "shall take care that the laws be faithfully executed."<sup>142</sup> The second argument maintains that the President's power to employ the military

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<sup>140</sup> Id.

<sup>141</sup> Letter from Edward Bates to Abraham Lincoln (July 5, 1861) *in* ABRAHAM LINCOLN PAPERS, Series 1, General Correspondence, at 2-3 (1833-1916) (opinion on suspension of writ of habeas corpus).

<sup>142</sup> U.S. CONST. art II, § 3.

does not stem from the President's inherent powers (if they exist). Instead, the power to use force to respond to domestic disorder is congressional. Through the Insurrection Act, Congress delegated its constitutional authority to the President.

The distinction between the sources of the President's authority is important for several reasons. First and most importantly, if the source of the President's authority is through delegation by Congress, then Congress can easily limit the President's power.<sup>143</sup> Conversely, if the President possesses inherent power to respond to domestic disturbances with force, then Congress is without authority to limit the President's authority. If this is the case, then the limits of the PCA are largely meaningless and invalid. In addition, any argument that the amendment to the Insurrection Act expanded the President's power would fail, because before the amendment, the President already possessed broad power to respond to domestic emergencies.

While I will outline the contours of both of these arguments below, it is important to note here that, for the purposes of this paper, the source of the President's constitutional power to employ the military domestically is not determinative. The Insurrection Act provides a clear statutory exception to the PCA. Thus, regardless of whether the President has inherent authority to respond to domestic disorders or whether Congress delegated its authority to the President to so respond, the President possess such a power under the Insurrection Act. The purpose of this paper is to identify the limits of the President's power under the Insurrection Act before and after the amendment. So long as the President possesses such power, regardless of its source, then the President's authority under the Insurrection Act is valid.

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<sup>143</sup> Stephan I. Vladeck, *Emergency Power and the Militia Acts*, Yale L. J. 149, 153 (Oct. 2004);

## A. The Executive Authority Argument

### 1. The Inherent Powers of the President

As noted above, despite the requirement of express constitutional exceptions in the Posse Comitatus Act, some commentators argue that the President may have inherent or implied power under the Constitution to respond to natural disasters.<sup>144</sup> There has been considerable debate over whether implied or inherent powers can be read into the President’s explicit constitutional powers.<sup>145</sup> For example, some argue, “[o]ur government . . . has no powers but such as are granted by the Constitution; and many powers are expressly withheld.”<sup>146</sup> Others, beginning with Alexander Hamilton, argue that the difference in wording between Article I and Article II demonstrates Congress’s intent to create inherent presidential powers.<sup>147</sup> Whereas Article I reads, “All legislative powers herein granted shall be vested in a Congress . . . ,”<sup>148</sup> Article II reads, “The executive Power shall be vested in a President . . . .”<sup>149</sup> Thus, under this argument, the exclusion of the “herein granted” language from Article II indicates that the framers intended to grant the President powers beyond those explicitly listed in the Constitution.

In Youngstown Sheet & Tube Co. v. Sawyer, the Supreme Court addressed the power of the President to act without express constitutional or statutory authority.<sup>150</sup> There, by a vote of 6 to 3, the Court found the President’s seizure of several steel mills unconstitutional. Although Justice Black wrote the majority opinion, six other Justices also wrote opinions, providing several different views on whether the President may act without express constitutional or statutory authority.

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<sup>144</sup> See Doyle, *supra* note 10, at 17.

<sup>145</sup> See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

<sup>146</sup> Edward Bates to Abraham Lincoln, *supra* note 141, at 5.

<sup>147</sup> Alexander Hamilton, *First Letter of Pacifus* (June 29, 1773), reprinted in William H. Goldsmith, *The Growth of Presidential Power* (1974).

<sup>148</sup> U.S. Const. art. I, § 1.

<sup>149</sup> U.S. Const. art. II, § 1.

<sup>150</sup> 343 U.S. 579 (1952).

Specifically, four distinct views emerged. First, Justice Black's majority opinion contained the view that there is no inherent presidential power, and as such the President may act only with express Constitutional or statutory authority.<sup>151</sup> Second, Justice Douglas's opinion maintained that the President has inherent authority to the extent that he does not usurp or interfere with the powers of another branch.<sup>152</sup> Third, Justice Frankfurter<sup>153</sup> and Justice Jackson<sup>154</sup> argued that the President may take any action not prohibited by the Constitution or by a statute. Finally, Chief Justice Vinson's dissenting opinion suggests that the President does have inherent powers, at least in some areas, and as a result, statutes restricting the President's power are unconstitutional.<sup>155</sup>

Unfortunately, the several opinions in Youngstown do not provide much guidance on the issue of the President's implied powers, as all four of the approaches have some support in Youngstown and in later cases. Moreover, later opinions on the issue rarely explicitly state on which approach they rely.<sup>156</sup> The various opinions in Youngstown seem to support the existence of some presidential inherent emergency power.<sup>157</sup> However, in Youngstown the President lacked express statutory authorization to seize control of the steel mills. As a result, instead of directly addressing the issue of inherent presidential emergency power, the bulk of the various opinions discuss whether Congress had impliedly authorized the President's actions.<sup>158</sup>

Unlike the situation in Youngstown, in the present case, Congress explicitly authorized the President to use force to respond to domestic disorder through the Insurrection Act. Thus, the President possesses express statutory authority to respond to threats to public security,

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<sup>151</sup> Id. at 585.

<sup>152</sup> Id. at 631-32 (Douglas, J., concurring).

<sup>153</sup> Id. at 602 (Frankfurter, J. concurring).

<sup>154</sup> Id. at 635 (Jackson, J., concurring).

<sup>155</sup> Id. at 667 (Vinson, C.J., dissenting).

<sup>156</sup> Monaghan, *supra* note 145, at 37.

<sup>157</sup> Id.

<sup>158</sup> Id.

including insurrection and domestic violence. However, as noted, commentators dispute whether this authority is, in fact, statutorily based. Instead, these scholars maintain that the President’s authority to employ the military domestically in response to disorder is inherent in the powers that the Constitution expressly grants to the President. Specifically, these scholars point to Article II, section 3, which states that the President “shall take care that the laws [are] faithfully executed.”<sup>159</sup>

Many scholars see the Insurrection Act as a reflection of this constitutional authority. Both the amended and the previous versions of the Act state that, where insurrection, combination, or domestic violence make it impracticable for local authorities to enforce the laws, the President may use the armed forces to ensure that the laws are enforced.<sup>160</sup> Of the original Insurrection Act, President Lincoln’s attorney general wrote, “[t]he duty to suppress the insurrection, being obvious and imperative, the two acts of Congress, of 1795 and 1807, come to his aid, and furnish the physical force which he needs, to suppress the insurrection and *execute the laws*. Those two acts authorize the President to employ, for that purpose, the Militia, the Army and the Navy.”<sup>161</sup>

Several Supreme Court cases address the President’s power to respond with force to domestic threats. For instance, in In Re Debs the Court recognized the authority of the President to respond to an emergency that threatened the authority of the federal government.<sup>162</sup> In the case, the Court upheld President Cleveland’s authority to use troops and seek an injunction to end the Pullman strike.<sup>163</sup> The Court recognized that the authority granted to the federal

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<sup>159</sup> U.S. CONST. art. II, § 3.

<sup>160</sup> See 10 U.S.C. § 333.

<sup>161</sup> Edward Bates to Abraham Lincoln, *supra* note 141, at 13 (emphasis added).

<sup>162</sup> *In re Debs*, 158 U.S. 564 (1895); see also Doyle, *supra* note 10, at 15.

<sup>163</sup> *In re Debs*, 158 U.S. 564.

government necessarily includes the means necessary to implement the government's powers.<sup>164</sup> The Court stated that it is "an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."<sup>165</sup> Thus, the Court concluded that the President may use the armed forces to "brush away all obstructions to the freedom of interstate commerce or to the transportation of the mails."<sup>166</sup>

Similarly, Martin v. Mott is also relevant. There, the Court upheld the President's discretionary power to determine when the use of force to quell civil disorder is appropriate.<sup>167</sup> Martin involved an Act of Congress giving the President the authority to call forth the militia in the event of a foreign invasion or attack by an "Indian tribe."<sup>168</sup> The Court concluded that, the authority to decide whether the exigency exists belongs exclusively to the President, and that his decision is "conclusive upon all other persons."<sup>169</sup>

Under the inherent executive powers argument, the above cases demonstrate that the President's constitutional grant of authority necessarily includes the ability to carry out his duties, including the duty to ensure that the laws are faithfully executed. The Constitution explicitly grants the President this duty and also places the President in the position of Commander in Chief of the Armed Forces.<sup>170</sup> The constitutional power of the President is unique. As President Lincoln's Attorney General, Edward Bates noted, it is, by its nature, an

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<sup>164</sup> Id. at 578.

<sup>165</sup> Id. at 578-79 (quoting *Ex parte Siebold*, 100 U.S. 371, 395 (1889)).

<sup>166</sup> Id. at 582.

<sup>167</sup> 25 U.S. 19 (1827).

<sup>168</sup> Id. at 29.

<sup>169</sup> Id. at 30.

<sup>170</sup> U.S. Const. art. II, §§ 3, 2.

active power.<sup>171</sup> Whereas Congress and the Judiciary must support the Constitution and the laws, the President must defend and enforce the Constitution and the laws.<sup>172</sup> Thus, “[t]he right of the President to use force in performance of his legal duties is not only inherent in his office, but has been frequently recognized and aided by Congress.”<sup>173</sup>

## 2. The President’s Inherent Powers and Hurricane Katrina

As noted above, commentators and DOD officials have indicated that the President’s authority and duty to ensure that the laws are faithfully executed provided the President with the power to send military troops to New Orleans during Hurricane Katrina.<sup>174</sup> Specifically, one scholar and former Department of Justice official referenced federal laws “protecting mail, telecommunications, or interstate commerce.”<sup>175</sup> The Supreme Court has recognized the President’s authority to use the military to enforce laws relating to mail and interstate commerce. For example, in In Re Debs, discussed above, the Court upheld the use of the military to “brush away all obstructions to the freedom of interstate commerce or to the transportation of the mails.”<sup>176</sup>

Others argue, however, that enforcing such laws would be a pretext, rather than the purpose, for sending troops to New Orleans, and as such, neither section 333, 332, nor the Constitution provided the President with the authority to send troops to New Orleans to enforce the law.<sup>177</sup> This view appears to be consistent with the Supreme Court’s recent rulings on the limits of Congress’s Commerce Clause authority. In United States v. Morrison, the Supreme Court limited the reach of the Commerce Clause to situations that have a “substantial effect” on

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<sup>171</sup> See Edward Bates to Abraham Lincoln, *supra* note 141, at 10.

<sup>172</sup> See *id.* at 12.

<sup>173</sup> *Id.* at 9.

<sup>174</sup> See Burns, *supra* note 51( referring to statements made by DoD spokesperson Lawrence Di Rita); Yoo, *supra* note 51; .

<sup>175</sup> Yoo, *supra* note 51.

<sup>176</sup> 158 U.S. at 582.

<sup>177</sup> See Dermaine, *supra* note 45, at 239.



interstate commerce.<sup>178</sup> Thus, under Morrison, a valid exercise of the Commerce Clause authority requires a more than attenuated effect on interstate commerce.

Whether the looting and rioting allegedly following Hurricane Katrina had a substantial and direct effect on interstate commerce is debatable. As noted in Part I, local businesses, including internet service providers and grain mills, reported looting on their premises that disrupted their operations and made deliveries impossible.<sup>179</sup> While the widespread reports of rioting and looting in New Orleans later proved to be exaggerated, it is relatively easy to imagine an emergency of such great size that it causes the total breakdown of the interstate commerce infrastructure, and thereby substantially affects interstate commerce.

Moreover, the pretext argument ignores the realities of situations where federal laws are not being enforced. The President's duty to enforce the "laws" encompasses all laws, including judicial orders, the Constitution, statutes, and treaties.<sup>180</sup> It is true that President Bush sought to send troops to New Orleans for reasons other than enforcing federal laws. Indeed, he sought to send troops to quell the civil disorder that was making it impossible for local authorities to enforce both federal and state laws. Situations in which the constituted authorities are not enforcing federal laws will necessarily be those in which either they are unable or unwilling to do so.

The language of the Insurrection Act recognizes this situation. To argue that enforcing federal laws is a pretext for sending troops to enforce the laws ignores the reality of the fact that, before the President can act, there must be some persons or conditions prohibiting the enforcement of federal law. In that sense, it is true that enforcing federal laws will never be the sole purpose of sending troops. Instead, responding to the situation that is making the

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<sup>178</sup> 529 U.S. 598 (2000).

<sup>179</sup> See THE FEDERAL RESPONSE TO HURRICANE KATRINA, *supra* notes 62.

<sup>180</sup> See Edward Bates to Abraham Lincoln, *supra* note 141, at 12.

enforcement of the laws impracticable will be the primary purpose for sending troops to enforce the laws.

While this authority may appear to allow the President to cite any federal law, even a minor law, to justify the deployment of troops domestically, as I discuss in Part IV, the President's authority to respond with force under the Insurrection Act is not without limits. Most notably, political and historical constraints will limit a president's ability to use enforcement of federal law as a "pretext" for invoking the Act.

### **B. The Congressional Authority Argument**

The second argument advanced concerning the source of the President's authority to respond with force to domestic disturbances maintains that the President's power stems from express congressional authorization. According to this argument, through the Insurrection Act, Congress delegated its authority under the Militia Clauses to the President.<sup>181</sup>

Article I, section 8 contains the Militia Clauses. That section reads, "[t]he Congress shall have the power . . . [t]o provide for calling forth the Militia, to execute the Laws of the Union, suppress Insurrections and repel Invasions."<sup>182</sup> The first clause of this section ("First Militia Clause") gives Congress the power to "provide for" the calling forth of the militia, but it does permit Congress itself to call forth the militia.<sup>183</sup>

Stephan Vladeck is the primary proponent of the argument that the President's authority to employ the military domestically stems from an Act of Congress, rather than from inherent executive powers. Vladeck maintains that the "founders and early congresses agreed that the Constitution gives most authority over military emergencies to the legislature, to delegate to its

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<sup>181</sup> See Stephan I. Vladeck, *Emergency Power and the Militia Acts*, YALE L. J. 149, 152-53 (Oct. 2004); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541, 586 n173 (1994) (citation omitted).

<sup>182</sup> U.S. CONST. art. I, § 8.

<sup>183</sup> Calabresi & Prakash, *supra* note 181, at n. 173 (citation omitted).

discretion.”<sup>184</sup> Vladeck concludes that the Militia Acts are implementations of the First Militia Clause.<sup>185</sup> As an example, Vladeck points to the fact that, in responding to the Whiskey Rebellion, neither President Washington, the Supreme Court (through Justice Wilson), nor Congress made any mention of inherent or explicit executive constitutional powers permitting the President to deploy the militia to quell the rebellion.<sup>186</sup> Instead, President Washington relied solely on authority granted to him by the Militia Act of 1792.<sup>187</sup>

Vladeck argues that the Supreme Court has also agreed that Congress has authority, through the Militia Clauses, to respond to domestic emergencies. Because the Supreme Court has never directly addressed the issue of the President’s authority and its relationship to the First Militia Clause, Vladeck looks to cases involving the Militia Acts.<sup>188</sup> Expectedly, Vladeck interprets these cases differently than those who point to the cases as judicial support for the existence of inherent presidential authority to respond to domestic disorder.

First, Vladeck considers Martin v. Mott. There, Justice Story, speaking for the Court, rejected the argument that the President lacked that authority to force citizens to serve in their state militias. Justice Story stated, “the act of 1795 is within the constitutional authority of Congress . . . [and] Congress may [] lawfully provide for cases of imminent danger of invasion . . . .”<sup>189</sup> Justice Story then looked to the Militia Act of 1795 as clearly giving the President broad, unreviewable authority to determine when a crisis necessitates the calling forth of troops.<sup>190</sup>

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<sup>184</sup> Vladeck, *supra* note 181, at 154.

<sup>185</sup> See *id.* at 169-70.

<sup>186</sup> *Id.* at 161.

<sup>187</sup> *Id.*

<sup>188</sup> See *id.* at 169-70.

<sup>189</sup> 25 U.S. at 29.

<sup>190</sup> *Id.* at 31.

Next, Vladeck notes that in Luther v. Borden, the Court held that the President’s authority to use force to respond to domestic disorder comes from the Militia Acts.<sup>191</sup> Vladeck concludes that because the Court states that it would be “in the power of Congress to apply the proper remedy” should the President abuse his power under the Militia Acts, the authority to grant the power to the President must have been “fully within the purview of Congress to begin with.”<sup>192</sup> Similarly, Vladeck points to the Court’s statements in the Prize Cases referring to the Acts of 1795 and of 1807 as indicating the Court’s recognition of congressional delegation of its authority to the President.<sup>193</sup>

Vladeck then attempts to distinguish In re Debs, one of the most-frequently cited cases in support of the existence of inherent presidential power.<sup>194</sup> Vladeck argues that the true issue in Debs was the President’s authority under the Militia Acts to call out the military to ensure the “faithful execution of the law.”<sup>195</sup> Vladeck concludes that Congress, through the Militia Acts, provided the President with the authority to respond in Debs. However, Vladeck acknowledges that the Court neither mentions the Militia Acts in Debs nor identifies the source of the President’s authority under the Militia Acts.<sup>196</sup> Despite this, in support of his conclusion, Vladeck notes that the President himself generally followed the requirements of the Militia Acts during the events at issue.<sup>197</sup>

### **C. Inherent or Delegated Power: Who Wins?**

As noted above, for the purpose of this paper, whether the President possesses inherent

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<sup>191</sup> Vladeck, *supra* note 181, at 170; 48 U.S. at 42-43.

<sup>192</sup> Vladeck, *supra* note 181, at 173.

<sup>193</sup> *Id.* at 178; 67 U.S. 635, 668 (1863).

<sup>194</sup> Vladeck, *supra* note 181, at 185.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

powers to call forth the military domestically in response to civil disturbances is not determinative. Whether the President has inherent power to respond to domestic disorder or whether Congress delegated its power to respond to domestic disorder to the President, the President possesses such a power. However, I will briefly note that each interpretation of the President's power possesses strengths and weaknesses.

One problem with the inherent presidential power argument is its limits. If the President has broad, implied authority to respond with force to domestic disorder, how dangerous must the exigency justifying such a response be? While it is true that historically Presidents have been hesitant and careful in responding to domestic emergencies with the armed forces due to the fear of political fallout, the inherent executive powers argument has a large potential for abuse. For the most part, proponents of the inherent executive power theory do not propose potential limits on the President's power.

Despite fears over the expansiveness of inherent presidential powers, the President has at least some powers that are not explicitly outlined in the Constitution. For example, the Constitution does not specify that the President may remove federal officers from office and that the President may recognize foreign governments, yet it is widely recognized that the President possess such powers.<sup>198</sup>

However, unlike the above powers whose need the framers might not have anticipated, the framers actually discussed the implications of granting the President the power to deploy the military domestically.<sup>199</sup> As Vladeck notes, the fact that the Constitution does not explicitly grant the President or Congress the power to deploy the military to suppress domestic disorder

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<sup>198</sup> See Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 883-84 (1983).

<sup>199</sup> See Vladeck, *supra* note 181, at 158

reflects the framers fear of standing armies.<sup>200</sup> However, the Constitution does grant Congress the power to defend the country from foreign and domestic threats.<sup>201</sup> This constitutional reference, coupled with the Supreme Court's identification of the early Militia Acts in cases involving domestic disorder supports Vladeck's contention that the power to use the military to enforce the law belongs to Congress.

Nonetheless, beyond pointing to the Militia Acts generally, the Court never clearly identifies the source of the President's authority to respond to domestic disorders. While the Court's failure to discuss the issue does not invalidate Vladeck's arguments, it weakens his somewhat sweeping reliance on Debs, Martin, and Borden.

Thus, Vladeck concludes too abruptly that the Court's decisions concerning the Militia Acts represent the Court's view on the First Militia Clause. The bulk of Vladeck's argument in this regard is that the Court's reference by name to the Militia Acts represents the Court's belief that the President's authority stems solely from these Acts. However, Vladeck fails to consider the possibility that the Militia Acts are a reflection of the President's inherent power, rather than a delegation of Congress's power. It is possible that Congress created the Insurrection Act in an attempt to delineate the President's powers. Such an action might represent Congress's express approval and recognition of the President's power.

I do not propose or attempt here to determine the source of the President's authority to respond to domestic crises with force. It is now undisputed that the President, through the Insurrection Act, has the authority to deploy the military domestically to quell at least some types of disorder. The question raised by the amendment to the Insurrection Act and addressed by this paper is not the source of the President's authority to respond to domestic disturbances, but

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<sup>200</sup> Id.

<sup>201</sup> Id. .

rather the extent of the President’s authority to so respond under the Insurrection Act. I address this issue below.

#### **IV. The Significance of the Insurrection Act Amendment**

While the instances of “insurrection, domestic violence, unlawful combinations and conspiracy” cited in the pre-amendment Insurrection Act are clear examples of situations that may interfere with the faithful execution of the laws, they are not the only circumstances under which the President may be called upon to ensure that the constituted authorities enforce the laws. Instead, the history of the Act’s use and an analysis of the terms used in the Act indicate that it is the extent, rather than the source of the domestic disorder that justifies the deployment of the military under the Act. Because the pre-Amendment Insurrection Act did not refer to the circumstances that can cause an insurrection or domestic violence, Congress’s amendment to the Act merely specifies the types of circumstances that might result in domestic disorder sufficiently serious to validate the President’s use of the military to enforce domestic laws.

##### **A. The Meaning of “Insurrection” and “Domestic Violence”**

While the Insurrection Act may appear to grant the President broad discretion in determining whether to deploy the armed forces domestically, the Act limits the President to responding to instances of insurrection, unlawful combination, domestic violence, and conspiracy. Because of this limitation, it is important to consider the meaning of these terms, in particular the meaning of “insurrection” and “domestic violence.”<sup>202</sup> A review of the history of these terms indicates confusion over both their meaning and application.

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<sup>202</sup> I focus on insurrection and domestic violence because they are most applicable to natural disaster situations.

## 1. Insurrection

Black’s Law Dictionary defines an insurrection as, “a violent revolt against an oppressive authority, usually a government.”<sup>203</sup> While they fail to define “insurrection,” DOD regulations define “domestic emergencies” to include an “enemy attack, insurrection, civil disturbance, earthquake, fire, flood or other major public disasters or equivalent emergencies that endanger the life and property or disrupt the usual process of government.”<sup>204</sup> Similarly, the regulations define “civil disturbances” as “[g]roup acts of violence and disorders prejudicial to public law and order . . . .”<sup>205</sup>

An insurrection is distinct from a mob or riot in that an insurrection involves an organized and armed attack on the authority or operations of the government.<sup>206</sup> Conversely, riots or mobs, however large the number of participants, are “disturbances of the peace which do not threaten the stability of the government or the existence of political society.”<sup>207</sup>

Others have a less strict definition of an insurrection. For example, in discussing the meaning of an “insurrection” and its relationship to the execution of the laws, James Madison stated, “[t]here are cases in which the execution of the laws may require the operation of militia, which cannot be said to be an invasion or insurrection. There may be a resistance to the laws which cannot be termed an insurrection.”<sup>208</sup> Madison elaborated, stating, “a riot did not come within the legal definition of an insurrection. There might be riots, to oppose the execution of the laws, which the civil power might not be sufficient to quell.”<sup>209</sup> Further, responding to criticism of his statements, Madison noted the distinction between calling forth the militia “when

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<sup>203</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>204</sup> DOD Directive 3025.1-M, C2.3 Domestic Emergency, 48-49 (June 1994).

<sup>205</sup> DOD Directive 3025.12 E2.1.4.

<sup>206</sup> Id. (citing 77 C.J.S. § 29, at 579 (1994)).

<sup>207</sup> Id.

<sup>208</sup> The Debates in the Several States on the Adoption of the Federal Constitution 408 (photo. reprint 1941) (Jonathan Elliot ed., 1836) (statements of James Madison).

<sup>209</sup> Id. at 410.



a combination is formed to prevent the execution of the laws” and the militia executing the law “in the first instance.”<sup>210</sup>

As the above discussion indicates, whether rioting and looting that may follow a natural disaster rises to the level of an insurrection is questionable. On the one hand, as Madison notes, where the civil authorities are unable to quell the disorder, federal troops may be necessary to ensure the enforcement of the laws. On the other hand, the idea of troops responding to a local disorder such as a riot triggers the fear of military involvement in domestic affairs. Despite these arguments, the amended Insurrection Act reflects the distinction between a riot or mob and an insurrection. The Act requires that a natural disaster, terrorist attack, or public health emergency create a situation of *domestic violence*, not insurrection, that the constituted authorities are unable to quell.

## 2. Domestic Violence

Article IV, section 4, gives the federal government the power to suppress domestic violence, “on Application of the Legislature, or of the Executive . . . .”<sup>211</sup> In interpreting and applying the Domestic Violence Clause, two primary issues have emerged. First, what is the meaning of “domestic violence?” Second, what is the import and effect of the Clause’s requirement of a state request for assistance? I will address both of these issues below.

The meaning of “domestic violence” has historically been, and continues to be, unclear.<sup>212</sup> During the Constitutional Convention, some drafters proposed replacing “domestic violence” with “insurrections.”<sup>213</sup> This indicates that at least some of the framers believed the two phrases were interchangeable. However, considering the plain language of the phrase,

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<sup>210</sup> Id. at 415.

<sup>211</sup> U.S. CONST. art. IV, § 4.

<sup>212</sup> See Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 39 (1997).

<sup>213</sup> Id.

coupled with the fact that the framers chose not to substitute “domestic violence” with “insurrection” there is a strong argument that “domestic violence” encompasses something beyond direct threats to the state.<sup>214</sup>

In Luther v. Borden the Supreme Court took a different approach. There, the Court considered, albeit cursory, the meaning of “domestic violence” and “insurrection” under the Militia Act of 1795.<sup>215</sup> The Court stated, “[i]f there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government.”<sup>216</sup> While the Militia Act of 1795 did not use the phrase domestic violence, the Court equated “domestic violence” with “insurrection,” although implying that domestic violence occurs against a state and insurrection occurs against the United States.

Unfortunately, the Court has not addressed the meaning of domestic violence since Luther v. Borden. As a result, the exact meaning of the phrase in the context of the Domestic Violence Clause is unclear. In Part B, below, I will address how this affects the use of the term “domestic violence” in the Insurrection Act.

Beyond the meaning of “domestic violence,” there has also been a debate over the Clause’s requirement of a request from the states. The framers considered omitting the requirement, but delegates of the Constitutional Convention rejected this proposal because the states did not wish to give the federal government the ability to interfere with their affairs in such a way.<sup>217</sup>

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<sup>214</sup> Id. at 39-40,

<sup>215</sup> 48 U.S. 1 (1849).

<sup>216</sup> Id. at 43.

<sup>217</sup> Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON. L. REV. 423, 466 (1999) (citation omitted).

Early versions of the Insurrection Act required a state request for assistance before the President could act. The expansion of presidential authority from requiring a state request for assistance to no such requirement occurred with the enactment of the Civil Rights Act of 1871.<sup>218</sup> At the time of the Civil Rights Act's passage, debates over the requirements of the Domestic Violence Clause and its relationship to the Insurrection Act ensued. Opponents to the Civil Rights Act made two arguments. First, those who saw the Domestic Violence Clause as representing a reservation of state power viewed the Civil Rights Act as a clear violation of the clause because the Act lacked a requirement for a state request.<sup>219</sup> Second, opponents argued that the Fourteenth Amendment could not effectively repeal the requirements of the Domestic Violence Clause by omitting the state request requirement.<sup>220</sup> As one commentator stated, "it is too great a leap to suggest that domestic violence is, without more, evidence of a state's failure to protect its citizens and sufficient justification for federal intervention. Such an approach, as the Supreme Court recognized in the early civil rights cases, would make the national government the peacekeeper of first resort."<sup>221</sup>

Conversely, proponents of the Civil Rights Act argued that the Domestic Violence Clause's requirement of a state request was "a mere technical difficulty"<sup>222</sup> and that the Clause implied power on the federal government.<sup>223</sup> As Senator Pratt stated, "[i]t cannot be that the United States, charged with guarantying to every State a republican form of government and protecting it against domestic violence, shall not possess the power adequate to fulfill its trust."<sup>224</sup> Senator Blair explained that a request from the state should not be required where a

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<sup>218</sup> See Bybee, *supra* note 212, at 60-61.

<sup>219</sup> See, e.g., *id.* at 331 (statement of Rep. Morgan).

<sup>220</sup> *Id.* at 207 (Statement of Rep. J. Blair).

<sup>221</sup> Bybee, *supra* note 212, at 78.

<sup>222</sup> *Id.* at 67 (quoting Cong. Globe, 42d Cong., 1st Sess. app. at 72 (1871)) (statements of Rep. A. Blair).

<sup>223</sup> *Id.* at 504 (citing Cong. Globe, 42d Cong., 1st Sess. app. at 72 (1871)) (statements of Sen. Pratt).

<sup>224</sup> Cong. Globe, 42d Cong., 1st Sess. app. at 72 (1871) (statements of Rep. A. Blair).

substantial number of the state's citizens are suffering from domestic violence, and the state is unwilling, in violation of their duty to its citizens, to make the request.<sup>225</sup> Under this view, the state's failure to call forth federal assistance effectively denies the citizens protection of the laws, permitting the federal government to intervene under the Fourteenth Amendment.<sup>226</sup>

Similarly, others argued that the Fourteenth Amendment itself provided the President with additional authority to call forth the armed forces.<sup>227</sup> As one representative noted, the Fourteenth Amendment provides for "equal laws and protection for all." Under the Amendment, where a State denies that protection, Congress may act to enforce protection. "The amendment does not say that in such case the laws of Congress must be made so that the protection cannot be furnished to the people until it is invited by the Legislature or Executive of the very State which is denying it."

However, there are several problems with arguments relying on the Fourteenth Amendment for justification of the use of the military to restore domestic order. First, over the past ten years the Court has affirmed that Congress can act only to prevent or remedy violations of rights, and cannot create new rights or expand the scope of rights.<sup>228</sup> Second, in United States v. Morrison, the Supreme Court limited Congress's ability to pass legislation under the authority of section V of the Fourteenth Amendment to regulating public, not private conduct.<sup>229</sup> The drafters of the Civil Rights Act appeared to recognize the distinction between public and private conduct by noting that the state's failure to enforce its citizen's rights constituted the Fourteenth Amendment violation, rather than the violence of private parties itself justifying presidential action.

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<sup>225</sup> Id. at 72-73.

<sup>226</sup> Id.

<sup>227</sup> See id. at 71 (statement of Rep. Shallabarger).

<sup>228</sup> See City of Boerne v. Flores, 521 U.S. 507 (1997).

<sup>229</sup> 529 U.S. at 621.

The application of such a state omission on the state action doctrine has been the source of much debate and confusion in the Court. Arguably, “[b]ecause the state has the power to stop the private infringement of individual rights, its failure to do so constitutes a state decision to permit the violations.”<sup>230</sup> However, under this reasoning, nearly any inaction by the government could be interpreted as permitting a violation of constitutional rights.<sup>231</sup> As a result of this, the Court has usually rejected this rationale.<sup>232</sup>

The above discussion of the domestic violence clause demonstrates that, at least under its historical meaning, the use of “domestic violence” in the Insurrection Act, does not appear to be a reflection of the government’s power under the Domestic Violence Clause for two reasons. First, the amended Act lacks a requirement for a request from the states. Second, it is clear from the history of the phrase that “domestic violence” refers to an uprising against the state, much like an insurrection.

Accordingly, the Domestic Violence Clause does not appear to be a source of the President’s ability to employ the military to respond to a natural disaster. If Congress intended the phrase to connote such a reflection, they misunderstood the nature and the history of the Clause. This, however, does not indicate that the amendment is unconstitutional or invalid. Instead, the reference to domestic violence un-artfully refers more generally to general civil disorder that interferes with the faithful execution of the laws.

### **B. The Effect of the Insurrection Act Amendment**

The point of the above discussion is to demonstrate the confusion over the meaning of the terms used in the Insurrection act. Despite this confusion, the history over the Act’s use indicates that it is the extent, rather than the source of the violence causing the civil disorder that

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<sup>230</sup> Id.

<sup>231</sup> Id.

<sup>232</sup> Id.

justifies presidential action under the Act. Thus, Presidents have invoked the Insurrection Act in situations that do not rise to the level of an armed attack on the United States or on a state. Instead, these situations involved general lawlessness that, while not aimed at bringing down the constituted authorities, threatened the government's continued existence. While Presidents have been more hesitant to send the military in response to situations not arising from direct opposition to the government, Presidents have also employed the military to quell disputes between different members of the citizenry.<sup>233</sup>

For example, since the reconstruction era, disorders necessitating military intervention often have revolved around industrial disputes.<sup>234</sup> As an example, President Harding initially refused to send federal military assistance to West Virginia "to end the long and bitter struggle between the miners and the operators over the question of unionization."<sup>235</sup> The President reasoned that the State had not established that "the State ha[d] exhausted all of its resources in the performance of its functions."<sup>236</sup> However, the President later decided to send troops largely because, after an agreement to resolve the dispute had been established, the miners fired on police officers attempting to serve warrants.<sup>237</sup> After issuing a proclamation for the insurgents to disperse, the President considered the insurgents to have placed themselves in opposition to the United States.<sup>238</sup>

Race riots during the post-World War I period also led to the deployment of troops to the states. For example, in Omaha, Nebraska, a mob estimated to have been 5,000 strong surrounded the county courthouse where authorities held a black man accused of attacking a

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<sup>233</sup> See Bennett Milton Rich, *The Presidents and Civil Disorder* 52-53 (1980).

<sup>234</sup> *Id.* at 212.

<sup>235</sup> *Id.* at 158.

<sup>236</sup> *Id.* at 160.

<sup>237</sup> *Id.* at 164.

<sup>238</sup> *Id.*

white girl.<sup>239</sup> After the police refused to turn over the man to the mob, the mob seized and lynched the man, and set fire to the courthouse.<sup>240</sup> In addition, the mob suspended the mayor from a lamp after he pleaded with the mob to stop.<sup>241</sup> State officials then requested troops, and Secretary Baker, acting on behalf of President Wilson, responded immediately.<sup>242</sup>

More recently, the use of the Insurrection Act reflects the blurred lines between an insurrection and domestic violence and rioting or looting. For example, presidents invoked the Act to enforce desegregation orders in the South.<sup>243</sup> In addition, presidents used the Act to respond to rioting in Los Angeles and following Hurricane Hugo in the Virgin Islands.<sup>244</sup> Arguably, with the exception of enforcing desegregation orders in the South these situations do not rise to the level of an insurrection, which requires an organized and armed effort that threatens the existence of political society.

Thus, it appears that in instances of civil disorder since the reconstruction era in which the President has intervened to enforce federal law, the enforcement of federal law has been secondary to the main dispute.<sup>245</sup> The above examples indicate that it is the extent, rather than the source, of the violence causing civil disorder that justifies presidential action. Prior to the amendment, the Insurrection Act made no mention of the events that could trigger the public disorder justifying the Presidents deployment of troops to restore order. Now, the amended Act adds that a “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition” may cause “domestic violence” to such an extent that the

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<sup>239</sup> Id. at 154.

<sup>240</sup> Id.

<sup>241</sup> Id.

<sup>242</sup> Id. Note that Secretary Baker responded rather than the President because during this period President Wilson was ill and had no knowledge of these events. The military’s actions during the post-War period has been criticized as circumventing the requirements of the Constitution and the Insurrection Act. See id. at 157-58.

<sup>243</sup> *Supra* notes 39 and 40.

<sup>244</sup> *Supra* notes 43 and 50.

<sup>245</sup> Id. at 212.

constituted authorities are incapable of maintaining public order. Thus, the amendment merely clarifies the circumstances under which the President may use the armed forces to restore order and ensure that the laws are faithfully executed.

#### **IV. The Scope of the Insurrection Act**

If it is the extent, rather than the source of the domestic violence that authorizes the President to act under the Insurrection Act, then limitations on the Act's authority remain largely unchanged following the Act's amendment. Despite the amendment's mere clarification of the President's power under the Act, however, there is a valid concern over the Act's potential for abuse. Thus, following the amendment, several important questions remain. First, the amendment failed to address the still unclear question of the Act's relationship to martial law. Second the amendment does not clarify actions that the Act permits the deployed troops to take. Third, the amendment failed to address the limits of the President's power to invoke the Act. I will address each of these issues below.

##### **A. The Limits of the Troops' Authority under the Insurrection Act**

When the President uses the Insurrection Act to deploy troops in response to a national disaster, the limits of the troops' power are somewhat unclear. For example, one might question whether the troops can make formal arrests, or whether they are limited to detaining citizens and turning them over to the appropriate civilian authority.

The Insurrection Act's broad language does not explicitly limit the power of the troops and appears to authorize the troops to use any means necessary to restore order. While Department of Defense regulations do not specifically address the limits of the troops' power, the regulations do permit active duty military to use deadly force where it is necessary to protect



offenses against the person and in self defense, among other things.<sup>246</sup> Because the military can use deadly force, it seems logical that they should also be able to take the less severe action of making arrests.

The Supreme Court has acknowledged this relationship between the use of deadly force and the authority to make arrests. In reference to the means available to a state governor to respond to disorder within his or her state, the Supreme Court has stated that, since the governor may authorize the use of deadly force against individuals who resist, he may also temporarily detain an individual suspected of causing disorder or standing in the way of restoring peace.<sup>247</sup> The Court noted that such arrests are not necessarily to punish the wrongdoers.<sup>248</sup> Instead, they may be “by way of precaution to prevent the exercise of hostile power.”<sup>249</sup> “So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off,” then the governor’s discretion will not be questioned.<sup>250</sup> Thus, the troops’ authority under the Insurrection Act does not appear to be limited to detention or arrests.

### **B. The Insurrection Act and Its Relationship to Martial Law**

The above discussion does not address whether the President’s invocation of the Insurrection Act automatically results in a state of martial law. This question is made more difficult by the fact that there is no precise definition of martial law and because various people have invoked the act in various ways.<sup>251</sup> As the Court noted in Duncan v. Kahanamoku, “by some it has been identified as ‘military law’ limited to members of, and those connected with, the armed forces. Others have said that the term does not imply a system of established rules but

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<sup>246</sup> 32 C.F.R. § 632.4.

<sup>247</sup> Moyer v. Peabody, 212 U.S. 78, 84 (1909).

<sup>248</sup> Id. at 84-85.

<sup>249</sup> Id. at 85.

<sup>250</sup> Id.

<sup>251</sup> Duncan v. Kahanamoku, 327 U.S. 304, 314 (1946).

denotes simply some kind of day to day expression of a General's will dictated by what he considers the imperious necessity of the moment.”<sup>252</sup> The Kahanamoku Court concluded that, in light of the historical importance of the distinction between civil and military power, by using the term “martial law” in the Hawaiian Organic Act, Congress intended to authorize the military to respond “vigorously” to threats of rebellion or invasion, but not to permit military tribunals to supplant the courts.<sup>253</sup> Ex Parte Mulligan is probably the most-cited Supreme Court case discussing martial law.<sup>254</sup> There, the Court held that military authorities could not try civilians by declaring martial law in an area where the courts were still in operation.<sup>255</sup>

The Constitution provides little guidance for the meaning of martial law, as it contains only one provision on point. The Habeas Corpus Suspension Clause states that, “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>256</sup> Because of this limited coverage by the Constitution, declarations of martial law have been closely tied to suspension of the writ of habeas corpus. Most famously, President Lincoln suspended the writ during the Civil War. In Ex parte Merryman, Chief Justice Taney found that the President exceeded his constitutional authority by suspending the writ.<sup>257</sup> The Chief Justice reasoned that the Suspension Clause’s location in Article I signified the framer’s intent to make suspension of the writ a legislative, not an executive power.<sup>258</sup> Thus, the Constitution limits the President’s power to ensuring the faithful execution of the law. The Chief Justice concluded that this meant that the Constitution did not authorize the President himself to execute the laws, but merely authorized the President to assist

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<sup>252</sup> Id. (citation omitted).

<sup>253</sup> Id. at 615-616.

<sup>254</sup> 71 U.S. 2 (1866).

<sup>255</sup> Id.

<sup>256</sup> U.S. Const. art I, § 9, cl. 2.

<sup>257</sup> 17 F. Cas. 144 (D. Md. 1861).

<sup>258</sup> Id. at 148.

the judiciary and legislature in executing the laws.<sup>259</sup> Although Congress later ratified President Lincoln's actions, the question of who has the authority to suspend the writ continues to be outstanding.

Most state constitutions have suspension clauses mirroring that in the federal Constitution.<sup>260</sup> Regarding a Governor's power to use the National Guard to prepare warrants, conduct searches and seizures and make arrests under a state constitution requiring the Governor to enforce the law, the Mississippi Supreme Court distinguished the Governor's role as commander and chief of the army from his civilian authority to ensure faithful execution of the laws.<sup>261</sup> In McPhall, the Governor was responding not to a riot or insurrection, but to the failure of local authorities to enforce state liquor laws.<sup>262</sup> The Court explicitly distinguished the case's factual situation from one in which the Governor acts in response to riots or insurrection, and as such avoided a discussion of martial law.<sup>263</sup> However, the Court did note that where the Governor acts to execute the laws, the militia's role is to enforce, and not supersede the law, as would be the case in martial law.<sup>264</sup> The Court concluded that where the Governor acts to execute the laws when local authorities are unable to do so, the Governor acts as a civil officer and the militia as a civil agency.<sup>265</sup>

As the history and use of the term "martial law" indicates, an attempt to resolve the meaning and application of martial law in the context of natural disasters and the Insurrection Act would require an in depth inquiry beyond the scope of this paper. For the purposes of this paper, it is sufficient to note the potential implications of the above discussion. First, whether

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<sup>259</sup> Id. at 149.

<sup>260</sup> Brandon L. Garret and Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 Duke L.J. 127, 156 (Oct. 2006) (citation omitted).

<sup>261</sup> *State v. McPhall*, 182 Miss. 360, (1938).

<sup>262</sup> Id. at 369.

<sup>263</sup> Id. at 370.

<sup>264</sup> Id. at 374.

<sup>265</sup> Id. at 372.

the President possesses the power to suspend the writ and thereby effectively declare martial law continues to be unclear. If the President has no such power, then the President cannot act unilaterally in response to a natural disaster under the Insurrection Act. In addition, as Kahanamoku and Milligan indicate, the role of the courts and the suspension of the writ of habeas corpus in the determination of martial law are important considerations in determining what situations may justify the imposition of martial law. However, the two cases appear to give different answers. While the Kahanamoku Court concluded that “martial law” existed even though the courts continued to function, the Milligan Court concluded that suspension of the writ could not occur where the court was open and properly functioning.

Hurricane Katrina severely limited the function of the judicial system.<sup>266</sup> The storm left thousands of detainees awaiting hearings and trials during the storm itself and for up to a year following the storm's end.<sup>267</sup> The detainees were unable to meet with lawyers and as one commentator stated, “in effect, Louisiana courts suspended the writ of habeas corpus for six months.”<sup>268</sup> However, there was no official declaration of martial law or official suspension of the courts. State Supreme Courts were at least able to implement measures to address the closures. For instances, the Mississippi Supreme Court extended deadlines and reschedule hearings and trials.<sup>269</sup> In New Orleans, a makeshift criminal court facility was created at a Greyhound bus station where a magistrate held bond hearings.<sup>270</sup> While the makeshift court did not follow rules of open procedure because it did not permit friends and family to observe the hearings, the majority of detainees were bused to state or federal courts outside of the area for

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<sup>266</sup> Emergency Administrative Order, Supreme Court of Mississippi, No. 2005-AD-00001 (Sept. 6, 2005).

<sup>267</sup> Brandon L. Garret and Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 Duke L.J. 127, 128 (Oct. 2006) (citation omitted).

<sup>268</sup> *Id.*

<sup>269</sup> Emergency Administrative Order, *supra* note 266.

<sup>270</sup> Garret and Tetlow, *supra* note 267, at 145.

bond hearings. Thus, it is unclear whether there was such a total breakdown of the judicial system to the extent that martial law was in unofficially in effect.

As a final note, as the McPhall case indicates, during a natural disaster there may be a distinction between the President's response in executing the laws and in responding to rioting and looting. Under McPhall, if the executive acts to execute the law, rather than to suppress a rebellion, he acts as a civil officer, and the military personnel under him act as civil servants. Whether this analysis applies to the President as opposed to a governor is questionable. First, whether it is possible for the military at the federal level to act in a civil capacity is unclear. In addition, this analysis indicates that regardless of the domestic disorder following a natural disaster, the President could respond with force if the local authorities are unable to enforce the law, without any requirement of violence, which is an expansive view of the President's authority.

In summary, the relationship between the Insurrection Act and martial law is unclear. If martial law is effectively invoked each time the President invokes the Insurrection Act, then both the President and the troops below him would have broad authority and discretion to act in response to domestic disorder. On the other hand, if domestic disorder does not cause a complete breakdown of the judicial system and the legislature does not suspend the writ of habeas corpus, then perhaps there is an area of authority where the President may deploy troops domestically and the troops may make limited arrests absent a declaration of martial law.

### **C. The Limits of the President's Authority under the Insurrection Act**

Although civil disorder can create situations that will authorize the President to act pursuant to his Constitutional duty to enforce the laws, this raises important and valid concerns over the potential for abuse of this power. For example, what will limit the President from citing

a minor federal law in justifying the sending of troops to quell what does not appear to be an “insurrection, domestic violence, unlawful combination, or conspiracy”? In fact, people voiced this very concern following the passing of the original Insurrection Act.<sup>271</sup> “It is said to be dangerous, in the hands of an ambitious and wicked President, because he may use it for the purpose of oppression or tyranny.”<sup>272</sup>

Initially, it seems logical to ask why the use of the military will be necessary in responding to a natural disaster. For example, federal law enforcement agents, rather than members of the armed forces, could be used to help support the state’s response to civil disorder following a natural disaster. Indeed, during Hurricane Katrina, Governor Blanco requested federal law enforcement assistance from both the Department of Justice and the Department of Homeland Security.<sup>273</sup> By September 5, the two agencies had provided over 2,000 law enforcement officers to Louisiana.<sup>274</sup> In addition, the Department of Agriculture, the Department of Interior, the Department of Treasury, the Department of Veteran Affairs, the Environmental Protection Agency, and the U.S. Postal Inspection Service deployed law enforcement personnel to Louisiana.<sup>275</sup> These officers conducted a variety of activities, including protecting Federal property, conducting search and rescue missions, and assisting local law enforcement.<sup>276</sup> However, the need to deputize these officers to enforce state and Federal law slowed these efforts.<sup>277</sup>

The primary benefit of federalizing the National Guard during a natural disaster is that, where a natural disaster involves multiple jurisdictions, placing the Guard under the single

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<sup>271</sup> Edward Bates to Abraham Lincoln, *supra* note 141, at 15.

<sup>272</sup> *Id.*

<sup>273</sup> THE FEDERAL RESPONSE TO HURRICANE KATRINA, *supra* note 1, at 41 (citations omitted).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

command of the federal government will minimize coordination issues and assist in the efficient use of resources.<sup>278</sup> On the other hand, federalizing the Guard strips state governors of their most valuable resources in responding to the natural disasters. In addition, when the Guard is in federal service, it is subject to the limitations of the Posse Comitatus Act. Invoking exceptions to the PCA might also be “inflammatory.” Indeed, Bush Administration, Pentagon and Justice Department Officials expressed concerns over sending troops over the objection of a Southern governor of the other party.<sup>279</sup>

One might argue that the phrase “other condition” in the amended Act is vague and has a high potential for abuse. As noted above, during the 19<sup>th</sup> century, commentators voiced similar concerns over the ability of a president to use the military to restore public order. These arguments demonstrate a fear of martial law. However, several factors limit the President’s ability to abuse his powers under the amended Act. First, in deciding whether to deploy the military, factors that the President should consider include “the extent of the disturbance which induce him to act, the evidence necessary to move him to act, [and] the persons on whom he will rely on for testimony or counsel.”<sup>280</sup>

Second, while “other condition” might be vague, the Act is specific about the circumstances under which the President may act, requiring a violation of a constitutional right or an obstruction of the execution of federal laws. Third, the pre-amendment Insurrection Act did not specify the circumstances that might cause the insurrection, domestic violence, unlawful combination, conspiracy. The amended Act’s inclusion of “other condition” is therefore consistent with the prior version of the Act. Fourth, the amended Act requires the President to notify Congress “as soon as practicable” when the President determines that he needs to exercise

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<sup>278</sup> BOWMAN et al., *supra* note 7, at 10.

<sup>279</sup> Lipton et al. *supra* note 8.

<sup>280</sup> Rich, *supra* note 233, at 197 (quoting Frederick Bernays Wiener, *A Practical Manual of Martial Law*, 54 (1950)).

his authority under the Act. In addition, the President must remain in contact with Congress every two weeks during which the President is acting under the Act. Thus, Congress will be involved in the President's decision to employ armed forces. In fact, Congress has previously questioned the President's use of the Insurrection Act power and will likely continue to do so in the future.<sup>281</sup>

Finally, despite fears of martial law and abuse by military personnel, the actual amount of fighting the soldiers have engaged in while acting under the Insurrection Act has been small.<sup>282</sup> History demonstrates that the mere presence of a small number of military personnel has been sufficient to quell civil disturbances.<sup>283</sup>

## CONCLUSION

“It was never the purpose of the Constitution . . . that the militia should be sent to execute the laws, merely because they are not being at all times diligently executed or perfectly enforced in the particular area in question.”<sup>284</sup> Despite critics' fears, however, the amended Insurrection Act does not demonstrate any dangerous intent on the part of Congress or of the Bush Administration. Nonetheless, the amendment does indicate a general misunderstanding of the Insurrection Act's historical meaning and application. While this failure reflects poorly on Congress, the Act's amendment was not, in the words of one critic, “a stealth maneuver . . . [that] will actually encourage the President to declare federal martial law.”<sup>285</sup>

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<sup>281</sup> See Senate Journal Monday, (at 9, December 4, 1871).

<sup>282</sup> See Rich, *supra* note 233, at 214.

<sup>283</sup> *Id.*

<sup>284</sup> McPhall, 182 Miss. at 373.

<sup>285</sup> Frank Morales, *Bush Moves Toward Martial Law*, Oct. 26, 2006, available at <http://towardfreedom.com/home/content/view/911/>.