NEW MODEL FOR DISASTER RELIEF: A SOLUTION TO THE *POSSE COMITATUS* CONUNDRUM

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I. INTRODUCTION

A hypothetical: on a bright spring morning in southern California, the roads are clogged as usual with people on their way to work. Between 7:45 and 8:15, the predictable traffic jams are interrupted by a series of explosions throughout the region. In a matter of minutes the freeways in the greater Los Angeles area are brought to a standstill. Simultaneously, dozens of gas stations in the area explode, along with several petroleum depots nearby.

Over the course of the morning, it becomes clear that several major traffic arteries in southern California were attacked by improvised explosive devices (IEDs). The target selection was deliberate, as revealed by a consistent method of attack and their occurrence at or near the busiest freeway interchanges. The most congested freeways in the country become little more than parking lots as frustrated, scared motorists leave their cars on the road to seek shelter. The attacks cause multiple casualties and incited panic. Fires rage and black smoke billows across southern California. The combination of attacks on the freeways and the petroleum infrastructure strike a purposeful blow to the California economy.

The area is paralyzed by fear and nothing moves on freeways that are now effectively sealed by the abandoned cars. A car explodes outside a federal building in Long Beach, and another outside the Los Angeles police headquarters. Casualties are unknown, but believed to be high. Southern California is under siege.

The Governor, recognizing the threat exceeds the capability of local and state police, calls up available members of the National Guard. They report

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for duty by day's end. A state-level response to a localized disaster is well understood and well rehearsed. But, on the other coast, the President determines that the attacks require a federal response and, as Commander in Chief, orders federal troops to prepare to move into California to secure the area, prevent future attacks, and reassure the citizenry. The appearance of uniformed troops in response to national disaster is more unusual and ad-hoc.

A question: is it legal? Can the President send federal troops to restore peace and uphold the rule of law within the United States? The unsettling answer is "maybe." The equivocation is due, in some part, to the *Posse Comitatus* Act (PCA). This law prohibits the domestic use of federal troops to enforce civil law.[1] But not only is the Act as it stands poorly understood, it also is being modified rapidly. Since September 11, 2001, the PCA has been the subject of academic[2] and legal debate,[3] as well as Congressional revision.[4] Commentators recommend a range of options, from scrapping the PCA entirely,[5] to amending it,[6] to keeping it in place without alteration.[7] Congress

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[1] 18 U.S.C. § 1385 (2000).

[2] *See generally* Linda J. Demaine & Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 NYU J. LEG. & PUB. POL'Y 167 (2005); Joshua M. Samek, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U. MIAMI L. REV. 441 (2007).

[3] John A. McCarthy, et al., *Posse Comitatus and the Military's Role in Disaster Relief*, DISASTERS AND THE LAW 50 (Daniel A. Farber & Jim Chen eds., 2006).

[4] *See* 10 U.S.C.A. § 2567 (West 2007) (effective Oct. 17, 2006); *repealed by* National Defense Authorization Act of 2008, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008) (10 U.S.C.A. § 333 (West 2008)).

[5] *See* Lieutenant Colonel Donald J. Currier, *The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?,* STRATEGIC STUD. INST. (2003).

[6] *See* Demaine & Rosen, *supra* note 2 at 250; *see also* John R. Longley III, *Military Purpose Act: An Alternative to the Posse Comitatus Act—Accomplishing Congress's Intent With Clear Statutory Language*, 49 ARIZ. L. REV. 717, 718, 740-41 (2007); Ashley J. Craw, *A Call to Arms: Civil Disorder Following Hurricane Katrina Warrants Attack on the Posse Comitatus Act*, 14 GEO. MASON L. REV. 829, 850-56 (2007).

[7] *See* Samek, *supra* note 2 at 465. *See also* Christopher Ligatti, *The Legality of American Military Troops Engaging in Law Enforcement in the Event of a Major Terrorist Attack*, 41 NEW ENG. L. REV. 199, 240-41 (2006) (providing a survey of several *posse comitatus* articles and opinions). Other authors simply bemoan the erosion of civil liberties, counting down the impending demise of *posse comitatus*. *See* Nathan Canestaro, *Homeland Defense: Another Nail in the*

seems similarly conflicted, repealing after only two years a 2006 law meant to clarify the PCA.[8]

A case study: the PCA was at issue most recently during Hurricane Katrina. While there were a multitude of causes for the devastating loss of life wrought by the storm and its aftermath, a substantive contributing factor was an endemic misunderstanding about *posse comitatus* regarding whether and how the President could order federal troops into a domestic disaster area. As will be discussed below, the power struggle regarding federal troops became a major point of contention, exacerbating an already slow disaster response.

The implicit goal of the PCA is a desire to keep the federal military out of the traditional state role of law enforcement. The challenge is to articulate the law in a way that upholds the tradition while also supporting effective disaster relief. The cost for not doing so, as seen in the Hurricane Katrina response, is the unnecessary loss of American lives. In the event there is a large-scale manmade disaster in the United States, a clear and ready application of the law will be even more urgent. The law as it stands probably affords the President all the power necessary to restore order after a disaster using federal troops.[9] But as recent experience during Hurricane Katrina shows, the PCA as currently applied is insufficiently clear for lawmakers, military, and first responders to avoid *posse comitatus* proscriptions.

In order to address the lack of clarity, this article explores the limits of the domestic use of the federal military under the *Posse Comitatus* Act, and recommends a way to combine the valued goals of the PCA with an effective domestic disaster response. An ideal solution would be sub-statutory, that is, a solution effectuated within the executive branch, not requiring new legislation. Each new law generates unforeseen second and third-order effects; indeed, recent Congressional attempts to clarify the PCA have already been repealed. Instead, this article provides what has been missing from the academic debate of *Posse Comitatus* to date: a workable and timely solution for domestic disaster response that respects the goals of *Posse Comitatus*.

Coffin for Posse Comitatus, 12 WASH. U. J.L. & POL'Y 99, 143-44 (2003); Lieutenant Colonel Mary J. Bradley et al., *The Posse Comitatus Act: Does It Impact the Department of Defense During Consequence Management Operations?*, ARMY LAW. 68, 72-75 (2007); Matthew S. Belser, *Martial Law After the Storm*, 35 S.U. L. REV. 147, 221 (2007).

[8] *See* 10 U.S.C. § 2567 (effective Oct. 17, 2006), *repealed by* National Defense Authorization Act of 2008, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008) (10 U.S.C.A. § 333 (West 2008)).

[9] *See* Samek, *supra* note 2, at 465.

To that end, this article reviews the Act's history, its role in the Hurricane Katrina response, and recent PCA legislation, and then outlines and applies a new model based on current analogs. Part II is a primer on the PCA and how it works, including its history, exceptions, and jurisprudence. Part III examines how a misapplication of the PCA was unnecessarily burdensome to federal disaster relief following Hurricane Katrina, showing what can go wrong when the law is misapplied. Part IV explores how Congress reacted to Katrina with legislation meant to clarify the PCA—then proceeded to reverse course little more than a year later. Part V looks at current government analogs that might be adapted when re-thinking domestic disaster response under the PCA. Part VI recommends a plan synthesizing the PCA with effective disaster relief, and applies the new model to the above hypothetical.

II. PRIMER: PCA MEANING, EXCEPTIONS, AND HISTORY

A. Beginnings of the Act

The *Posse Comitatus* Act[10] is not just a mere regulatory proscription, but is in fact a criminal statute:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[11]

Posse comitatus is Latin for "power of the county," and is defined as "[a] group of citizens who are called together to help the sheriff keep the peace."[12] The plain text of the statute makes it a federal crime to use any portion of the Army or Air Force to enforce the law.[13] While the Navy and Marine Corps are not mentioned in the statute, internal regulations place similar restrictions on the use of these military branches as well.[14] Simply saying that the military may not

[10] 18 U.S.C.A. § 1385 (West 2008).
[11] *Id.*
[12] BLACK'S LAW DICTIONARY (3rd pocket ed. 2006).
[13] 18 U.S.C. § 1385 (2008).
[14] U.S. DEP'T OF DEFENSE, DIR. 5525.5, MILITARY SUPPORT TO CIVIL AUTHORITIES 13 – 21 (15 Jan. 1993) hereinafter DOD DIR. 5525.5]. *See also* U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS 5 (26 Jan. 2006) [hereinafter SECNAVINSTR 5820.7C] (recognizing that DOD DIR 5525.5 applies PCA proscriptions to the Navy and Marine Corps, though not required by statute).

enforce the law, however, only begins the inquiry. A full understanding of the law requires an historical, textual, and legal inquiry.

1. Posse Comitatus *Antecedents*

The concepts behind the PCA predate the republic. A national army is perhaps the most threatening arm of a federalized government, and the Framers feared its reach. In *The Federalist No. 26*, Alexander Hamilton underscored the wisdom of requiring funding for an army to be reauthorized every two years, as required in the "new Constitution."[15] He predicted this biannual debate over a standing army would provide the states with the opportunity to focus their citizenry on any possible "encroachments from the federal government."[16]

James Madison also felt a standing army was "dangerous, at the same time that it may be necessary."[17] He agreed with Hamilton that "the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support."[18] Their opinions reflect the mood of the Framers and their arguments convinced the burgeoning nation to ratify the newly drafted Constitution.[19] The fact that this coordinated propaganda campaign addressed and downplayed the reach of a federal military is evidence of an historical American distrust of a standing army.[20]

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[15] THE FEDERALIST No. 26, at 139 (Alexander Hamilton) (Clinton Rossiter ed.,, 1999). *See also* U.S. CONST. art. I, § 8, cl. 12.
[16] THE FEDERALIST No. 26, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1999).
[17] THE FEDERALIST No. 41, at 225 (James Madison) (Clinton Rossiter ed., 1999).
[18] *Id.* at 227.
[19] Charles R. Kesler, *Introduction to* THE FEDERALIST PAPERS, i, viii (Clinton Rossiter, ed., 1999).
[20] Interestingly, the Constitution memorializes distrust only in federal ground forces. The Constitution grants Congress the power to "raise and support Armies," with appropriations limited to two years. U.S. CONST. art. I, § 8, cl. 12. State militias, however, were authorized and armed by Congress, with no similar requirement for periodic reauthorization, *id.* at cl. 16, even though state militias could be called into federal service. *Id.* at cl. 15. Similarly, Congress may "provide and maintain a Navy," *id.* at cl. 13, but is not constitutionally required to periodically review funding for naval forces. *Id.* This disparity between the constitution's treatment of land and naval forces shows America's historical wariness towards a standing army, also evidenced by the text of the *Posse Comitatus Act*. 18
U.S.C.A. § 1385 (West 2008).

Once the Constitution was ratified, Congress established the federal District Courts with the Judiciary Act of 1789. [21] The Act also provided the courts with U.S. Marshals.[22] The U.S. Marshals, in turn, used the local citizens as the common law "power of the county," or *posse comitatus*, to help the Marshal enforce the laws as needed.[23] Federal soldiers were not often used by the Marshals, and for the century between the American Revolution and passage of the PCA, it remained an open question as to whether the federal marshals could legally require military members to become part of a *posse comitatus*.[24]

While the nascent court system developed and matured, deep and abiding distrust of federal troops remained part of the national psyche. Chief Justice Burger acknowledged this fact in a hotly contested case about domestic military surveillance, writing that there exists

> [a] traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibition[s'] . . . philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime.[25]

That traditional insistence dates back at least as far as Madison and Hamilton, who penned the opening volleys addressing the distrust of federal military power. This distrust carried forward 100 years from the nation's founding, and under somewhat different circumstances, led to the passage of the original *Posse Comitatus* Act.

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21 An Act to Establish the Judicial Courts of the United States, 1st Cong., 1 Stat. 73 (1789).
[22] *Id.*
[23] Currier, *supra* note 5, at 2.
[24] *Id.* at 2 – 3.
[25] Laird v. Tatum, 408 U.S. 1, 15 (1972).

2. Passage

Congress passed the PCA during Reconstruction.[26] During that time, the earlier wariness of central federal authority intruding on states' rights was strengthened by new political and racial concerns. The catalyzing events leading to *Posse Comitatus* were repeated uses of the federal army to intervene in antebellum Louisiana, Arkansas, and South Carolina; these interventions affected state politics, and were necessary to keep the peace in the face of dangerous elements such as the Ku Klux Klan or armed factions striking at the state governments.[27] The introduction of federal troops, perceived as an insult to state sovereignty, made domestic use of the military a major issue in the election of 1876.[28] As a result, the 45th Congress, with recently repatriated southern congressmen, passed the original *Posse Comitatus* Act as part of the army's appropriation bill.[29] Though there was much discussion about the historical wariness towards a centralized government,[30] the background of Reconstruction and contemporaneous racial retrenchment made clear the intent of *Posse Comitatus* was to prevent further federal meddling in southern states' internal affairs.[31] From this ignoble beginning came the longstanding law that has come to represent a general respect for civilian supremacy in law enforcement.

A. Posse Comitatus in Context

Having explored the historical antecedents and passage of *Posse Comitatus*, a fuller understanding of the law's operation requires learning about the Act's function in both Constitutional and statutory context, along with judicial interpretation. This inquiry will later inform a recommendation for an effective, *Posse Comitatus*-compliant, disaster relief plan.

1. Constitutional Underpinnings

Several Constitutional provisions provide the framework for analyzing the PCA. The Constitution requires the President to "take Care that the Laws be

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[26] 18 U.S.C.A § 1385 (West 2008) (originally passed June 18, 1878). *See also* Currier, *supra* note 5, at 3.
[27] Currier, *supra* note 5, at 4-5.
[28] Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 MIL. L. REV. 86, 112 (2003).
[29] Currier, *supra* note 5, at 5.
[30] *Id.*
[31] Felicetti & Luce, *supra* note 28.

faithfully executed."[32] Additionally, the President is the Commander in Chief of the federal armed forces, and state militias when in federal service.[33] Congress's powers under the Constitution are equally relevant to the PCA. Congress funds and regulates the federal military,[34] and funds and regulates the state militias.[35] Additionally, Congress is empowered to pass laws "provid[ing] for calling forth the [state] Militia to execute the laws of the Union, suppress Insurrections and repel Invasions."[36]

2. Statutory Exceptions

There are two broad categories of statutory exceptions to the PCA. The first category refers to insurrections, and is Congress' guidance to the President concerning the employment of state militias and federal troops domestically.[37] The second category of exceptions, the one most pertinent to this discussion, is Congress' instructions to the President concerning use of the military to assist civilian law enforcement.[38]

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[32] U.S. CONST. art. II, § 3.
[33] *Id.* at § 2.
[34] *Id.* at art. I, § 8, cl. 12 – 14.
[35] *Id.* at cl. 16.
[36] *Id.* at cl. 15.
[37] 10 U.S.C. §§ 331 – 334, 12406 (2000). For a thorough treatment of the insurrection statutes, see Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 81 TEMPLE L. REV. 391, 432-436 (2007).
[38] 10 U.S.C. §§ 372 – 382 (2000). Other authors include the Defense Department's Immediate Response Authority as part of similar discussions. *See* Ross C. Paolino, Note, *Is it Safe to Chevron Two-Step in a Hurricane? A Critical Examination of How Expanding the Government's Role in Disaster Relief Will Only Exacerbate the Damage*, 76 GEO. WASH. L. REV. 1392, 1401-02 (2008). The Immediate Response Authority is not addressed in this piece because the directive creating the authority is an intradepartmental regulation creating civil Department of Defense emergency response coordinators, and implementing the Stafford Act, discussed *infra*. U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES 1-2 (15 Jan. 1993) [hereinafter DOD DIR. 3025.1]. Additionally, regarding the "Immediate Response" specifically, it is a power granted to local commanders immediately following a disaster when communication with higher headquarters is unavailable. *Id.* at 7. Law enforcement may perhaps be exercised in such an exigency, but such an allowance is, at best, implicit. *Id.* at 7-8. The Immediate Response Authority, therefore, is an individual commander's decision to use available troops before a full-scale recovery effort is launched, akin to the

The guidance for the President in responding to insurrection is permissive, granting the President the discretion to call forth the militia "as he considers necessary."[39] These "calling forth" statutes, as they are referred to, give the President explicit power to use state militias and federal military forces in specific circumstances.[40] Some examples include restoring order in the event of insurrection against a state,[41] quelling rebellion or other unrest against federal authority,[42] responding to threat of invasion, [43] and restoring order after a major public emergency.[44]

While the "calling forth" statues give the President wide latitude, the law enforcement statutes are more specific, and can be read as enabling legislation. The law enforcement statutes grant power directly to the Secretary of Defense[45] to share equipment and facilities,[46] information gleaned through surveillance,[47] and even military training and uniformed experts, with law enforcement.[48] While these statutes seem to allow a blurring of the lines between military and civilian law enforcement, accompanying sections state that these laws are not intended to grant any greater law enforcement powers to

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commander of the Presidio using federal troops to help fight fires after the San Francisco earthquake of 1906. Because this piece addresses disaster response from the federal level, the Immediate Response authority will not be discussed any further.

[39] 10 U.S.C. §§ 331 (2000).

[40] The term "militia" is generally used today to refer to the National Guard, and that will be its use in this article. National Guard Bureau, About the National Guard, http://www.ngb.army.mil/About/default.aspx, (last visited Nov. 20, 2008). Though not discussed further herein, it is interesting to note that several states continue the tradition of maintaining separate state militia organizations. These organizations include the Maryland Defense Force, http://www.mddefenseforce.org/ (last visited Nov. 20, 2008); the Texas State Guard, http://www.txsg.state.tx.us/ (last visited Nov. 20, 2008); the Alabama State Defense Force, http://sdf.alabama.gov/default.htm (last visited Nov. 20, 2008); and the New York Guard, http://dmna.state.ny.us/nyg/nyg.html (last visited Nov. 20, 2008), and New York Naval Militia, http://www.dmna.state.ny.us/nynm/naval.php (last visited Nov. 20, 2008).

[41] 10 U.S.C. § 331.

[42] *Id.* at § 332.

[43] *Id.* at § 12406.

[44] *Id.* at § 333.

[45] *See, e.g.*, 10 U.S.C. § 372(a).

[46] 10 U.S.C. §§ 372, 374.

[47] 10 U.S.C. § 371 (2000).

[48] 10 U.S.C. § 373.

military members than was present before the laws' passage.[49] The Constitution provides for Congressional regulation of Presidential power with respect to use of the military and militia domestically. The PCA generally forbids military members from acting as civil law enforcement. In short, the "calling forth" statutes give the "when," and the military law enforcement statutes provide the "how" for statutory PCA exceptions.

3. Judicial Interpretation

By deciding cases and controversies in light of this constitutional and statutory framework, the judiciary at once illuminates and obfuscates the PCA, related laws, and the many common law exceptions.

a. Related Case Law

Judicial interpretation of the "support to law enforcement" statutes suggests a narrow reading of *Posse Comitatus* proscriptions. The text of the PCA applies only to the Army and Air Force.[50] It is conceivable to extend the law's proscriptions to the Navy, as a handful of courts have interpreted the PCA.[51] The majority view, however, gives *Posse Comitatus* a narrow reading, allowing the Navy, operating in international waters, to provide indirect support to law enforcement missions, even when the missions depend upon that military support.[52]

However, though most courts read PCA proscriptions narrowly, most courts also grant the President broad discretion with respect to the insurrection and calling forth statutes. In one stark example, a federal appeals court abrogated its power in this area of law:

> [T]he decision whether to use troops or the militia (National Guard) in quelling a civil disorder is exclusively within the province of the president. The Courts also have made it clear that presidential discretion in exercising those powers granted

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[49] 10 U.S.C. §§ 375, 387.

[50] 10 U.S.C. § 1385. Early drafts of the act included naval forces in the proscriptions. The language was dropped in the final version. *See* Felicetti & Luce, *supra* note 28, at 111.

[51] United States v. Kahn, 35 F.3d 426, 431 n.6 (9th Cir. 1994).

[52] *See, e.g.*, United States v. Rasheed, 802 F.Supp. 312, 325 (D. Haw. 1992); and State v. Short, 775 P.2d 458, 459 (Wash. 1989).

> in the Constitution and in the implementing statutes is not subject to judicial review.[53]

In that case, not only was the President ruled the sole authority to declare when insurrections were occurring, but the court also denied the existence of a cause of action, on constitutional and statutory grounds, against the President for damages caused by his failure to protect property when declining to exercise his "calling forth" power .[54]

Just as there is generally no cause of action against a President who fails to exercise his authority under the "calling forth" statutes, so do most courts similarly disallow suing the government for taking affirmative steps in preparation for using the "calling forth" powers. For example, in 1963, Governor George Wallace sought an injunction to prevent federal troops from being placed within Alabama.[55] In a terse single paragraph, the Supreme Court cited one of the "calling forth" statutes as authority for "alerting and stationing military personnel in the Birmingham area."[56] Finding the President's actions were within the statute, and moreover that the statute did not provide a cause of action, the Court dismissed Wallace's complaint.[57]

Courts are reluctant to contravene the President's broad authority under the "calling forth" statutes. In one case involving a coal mine strike, a federal court refused to certify the need for federal troops to quell civil unrest, as requested by the plaintiff coal company.[58] Claiming violence was a certainty if they attempted to move coal past striking miners, the coal company requested certification of a state of insurrection as one alternative form of relief.[59] Denying the request, the court reasoned that the President's power to send troops into a state was a decision left entirely to the executive branch, to the exclusion of the judiciary.[60] Additionally, once the President declares territory

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[53] Monarch Ins. Co. v. District of Columbia**,** 353 F.Supp. 1249, 1255 (D.D.C. 1973). *See also* Martin v. Mott, 25 U.S. 19, 30-32 (1827) (entrusting the power to declare the existence of an insurrection solely to the President).
[54] *Monarch Ins. Co.*, 353 F.Supp. at 1257 – 61.
[55] Brief for Plaintiff at 11, Alabama v. United States, 1963 WL 81838 (U.S. 1963).
[56] Alabama v. United States, 373 U.S. 545, 545 (1963).
[57] *Id.*
[58] Consolidated Coal & Coke Co v. Beale, 282 F. 934, 936 (S.D. Ohio 1922).
[59] *Id.* at 934 – 35.
[60] *Id.* at 936.

to be in a state of insurrection, that designation remains in effect until the President declares the insurrection to be over.[61]

Taken together, judicial interpretation of the law enforcement and "calling forth" statutes show a reluctance to infringe upon the sphere of the executive branch in many areas of the law that overlap with the PCA. Beyond mere statutory interpretation, however, the judiciary has several modes of analysis to determine when an executive branch action oversteps the bounds of the PCA.

b. Tests for PCA Violations

There are three methods of analysis that courts use to determine whether the PCA has been violated. After an exploration into each of the three tests, the tests will be applied to a real fact pattern, to demonstrate their relative probity.

"The first test [is] whether civilian law enforcement agents made 'direct active use' of military personnel to execute the laws."[62] This "direct active use" interpretation of the PCA language applies to military personnel,[63] including "any unit of federal military troops of whatever size or designation to include one single soldier or large units such as a platoon or squadron."[64] When first articulated in *United States v. Red Feather,*[65] the court held as a matter of law that the PCA could not be violated by sharing material resources between the military and law enforcement.[66] However, defendants could defeat criminal charges by successfully proving that military personnel had assisted law enforcement.[67] The charges in *Red Feather* alleged the defendants impeded law enforcement officers who were "lawfully engaged in the lawful performance of [their] official duties."[68] If the defendant could prove that law enforcement violated the PCA by using members of the Army or Air Force to enforce the

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[61] Hamilton v. Dillin, 88 U.S. 73, 95 (1875).
[62] United States v. Yunis, 681 F. Supp. 891, 892 (D.D.C. 1988).
[63] United States v. Red Feather, 392 F. Supp. 916, 921- 22 (D.S.D. 1975). *See also* 10 U.S.C. § 375 (passed in 1981, this statute effectively codifies the *Red Feather* holding and prohibits the military from directly participating in search, seizure, or arrests).
[64] *Red Feather,* 392 F. Supp. at 922.
[65] *Id.* at n.63.
[66] *Id.*at 924.
[67] *Id.* at 923 – 24.
[68] 18 U.S.C. § 231(a)(3) (2000).

civil laws, the police were necessarily acting unlawfully, which would defeat the charge.[69]

Perhaps most interesting to the "direct and active use" test is that, after finding a possible PCA violation, the *Red Feather* court went out of its way to limit the impact of its opinion.[70] The court drew a distinction between military personnel executing the laws, as proscribed by the PCA, and aiding civilian investigations, which courts generally allow.[71] This distinction between executing the laws and assisting investigations is generally considered correct and unambiguous. In any event, this test of "direct and active use" is perhaps the clearest and easiest of the three PCA tests to apply.[72]

The second test weighs whether the "'use of any part of the Army or Air Force pervaded the activities of the civilian law enforcement agents."[73] First articulated in *U.S. v. Jaramillo*[74], the "pervaded" test is akin to a "totality of the circumstances" analysis.[75] *Jaramillo*, like *Red_Feather*, was a criminal case arising from the events at Wounded Knee in 1973,[76] and again one of the charges required law enforcement officers to have been acting lawfully.[77] The court drew attention to the actions of Colonel Volney Warner, U.S. Army, and the unique role he played during the standoff.[78] Col. Warner received orders to report to Wounded Knee to observe events, and advise the Defense Department whether or not federal troops were required.[79] Although Col. Warner advised against the need for troops, his observation crept towards advice to law enforcement, and his advice arguably crossed the line into assistance.[80] Col. Warner recommended the law enforcement officers change their rules of engagement, and provided military vehicles to law enforcement officials.

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[69] *Red Feather*, 392 F. Supp. at 923 – 24.
[70] *Id.* at 924 – 25.
[71] *Id. See also* Burns v. State, 473 S.W.2d 19 (Tex. Crim. App. 1971); United States v. Walden, 490 F.2d 372 (4th Cir. 1974).
[72] *See also* United States v. Hartley, 796 F.2d 112, 115 (5th Cir. 1986) (passing information from the Air Force to Customs did not amount to "direct participation of the military").
[73] United States v. Yunis, 681 F. Supp. 891, 892 (D.D.C. 1988) (*quoting* United States v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974)).
[74] United States v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974).
[75] *Id.*. at 1381.
[76] *Id.* at 1376.
[77] *Id.*
[78] *Id.* at 1379 – 80.
[79] *Jaramillo*, 380 F. Supp. at 1379.
[80] *Id.* at 1379 – 80.

Because one condition for using the vehicles was that the police use tactics prescribed by Col. Warner, the colonel's conditions became *de facto* orders that were promulgated to the law enforcement officers.[81]

On the basis of these facts, the court acquitted the defendants.[82] Being careful to stop short of an explicit finding of a *Posse Comitatus* violation, the court held that Col. Warner's participation raised a reasonable doubt, under the PCA, as to whether the law enforcement personnel were acting lawfully.[83] In short, there likely was a PCA violation by Col. Warner, because his participation in the stand-off at Wounded Knee "pervaded the activities" of civilian law enforcement.[84]

"The third [and final] test is whether the military personnel subjected citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature."[85] Another case arising from the Wounded Knee standoff, *U.S. v. McArthur*[86] first formulated this test, finding the earlier "direct and active use" and "pervade" tests inadequate.[87] The court in *McArthur* applied a "regulate, proscribe, or compel" test to the same facts discussed in *Red Feather* and *Jaramillo*.[88] Taking Col. Warner's presence at Wounded Knee to be preparatory in nature, and his advice to civilian law enforcement to be incidental, the court in *McArthur* ruled that Warner's assistance did not run afoul of the PCA.[89] The court reasoned that it was the civil authorities who gave the orders, so that Warner's advice did not compel civilian law enforcement to do anything; therefore, the PCA was not violated.[90]

Applying these judicial tests to another factual scenario will better illustrate the three analyses of the PCA. For example, imagine if an Air Force

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[81] *Id.*
[82] *Id.* at 1381.
[83] *Id.*
[84] *Jaramillo,* 380 F. Supp. at 1379.
[85] United States v. Yunis, 681 F. Supp. 891, 892 (D.D.C. 1988).
[86] Monarch Ins. Co. v. District of Columbia**,** 353 F.Supp. 1249 n.53 (D.D.C. 1973).
[87] United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1975).
[88] *Id.* at 193.
[89] *Id.* at 195.
[90] *Id.* at 194 – 95. The court in *McArthur* does not make the "regulate, proscribe, or compel" test as clearly distinct as was perhaps intended. In fact, the court circles back to the "pervade" test, almost rhetorically challenging the *Jaramillo* court on its conclusion. *McArthur*, 419 F. Supp. at 195. Though there may only be a fine conceptual difference, the third test is still a useful point of view for evaluating possible PCA violations.

helicopter pilot flew a search mission to help civilian law enforcement capture a fugitive.[91] During the search, the pilot lands in a field and injures a bystander when debris is sent flying by the helicopter's rotor downwash.[92] In a resulting civil action, the plaintiff seeks to hold the government liable for the pilot's actions, arguing that the aerial search was within the pilot's scope of employment.[93]

To help illustrate the differences between the three tests and discover any disparity in result, the fact pattern above will be analyzed with each test. First, the "direct and active use" test would almost certainly find that the law enforcement officials violated the PCA. By flying search patterns, the military pilot was a direct and active participant in the fugitive search. Just as the defendant in *Red Feather* was allowed to prove active participation in the law enforcement action, here, the helicopter pilot seems both an archetype of "direct and active use," as well as a modern analogue to the *mounted cavalry helping the sheriff track down a cattle rustler*. Because it was prohibited when on horseback, so too is the "direct and active use" of a military helicopter prohibited by the PCA.

The second test, whether military assistance "pervades" the law enforcement action, is less satisfying when applied to the above facts. The helicopter pilot, depending on the storyteller, could be either the linchpin of the whole search operation, or a mere last minute addition, unimportant to the overall search. Given the *Jaramillo* decision and the extent of Col. Warner's egregious direction in the Wounded Knee standoff, the pilot above probably did not violate the PCA. The pilot was in the air and had some part in directing the search by communicating with the civilian law enforcement, but there is no suggestion that the pilot set conditions and rules like Col. Warner. Because the pilot's participation likely helped shape the search, however, in a manner that was somewhat pervasive, the pilot's assistance could run afoul of PCA under the "pervade" test; there is no clear answer using this test.

Finally, the "regulate, proscribe, or compel" test is almost certainly not violated on the above facts. Just as the *McArthur* court used the same Wounded Knee facts and found no violation, the pilot in the above facts would likely not

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[91] Facts in this hypothetical are drawn from *Wrynn v. United States*, 200 F. Supp. 457 (E.D.N.Y. 1961).

[92] *Wrynn*, 200 F. Supp. at 465.

[93] *Id.* In *Wrynn*, though the court did not reach the question, removing the federal government's liability, as the court did, should have allowed the plaintiff to pursue a tort claim against the pilot personally. Restatement (Third) of Agency § 7.01 (2006).

violate the PCA under this test. Although the pilot's input to the search may have amounted to some level of control, the pilot's direction and communications cannot fairly be considered regulation, proscription, or compulsion. The *McArthur* court was focused on the fact that the colonel's advice had to be enforced by a supervisory law enforcement officer. Similarly, the pilot's descriptions of what he did or did not see would probably have been advisory, and the law enforcement personnel on the ground could continue to direct their search however they saw fit, regardless of what the pilot said. It seems, then, that unless a military member directs civilians on threat of force, or exercises some unequivocal authority over a civilian, the "regulate, proscribe, or compel" test is very difficult to violate.

As the preceding discussion illustrates, each of the three tests looks at different aspects of military involvement in law enforcement. For that reason, all three tests must be kept in mind when suggesting a working model for disaster relief.

Having reviewed the foundational case law and political antecedents of *Posse Comitatus*, the next analysis turns to a recent example of misunderstanding the law. Exploring the damage caused by misapplying the PCA will highlight the need to clarify the system, so that the military may legally and effectively perform domestic disaster relief.

III. HURRICANE KATRINA: POSSE COMITATUS AS IMPEDIMENT

Hurricane Katrina became a Category Five hurricane while swirling at sea on August 28, 2005.[94] The storm was 150 miles across, and at the time was predicted to produce flooding nearly twenty feet above normal tidal levels.[95] The damage wrought by the storm itself, as well as by the slow response and misapplication of *Posse Comitatus,* reveals the need to revise the way federal troops are provided to disaster relief efforts.

A. Storm Damage

Hurricane Katrina was the most destructive natural disaster in American history; it was the deadliest American disaster in eight decades, and adjusted for inflation, the storm and its aftermath exceeded property damage in any previous natural disaster.[96] There were an estimated 1,330 deaths caused by

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[94] STEPHEN FLYNN, THE EDGE OF DISASTER xix (2007).
[95] *Id.*
[96] The White House, *The Federal Response to Hurricane Katrina: Lessons Learned 5-9, in* DISASTERS AND THE

the storm and flooding, and more than 1 million evacuees.[97] Property damage neared $100 billion, including the destruction of 300,000 homes.[98]

Economic and environmental maladies have beset the Gulf Coast since the storm: unemployment, damaged infrastructure, oil spills and other toxic hazards, and the loss of hundreds of thousands of residents who may never return to their homes in Louisiana and Mississippi.[99] An incredible 90,000 square miles of land were devastated, an area the size of the United Kingdom.[100] One commentator likens the enormity of the storm to the damage that a nuclear detonation would cause.[101] The storm's formation off the Gulf Coast was an act of nature that could not be averted. The government's response to the disaster, however, was itself disastrous.

B. Slow Federal Response

It is hard to imagine a city more poorly situated topologically to weather a heavy storm than New Orleans. It has been slowly sinking into the swamp for centuries, and presently averages an elevation six feet below sea level, with some sections eleven feet below sea level.[102] It has been said that but for the levee system, "much of the city would be a shallow lake."[103]

Because of the unique geographic features and the region's propensity for hurricanes, the idea of a hurricane hitting New Orleans was contemplated well before August 2005. In fact, the near-miss of Hurricane Georges in 1998 spurred New Orleans to plan for a major hurricane disaster. The city received funding five years later, and the region ran a hurricane response exercise called "Hurricane Pam" in 2004.[104] Many of the shortcomings discovered in Hurricane Pam were replayed with real life consequences following Hurricane Katrina.[105]

LAW 2, 2-4 (Daniel A. Farber & Jim Chen eds., 2006).
[97] *Id.* at 4-5.
[98] *Id.* at 3.
[99] *Id.* at 4-5.
[100] U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared, in* DISASTERS AND THE LAW 5, 6 (Daniel A. Farber & Jim Chen eds., 2006).
[101] FLYNN, *supra* note 94, at xx.
[102] *Id*. at 48.
[103] *Id.*
[104] U.S. Senate, *supra* note 100, at 7.
[105] *Id. See also* Paolino, *supra* note 38, at 1392-94 (discussing Hurricane Pam as foreshadowing Katrina).

In spite of these preparations, however, the federal government was slow to provide assistance to the region when Hurricane Katrina hit. And this was not for a failure to recognize the seriousness of the situation. On August 28, 2005, while Katrina moved towards New Orleans, President Bush had already declared Louisiana and Mississippi disaster areas.[106] The President spoke with the governors of Alabama, Florida, Louisiana, and Mississippi, and urged residents in the storm's path to evacuate, although it was probably too late by the time he made his short speech.[107] Though he referred to federal agencies that would assist in disaster relief, conspicuously absent from his remarks was any mention of military assistance.[108] Weeks later, the Department of Defense was unable to pinpoint exactly when the military was first contacted and requested to assist with storm recovery.[109]

The first uniformed presence in New Orleans was, not surprisingly, the Louisiana National Guard.[110] Some members were sent to the Superdome, where they kept order fairly well for a time.[111] The enormous crowds challenged the relatively small number of Guardsmen present, however, and the ultimate consensus was that the Guard overpromised and under delivered aid to the evacuees.[112] This may have been affected by the overseas deployment of much as 40 percent of the National Guard of Louisiana and surrounding states.[113]

In a gesture of solidarity, Governor Bill Richardson of New Mexico sent a contingent of his own state's National Guard to Louisiana to assist in the recovery.[114] Embarrassingly for the Defense Department, the New Mexico National Guard arrived in Louisiana before any federal troops.[115] Inexplicably,

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[106] DOUGLAS BRINKLEY, THE EDGE OF DISASTER: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST 100-01 (2006).
[107] *Id.*
[108] *Id.*
[109] *Id.* at 100.
[110] *Id.* at 421.
[111] BRINKLEY, *supra* note 106, at 421.
[112] JED HORNE, BREACH OF FAITH: HURRICANE KATRINA AND THE NEAR DEATH OF A GREAT AMERICAN CITY 52 (2006).
[113] BRINKLEY, *supra* note 106, at 416. *See also* PHILLIP CARTER, REBUILDING AMERICA'S RESERVES, PROGRESSIVE POL. INST. POLICY PAPER (2007), *available at* http://www.ppionline.org/documents/RebuildingReserves111407.pdf.
[114] BRINKLEY, *supra* note 106, at 421.
[115] *Id.* at 422.

the federal troops at Fort Polk, a mere 270 miles from New Orleans, were bypassed, and the 82d Airborne was sent from North Carolina instead.[116]

The President was slow in ordering the troops to leave for Louisiana as well. As one author editorializes, "[i]f the Pentagon had been purposely keeping the troops from Louisiana, it could not have done a better job of causing delays."[117] Although it is still unclear why the federal troops were so slow to respond,[118] it is undeniable that the political battle and legal confusion around *Posse Comitatus* were contributing factors.

The delayed, piecemeal military response to Katrina is indicative of the problems surrounding use of *Posse Comitatus.* To borrow a phrase, assistance delayed is assistance denied. Four days after Katrina hit, while the disaster in Louisiana deepened, President Bush had yet to provide meaningful federal relief.[119] As news from Louisiana kept getting worse, the Bush administration began to slowly piece together a plan that included federalizing the Louisiana National Guard.[120] Louisiana Governor Kathleen Blanco and President Bush were at odds over this idea. The White House argued for federalizing the troops but Governor Blanco strongly opposed the proposal.[121] She opposed a federal takeover of her state militia as a sign of failure of her own governance, particularly as a member of the opposing party, and did not feel this was a necessary measure to secure the needed aid.[122]

Ultimately, Governor Blanco neither requested nor acquiesced to the President's request to federalize the Louisiana National Guard, and the President declined to do so without her support.[123] In the midst of this political infighting, people were dying.[124] It would be another 36 hours before the cavalry arrived in the form of 30,000 federal troops.[125] In the interim, the Louisiana National

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[116] *Id.* at 417.
[117] *Id.* at 421.
[118] *Id.*
[119] BRINKLEY, *supra* note 106, at 562-63.
[120] *Id.* at 563.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 565.
[124] During this time, Governor Blanco's office was dogged by reporters asking why she had not declared a state of emergency—when she had in fact done so three days before the storm struck. Apparently, the White House promulgated that misinformation, and the rumor would not go away. HORNE, *supra* note 112, at 97.
[125] *Id.*

Guard successfully evacuated the Super Dome on a shoestring and began evacuating the Convention Center. While there was still work to be done, the cavalry arrived too late to help the overwhelmed Guard with much of the initial relocation and relief.[126]

C. Analysis

1. Could the President Legally Send Federal Troops?

Under the insurrection statutes[127] and the Constitution,[128] the President did have the power to federalize the National Guard of his own accord, and command them as if they were regular federal troops.[129] The White House, Governor Blanco, and the National Guard Bureau, however, fought over the legal effect of federalizing the National Guard.[130] Ultimately, opting not to federalize the state militia was probably more about public perception than legal authority.[131] It would have been heavy-handed to grab the National Guard out from under the governor; federal suppression of an insurrection in Louisiana, after all, was one of the historical impetuses for passing *Posse Comitatus* in the first place.[132] The Bush Administration wanted the governor to publicly request, or at least quietly acquiesce in, federalizing the National Guard.[133]

Rather than forcibly recharacterize state militia into federal troops, the President opted to send 30,000 regular army troops into Louisiana.[134] This was clearly acceptable under the PCA. Likewise, however, *Posse Comitatus* would not have been offended by federalized National Guardsmen. Because the area was lawless and individuals were being denied their rights, the President's powers under the insurrection statutes would have allowed him to restore order with federalized troops.[135] After the Katrina disaster, one commentator who fully understood the President's constitutional and statutory authority unequivocally laid the blame for the slow response at the feet of the Administration: "[i]t's utterly clear that [the president has] the authority to

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[126] *Id.* at 567.
[127] 10 U.S.C.A. §§ 331-334 (West 2008).
[128] U.S. CONST. art. II, § 2.
[129] BRINKLEY, *supra* note 106, at 569.
[130] HORNE, *supra* note 112 at 96. *See also* BRINKLEY, *supra* note 106, at 416, 487, 563-69.
[131] BRINKLEY, *supra* note 106, at 569.
[132] Currier, *supra* note 5, at 4-5.
[133] BRINKLEY, *supra* note 106, at 569.
[134] *Id*. at 417.
[135] 10 U.S.C.A. §§ 331-334.

preposition assets and to significantly accelerate the federal response . . . . [He] did not need to wait for the state."[136]

2. Would Troops Have Helped?

Before discussing solutions to the legal impasse compounding the Katrina disaster, it is worthwhile to explore whether having troops in place earlier would have been helpful. Despite the huge outcry when the troops did not show up, there are commentators who believe that the military should have a lesser role in disaster relief than currently envisioned.[137] Similar if less informed commentary argues that military systems "such as fighter jets, tanks, heavy weaponry, and battleships, are simply not appropriate for law enforcement or disaster relief purposes."[138] Without quibbling,[139] this reductive view ignores the experience from Katrina and other recent disasters which definitively show how helpful a military response can be in the face of calamity.

In a 1993 report, the Government Accountability Office (GAO) concluded that the Defense Department "is the only organization capable of providing, transporting, and distributing sufficient quantities of items needed" to

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[136] IVOR VAN HEERDEN & MIKE BRYAN, THE STORM: WHAT WENT WRONG AND WHY DURING HURRICANE KATRINA—THE INSIDE STORY FROM ONE LOUISIANA SCIENTIST 147 (2006).

[137] Kathleen Tierny, et al., *Metaphors Matter: Disaster Myths, Media Frames, and their Consequences in Hurricane Katrina*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 76-78 (2006).

[138] Dan Bennett, Comment, *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, 945 (2006).

[139] Bennett's ultimate conclusion is not inaccurate, finding that the laws currently in effect are sufficient to allow for
effective disaster relief while respecting a historical split between civil and military authority. *Id.* at 953-54. However, like his broader point discussed *supra* in the text, Bennett's assertion about military hardware, sans citation, is unencumbered by fact. Glaring questions arise, such as why indeed fighter jets would be ordered into a disaster area, when helicopters would be a much more suitable platform; or why a "battleship" would be sent to a disaster area when an amphibious ship (discussed *supra* in text) would make more sense. Moreover, there has not been a single American battleship in commission since the U.S.S. MISSOURI (BB-63) was decommissioned the second time in 1992. U.S. Navy, A Short History, http://www.navy.mil/navydata/ships/battleships/bbhistory.asp (last visited Nov. 21, 2008).

respond to a disaster.[140] Working together in the early aftermath of Katrina, Coast Guard and National Guard helicopters and boats rescued 2,000 individuals.[141] The Texas Air National Guard supplied rescue helicopters,[142] Army personnel restored and maintained order on the streets,[143] and the Navy provided six ships to "serve as the launch pad for amphibious and air operations to deliver supplies . . . [and] establish a foothold . . . as massive recovery efforts continue[d]."[144] One of them, the amphibious ship U.S.S. IWO JIMA (LHD-7), hosted "thousands of police, fire and rescue personnel . . . onboard during recovery operations[,] and *Iwo Jima* operated as the central command and control hub," thus becoming the floating command center and the emergency workers' hotel for the recovery effort.[145]

In addition to these tangible contributions, the military's intangible contribution to the Katrina recovery effort was significant: the people wanted to know they were safe. There is one account of gunmen firing at doctors on the roof of a New Orleans hospital.[146] While there were some National Guardsmen present protecting the hospital staff,[147] had the Army's 82d Airborne Division arrived earlier, they could have provided a highly visible show of force to counteract the sense of lawlessness and vigilantism compounding the civic breakdown.

The responses of those living through Katrina's aftermath show how welcome military assistance is in time of need. When the New Mexico National Guard arrived, one soldier was greeted with a sigh of relief and told by a state utility worker that "there's a million ways [to] help. I'm so glad to see you."[148] The "can-do" attitude, operational readiness, and organizational skills that the

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[140] VAN HEERDEN & BRYAN, *supra* note 136, at 148.
[141] *Id.* at 100-101.
[142] *Id.* at 103.
[143] Tierny, et al., *supra* note 137, at 72. *See also* BRINKLEY, *supra* note 106, at photo pages after 492 (picture of red-bereted 82d Airborne soldiers in downtown New Orleans; the caption states that the "primary goal was to establish law and order in the streets of New Orleans").
[144] Mike Jones, *Iwo Jima Arrives to Assist Hurricane Katrina Recovery Efforts*, U.S. NAVY, Sep. 5, 2005, *available at* http://www.news.navy.mil/search/display.asp?story_id=19913.
[145] U.S. Navy, Fact File: Amphibious Assault Ships, http://www.news.navy.mil/navydata/fact_display.asp?cid=4200&tid=400&ct=4 (last visited Nov. 21, 2008).
[146] BRINKLEY, *supra* note 106, at 488-89.
[147] *Id.*
[148] *Id.* at 422.

New Mexico militiamen brought with them served as a morale boost for the state workers who were overwhelmed; they were grateful for the help.[149] Though not a rescuer by trade, New Orleans Councilwoman Jackie Clarkson tried to get on a boat herself and perform rescues.[150] Instead finding her niche working communications, Councilwoman Clarkson wished that the military had responded sooner, saying, "[g]ive me the Army, Marines, and Navy anytime. If they had come in, everything would have been better."[151]

It is likely that the GAO was right: the military is the organization best equipped to respond to large scale disasters in a short period of time. In order to prescribe a workable method to allow that response within the bounds of *Posse Comitatus*, recent legislation surrounding the law needs to be explored to see whether a statutory solution would be effective.

IV. RECENT DEVELOPMENTS: CONFUSION REIGNS

In the past six years, there have been three major changes to statutes impacting *Posse Comitatus*. Before recommending a sub-statutory solution, an exploration of the most recent statutory changes to *Posse Comitatus* is appropriate to evaluate the efficacy of a statutory solution.

A. "Sense of the Congress"

In the wake of September 11, 2001, Congress passed a law that "reaffirmed" its view of "the continued importance and applicability of the Posse Comitatus Act."[152] Enacted as part of the Homeland Security Act of 2002,[153] this law describes how Congress believes the PCA is still relevant to federal law enforcement, and that it "has served the nation well in limiting the use of the Armed Forces to enforce the law."[154] The statute goes on to state the non-controversial idea that the PCA is not a complete barrier to the use of federal troops, and that the President retains many powers to employ troops domestically if required to respond to an emergency.[155] The insurrection

[149] *Id.*
[150] *Id.* at 359-60.
[151] BRINKLEY, *supra* note 106, at 360.
[152] 6 U.S.C.A. § 466 (West 2007).
[153] Demaine & Rosen, *supra* note 2, at 213.
[154] 6 U.S.C. § 466(a)(3).
[155] *Id.* at §466(a)(4).

statutes and the Stafford Act[156] are cited as specific exceptions to the PCA that may be invoked when necessary.[157]

All of this verbiage serves no functional purpose other than creating a cross-reference to already existing and effective federal statutes. One commentator noted that this "sense of Congress" is not binding, as it neither compels nor prohibits.[158] Note that after the title and heading "Findings," the law states that "Congress finds" the substantive portion of the statute that followed.[159] Because Congress found, rather than amended or altered any pre-existing law, its contents are simply the expression of an opinion.[160] The beginning of the final section of the statute declares that "Congress reaffirms the continued importance" of *Posse Comitatus*.[161] All this finding and reaffirming shows that, at least in 2002, Congress was relatively happy with the state of the law regarding PCA and the domestic use of the military.

B. The Warner Amendment

The statutory status quo did not last. Having weathered September 11, 2001, with a mere reaffirmation of existing law, *Posse Comitatus* and related laws were due for an overhaul after the incredible loss of life following Hurricane Katrina. This overhaul lasted about fifteen months, and was recently repealed.

While working on the 2007 National Defense Authorization Act, both Houses considered the lessons of Hurricane Katrina.[162] The White House similarly tried to look ahead to a different plan for the next major disaster, when military and civilian officials might better coordinate for a more effective

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[156] *See infra* for discussion of Stafford Act.
[157] 6 U.S.C. § 466(a)(5).
[158] *See generally* Demaine & Rosen, *supra* note 2, at 214-218. *See also* Marbury v. Madison, 5 U.S. 137,
177 (1803).
[159] 6 U.S.C. § 466(a).
[160] *See* Demaine & Rosen, *supra* note 2, at 213–14.
[161] 6 U.S.C. § 466(b).
[162] Michael Greenberger, *Yes Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City From a Devastating Natural Catastrophe*, 26 MISS. C. L. REV. 107, 121 (2006 – 2007).

response.[163] It was in this environment that 10 U.S.C. § 333, one of the major "calling forth" statutory exceptions to the PCA, was changed.[164]

The 2006 version of the statute, called the "Warner Amendment," more explicitly stated the circumstances in which a President may "call forth" the militia. The latter half of the 2006 version of § 333 retains the entirety of the original, allowing the President to intervene when a domestic condition "hinders the execution of the laws of a State."[165] An additional relatively minor change required the President to notify Congress when he invoked the law.[166]

The biggest change, however, added a list of specific instances in which the President could act. The original version limited the President to intervening in the event of "insurrection, domestic violence, unlawful combination, or conspiracy."[167] Under the Warner Amendment, however, § 333 allowed the President to intervene in the event of "natural disaster, epidemic, or other serious public health emergency," in addition to the original list.[168] It seems a stretch that the idea of "natural disaster" is so removed from "domestic violence" or "unlawful combination," as to give a policy maker pause when planning to send relief to a storm ravaged area. Indeed, the lessons of Katrina clarify how easily a natural disaster may give rise to violence within the ravaged area. However, at least one commentator believed that the Warner Amendment "remove[d] all doubt about the President's ability to decide unilaterally to use federal troops to respond to a massive disaster."[169] If that is accurate, perhaps Congress accomplished its goal by passing the Warner Amendment. It was a short-lived victory.

C. Repealing the Warner Amendment

Little more than a year after updating § 333 to clarify the President's powers to send federal troops into disaster areas, Congress removed the articulated list provided in 2006. Opposition to the Warner Amendment included governors, National Guard lobbying organizations, and congressmen

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[163] *Id.*
[164] John Warner National Defense Authorization Act of 2007, Pub. L. No. 109-364, § 1076, 120 Stat. 2404, *repealed by* National Defense Authorization Act of 2008, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008) (current version at 10 U.S.C.A. § 333 (West 2008)).
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] Greenberger, *supra* note 162, at 121.

on both sides of the aisle.[170] House Armed Services Chairman Ike Skelton (D-Mo.) stated that when complaints from state governors and others began to accumulate, his committee decided that the old law should be put back in place.[171] These complaints included letters from two governors to the House and Senate Armed Services Committees, demanding that the Warner Amendment's "egregious intrusion upon the sovereignty and prerogatives of state governments [ ] should be stricken."[172]

Though the White House expressed a desire to keep the new Amendment in effect, few spoke out to keep the changes. In comments that cut to the heart of whether the Warner Amendment should be repealed, National Guard commander Lt. Gen. H. Steven Blum testified in April 2007 that the Warner Amendment would not have helped the response to Hurricane Katrina.[173] With its major justification pulled out from under it, the 2006 Warner Amendment was repealed. The 2008 National Defense Authorization Act restored the original language of § 333, ending the supposed clarifications contained in the Warner Amendment.[174]

The Warner Amendment was a failed attempt to solve *Posse Comitatus* problems without disrupting the policy goals represented by the law. In other words, it was a statutory attempt to avoid throwing out the baby with the bathwater. As Lt. General Blum made clear, however, a statutory list detailing the President's "calling forth" powers would probably not prevent another Katrina-like disaster response.[175] A more fruitful approach would honor the *Posse Comitatus* policy concerns separating the military from civilian law enforcement. A more clearly demarcated boundary, set in place by a quick sub-statutory solution, would allow for effective military disaster response in a domestic context.

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[170] John M. Donnelly, *Bowing to Robust Lobbying by U.S. Governors, Members of Congress Appear Poised to Repeal a Law Enacted Just a Year Ago that Expanded the President's Power to Invoke Martial Law*, CQ TODAY, Oct. 19, 2007, *available at* http://public.cq.com/docs/cqt/news110-0000026909356.html.
[171] *Id*.
[172] *Id*.
[173] *Id*.
[174] National Defense Authorization Act of 2008, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008) (current version at
10 U.S.C.A. § 333 (West 2008)).
[175] Donnelly, *supra* note 170.

V. CURRENT MODELS AND NEW ORGANIZATION

Two current organizational models are explored below. Together, the models can be synthesized to find a legal avenue to provide domestic military disaster relief, while still honoring the goal of keeping the military out of day-to-day law enforcement. These methods and models have as much to do with law and regulation as they do with training and coordination, which will be made clearer as each model is discussed and applied in turn, followed by a discussion of statutory limitations and recent developments.

A. The National Guard's Shifting Chains of Command

The National Guard is the modern incarnation of the militia.[176] The National Guard usually exists as the state militia and becomes part of the federal military, to the exclusion of state duties, when ordered to active federal service.[177] In normal conditions they serve under the governors of their respective states. [178] When called into federal service, however, they serve under the President as Commander in Chief of the military.[179] This shifting chain of command, from state to federal authority, from governor to President, could provide a useful model for the federal military in disaster relief. To more fully understand how the National Guard is shared by state and federal officials, it will help to examine the missions particular to each sovereign, and then examine disaster relief as a shared mission.

1. Unique State Mission: Drug Interdiction

The National Guard is specifically authorized to directly assist their respective state law enforcement agencies in performing law enforcement roles

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[176] National Guard, About the National Guard, http://www.ngb.army.mil/About/default.aspx (last visited November 21, 2008).

[177] 32 U.S.C. § 325 (2000). *See also* Perpich v. Dep't of Def., 496 U.S. 334, 347-49 (1990) (explaining the mutually exclusive roles of state militia member and federal soldier).

[178] *Perpich*, 496 U.S. at 343-44. This dichotomy extends beyond the power at the top of the chain of command.
See 10 U.S.C. § 12405 (2000) (applying U.S. Army and U.S. Air Force regulations to the National Guard and Air National Guard when militia members are called into federal service). *See also* O'Toole v. United States, 206 F.2d 912, 917 (3rd Cir. 1953) (explaining that National Guardsmen take an oath to obey the orders of their respective governors, as well as the orders of the President).

[179] U.S. CONST. art. II, § 2.

within the state, as allowed by the law of each state.[180] Funding is done at the state level, with some unusual contributions from the federal government. For example, federal law even allows the Secretary of Defense to fund state counter-drug missions performed by a state National Guard.[181]

At first glance, such a grant of authority for state militia and funding by the federal government seems to conflict with the Posse Comitatus Act. The PCA, however, includes an exception for "circumstances expressly authorized by the Constitution or Act of Congress."[182] Additionally, even if the text of the PCA did not include such an exception, the intent of the PCA is not endangered because National Guard members, when serving in their state capacity, are not part of the federal Army, regardless of funding.[183] Command and control is retained at the state level. When a state National Guard is called into federal service, however, the militia's nature changes to become a federal entity.[184]

The Sixth Circuit addressed the status of the National Guard when performing state law enforcement duties in *Gilbert v. United States.*[185] In *Gilbert*, the Kentucky National Guard worked with a state anti-drug task force, and arrested the defendants for multiple drug violations.[186] The defendants sought to challenge their arrest, claiming that the *Posse Comitatus* Act should bar the Kentucky National Guard from serving as a law enforcement entity.[187] The court, however, highlighted the difference between the National Guard serving as a state or federal entity: because the anti-drug task force was a state entity, the Kentucky National Guard was serving in its state capacity, and this remained the case even though there were federal civilian agents included in the task force.[188] It was irrelevant that the guardsmen were drawing their pay from federal funds, or that they "looked and acted like soldiers."[189] The key fact to whether the Guardsmen were in a federal or state status was whether the President or state governor was the ultimate authority issuing orders. Because

[180] 32 U.S.C.A. § 112 (West 2007).
[181] *Id.*
[182] 18 U.S.C. § 1385.
[183] United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997).
[184] *See e.g.* 10 U.S.C. § 12405 (2000) (applying federal military regulations to the National Guard after being called into federal service).
[185] Gilbert v. United States, 165 F.3d 470 (6th Cir. 1990).
[186] *Id.* at 471-72.
[187] *Id.* at 472.
[188] *Id.* at 473.
[189] *Id.*

the governor maintained control of the guardsmen and the counter-drug operation, the guardsmen served in a state status, and the PCA did not apply.[190]

As the *Gilbert* case shows, law enforcement may be undertaken legally by the National Guard. Law enforcement generally, and counter-drug operations specifically, may be undertaken by the state militia. The *Gilbert* court had little trouble upholding an arrest and seizure made by a Guardsman,[191] while federal law requires administrative regulations to prevent the federal military from doing the very same.[192] The key fact is that the Kentucky National Guard was working for the state of Kentucky at the time of the actions under scrutiny. This key distinction underscores the importance of shifting chains of command between the federal and state levels. This uniquely state mission of the National Guard can be contrasted with its uniquely federal missions.

2. Unique Federal Mission: Overseas Deployment

A brief history of the laws of the National Guard is necessary to frame the discussion of overseas deployment of the National Guard. In 1916, Congress turned the nascent National Guard from a system of affiliated state organizations into one federal organization administered separately by the states.[193] More than a distinction without a difference, this centralized structure maintained the state character of the militia, but gave the federal government the power to turn state militia members into federal troops when necessary.[194] Soon after the statutes were enacted, the Supreme Court ruled that membership in the National Guard did not preclude units being called forth to federal service.[195] Because the militia could be called into federal service, there was neither

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[190] *Gilbert,* 165 F.3d at 473. Additionally, the court cited 32 U.S.C. § 112 (2000), the congressional authorization for federal funding of state-organized counter-drug missions performed by the National Guard. This statutory reasoning was an alternative ground, however, and is given relatively short treatment compared to the lengthy discussion about the varying chains of command between state and federal authority. *Id.* at 473 – 74. *See also* United States v. Benish, 5 F.3d 20, 25-26 (3rd Cir. 1993) (similarly holding that state militia may assist with law enforcement because PCA applies to the Army and Air Force, but not the National Guard).

[191] *Gilbert*, 165 F.3d at 472-73.

[192] 10 U.S.C. § 375.

[193] Perpich v. Dep't of Def., 496 U.S. 334, 343-44 (1990).

[194] *Id.*

[195] Arver v. United States, 245 U.S. 366, 387-88 (1918).

constitutional nor statutory restriction against former state militia members being sent abroad when the President so directed.[196]

More recently, however, the Governor of Minnesota sought to enjoin the federal government from sending members of the Minnesota National Guard abroad for training exercises.[197] In *Perpich v. Department of Defense*,[198] the Governor of Minnesota argued that the constitutional power of the President to call forth the militia does not allow the President to send National Guard members abroad for training unless the governor grants permission.[199] The gubernatorial permission requirement was amended only a few years prior to the case; the previous version of the law had required the governor's permission to federalize National Guard troops.[200] The amendment limited the scope of the gubernatorial permission requirement, specifying that:

> [t]he consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.[201]

Governor Perpich, however, contended that Congress unconstitutionally narrowed the governor's power to prevent foreign deployment of National Guard personnel.[202]

For many of the same reasons that an earlier Court allowed the President to send militia members abroad,[203] the *Perpich* court upheld the law as amended.[204] The court reasoned that although National Guard members were not sent abroad during peacetime before the 1950s, the statutory scheme required that once the National Guard is called into federal service, the state's hold over the guardsmen is temporarily suspended.[205] With no further hold over

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[196] Cox v. Wood, 247 U.S. 3, 6 (1918).
[197] *Perpich*, 496 U.S. at 337-38.
[198] *Id.* at 343-44.
[199] *Id.* at 336-39.
[200] *Id.* at 336 – 37.
[201] 10 U.S.C.A. § 12301 (West 2007).
[202] *Perpich*, 496 U.S. at 337.
[203] *Id.* at 344-45, 349
[204] *Id.* at 347-49.
[205] *Id.*

the militia member, then, the state governor has no constitutional authority to prevent the federalized National Guard member from being sent abroad.[206]

The key point for this discussion is that the *Perpich* case shows how the federal government has the power to send National Guard troops overseas after asserting authority over the militia.[207] The governor's brief in *Perpich* implicitly admitted that the state governors have no power to send their militias abroad.[208] *Perpich* shows a mutually exclusive chain of command wherein state authority ends, and federal authority takes over.[209] As a result, the overseas deployment of state militia members is uniquely within the province of the federal executive.[210]

This federal power over state militias is clearly evidenced in the present conflicts in Iraq and Afghanistan, where significant portions of the deployed forces are federalized National Guard troops.[211] For instance, the National Guard website states that "at one point in 2005, half of the combat brigades in Iraq were Army National Guard - a percentage of commitment as part of the overall Army effort not seen since the first years of World War II."[212] With state militia members fighting the nation's wars half a world away, it is an easy step to conclude state and federal authority over the National Guard is an all-or-nothing proposition – in other words, the exercise of the President's authority

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[206] *Id.*
[207] *Perpich*, 496 U.S. at 347-49.
[208] *Id.* at 344.
[209] *See* U.S. CONST. art. I, § 8, cl. 10 – 15 (detailing the military powers of the legislative branch); *id.* at cl. 16 (states will train the militias with Congressional assistance); U.S. CONST. Art. II, § 1 (President as the executive), *id.* at § 2, cl. 1 (President as Commander in Chief); *id.* at § 2, cl. 2 (foreign policy powers of the President curbed by Senate approval of treaties); U.S. CONST. art. VI (the Constitution and federal laws are the supreme law of the land); U.S. CONST. amend. X (powers not granted to the federal government nor the states are reserved for the people). A state's only role in military and foreign policy, it seems, is to train its militia.
[210] *Perpich*, 496 U.S. at 351-352. *See also id.* at 352 (leaving open the question of whether or not it would be unconstitutional to strip governors of the ability to object to foreign militia deployment, due to governors' emergency preparedness responsibilities; without answering the question, the court's tone is skeptical).
[211] The National Guard, About the National Guard, http://www.ngb.army.mil/About/default.aspx, (follow National Guard History hyperlink to "2002 Global War on Terror") (last visited Nov. 21, 2008).
[212] *Id.* The Air National Guard was also deployed, notably to Afghanistan. *Id.*

ends state control over its National Guard, as in the case with overseas deployments. But that is not the case.

3. Disaster Response and Civil Order: State and Federal Overlap

Domestic responses to emergencies are perhaps the best known uses of the National Guard. Key to this discussion is the fact that both state and federal authorities may exercise control over National Guard troops while responding to domestic emergencies.

The National Guard is normally a state entity, and as such the governors may call upon their respective militias to assist in time of emergency.[213] The historically common use of this power was to respond to provide disaster relief and to calm civil unrest.[214] In fact, the use of National Guard troops for disaster relief was so common that several states had standing agreements to provide troops to respond after hurricanes.[215]

One infamous example of a militia acting under state control was Governor Faubus' order sending the Arkansas National Guard to Little Rock Central High School to prevent its racial integration in 1957.[216] The District Court for the Eastern District of Arkansas issued an injunction ordering Faubus to stop using his militia to obstruct the court-ordered integration.[217] Faubus argued that, as governor, he had the power to employ his militia, and needed to do so to preserve order.[218] Unimpressed, the appellate court upheld the injunction, effectively ordering the governor to stop impeding integration.[219]

Most pertinent to this discussion, however, was that the *Faubus* court was careful to maintain the governor's appropriate sphere of action. The

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[213] STEVE BOWMAN ET AL., CONGRESSIONAL RESEARCH SERVICE, HURRICANE KATRINA: DOD DISASTER RESPONSE
7 (2005). [hereinafter "CRS KATRINA"]
[214] *Id.* at 20-21.
[215] *Id.* at 7-8.
[216] Faubus v. United States, 254 F.2d 797, 801 (8th Cir. 1958). There are many examples of the National Guard
responding to emergencies under state authority, but disaster response rarely makes for instructive jurisprudence, which was the key consideration for picking this case as the explanatory example.
[217] *Id.* at 803.
[218] *Id.* at 805-806.
[219] *Id.* at 807-808.

contested injunction from the district court "expressly preserved to Governor Faubus the right to use the Arkansas National Guard for the preservation of law and order," provided that such use did not hinder the constitutional requirement to integrate schools.[220] Similarly, the federal government did not challenge the governor's authority to use the militia within the state to enforce the law.[221] Though opposed to the way Faubus employed the militia, the courts and the executive branch agreed that Faubus maintained the power as governor to use the militia to assist in keeping the peace, as long as that use did not otherwise break the law. Imprudent and even illegal use of the state militia did not require the governor to relinquish command of his forces.

State authority, however, is not the only way in which National Guard troops may be employed for disaster relief or for domestic disturbances. The "calling forth" statutes, discussed *supra*, provide the President with ample opportunity to employ the militia in a variety of situations.[222] This calling forth of the militia was employed in 1794, in President Washington's response to the Whiskey Rebellion.[223]

Further complicating the National Guard's shifting lines of authority is the fact that federal power over the militia is not a singular choice. There are at least three options, including state use of the National Guard,[224] federal authority provided under the "calling forth" statutes, and the procurement authorizations of the Stafford Act.[225] Under the Stafford Act, the President may "direct any Federal agency . . . to utilize its authorities and the resources granted to it under federal law . . . in support of State and local assistance response or recovery efforts."[226] The Stafford Act emergency powers include the power of the President to use the military for disaster relief, and do not preclude federalized militia members from being called into service domestically, though not for law enforcement.[227]

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[220] *Id.* at 798.
[221] *Faubus,* 254 F.2d at 805.
[222] 10 U.S.C. §§ 331 – 334 (2000).
[223] THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 196 (1986). The language of Washington's proclamation closely follows current language at the end of 10 U.S.C. § 334.
[224] PCA does not apply to state militias when under state control. CRS KATRINA, *supra* note 213, at 7.
[225] 42 U.S.C. §§ 5121 – 5207 (2000).
[226] 42 U.S.C. § 5170a (2000).
[227] JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES 5 (2007) [hereinafter "CRS Legal"]. Whether the federal troops were regular federal

There is yet another way that governors may employ their own militias for disaster response, beyond the normal state use of the militia. A National Guard member may be called to duty under state authority while receiving federal pay,[228] in what is called "Title 32" status.[229] The statute allows National Guard members to "perform training or other duty . . . [in] [s]upport of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense."[230] Though it is not intuitively obvious from the text of the statute, this "Title 32 status" provides enough flexibility for militia members to perform state missions, and remain under control of the governor, while the federal government foots the bill.[231] Title 32 status is a useful National Guard status to avoid PCA proscriptions for disaster relief, because the federal government is better positioned than the states to ensure adequate funding, while the National Guard units are already physically present in the disaster area.[232]

While the substantive details of the National Guard and Title 32 status are interesting, they are collateral; the point is that the National Guard already has at least three distinct authorities,[233] whether under state control, federal control, or the hybrid Title 32 status, with alternating reporting authority as required. This idea of shifting chains of command between federal and state authority might provide more options when deciding how best to respond to a domestic emergency.

Army or federalized National Guard troops, they would still be subject to the PCA because the Stafford Act is not itself a PCA exception. *Id. See also* 18 U.S.C. § 1385 (2000) (PCA exceptions must be "expressly authorized by the Constitution or Act of Congress").

[228] 32 U.S.C. § 502(f) (2000).

[229] CRS KATRINA, *supra* note 213, at 8. For a thorough discussion of this duty status and its historical development, see generally Christopher R. Brown, *Been There, Doing That in a Title 32 Status,* ARMY LAW, May 2008, at 23.

[230] 32 U.S.C. § 502(f).

[231] CRS KATRINA, *supra* note 213, at 8. The Defense Department authorized Title 32 status for disaster relief following Hurricane Katrina. *See* Brown, *supra* note 229 at 32.

[232] CRS KATRINA *supra* note 213 at 8-9. *See also* Brown, *supra* note 229, at 33, explaining why PCA does not apply to National Guard members serving in Title 32 status.

[233] A fourth duty status may exist when a National Guard unit commander is authorized to serve simultaneously in both a federal and state capacity. 32 U.S.C.A. § 325 (West 2008). This is a small percentage of the overall troop levels, and not significant enough to affect disaster relief planning.

4. National Guard Model Applied

A multiple option approach is very helpful in organizing a disaster response utilizing the National Guard. As Congress allowed and the courts endorsed, National Guard troops may be employed by federal or state authority, or even under state authority while taking broad direction from the federal government.

A similar approach with multiple options could be employed with federal troops. To allow federal troops to assist in domestic disaster response and avoid *Posse Comitatus* proscriptions, entire units should be allowed to be temporarily transferred to the Department of Homeland Security. It is notable that there is already at least one model wherein organizations and individuals shift reporting authority between different executive branch departments.

B. Coast Guard Integration with the Navy

1. Inter-Service Assignment

The United States Coast Guard, an armed, uniformed service, is in the unique position of being able to operate under military or civilian authority. Federal law defines the Coast Guard as "a service in the Department of Homeland Security, except when operating as a service in the Navy."[234] The Coast Guard operates as part of the Navy "[u]pon the declaration of war if Congress so directs in the declaration or when the President directs."[235] When this happens, the Coast Guard is effectively part of the Department of Defense, because "[w]hile operating as a service in the Navy, the Coast Guard shall be subject to the orders of the Secretary of the Navy."[236]

There is historical precedent for such an interdepartmental shuffle. Throughout its history, the Coast Guard and its forerunner organizations have fought alongside Navy sailors and vessels.[237] Near the outbreak of World War

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[234] 14 U.S.C.A. § 1 (West 2008). *See also* 5 U.S.C.A. § 2101 (West 2007), defining the Coast Guard as part of the armed forces, irrespective of the executive department with which the service is working.

[235] 14 U.S.C.A. § 3 (West 2008). *See also* 14 U.S.C.A. § 4 (West 2008), stating that Navy regulations apply to the Coast Guard when the Coast Guard operates as part of the Navy.

[236] 14 U.S.C.A. § 3.

[237] U. S. Coast Guard, The Coast Guard at War, http://www.uscg.mil/history/h_militaryindex.asp (last visited Nov. 21, 2008).

II, President Roosevelt ordered the entire Coast Guard into duty as part of the Navy.[238] Its duties as part of the Navy included traditional Coast Guard missions of search and rescue and port security, as well as Navy missions of convoy duty and amphibious landings.[239] Folding one entire armed service into another demonstrates that organizational lines of authority can be altered and rewritten as required by the exigencies of an emergency situation.

In addition to administratively moving the entire Coast Guard between cabinet-level departments, federal law provides for assigning Coast Guard units or individuals to the Navy as needed. In statutory language that gives the respective secretaries of the Navy and Homeland Security latitude to make their own determinations, Congress permits the two service secretaries to make "available to each other such personnel, vessels, facilities, and equipment, and agree to undertake such assignments and functions for each other as they may agree are necessary and advisable."[240] One manifestation of this broad grant of administrative discretion is that the Coast Guard maintains a staff presence overseas at the headquarters for the U.S. naval forces in the Persian Gulf, providing expertise and training assistance.[241] There are also Coast Guard vessels currently on station in the Persian Gulf.[242] These overseas deployments of Coast Guard personnel and vessels show that sharing personnel and resources between the Navy and Coast Guard is possible and sustainable at the unit level.

On a smaller scale, the Secretary of Homeland Security and Secretary of Defense may coordinate to place individual Coast Guard Sailors aboard Navy vessels in order to make arrests and conduct search and seizure.[243] The specific statutory allowance for such placements is necessary because, in addition to *Posse Comitatus* proscriptions, the Department of Defense is generally prohibited from making arrests or conducting search and seizure.[244]

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[238] *Id.*
[239] *Id.*
[240] 14 U.S.C.A. § 145 (West 2008).
[241] *See* Press Release, U.S. Naval Forces Central Command, Coast Guard Patrol Forces Southwest Asia Changes
Command (July 25, 2006) (http://www.cusnc.navy.mil/articles/2006/139.html).
[242] *CG Relieves Cutter Skipper in Persian Gulf*, NAVY TIMES, Feb. 20, 2008, http://www.navytimes.com/news/2008/02/coastguard_skipper_relieved_080219w/.
[243] 10 U.S.C.A. § 379 (West 2008). The presence of Coast Guard personnel as law enforcement officials does not limit the range of responses available to the military. *See* 14 U.S.C.A. § 637 (West 2008).
[244] 10 U.S.C.A. § 375 (West 2008). Like the PCA proscriptions, this section's prohibition is not ironclad. A law seemingly inspired by Fourth Amendment

In order to make arrests at sea without running afoul of federal law, the Navy uses Coast Guard personnel as law enforcement officers. These individuals most commonly perform counter-narcotics missions, whereby the Navy searches for and pursues the drug runners, but the Coast Guard Law Enforcement Detachment (LEDET) boards the smuggling vessel.[245] As the chase winds down and the LEDET prepares to board, the Navy vessel hoists the Coast Guard ensign,[246] and in a nearly metaphysical transformation suddenly becomes a Coast Guard ship, the grey hull and missile launchers notwithstanding.[247] The LEDET conducts the boarding, perhaps supplemented by Navy sailors. But as the sole law enforcement personnel present, the Coast Guardsmen in the boarding party will be the ones to search the vessel, seize whatever cargo or other evidence may be necessary, and arrest smuggling suspects if required.[248] This elaborate process allows the Navy to conduct law enforcement at sea, assisted by personnel from its sister service, the Coast Guard.

2. Coast Guard Model Applied

The shifting of personnel, staffs, vessels, and even an entire uniformed service between cabinet-level departments shows that the federal government is capable of large, complex changes in organizational structure and reporting authority. Applying that model to disaster relief, and combining it with the National Guard model discussed above, the military departments should be able to shift forces from the Department of Defense and into the Department of Homeland Security in order to respond to emergencies.[249]

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concerns, this statute prevents the Department of Defense from conducting search and seizure except as "otherwise authorized by law." *Id.*

[245] Douglas Daniels, *How to Allocate Maritime Responsibility Between the Navy and Coast Guard in Maritime Counterterrorism Operations,* 61 U. MIAMI L. REV. 467, 483 (2007).

[246] The Coast Guard ensign, consisting of sixteen vertical red and white stripes and the service's coat of arms, is its flag. It is the unique symbol of that service's authority at sea. For a more complete explanation, *see* Daniels, *supra* note 245, at 483; *see also* 33 C.F.R. § 23.15 (2004).

[247] Daniels, *supra* note 245, at 483.

[248] *Id.*

[249] *See* Felicetti & Luce, *supra* note 28, at 182. Before the creation of the Department of Homeland Security, authors Felicetti and Luce mentioned, in passing, shifting forces between executive branch departments, similar to the plan examined herein. Their thought recommended a statutory authorization to temporarily assign military forces to the then-prospective Department of Homeland Security. *Id.* The separate contribution of this article is to show that

As an example, if there were a need for aerial search and rescue following a disaster, Air Force helicopters should be made available to help in the search. That is not a change from how federal forces currently conduct disaster relief, but applying the National Guard and Coast Guard models would make the transition and operations smoother. Rather than have Air Force officials direct the movement and employment of the aircraft in response to a disaster, the Air Force would follow a model like the Coast Guard: the helicopters, their crews, and logistical support would be turned over to the Department of Homeland Security. The Pentagon would be out of the picture, and the helicopter pilots and squadron commander would report to the civilian Homeland Security rescue coordinator, rather than to the Defense Department. Like the Title 32 National Guardsmen who are paid by the federal government but work for the state, these helicopter pilots and aircrew would be paid by the Department of Defense, but would work for the Department of Homeland Security.

This model could be applied to any kind of federal military forces: infantry units could be assigned to restore order after a disaster, amphibious ships could be sent to provide logistical and medical support, and so forth. For the limited purpose of providing assistance, the detached people and forces would become Homeland Security personnel and assets, and then would return to the Defense Department when no longer needed. While such a scheme may sound like legal hair-splitting, it is based on well-trod legal ground consistent with established National Guard and Coast Guard practice regarding authority shifting and force sharing.

C. Statutory Stumbling Block

The National Guard and Coast Guard models show that executive departments are capable of sharing individuals and organizations between different authorities and departments. This comment, however, argues that a sub-statutory solution would be both expedient and effective. As discussed above, there are specific statutory allowances for shifting reporting responsibility for the National Guard[250] and the Coast Guard.[251] A sub-statutory

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temporary reassignment of military forces is possible under the current statutory scheme, feasible under current practice, and maintains proper respect for the *Posse Comitatus* Act. Additionally, this article fleshes out Felicetti & Luce's insightful passing comment in a comprehensive manner to show how it can be brought to fruition.

[250] 10 U.S.C. §§ 331 – 334 (2000); 32 U.S.C. § 502(f) (2000); 42 U.S.C. §§ 5121 – 5207 (2000). *See also* U.S. CONST. art. II, §2, cl. 1 (granting the

solution would have to use existing federal law to allow federal military forces to shift into the Department of Homeland Security.

The entering argument supporting this recommended course of action is that the President is the Commander in Chief of the armed forces.[252] Because the Departments of Defense and Homeland Security are both statutory creations within the executive branch, it would not offend the Constitution for the Secretary of Homeland Security, rather than Defense, to temporarily take control of a military force for the purpose of augmenting domestic disaster relief.

The statutory scheme currently in place presents a two-fold problem for implementing the models described above. First, the statutes must allow, or at least not foreclose, such a shuffling of forces. Secondly, *Posse Comitatus* itself must be addressed; a recommendation that puts the federalist values of the PCA into action is only helpful if the recommendation itself does not run afoul of the PCA. As discussed below, the current statutes leave room for such departmental restructuring which respects *Posse Comitatus*.

There is sufficient room in federal law for the President and Secretary of Defense to reorganize the Defense Department by shifting forces, even to another department. Specific statutory provisions allow the Secretary of Defense to transfer or reassign "any function, power, or duty," in order "to provide more effective [or] efficient" operation.[253] Further, the law explicitly allows that, in time of "hostilities or imminent threat of hostilities," the President may authorize the transfer or reassignment of "an officer, official, or agency [of the Department of Defense]," even if those duties are otherwise entrusted to the Department of Defense by law.[254] Use of this statute for a PCA solution turns on a relatively generous interpretation of "hostilities or imminent threat of hostilities;" perhaps hostilities could be interpreted to include domestic disturbance or threat of a domestic disturbance following a disaster. Certainly some Hurricane Katrina survivors would have believed that the lawlessness following the storm constituted a "threat of hostilities."

Case law interpreting this transfer authority shows a historically wide swath of discretion for decisions of the Secretary of Defense. In *Perkins v. Rumsfeld*, the Sixth Circuit upheld the Secretary of Defense's decision under his

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President Commander in Chief status over state militias when "called into the actual service of the United States").

[251] 14 U.S.C.A. §§ 145, 379 (West 2008).

[252] U.S. CONST. art. II, §2, cl. 1.

[253] 10 U.S.C § 125(a) (2000).

[254] *Id.* at § 125(b).

transfer authority.[255] Secretary Rumsfeld decided to move a communications equipment repair facility out of Kentucky, and plaintiffs, including the Kentucky congressional delegation, brought suit.[256] In a terse opinion, the Sixth Circuit held that "the authority to transfer functions from one military establishment to another is vested in the Secretary of Defense by Congress pursuant to 10 U.S.C. § 125."[257] Interestingly, the text of § 125's transfer authority does not require maintaining functions within the Department of Defense. This lack of specificity, combined with judicial deference to the Secretary of Defense's decisions, and the § 125 allowances for the President to transfer any defense agency in time of emergency, leads to a helpful inference.[258] Taken together, one can permissibly conclude that the current statutory scheme allows the transfer of federal military forces from the Department of Defense to the Department of Homeland Security.

1. Background on Memoranda of Understanding

Once the forces are in the Department of Homeland Security, however, *Posse Comitatus* may still prove an impediment. In order for military and civilian leadership to have a clear understanding of lines of authority, and to avoid violating the PCA, a memorandum of understanding ought to be signed in advance of any emergency.

Memoranda of understanding are relatively common instruments used to show agreement between parties. Though informal, a court may consider a

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[255] Perkins v. Rumsfeld, 577 F.2d 366, 368 (6th Cir. 1978). Donald Rumsfeld was the named defendant because the case originated while he served his first term as Secretary of Defense. Defense Department, Donald H. Rumsfeld, http://www.defenselink.mil/specials/secdef_histories/bios/rumsfeld.htm (last visited Nov. 21, 2008).

[256] *Perkins*, 577 F.2d at 367-68.

[257] *Id.* at 368. *See also* Armstrong v. United States, 354 F.2d 648, 649 (9th Cir. 1965) *affirming* 233 F. Supp. 188 (S.D. Cal. 1964) (9th Circuit agreed with District Court reasoning granting discretion to Secretary of Defense to shut down a naval repair facility).

[258] *But see* DAVID M. WALKER, SUMMARY OF RECOMMENDATIONS: THE 9/11 COMMISSION REPORT, HOUSE MISC. DOC. NO. B- 303692, at *25, 2004 WL 3104800 (Comptroller General's report indicating that federal law placing command of military forces in the hands of Secretary of Defense would require statutory change before those military forces could be reassigned.)

memorandum of understanding sufficiently definite to enforce it as a contract.[259] Memoranda of understanding may be signed between a multitude of parties, including nations,[260] between the government and private industry,[261] between private parties, [262] between a military department and a U.S. territory,[263] and between two different offices within the same executive branch.[264] In short, parties from both outside and inside the government may agree to a memorandum of understanding.

The legal effect of memoranda of understanding is not uniform. Though a memorandum could be construed as a contract, courts will not necessarily bind the government to every memorandum signed. In *Missouri* ex rel *Garstang v. Department of the Interior*, the plaintiff brought a freedom of information challenge based on a memorandum of understanding between a corporation and the federal government.[265] Created by several states, the public corporation entered into a memorandum of understanding with the Army Corps of Engineers and the Fish & Wildlife Service.[266] Federal law allowed the Fish & Wildlife Service to provide unspecified assistance to the corporation, and the

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[259] *See* Bauer v. Roman Catholic Diocese, 457 N.Y.S.2d 1003, 1004 (App. Div. 1982) (holding the memorandum "appears to state the essential or material terms of the contract").

[260] Self-Powered Lighting, Ltd. v. United States, 492 F.Supp. 1267, 1274-75 (S.D.N.Y. 1980) (upholding a memorandum of understanding between U.S. Defense Department and the United Kingdom). *See also* Standing Rock Sioux Tribe v. United States, 182 Ct. Cl. 813, *2 (1968) (memorandum of understanding signed between the United States and the Sioux American Indian nation).

[261] Sweetwater, A Wilderness Lodge LLC v. United States, 72 Fed. Cl. 208, 211 (2006) (memorandum of understanding signed between the Forest Service and a private business).

[262] Great Western Bank v. Office of Thrift Supervision, 916 F.2d 1421, 1425 (9th Cir. 1990) (memorandum of understanding between two banks prior to merger).

[263] Abreu v. United States, 468 F.3d 20, 24-28 (1st Cir. 2006) (memorandum of understanding between the Navy and Puerto Rico, regarding pollution at the Vieques range).

[264] United States Dep't of Justice v. Fed. Labor Relations Auth., 39 F.3d 361, 363 (D.C. Cir. 1994) (memorandum of understanding between Department of Justice's Office of Professional Responsibility, and the department's Inspector General, regarding internal investigations).

[265] Missouri ex rel. Garstang v. United States Dep't of Interior, 297 F.3d 745, 747-750 (8th Cir. 2002).

[266] *Id.* at 747.

memorandum of understanding established that the assistance would be in the form of the federal agency paying for a full-time coordinator to run the corporation.[267] In ruling for the corporation, the Eighth Circuit ruled that "[t]he provision of federal resources, such as federal funding, is insufficient to transform a private organization into a federal agency."[268] This ruling implicitly condoned the memorandum of understanding as a mechanism to fund the corporation, while showing that such a memo does not require federal oversight of a recipient of federal funds.

Similar reasoning could be used if the concerned cabinet officials were to sign a memorandum of understanding to shift military forces within the executive branch. The memorandum of understanding in *Garstang* did not turn the corporation into a federal entity; similarly, if a memorandum of understanding provided for the transfer of military units to Homeland Security for disaster relief, that mechanism should not transfer the military character of the units into the Department of Homeland Security. In other words, if federal funds, provided based on a memorandum of understanding, do not create a federal agency, neither should federal forces, provided based on a memorandum of understanding, create another military service. Therefore, a memorandum of understanding is an effective conduit for transferring certain uses for military assets to the Department of Homeland Security without shifting ultimate control of the assets, or changing the character of the Department of Homeland Security while it controls the assets.

2. Memorandum of Understanding as Firewall

A memorandum of understanding ought to be employed as the document to execute a plan to shift forces between executive branch departments. The memorandum would cement relationships between the Departments of Defense and Homeland Security, and clarify, in advance, that sharing military forces in time of domestic emergency is encouraged. Such a memo would ideally be signed by the Secretaries of Defense and Homeland Security, as well as the Attorney General. The Secretary of Defense would sign on as the force provider, agreeing to detach units to the Department of Homeland Security as agreed upon by the two secretaries, or as directed by the President.[269] The Secretary of Homeland Security would sign as the department

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[267] *Id.*
[268] *Id.* at 750.
[269] As discussed *supra*, the statutory authority for such transfer of military forces flows from the power vested in the Secretary of Defense and the President in 10 U.S.C. § 125 (2000).

official that would receive the forces, and supervise the newly-acquired Homeland Security personnel and assets during disaster relief operations.

The Attorney General's signature would be central to making the memorandum effective. The Attorney General would sign the memorandum to underscore the sound legal footing of the transfer of forces agreement, indicating that assets shifted to the Department of Homeland Security are acting both within the law and in compliance with the PCA. *Posse Comitatus* is a federal criminal statute,[270] so assurances by the top federal prosecutor would assuage fears of prosecution under the PCA.[271]

Perhaps the best way to ensure the solidity of a Department of Justice agreement to refrain from prosecuting possible PCA violations would be to incorporate the common law PCA tests as the language that limits the memo's protection. In other words, the Attorney General could agree not to bring PCA charges, provided that personnel acting under the memo do not employ military forces (1) as direct, active participants in civil law enforcement,[272] (2) so as to pervade the activities of civil law enforcement,[273] or (3) to regulate, proscribe, or compel the activities of civilian law enforcement.[274] A memorandum so limited would amount to the Attorney General agreeing that as long as the PCA is not violated, there will be no federal charges under the Act.[275]

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[270] 18 U.S.C. §1385 (2000). The criminal sanctions of the law have never been enforced. Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL'Y 99 (2003).

[271] The Los Angeles Riots are a good, relatively recent example of such fears adversely affecting disaster response. The commanding general of federal forces sent to quell the riots was convinced that *Posse Comitatus* prevented him from using military forces to enforce the law. President George H.W. Bush, however, issued a proclamation directing the rioters to cease and desist. Such a proclamation should have been a clear signal that the President was invoking his statutory powers to stop an insurrection. The general's hesitation over *Posse Comitatus* shows he was misinformed. Currier, *supra* note 5, at 12. *See also* 10 U.S.C. §§ 331-334 & 12406 (2000).

[272] United States v. Yunis, 681 F.Supp. 891, 892 (D.D.C. 1988); United States v. Red Feather, 392 F. Supp. 916, 922-25 (D.S.D. 1975).

[273] United States v. Jaramillo, 380 F. Supp. 1375, 1379-81(D. Neb. 1974).

[274] United States v. McArthur, 419 F. Supp. 186, 193-194 (D.N.D. 1975).

[275] Whether such a memorandum could be binding upon individual U.S. Attorneys and their assistants, whether prosecutors would be estopped from prosecuting good faith infractions, and how Department of Justice policies affect prosecutorial discretion are interesting ideas beyond the scope of this discussion.

This memorandum provides an effective way to memorialize an agreement between the executive branch departments concerned. Military commanders, civil servants, and disaster relief coordinators would all be on notice that sharing military members and units between the Department of Defense and the Department of Homeland Security is not only legal under PCA, but encouraged as appropriate.

D. Baby Steps: NORTHCOM and the National Response Framework

Without going quite so far as formalizing an agreement in writing, there is already some movement in the direction of an organized military response to domestic disasters. The relatively recently established U.S. Northern Command is the lead military agency for coordinating disaster relief, while the federal government's National Response Framework is another small step mostly in the right direction.

1. U.S. Northern Command

In October 2002, the United States Northern Command (NORTHCOM) came into existence. A product of reaction to September 11th, it is a federal military organization whose mission is "to provide command and control of Department of Defense homeland defense efforts and to coordinate defense support of civil authorities."[276] The NORTHCOM duties most pertinent to this discussion are the planning, organization, and execution of homeland defense missions.[277]

NORTHCOM has very few permanently assigned military forces; instead, forces are assigned to NORTHCOM as required by the President and Secretary of Defense.[278] In practice, NORTHCOM serves as something of a clearinghouse for domestic emergency relief. For example, in early 2007, when harsh winter storms closed hundreds of miles of interstate and killed at least 13 people, NORTHCOM coordinated a relief effort.[279] From all appearances, the federal military did not take charge of the rescue operations. Instead, National Guard units from nearly a dozen states were deployed under their own

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[276] U.S. Northern Command, About USNORTHCOM, http://www.northcom.mil/About/index.html, (last visited Nov. 21, 2008).
[277] *Id.*
[278] *Id.*
[279] Jim Greenhill, *National Guard Rescues People, Cattle After Severe Winter Storms*, U.S. NORTHCOM NEWS, Jan. 5, 2007 *available at* http://www.northcom.mil/News/2007/010807.html.

cognizance, along with the Federal Emergency Management Agency (FEMA) and state emergency organizations, as organized by NORTHCOM.[280]

Using the federal military Northern Command as a clearinghouse for domestic disaster relief is not the role recommended herein. Nevertheless, having a standing organization with the sole purpose of coordinating disaster relief can only help the confused process that was so muddled during the response to Katrina. As a positive sign, in August 2007, NORTHCOM coordinated the deployment of an Army unit to St. Thomas in advance of Hurricane Dean's arrival. Though NORTHCOM did not command the team in St. Thomas, it provided a communications node and helped liaison with FEMA to get the team there in advance of the storm.[281] Sending and communicating with an advance team may not demonstrate a total victory over the problems of Katrina, but it is at least a start.

NORTHCOM recently gained an active duty Army brigade.[282] The unit is the 3rd Infantry Division's 1st Brigade Combat Team, from Fort Stewart, Georgia, assigned to NORTHCOM on October 1, 2008.[283] The assignment is the first time an active unit has been assigned to NORTHCOM en masse. The brigade is expected to be attached for a year, and then replaced by a new unit.[284] The NORTHCOM brigade is expected to be on call to respond to domestic disasters, including chemical, biological, nuclear, and natural disasters.[285]

There seems to be a mismatch between the NORTHCOM brigade's training and its planned purpose. The brigade commander discussed impending training to use the Army's "first ever nonlethal package," including traffic control equipment and nonlethal weapons including shields, batons, beanbag

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[280] *Id.*

[281] Press Release, ARNORTH Deploys Team in Preparation for Hurricane Dean Arrival, U.S. Northern Command (Aug. 16, 2007) (http://www.northcom.mil/News/2007/081607.html).

[282] Press Release, U.S. Northern Command Gains Dedicated Response Force, U.S. Northern Command (Sep. 30, 2008) (http://www.northcom.mil/News/2008/093008.html).

[283] *Id.*

[284] Gina Cavallaro, *Brigade Homeland Tours Start Oct. 1*, ARMY TIMES, Sept. 7, 2008, *available at* http://www.armytimes.com/news/2008/09/army_homeland_090808w/.

[285] Press Release, Patti Bielling, Exercise Readies First Units for NORTHCOM Assignment, U.S. Army (Sept. 29, 2008) (http://www.army.mil/-news/2008/09/29/12779-exercise-readies-first-units-for-northcom-assignment/).

bullets, and Tasers.[286] The commander explained that "because of this mission," the NORTHCOM brigade was "the first to get [the nonlethal weapons package]."[287] However, nonlethal weapons are only intended for use in foreign war zones, to the exclusion of domestic use.[288] It is interesting that the domestic disaster response mission enables the NORTHCOM brigade to get the nonlethal weapons first, and yet the brigade is not intended to use those nonlethal weapons domestically. Training the army as a domestic constabulary is problematic; the mismatch between training and justification raises the question whether the permanent assignment of an active duty infantry brigade to train for civil disaster response is really the right solution for domestic disaster relief.

2. National Response Framework

In addition to establishing NORTHCOM, the federal government has recently adopted the National Response Framework, "a guide that details how the Nation conducts all-hazards response – from the smallest incident to the largest catastrophe. This document establishes a comprehensive, national, all-hazards approach to domestic incident response."[289]

In pertinent part, the new Framework maintains separate and clear lines of authority between civil and military organizations in disaster relief. In responding to an incident, the Framework envisions a FEMA representative leading the recovery, or a Department of Homeland Security official coordinating directly with the Secretary following severe disasters.[290] Though these civilian officials would be in charge of a disaster response operation and assign tasks to other federal agencies, the positions' descriptions are silent on whether that supervision extends to military forces.[291]

In defining the responsibilities of military representatives, however, the Framework requires the military commander "be co-located with the senior on-

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[286] Cavallaro, *supra* note 284.
[287] *Id.*
[288] *Id.*
[289] Department of Homeland Security, National Response Framework (NRF) – Fact Sheet, *available at* http://www.fema.gov/pdf/emergency/nrf/NRFOnePageFactSheet.pdf (last visited Nov. 21, 2008).
[290] Department of Homeland Security, National Response Framework: Frequently Asked Questions, *6, *available at* http://www.fema.gov/pdf/emergency/nrf/NRF_FAQ.pdf (last visited Nov. 21, 2008).
[291] *Id.*

scene [civilian] leadership . . . to ensure coordination and unity of effort."[292] Based on this language, it would seem that under the Framework, the military commander does not answer to the civilian Homeland Security official leading the recovery effort. Retaining forces squarely within the military command structure, as the Framework does, does not address the *Posse Comitatus* problem.

3. The 2008 Hurricane Season: Lessons Learned?

NORTHCOM's responses during the 2008 hurricane season were probably better than 2005, but the *Posse Comitatus* Act was still unaddressed. When Hurricane Gustav came ashore on September 2, 2008, the Louisiana National Guard began search and rescue missions, and quickly shifted to food and water distribution upon realizing that was the greater need.[293] The Mississippi National Guard pre-positioned equipment and troops, and because of problems after Hurricane Katrina, were better able to anticipate what aid would be needed where.[294]

At the national level, Defense Secretary Gates authorized up to 50,000 National Guardsmen to be mobilized to respond to Hurricane Gustav, if necessary.[295] The guardsmen were to serve "under the control of the governors," which probably means in a Title 32 status.[296] Under Secretary Gates' authorization, at least 14,000 guardsmen were mobilized, evacuating 17,000 people from New Orleans and 600 special needs medical patients from the region.[297] In addition to evacuation by land and air, the Guard also conducted 24-hour security patrols in New Orleans.[298] Following Hurricane Ike,

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[292] *Id.* at *7.
[293] Press Release, Louisiana Guard's Focus Shifts to Food, Water Distribution, Department of Defense (Sept. 4, 2008) (http://www.defenselink.mil/news/newsarticle.aspx?id=51031).
[294] Press Release, Michael J. Carden, Mississippi Guard Applies Lessons Learned from Hurricane Katrina, Department of Defense (Sept. 3, 2008) (http://www.defenselink.mil/news/newsarticle.aspx?id=51016).
[295] Press Release, Ellen Krenke, Gates OKs Call-up of 50,000 Guard Troops for Hurricane Support (Sept. 2, 2008) (http://www.defenselink.mil/news/newsarticle.aspx?id=51007).
[296] *Id.*
[297] *Id.*
[298] *Id.*

active duty military contributions included search and rescue missions and logistical preparations both ashore[299] and afloat.[300]

The response provided was largely adequate to respond to Hurricanes Gustav and Ike. But, at risk of minimizing the damage brought to the Galveston area, it was fortunate that the damage and human suffering were not on the same scale as that following Hurricane Katrina. The 2008 hurricane season left the current framework relatively untested. It remains an open question how this level of response would function if the National Guard troops patrolling New Orleans after Gustav were overwhelmed either by evacuees or lawless banditry on a city-wide scale. In other words, the *Posse Comitatus* Act is still the elephant in the room for disaster response planning. The 2008 hurricane season did not fully test either NORTHCOM or the National Response Framework insofar as transitioning to a full-scale active military relief effort. For that reason, the recommendation below could improve the current Framework, and create a workable model for military assistance in disaster recovery.

VI. THE WAY AHEAD

A. Recommendation

Using a model like the shifting chains of command for the National Guard, and the Coast Guard's shifting between the Department of Homeland Security and the Department of Defense, national disaster response could be set up for better coordination. Using these models, the President should be able to order either federal forces or nationalized militia forces into the Department of Homeland Security, and then Homeland Security would take operational control of those units. There is no constitutional problem implicated, as the President remains the Commander in Chief.[301] This change of authority would be similar to the way the Coast Guard, as a service, as units, or as individuals, can and do move between the Department of Homeland Security and the Department of Defense. Similarly, this recommendation would place military units under the operational control of the Department of Homeland Security, shifting chains of command the way National Guard units shift between state and federal authority.

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[299] Press Release, U.S. Northern Command Provides Additional Support in Wake of Hurricane Ike, U.S. Northern Command (Sept. 13, 2008) (http://www.northcom.mil/News/2008/091308l_c.html).

[300] Elizabeth Merriam, Press Release, USS Nassau Responding to Hurricane Ike at 'Best Speed,' U.S. Navy (Sept. 17, 2008) (http://www.navy.mil/search/display.asp?story_id=39801).

[301] U.S. CONST. art. II, § 2.

Once the President authorized the Department of Homeland Security to take control of specified military forces, no further advice or permission would be necessary from the Pentagon. The forces on-scene providing disaster relief would report to the Department of Homeland Security on-scene coordinator, who reports to the Secretary of Homeland Security.[302] Just as when a Coast Guard member directs Navy assistants during a drug seizure, a Homeland Security relief coordinator directing military forces places the expertise in charge of the wherewithal.

This is only a partial solution. Even if an infantry brigade were temporarily assigned to the Department of Homeland Security, it would still arguably be "any part of the Army or Air Force" as defined in the PCA.[303] It is possible to argue that when working for the Secretary of Homeland Security, a federal Army brigade is no longer "part of the Army" *per se*. But as nothing in PCA jurisprudence supports this contention, however, prudence requires more process.

A memorandum of understanding would be a useful tool. The Secretaries of Defense and Homeland Security could sign the memorandum, whereby Defense would agree to provide military forces to Homeland Security for disaster relief. To strengthen the legality of such a memo, the shuffling of forces should perhaps only happen at the President's direction, lending both statutory[304] and inherent Commander in Chief powers[305] to the agreement.

With the Attorney General also signing the memorandum, civil and military officials would be assured that good faith errors would not result in prosecution under *Posse Comitatus*. The Attorney General would agree that the contemplated actions were legal and did not violate the *Posse Comitatus* Act, provided that the military forces involved were not direct, active participants in civil law enforcement,[i] and did not pervade[ii] or regulate, proscribe, or compel[iii] the activities of civilian law enforcement. This memorandum would reassure leaders using military forces that they would not be prosecuted, and provide the leaders' legal advisors with relatively clear guidelines going into a disaster.

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302 Department of Homeland Security, National Response Framework: Frequently Asked Questions, *6, *available at* http://www.fema.gov/pdf/emergency/nrf/NRF_FAQ.pdf (last visited Nov. 21, 2008).
303 18 U.S.C. §1385 (2000).
304 10 U.S.C.A. § 125 (West 2008).
305 U.S. CONST. art. II, § 2.

This recommendation does not implicate the traditional concerns reflected in the PCA. Rather than reporting through the traditional military channels, a unit temporarily assigned to the disaster relief effort would report to the Department of Homeland Security. Moreover, the Department of Homeland Security's official in charge of the recovery effort would likely not need "to execute the laws,"[306] as a primary concern, when there is search and rescue and evacuation to perform.[307]

Even if some law enforcement support were required during recovery, the varying PCA tests might not be violated. The Department of Homeland Security directing military forces during a recovery would almost certainly not run afoul of the "regulate, proscribe, or compel" test. Recall that in formulating that test, the court found no PCA violation when the civilian officials gave the orders during the course of an operation.[308] Disaster relief under the National Response Framework, with a Department of Homeland Security civilian leading the effort, would likely provide a similar level of protection from the PCA.[309]

The "pervade" test requires careful shepherding. When this test was formulated, the court stopped short of finding an explicit PCA violation, but found functionally the same in ruling that the colonel's advice and direction "pervaded the activities" of civilian law enforcement.[310] If this is the standard applied, the Department of Homeland Security relief coordinator would have to be careful to put civilians and state militia members in as many positions of responsibility as possible, to avoid the contention that the federal military "pervaded" the law enforcement. Assuming a disaster area were small enough, or that there were ample National Guard and state and local law enforcement and emergency responders, it is likely that a well managed relief effort would not run afoul of the PCA. In any event, civilian leadership over the military forces, following force realignment into the Department of Homeland Security, would likely preclude a finding that military assistance "pervaded" the relief effort.

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[306] *Id.*

[307] Some commentators believe, however, that even simple patrols to maintain order after a disaster would run afoul of the PCA. CRS LEGAL, *supra* note 229, at 5.

[308] United States v. McArthur, 419 F. Supp. 186, 194-95 (D.N.D. 1975).

[309] Cynically, one could argue that this test boils down to little more than asking whether the person in charge is wearing a uniform. Such a superficial threshold was met in *McArthur*, *id.*, and would be met with a Department of Homeland Security official leading the disaster relief.

[310] United States v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974).

The "direct and active participation" standard might be yet more difficult to clear, but not insurmountable. This test allows the military to incidentally aid civilian investigators, but not to execute the laws.[311] Imagine federal troops patrolling a city street after an emergency, like the 82d Airborne Division did after Katrina. To avoid violating this test, federal troops' presence must be intended to keep the peace, rather than execute the laws. The relief coordinator could follow the Coast Guard counter-drug model, and ensure that a civilian law enforcement officer or state militia member is present with any federal forces that might be called on to enforce the laws. Like the naval ship that suddenly becomes a Coast Guard vessel for purposes of making a drug arrest at sea, a mixed patrol of federal soldiers and state police could operate as a bifurcated unit: the state militia or police enforce the law by making the arrest, while the federal troops incidentally aid in the investigation, as is more consistent with case law.[312]

Paradoxically, the bifurcated patrol would create exactly the situation the PCA originally intended to avoid: local law enforcement bringing along the federal Army to help enforce the law.[313] If a disaster area is so lawless that there are insufficient law enforcement and state militia members present, there may be no clear way to avoid PCA proscriptions. The Department of Homeland Security-controlled troops are not well-suited for this eventuality. The most viable option legally, if not politically, [314] under these facts would be for a President to invoke the "calling forth" power and insurrection statutes,[315] and provide federal troops and federalized militia to enforce the laws as long as the danger persists.

The working model, then, would be a two-step process, assuming the period immediately following a disaster was particularly dangerous. In the first step, the President would call forth the National Guard[316] in affected states, neighboring states, and other states where the Guard could get to the disaster area most quickly. Additionally, federal troops would be sent to stop any

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[311] United States v. Red Feather, 392 F. Supp. 916, 924- 25 (D.S.D. 1975).
[312] *Id.*
[313] 18 U.S.C. § 1385 (2000).
[314] HAROLD C. RELYEA, CONGRESSIONAL RESEARCH SERVICE, MARTIAL LAW AND NATIONAL EMERGENCY 4-5 (2005). Martial law is certainly legal under § 332, but it is unclear if a declaration of martial law is required to invoke § 332 to quell a civil disturbance. In any event, as the experience in Hurricane Katrina shows, federalizing the local National Guard or sending the federal Army into a U.S. state uninvited may have ugly political consequences.
[315] 10 U.S.C. § 331-334 (2000).
[316] 10 U.S.C. § 332.

violence. The first relief worker on scene need not be a soldier with a rifle, but if there is violence in the area perpetrated by fellow victims, criminals, or terrorists, the military could conduct peace enforcement operations. While the military responds to secure the scene, the federal government would be coordinating between Homeland Security and the affected state and local leaders.

Posse Comitatus is not yet implicated, because the "calling forth" and insurrection statutes are themselves statutory exceptions. As soon as possible, the President should cancel his insurrection power, ending military management of the situation, and turn the relief operation entirely over to the Department of Homeland Security and state leadership.

At this point, the shifting lines of authority would be crucial. The federal military units would be turned over to the Department of Homeland Security to assist in any permissible way: logistical support, distributing aid, search and rescue, medical support, liaison with federal military authorities – essentially anything short of directly enforcing the civil law. The federal military would not report to the Pentagon, but instead would temporarily report to the Department of Homeland Security. The National Guard would revert to either a state status or hybrid Title 32 status, avoiding PCA problems. The National Guard members, along with civilian law enforcement, would provide all of the direct law enforcement. If there should be an outbreak of violence, the Department of Homeland Security would coordinate a response. Even if there were violence, the federal military could respond with force as necessary, provided that state militia and law enforcement were the individuals making necessary arrests and otherwise enforcing the civil law. This would keep the Department of Homeland Security coordinator and the subordinate military commanders in compliance with the criminal prohibitions of the PCA.[317] As long as the local military commanders, temporarily subordinate to the Department of Homeland Security civilian leadership, were careful not to directly or actively participate in law enforcement, they would not run afoul of the law. The memorandum of understanding between the executive branch heads should provide the clarity needed to ensure the PCA was not violated.

If a violent incident or trend were too great for the military forces on hand, the only lawful way to reduce the violence and allow disaster relief to continue would be for the President to once again invoke the calling forth statutes for insurrections.[318] Federal troops involved in quelling the violence would be permitted to directly and actively enforce the civil law for the brief

[317] 18 U.S.C. § 1385.
[318] 10 U.S.C. § 332-333.

duration of the "unlawful obstruction,"[319] or the "domestic violence [or] unlawful combination."[320] The "calling forth" would start the process over again, with the military taking the lead role in quelling the violence while providing aid to those in need. As soon as violence abated, state militia and police forces would resume sole responsibility for law enforcement, with federal troops in supporting roles as described above. In any event, the memorandum of understanding between the Attorney General, Secretary of Defense, and Secretary of Homeland Security would provide metes and bounds of permissible action, giving the clarity needed for a rapid response action.

This plan of action ensures the federal military can provide assistance to those in need without violating *Posse Comitatus*. The original dislike of the domestic use of the federal military is respected in this plan because the level of coordination within the executive branch require transfer of individuals and units to Homeland Security, so that the transferred units are temporarily not part of the federal military. The memorandum of understanding would only be effective to the extent that the individuals acted within the common law standards for the PCA.

B. Application

To return to the introductory hypothetical, the explosions that rocked Southern California have caused thousands of casualties by midday, mostly due to the attacks on the petroleum infrastructure. Additionally, because the major roadways are blocked, first responders are slow in responding to calls for firefighting and medical assistance. Upon consultation with the state governors, the President exercises his insurrection power, federalizes the National Guards of California, Nevada, and Oregon, and sends the federalized National Guard and all federal ground forces in the western United States into California, providing physical security to the southern half of the state. Though the law does not compel him to make such an agreement, the President assures the governors that as soon as the situation is in hand, he will cancel the insurrection power, and return the Guard troops to their respective governors' control.

In addition to ground forces, helicopter squadrons from the military services are ordered into the area to conduct search and rescue operations. The Navy sends one amphibious ship to dock at Long Beach and serve as a floating headquarters, while several other amphibious ships and aircraft carriers remain at sea to provide secure helicopter landing platforms and hospital services.

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[319] *Id.* at § 332.
[320] *Id.* at § 333.

While the military forces assemble and begin to secure the area, the alphabet soup of government agencies investigate the attacks. Twelve hours pass, and by nightfall federal investigators have an idea of the identity of the perpetrators, and are formulating a plan to prevent further attacks. Federal soldiers and armored vehicles patrol the streets, performing law enforcement missions as allowed under the "calling forth" statutes.[321]

When 24 hours pass without incident, the President declares that the insurrection has passed, at least for the moment. By then the Homeland Security response team has had time to assemble and organize. As soon as the President cancels his insurrection power, the Homeland Security recovery coordinator fully takes over disaster response.

Under the plan recommended in this article, the President leaves all the federal military personnel in place, but turns them over to the civilian Department of Homeland Security recovery coordinator. The California National Guard is returned to state status for the governor to use as he deems fit, while the Nevada and Oregon Guards are put on Title 32 status, and by agreement of those two states' governors, stay in California acting as state agents.

The Homeland Security relief coordinator supervises the on-scene military commander, who reports to him for the duration of the mission. NORTHCOM monitors and coordinates from afar but has no control or direction ability. The Department of Homeland Security coordinator and military commander are both aware of the limitations outlined in the *Posse Comitatus* memorandum of understanding, and take measures to employ the military to help in the recovery effort, sending the National Guard or civilian police for any law enforcement tasks. In so doing, neither the civilian coordinator nor military commander violates *Posse Comitatus*. Because of careful attention to the requirements of the law, disaster relief can legally go forward with military assistance in a clear, concise, and rapid manner.

In the following days, disaster relief continues, with military assistance provided at the direction of the Homeland Security coordinator. The plan to prevent further attacks is successfully implemented, with regular patrols by both police and military units reporting suspicious activity for further police investigation. The squadrons and ships remain on scene for nearly two weeks, providing medical support and emergency airlift until the roads can be reopened for emergency responders, and soon thereafter completely cleared and reopened. The Army units are released back to the Department of Defense within ten days,

[321] 10 U.S.C. § 331-334.

as patrols become less frequent, and the situation becomes smaller in scope and within the capability of the National Guard. The loss of life was significantly reduced by the quick availability of military hardware and personnel. Because *Posse Comitatus* was understood in advance, it was no longer a point of contention. The President and governor were able to quickly mobilize necessary manpower to respond to the emergency.

C. Conclusion

The *Posse Comitatus* Act reflects a longstanding American tradition of wariness towards military authority domestically. Respecting that historical wariness requires keeping *Posse Comitatus* as an effective prohibition against federal soldiers performing law enforcement.

Keeping the PCA while ensuring disaster response will require flexibility from federal and state officials, and a commitment to keeping the federal military out of law enforcement. Although a statutory solution is an alternative, the repeal of the recent Warner Amendment shows that Congressional solutions are not necessarily effective or permanent.

Legislation is not necessary. Working within the existing law while taking sufficient steps to clarify actions is sufficient. Shifting responsibility away from the federal military, directly to Homeland Security, is a good start. Transferring military units to the control of the Department of Homeland Security would maintain the spirit of *Posse Comitatus*, while limiting law enforcement duties to state militia and civilian police would meet the letter of the law. The Memorandum of Understanding would provide the clarity needed to enable decisive action.

If the above recommendations are followed, effective disaster relief is possible while respecting the goals the PCA. This plan will prevent another political and legal battle over *Posse Comitatus* like the one experienced during Hurricane Katrina. It allows the government to focus on the business of providing vital assistance rather than arguing about process while lives hang in the balance.