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**DID THE FOUNDING FATHERS DO “A HECKUVA JOB”?  
CONSTITUTIONAL AUTHORIZATION FOR THE USE OF  
FEDERAL TROOPS TO PREVENT THE LOSS OF A MAJOR  
AMERICAN CITY**

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INTRODUCTION

*Brownie, you’re doing a heckuva job.<sup>1</sup>*

In the year and a half since Hurricane Katrina’s landfall on the Gulf Coast, the Bush administration has been highly criticized for its mismanagement of

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<sup>1</sup> President George W. Bush, *quoted in* Andrew Zajac & Andrew Martin, *Top FEMA Leaders Short on Experience*, CHI. TRIB., Sept. 7, 2005, § 1, at 4.

the response to that catastrophe.<sup>2</sup> Indeed, while many view the administration's mired military venture in Iraq as central to the President's record low approval ratings and the Democratic takeover of both houses of Congress in the 2006 midterm elections,<sup>3</sup> there can be little doubt that the initial misstep leading to the President's and the Republican Party's fall from grace was the mishandling of, and haunting human suffering from, the Katrina affair, an event repeatedly drummed into the American psyche by nonstop newscasts in late August and early September 2005.

There is, however, a high irony in the Katrina failure. Central to the criticism of the Bush administration was its multi-day indecisiveness about whether to deploy the federal government's overwhelming military assets to rescue and protect Gulf Coast citizens.<sup>4</sup> As will be shown in greater detail below, the President failed to act decisively at that time because of a perceived lack of constitutional authority to override Louisiana Governor Kathleen Babineaux Blanco's refusal to allow the federal government to have ultimate control over the deployment of those troops and related federal assets.

Karl Rove, then White House Deputy Chief of Staff, reportedly said that "[t]he only mistake we made with Katrina was not overriding the local government."<sup>5</sup> Yet it is noteworthy that this constitutional uncertainty emanated from the very same administration which has, as its most prominent hallmark, made breathtaking claims of broad inherent presidential authority to act unilaterally in the "War on Terror."<sup>6</sup>

Indeed, in a telling criticism of the lack of support from the federal government, Michael Brown, testifying before a Senate committee, noted that

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<sup>2</sup> See, e.g., Eric Lipton & Scott Shane, *Leader of Federal Effort Feels the Heat*, N.Y. TIMES, Sept. 3, 2005, at A17; Jennifer Steinhauer & Eric Lipton, *FEMA, Slow to the Rescue, Now Stumbles in Aid Effort*, N.Y. TIMES, Sept. 17, 2005, at A1; Richard W. Stevenson, *After Days of Criticism, Emergency Director Resigns*, N.Y. TIMES, Sept. 13, 2005, at A26; see also FRANCES FRAGOS TOWNSEND, *THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED* 69 (2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf> ("[T]he Federal response to Hurricane Katrina demonstrated that the energy and professionalism of DHS personnel was not enough to support the Department's role as the manager of the Federal response.").

<sup>3</sup> See, e.g., Dan Balz & Jon Cohen, *Independent Voters Favor Democrats by 2 to 1 in Poll: Iraq War Cited Most Often as Top Issue for Elections*, WASH. POST, Oct. 24, 2006, at A1; *Exit Polls: Bush, Iraq Key to Outcome*, CNN.COM, Nov. 8, 2006, <http://www.cnn.com/2006/POLITICS/11/08/election.why/index.html>.

<sup>4</sup> See TOWNSEND, *supra* note 2, at 54; Donald F. Thompson, *Terrorism and Domestic Response: Can DOD Help Get It Right?*, JOINT FORCE Q., 1st Quarter 2006, at 16, 16.

<sup>5</sup> See *Rove Off the Record on Iraq*, THE HUFFINGTON POST, Sept. 17, 2005, [http://www.huffingtonpost.com/2005/09/17/rove-off-the-record-on-ir\\_n\\_7513.html](http://www.huffingtonpost.com/2005/09/17/rove-off-the-record-on-ir_n_7513.html).

<sup>6</sup> See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* § 4.6.4 (3d ed. 2006); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 294 (2005). See generally *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

if it had been “confirmed that a terrorist ha[d] blown up the 17th Street Canal levee, then everybody would have jumped all over that and been trying to do everything they could.”<sup>7</sup> However, because the event was a natural phenomenon, the Bush administration’s first instinct was to follow the usual template for response to natural disasters, that is, to rely on the affected states and cities to take the lead, and in the event of inadequacies at those levels of government, to take over the governmental response only if invited to do so.<sup>8</sup>

Confronted with the prospect of effectively losing a major American city to a hurricane, what was the basis for this surprising and deadly hesitation by the executive branch? Most of the Bush administration’s claims of broad executive power concerning the War on Terror are premised on the Commander-in-Chief Clause,<sup>9</sup> which contemplates war efforts. Because there was no attack or invasion causing the Katrina disruptions, the sturdy foundation of Article II war powers was almost certainly viewed as an unavailable rationale to the administration. Moreover, due to Governor Blanco’s refusal to relinquish authority to the military, worries about unilateral action infringing on state sovereignty, especially the police power prerogatives of the state, had to be paramount in the eyes of the administration. The Rehnquist Court’s rulings contracting the reach of the Commerce Clause,<sup>10</sup> as well as its related expansion of Tenth Amendment jurisprudence,<sup>11</sup> must have inspired a natural reflex of legal hesitancy for purposes of federal intervention with federal troops<sup>12</sup> when confronted with state resistance.

The indecision surrounding the use of federal troops was doubtless aggravated by the paralyzing effect of a single Reconstruction era federal statute: the Posse Comitatus Act (PCA).<sup>13</sup> The current version of the statute provides that “except in cases and under circumstances expressly authorized by the Constitution or Act of Congress,” federal troops may not be used for

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<sup>7</sup> *Hurricane Katrina: The Roles of U.S. Department of Homeland Security and Federal Emergency Management Agency Leadership: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 109th Cong. 15 (2006).

<sup>8</sup> Many public health law academics deem this highly deferential approach to be constitutionally required, viewing emergency response as a primary element of the police powers which cannot be trumped by federal authority. *See infra* note 97 and accompanying text.

<sup>9</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>10</sup> *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *see also* Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1, 9 (2002) (observing that in recent Commerce Clause cases the Supreme Court “has displayed an almost reflexive inclination to favor the states”).

<sup>11</sup> *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

<sup>12</sup> Throughout this Article, the term “federal troops” refers to both the armed forces and the federalized National Guard.

<sup>13</sup> Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145, 152.

domestic law enforcement.<sup>14</sup> As is shown below, the Bush administration by the end of 2004 had already publicly announced that the PCA would not prevent it from using federal troops to respond to a massive natural disaster such as Katrina.<sup>15</sup> Yet that resolution somehow was mystifyingly forgotten after Katrina hit. Federal lawyers pondered for days after Katrina's landfall whether there were exceptions to the PCA that would allow introduction of federal troops.<sup>16</sup>

On October 17, 2006, however, all doubt about the President's authority to use federal troops to respond to a catastrophic natural disaster, even over the objection of the affected state, was resolved. That day the President signed into law the John Warner National Defense Authorization Act for Fiscal Year 2007.<sup>17</sup> A key provision within this legislation (the Warner Amendment) amends the Insurrection Act to allow the President unilaterally, i.e., without the consent of the states involved, to deploy federal troops to respond to natural disasters and other major domestic emergencies.<sup>18</sup> The amendment, therefore, creates the kind of statutory exception recognized as trumping the deployment prohibition within the PCA. The Warner Amendment became law over the bipartisan objection of all state governors, who claimed that it trampled upon state sovereignty.<sup>19</sup>

The question remains, however, whether there is a constitutional justification for the Warner Amendment, especially in situations where the state in question resists federal control of the disaster response. The thesis of this Article is that constitutional justification for the Warner Amendment can be found within the relatively obscure Insurrection and Guarantee Clauses of the Constitution, as well as a careful reading of even those Commerce Clause cases that have given the greatest deference to state sovereignty. Moreover, as Justice Scalia has recently emphasized, the Necessary and Proper Clause may

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<sup>14</sup> 18 U.S.C. § 1385 (2000).

<sup>15</sup> See *infra* notes 123-28 and accompanying text.

<sup>16</sup> See Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1.

<sup>17</sup> Pub. L. No. 109-364, 120 Stat. 2083 (2006).

<sup>18</sup> *Id.* § 1076, 120 Stat. at 2404 (to be codified as amended at 10 U.S.C. § 333).

<sup>19</sup> See George Cahlink, *Governors 'Disappointed' with Expanding Federal Role of National Guard*, CONG. Q. TODAY, Oct. 6, 2006, available at 2006 WLNR 17649022 (Westlaw); *Governors Association Opposes Senate Authorization Measure*, INSIDE THE ARMY, Sept. 4, 2006 [hereinafter NGA], available at 2006 WLNR 15348717 (Westlaw); Press Release, Office of Governor Napolitano, Napolitano Urges Removal of Provisions in Federal Legislation Usurping Governors' Control of National Guard (Sept. 20, 2006) [hereinafter Napolitano Press Release], available at [http://azgovernor.gov/dms/upload/NR\\_092006\\_National%20guard%20provisions.pdf](http://azgovernor.gov/dms/upload/NR_092006_National%20guard%20provisions.pdf); Press Release, Office of Senator Leahy, Hill's National Guard Advocates Hold News Conference To Protest DOD Bill's Proposed Decisions on National Guard (Sept. 19, 2006), available at <http://leahy.senate.gov/press/200609/091906a.html>.

supply an additional supporting foundation for congressional reliance on the aforementioned clauses.

If, however, there is uncertainty about these constitutional justifications, this Article argues that Congress could remove all constitutional doubt by conditioning the considerable federal funding given to states to respond to severe natural disasters on the ability of the President to determine that federal troops must be placed in control where the President finds, as was the case in Katrina, that the state is incapable of taking charge of the response.

The extraordinary power contemplated by the Warner Amendment must be understood in context. It is clear from the legislative history of the amendment, as well as repeated executive branch doctrine, that the conventional expectation will be that states and localities will control responses to natural disasters, even severe ones. In those instances, the federal government will supplement, not take over, state and local resources. However, in those rare instances where state and local resources are insufficient, as was true in Katrina, the Constitution, in Justice Jackson's apt phrase, should not be turned "into a suicide pact."<sup>20</sup> In those dire instances, when the state cannot act, the federal government has not only the authority, but, indeed, the constitutional duty to lead the response.

To place these points in context, it will be helpful first to review the magnitude of the Katrina disaster in terms of both the human suffering it caused and the inability of Louisiana and New Orleans to mount a response. Second, I will review the impact of the PCA, giving special consideration to the widespread and inaccurate myths that surround that statute and cause a reflexive and unnecessary hesitation to use federal troops when states are overwhelmed. Third, I will address the Warner Amendment, including the congressional insistence that federal troops only lead the response in circumstances such as Katrina, where states and localities are overwhelmed. Finally, I will discuss the constitutional underpinnings of the Warner Amendment, especially in light of the opposition it received from the states.

#### I. HURRICANE KATRINA AND THE ABSENCE OF GOVERNMENT

Hurricane Katrina was an unprecedented disaster that virtually destroyed a major American city. During the days following its landfall, chaos reigned in the Gulf Coast region, particularly in New Orleans. In Louisiana, state and local governments were incapable of acting in areas affected by the hurricane, and desperation grew as the public sector "seemed unable to meet its basic compact with its citizens."<sup>21</sup> Evacuations were ordered that could not be executed. Basic civil services were nil: the power was out, the roads were not

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<sup>20</sup> *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

<sup>21</sup> Susan B. Glasser & Michael Grunwald, *The Steady Buildup to a City's Chaos: Confusion Reigned at Every Level of Government*, WASH. POST, Sept. 11, 2005, at A1.

navigable, communication was all but nonexistent,<sup>22</sup> “[f]ires burned untended,”<sup>23</sup> and rescue efforts were “a fugue of improvisation.”<sup>24</sup> In short, the sheer magnitude of the catastrophe effectively shut down the state and local government insofar as New Orleans was concerned.

Hurricane Katrina “impacted nearly 93,000 square miles across 138 parishes and counties.”<sup>25</sup> The official death toll exceeded 1300.<sup>26</sup> It is estimated that property damage as a result of Katrina is approaching the \$100 billion mark, making Katrina the costliest disaster in U.S. history.<sup>27</sup> In addition to Katrina’s fatalities, about 770,000 people were displaced from their homes.<sup>28</sup> Even well over a year after Katrina, most public schools are still closed, hospitals are crippled, the court system is dysfunctional, and power outages are common.<sup>29</sup>

In its immediate aftermath, Katrina’s destruction sent thousands of victims across state borders in search of food and shelter.<sup>30</sup> Saving those still trapped in New Orleans required immediate delivery of relief workers and supplies from across the nation.<sup>31</sup> Major national industries dependent upon the region were closed or their operations dramatically cut back.<sup>32</sup> The hurricane severely impaired substantial portions of the country’s oil refineries and curtailed offshore production of oil and gas, causing a sharp and immediate spike in gas prices nationwide.<sup>33</sup>

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<sup>22</sup> *See id.*

<sup>23</sup> James Janega & Angela Rozas, *Death, Disease Still a Threat as Downtown Clears*, CHI. TRIB., Sept. 4, 2005, § 1, at 1.

<sup>24</sup> Glasser & Grunwald, *supra* note 21.

<sup>25</sup> TOWNSEND, *supra* note 2, at 5.

<sup>26</sup> *Id.* at 8.

<sup>27</sup> *Id.* at 6-7.

<sup>28</sup> *Id.* at 8.

<sup>29</sup> Jennifer Moses, *Hurry Up and Wait*, WASH. POST, Aug. 29, 2006, at A15.

<sup>30</sup> *See* James Dao, *No Fixed Address*, N.Y. TIMES, Sept. 11, 2005, § 4, at 1 (“The images of starving, exhausted, flood-bedraggled people fleeing New Orleans and southern Mississippi over the last two weeks have scandalized many Americans long accustomed to seeing such scenes only in faraway storm-tossed or war-ravaged places like Kosovo, Sudan or Banda Aceh.”).

<sup>31</sup> *See* Kirk Johnson et al., *President Visits as New Orleans Sees Some Gains*, N.Y. TIMES, Sept. 12, 2005, at A1 (describing extensive relief efforts on the part of government agencies and volunteers from across the United States).

<sup>32</sup> *See* Eduardo Porter, *Damage to Economy Is Deep and Wide*, N.Y. TIMES, Aug. 31, 2005, at C1 (“[I]t is clear that much of the economic activity in the gulf region has indeed been clobbered.”).

<sup>33</sup> Jad Mouawad & Simon Romero, *Gas Prices Surge as Supply Drops*, N.Y. TIMES, Sept. 1, 2005, at A1; *see also* Jad Mouawad, *Storm Stretches Refiners Past a Perilous Point*, N.Y. TIMES, Sept. 11, 2005, § 1, at 27 (“The hurricane . . . knocked off a dozen refineries at the peak of summer demand, sending oil prices higher and gasoline prices to inflation-adjusted records.”).

In the absence of a state and local governmental presence, lawlessness consumed the city of New Orleans:

- “With police officers and National Guard troops giving priority to saving lives, looters brazenly ripped open gates and ransacked stores for food, clothing, television sets, computers, jewelry and guns, often in full view of helpless law-enforcement officials.”<sup>34</sup>
- “[R]apes were reported in the Convention Center, where some officers were beaten by an angry crowd.”<sup>35</sup>
- “Reports of carjackings, shootings, lootings and rapes reached authorities who admitted that much of New Orleans ha[d] slipped from their control.”<sup>36</sup>
- “The police themselves may have helped trigger the lawlessness, as reports that some of their own had engaged in looting swept through the city.”<sup>37</sup>

This lawlessness contributed to the barbaric and subhuman conditions that refugees endured at the New Orleans Superdome and the Ernest N. Morial Convention Center. Refugees described the havoc within these structures as a “horrible prison,” “the darkest hole in the world,” “the place I want to forget,” and “hell.”<sup>38</sup> New Orleans officials had previously designated the Superdome as a “shelter of last resort,” never meant to hold storm refugees for long.<sup>39</sup> Nonetheless, it housed over twenty thousand Katrina refugees between August 29 and September 4, 2005.<sup>40</sup> Within this “shelter of last resort,” neither state nor city officials had plans to stock the facility with food and water.<sup>41</sup> Lost power meant no air conditioning and backed up toilets.<sup>42</sup> The stench became so bad that medical workers had to wear masks and thousands of retching people had to be moved outside the dome.<sup>43</sup>

One advantage that refugees at the Superdome enjoyed, however, was that those entering the facility had been searched for weapons. Such precautions

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<sup>34</sup> Robert D. McFadden & Ralph Blumenthal, *Bush Sees Long Recovery for New Orleans; 30,000 Troops in Largest U.S. Relief Effort*, N.Y. TIMES, Sept. 1, 2005, at A1.

<sup>35</sup> Douglas Birch et al., *Ruined City Turns Violent*, BALT. SUN, Sept. 2, 2005, at 1A.

<sup>36</sup> Lee Hancock & Michael Grabell, *‘Desperate SOS’ Amid Hunger, Thirst and Lawlessness*, DALLAS MORNING NEWS, Sept. 2, 2005, at 1A.

<sup>37</sup> Evan Thomas, *The Lost City*, NEWSWEEK, Sept. 12, 2005, at 42, 47.

<sup>38</sup> See Paul Salopek & Deborah Horan, *How Places of Refuge Went to Hell*, CHI. TRIB., Sept. 15, 2005, at C1.

<sup>39</sup> *Id.*

<sup>40</sup> See Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, § 1, at 1.

<sup>41</sup> Salopek & Horan, *supra* note 38.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

were not taken at the Convention Center; as a result, violence at the Convention Center exceeded even that at the Superdome.<sup>44</sup> Unlike the Superdome, the Convention Center was never intended to hold refugees, not even as a last resort.<sup>45</sup> Yet this structure held fifteen thousand people during those fateful days.<sup>46</sup> Also without power and swelteringly hot, the situation at the Convention Center was described by Captain Winn, the head of the police SWAT team, as “completely lawless.”<sup>47</sup> Gunfire was routine.<sup>48</sup> There were several reports of women dragged away by groups of men and gang-raped.<sup>49</sup> Captain Winn found a corpse with multiple stab wounds in the building.<sup>50</sup> The beleaguered eighty to ninety New Orleans police officers, already at a severe disadvantage in number, could only rush into the darkness with flashlights after seeing muzzle flashes.<sup>51</sup> Even when police did manage to catch and subdue the culprits, chaos prevailed, as no temporary holding cells had been set up to hold them.<sup>52</sup>

As early as August 19th (ten days before Katrina’s landfall on the Gulf Coast), the Secretary of Defense had delegated to the U.S. Northern Command (NORTHCOM) the authority to deploy Department of Defense (DOD) assets in anticipation of the hurricane.<sup>53</sup> On August 24th, the NORTHCOM Operations Directorate began conducting teleconferences with entities such as FEMA, the First and Fifth Armies, and the supporting commands of the Navy, Marine Corps, and Air Force.<sup>54</sup> On August 30th, the day after Katrina’s landfall, the Deputy Secretary of Defense informed NORTHCOM’s commander that he had a “blank check” for DOD resources that he believed were necessary for the response effort.<sup>55</sup>

The evening of Monday, August 29th, the day of Katrina’s landfall in Louisiana, Governor Blanco made her now infamous plea for President Bush to send “everything you’ve got.”<sup>56</sup> Over the next two days, Governor Blanco specified her request by asking for troops from the President at least two more times, one time asking for forty thousand federal troops.<sup>57</sup> President Bush

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<sup>44</sup> See Lipton et al., *supra* note 40; Salopek & Horan, *supra* note 38.

<sup>45</sup> Salopek & Horan, *supra* note 38.

<sup>46</sup> See *id.*

<sup>47</sup> See Lipton et al., *supra* note 40.

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

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

<sup>50</sup> Salopek & Horan, *supra* note 38.

<sup>51</sup> Lipton et al., *supra* note 40.

<sup>52</sup> *Id.*

<sup>53</sup> S. REP. NO. 109-322, at 476 (2006).

<sup>54</sup> *Id.* at 478.

<sup>55</sup> *Id.* at 485-86.

<sup>56</sup> See *id.* at 504.

<sup>57</sup> *Id.* at 504-05.



promised 7200 federal troops on Saturday, five days after landfall.<sup>58</sup> Although Governor Blanco, according to one of her aides, “wouldn’t have turned down federal troops,”<sup>59</sup> she also did not want a federal takeover of the disaster relief effort. Instead, she wanted to maintain primary reliance on state National Guard troops, while using federal troops under Louisiana control for traditional disaster relief tasks not amounting to law enforcement.<sup>60</sup> Yet given the state of chaos all along the Gulf Coast, Pentagon and military officials were hesitant to send in federal troops under Governor Blanco’s control, especially if those troops would not have law enforcement authority.<sup>61</sup>

Both President Bush and White House Chief of Staff Andrew Card pressed Governor Blanco to permit a federal takeover of the relief effort so that federal troops could be effectively deployed to restore law and order.<sup>62</sup> Governor Blanco balked at the suggestion,<sup>63</sup> as she considered it to be the equivalent of a “federal declaration of martial law.”<sup>64</sup> The Bush administration then sent Governor Blanco a proposed legal memorandum, urging her once more to authorize a federal takeover, which she rejected.<sup>65</sup> She also rejected a more modest proposal for a hybrid command structure, under which a three-star general (after being sworn into the Louisiana National Guard) would have commanded all troops – both state and federalized National Guard and armed services troops.<sup>66</sup>

Appeasement, even during the crisis, was thought to be necessary because the Bush administration then believed that the PCA barred deployment of troops to restore order. The investigation into the legality of invoking the Insurrection Act, an exception to the PCA that would allow federal troops to enforce civil law, even in the absence of state agreement, led to “a flurry of meetings at the Justice Department, the White House and other agencies,”<sup>67</sup> and erupted into “a fierce debate.”<sup>68</sup> The White House instructed the Justice Department’s Office of Legal Counsel (OLC) to resolve the issue. The OLC

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

<sup>59</sup> See Glasser & Grunwald, *supra* note 21.

<sup>60</sup> See S. REP. NO. 109-322, at 515. Some typical disaster relief tasks that do not amount to law enforcement include “search and rescue, clearing roads, delivering supplies, and providing medical assistance.” STEVE BOWMAN, CONG. RESEARCH SERV., ORDER CODE RL33095, HURRICANE KATRINA: DOD DISASTER RESPONSE 7 n.21 (2005).

<sup>61</sup> See Eric Lipton et al., *Why Troops Weren’t Sent Right Away*, PITTSBURGH POST-GAZETTE, Sept. 9, 2005, at A1.

<sup>62</sup> Glasser & Grunwald, *supra* note 21.

<sup>63</sup> *Id.*

<sup>64</sup> Manuel Roig-Franzia & Spencer Hsu, *Many Evacuated, but Thousands Still Waiting*, WASH. POST, Sept. 4, 2005, at A1.

<sup>65</sup> *Id.*

<sup>66</sup> Lipton et al., *supra* note 16.

<sup>67</sup> *Id.*

<sup>68</sup> Glasser & Grunwald, *supra* note 21.

finally “concluded that the federal government had authority to move in even over the objection of local officials.”<sup>69</sup>

## II. THE POSSE COMITATUS ACT

As the discussion above demonstrates, the PCA has been a jurisdictional force with which to be reckoned. The PCA prohibits the use of federal troops for law enforcement purposes “except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.”<sup>70</sup> Enacted in 1878, the PCA was a response to the imposition of federal martial law upon the former Confederate States to maintain civil order.<sup>71</sup> Congress was concerned that this use of the U.S. military was rendering that statute to be more of a political tool and less of a defense force.<sup>72</sup> However, Congress also clearly recognized that, by virtue of constitutional authority or statutory authorization, exceptions to the general bar would be required in extraordinary circumstances to preserve law and order.

In the context of this discussion, it is important to understand the distinctions between the active armed forces and the National Guard. Members of the armed forces are in the active military service of the Army, Navy, Air Force, Marine Corps, or Coast Guard.<sup>73</sup> With the exception of the Coast Guard, members of the armed forces are constrained by the PCA.<sup>74</sup> The U.S. Constitution grants the President, as Commander in Chief, control of the operation of the armed forces.<sup>75</sup>

National Guard personnel are simultaneously members of their respective state militias and the Army federal reserve.<sup>76</sup> The National Guard is traditionally under state and territorial control.<sup>77</sup> In this state capacity, members of the National Guard are not constrained by the PCA and may

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<sup>69</sup> Lipton et al., *supra* note 16.

<sup>70</sup> 18 U.S.C. § 1385 (2000).

<sup>71</sup> Craig T. Trebilcock, *The Myth of Posse Comitatus*, J. HOMELAND SEC., Oct. 2000, <http://www.homelandsecurity.org/newjournal/articles/trebilcock.htm>.

<sup>72</sup> *Id.*

<sup>73</sup> 10 U.S.C. § 101(a)(4) (2000).

<sup>74</sup> Linda J. Demaine & Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 167, 174-75, 177-78 (2005) (“The express language of the PCA applies to . . . the Army and the Air Force. Courts generally have held that the PCA does not apply directly to the Navy or the Marine Corps, but that the PCA’s proscriptions have been extended to those services through other statutes and DoD policy. . . . The Coast Guard typically operates under the Department of Homeland Security (DHS) and in this capacity is not subject to the PCA.” (footnotes omitted)).

<sup>75</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>76</sup> See BOWMAN, *supra* note 60, at 6-7.

<sup>77</sup> *Id.* at 7.

perform civilian law enforcement functions.<sup>78</sup> However, National Guard personnel may be called into federal service (or “federalized”) by the President.<sup>79</sup> While under federal status, National Guard members may perform typical disaster relief tasks (such as search and rescue, clearing roads, delivering supplies, and providing medical assistance),<sup>80</sup> but, when federalized, members of the Guard are subject to the PCA, and they may not perform law enforcement functions unless pursuant to a PCA exception.<sup>81</sup>

On April 17, 2002, President Bush authorized the establishment of NORTHCOM;<sup>82</sup> its mission is to provide command and control of DOD homeland defense efforts and to coordinate defense support of civil authorities within the United States.<sup>83</sup> NORTHCOM’s assigned area of responsibility “includes air, land and sea approaches and encompasses the continental United States, Alaska, Canada, Mexico and the surrounding water out to approximately 500 nautical miles.”<sup>84</sup> NORTHCOM assumed its official responsibilities on October 1, 2002.<sup>85</sup> The creation of NORTHCOM marked the first time since the Civil War that the U.S. Armed Forces had operational command for domestic purposes.<sup>86</sup>

As discussed in detail below, there are statutory provisions that, even prior to Katrina, had been recognized as constituting the express congressional exceptions contemplated by the PCA.<sup>87</sup> These well-recognized exceptions almost certainly authorized the very action that the Bush administration equivocated over for days before finally and belatedly introducing federal troops and military assets into Louisiana. The confusion over the scope of the PCA after Katrina’s onset is even more remarkable considering that in December 2004, thirty-two federal officials under the leadership of the Department of Homeland Security (DHS) promulgated the National Response

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<sup>78</sup> *Id.* National Guard personnel may also have “Title 32” (32 U.S.C. § 502(f) (2000)) status, meaning that they remain under the control of their governor but receive federal pay and benefits. *Id.* at 8. National Guard personnel under Title 32 status are not constrained by the PCA. *Id.*; see also United States Northern Command, The Posse Comitatus Act, [http://www.northcom.mil/About/history\\_education/posse.html](http://www.northcom.mil/About/history_education/posse.html) (last visited Apr. 1, 2007).

<sup>79</sup> BOWMAN, *supra* note 60, at 9.

<sup>80</sup> *Id.* at 7 n.21.

<sup>81</sup> *Id.* at 9.

<sup>82</sup> United States Northern Command, History, [http://www.northcom.mil/About/history\\_education/history.html](http://www.northcom.mil/About/history_education/history.html) (last visited Apr. 1, 2007).

<sup>83</sup> United States Northern Command, About Us, <http://www.northcom.mil/About/index.html> (last visited Apr. 1, 2007).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Laura K. Donohue, Op-Ed., *Pentagon Spies Are Watching You*, L.A. TIMES, May 18, 2006, at B13.

<sup>87</sup> See *infra* notes 102-28 and accompanying text.

Plan (NRP),<sup>88</sup> designed to provide federally directed coordination of responses to natural and manmade disasters amounting to “Incidents of National Significance.”<sup>89</sup> The NRP expressly provides that facing “[i]mminently serious conditions,” the military may be called upon to take any and all action necessary “to save lives, prevent human suffering, or mitigate property damage.”<sup>90</sup> The White House, DHS, and the remaining thirty-one agencies that signed on to the NRP all failed to realize that, as of December 2004, the federal government was already expressly on record as authorizing the kind of federal leadership that was so disastrously delayed after Katrina’s landfall.

Still more confounding is that even after the OLC recognized that the PCA did not bar federal action even in the face of state opposition, the leadership of the Justice Department and DOD nevertheless counseled President Bush not to take command of the relief effort, due to a fear that Governor Blanco would refuse to surrender control, thereby causing a political backlash.<sup>91</sup> One senior administration official, speaking anonymously, stated,

Can you imagine how it would have been perceived if a president of the United States of one party had pre-emptively taken from the female governor of another party the command and control of her forces, unless the security situation made it completely clear that she was unable to effectively execute her command authority and that lawlessness was the inevitable result?<sup>92</sup>

In fact, one can “imagine” what the political response would have been throughout the nation if the President had immediately deployed the military and all federal resources to rescue, for example, those trapped in the Superdome and the Convention Center, or those many elderly patients trapped in hospitals and elder care facilities. It does not take us too far afield to speculate that had the President so acted, even in the face of Governor Blanco’s opposition, the public response to the federal handling of Katrina would have been one of enthusiastic support.

Ultimately (but belatedly), on September 7, 2005, “DOD assets in the affected area included 42,990 National Guard personnel, 17,417 active duty personnel, 20 U.S. ships, 360 helicopters, and 93 fixed wing aircraft.”<sup>93</sup> A week and a half after the hurricane made landfall, fifty thousand National Guard troops and twenty-two thousand active duty troops were on the ground

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<sup>88</sup> See U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE PLAN, at v-viii (2004) [hereinafter NRP], available at [http://www.dhs.gov/xlibrary/assets/NRP\\_FullText.pdf](http://www.dhs.gov/xlibrary/assets/NRP_FullText.pdf) (listing the thirty-two participating officials).

<sup>89</sup> *Id.* at 4.

<sup>90</sup> *Id.* at 42.

<sup>91</sup> Lipton et al., *supra* note 16.

<sup>92</sup> See *id.*

<sup>93</sup> BOWMAN, *supra* note 60, at 6.

in the Gulf Coast region, constituting the largest deployment of troops within the United States since the Civil War.<sup>94</sup>

On September 15, 2005, in his speech at Jackson Square in New Orleans, President Bush stated that "[i]t is now clear that a challenge on this scale requires greater Federal authority and a broader role for the Armed Forces."<sup>95</sup> Shortly thereafter, on October 19, 2005, Governor Janet Napolitano (D-Ariz.), then Vice Chair of the National Governors Association, directly contradicted President Bush's sentiment, insisting that "[s]tate and local governments are in the best position to prepare for, respond to, and recover from disaster and emergency."<sup>96</sup>

### III. TRADITIONAL EXCEPTIONS TO THE POSSE COMITATUS ACT

Even before the Warner Amendment's October 17, 2006, enactment unmistakably authorized the use of federal troops in these circumstances, there was already an abundance of authority that military deployment would have been permissible. For example, the NRP expressly stated in December 2004 that, when confronted with overwhelmed state and local entities in a disaster of nationwide consequence, the federal government could deploy federal troops to lead the response even in the face of state and local opposition. It bears repeating that when state and local governments are capable of mounting a response and maintaining law and order (as is usually the case), state and local institutions should, both as a matter of law and policy, retain the lead role. In those instances, the federal government, where properly requested, should supplement, rather than take over, the state and local command structure.<sup>97</sup> Given the size of Katrina, however, the only level of government with the assets to handle the incident was the federal government, acting through, among other things, military deployments. Katrina and disasters of that magnitude present security situations in which, contrary to the belief of the Bush administration official quoted above, it *is* "completely clear that [states

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<sup>94</sup> S. REP. NO. 109-322, at 476 (2006).

<sup>95</sup> Address to the Nation on Hurricane Katrina Recovery from New Orleans, Louisiana, 40 WEEKLY COMP. PRES. DOC. 1405, 1408 (Sept. 15, 2005).

<sup>96</sup> *Federalism and Disaster Response: Examining the Roles and Responsibilities of Local, State, and Federal Agencies: Hearing Before the H. Comm. on Homeland Security*, 109th Cong. (2005) (statement of Janet Napolitano, Governor of Arizona). Governor Napolitano's statement is available at <http://www.homelandsecurity.az.gov/documents/101905-GovernorsTestimony.pdf> (last visited Apr. 1, 2007).

<sup>97</sup> For example, the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207 (2000), is the most prominent statutory program authorizing federal supplemental aid to states and localities during disasters and emergencies. See FEMA, Robert T. Stafford Disaster Relief and Emergency Assistance Act, <http://www.fema.gov/about/stafact.shtm> (last visited Apr. 1, 2007).

are] unable to effectively execute . . . command authority and that lawlessness [is] the inevitable result.”<sup>98</sup>

To be sure, prior to the Warner Amendment, many viewed the PCA as being “riddled with uncertainty and complexity.”<sup>99</sup> Much of this uncertainty arose because lay observers, especially military commanders and first responders at all levels of government, focused almost exclusively on the prohibition within the PCA, while simply overlooking the fact that there may be statutory or constitutional exceptions that the statute would recognize.<sup>100</sup> There has also been much confusion as to which exceptions apply, when they apply, and the extent of their scope.<sup>101</sup> This Article discusses two critically important PCA exceptions: the Insurrection Act and the Homeland Security Act of 2002, both of which predate the passage of the Warner Amendment and are the basis of the scholarship underpinning the NRP’s recognition that federal troops may be deployed in response to a natural catastrophe in the face of overwhelmed state capacity.

#### A. *The Insurrection Act*

The Insurrection Act,<sup>102</sup> even before the Warner Amendment’s clarification, permitted the use of federal troops to enforce civilian laws in response to insurrections and similar types of civil disturbance.<sup>103</sup> For example, in 1992, upon the request of California’s Governor, President George H.W. Bush used federal troops to quell the Los Angeles riots.<sup>104</sup> He did so pursuant to the first provision of the Insurrection Act:

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.<sup>105</sup>

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<sup>98</sup> See *supra* note 92 and accompanying text.

<sup>99</sup> Demaine & Rosen, *supra* note 74, at 170.

<sup>100</sup> In addition to constitutional exceptions to the PCA, one commentator has identified at least twenty-six statutory exceptions to the PCA. See CHARLES DOYLE, CONG. RESEARCH SERV., ORDER CODE 95-964 S, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 21 n.48 (2000).

<sup>101</sup> Demaine & Rosen, *supra* note 74, at 170-71 (“[I]t is unclear to what situations the PCA applies, what military activities the PCA prohibits, what exceptions to the PCA exist, and the boundaries of the exceptions that do exist.”).

<sup>102</sup> Act of May 2, 1792, ch. 28, 1 Stat. 264 (codified as amended at 10 U.S.C. §§ 331-335 (2000)).

<sup>103</sup> Demaine & Rosen, *supra* note 74, at 193-94.

<sup>104</sup> See Nicholas Lemann, *Insurrection*, NEW YORKER, Sept. 26, 2005, at 67, 67-68.

<sup>105</sup> 10 U.S.C. § 331.

While this provision requires the request of a governor or state legislature, the next two provisions of the Insurrection Act do not. For example, under the Act's second provision,

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.<sup>106</sup>

Thus, this provision permits the President to decide unilaterally to deploy federal troops, even in the absence of a state request, to restore the ability to enforce federal law. Under an early version of this provision, President Washington, in 1794, used the military to suppress the Whiskey Rebellion in Pennsylvania despite lacking the active support of that state's governor.<sup>107</sup>

Moreover, under the third provision of the Insurrection Act,

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.<sup>108</sup>

This provision therefore permits the President to use federal troops, even in the absence of a state request, to ensure that citizens are provided the protections of federal law when state authorities are unable or unwilling to enforce the law. Under this provision, Presidents Eisenhower and Kennedy, in 1957 and 1963, unilaterally decided to send troops into the southern states to enforce constitutionally protected civil rights through desegregation.<sup>109</sup>

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<sup>106</sup> *Id.* § 332.

<sup>107</sup> See Papers of George Washington: The Whiskey Insurrection, <http://gwpapers.virginia.edu/documents/whiskey/index.html> (last visited Apr. 1, 2007) (discussing George Washington's diary entries related to the Whiskey Rebellion). Pennsylvania Governor Thomas Mifflin told President Washington that he "was reluctant to use military forces," but "pledged to cooperate with any action the President decided to take." Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 110 (2005).

<sup>108</sup> 10 U.S.C. § 333.

<sup>109</sup> See Lemann, *supra* note 104, at 68.

Thus, even before the recent passage of the Warner Amendment, the second and third provisions of the Insurrection Act were deemed important exceptions to the PCA, permitting the President to use federal troops to restore law and order when state governments were neither able nor eager to do so.

B. *The Homeland Security Act of 2002*

The Homeland Security Act of 2002 (HSA)<sup>110</sup> was signed into law by President George W. Bush on November 25, 2002.<sup>111</sup> This sweeping legislation created the DHS, whose duties were to “analyze threats, . . . guard our borders and airports, protect our critical infrastructure, and coordinate the response of our Nation to future emergencies.”<sup>112</sup> Title Five of the HSA, entitled “Emergency Preparedness and Response,” broadly defines the duties of the Secretary of Homeland Security to include “helping to ensure the effectiveness of emergency response providers to terrorist attacks, major disasters, and other emergencies,”<sup>113</sup> managing “the Federal Government’s response to terrorist attacks and major disasters,”<sup>114</sup> “aiding the recovery from terrorist attacks and major disasters,”<sup>115</sup> “building a comprehensive national incident management system with Federal, State, and local government personnel, agencies, and authorities, to respond to such attacks and disasters,”<sup>116</sup> and “consolidating existing Federal Government emergency response plans into a single, coordinated national response plan.”<sup>117</sup>

In response to the HSA, the President issued a Homeland Security Presidential Directive (HSPD-5)<sup>118</sup> assigning the DHS Secretary the responsibility of developing a National Incident Management System (NIMS) to provide a “nationwide approach for Federal, State, and local governments to work effectively and efficiently together to prepare for, respond to, and recover from domestic incidents, regardless of cause, size, or complexity.”<sup>119</sup> HSPD-5 also implemented HSA’s mandate that a National Response Plan (NRP) be developed to “integrate Federal Government domestic prevention,

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<sup>110</sup> Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of U.S.C.).

<sup>111</sup> Remarks on Signing the Homeland Security Act of 2002, 38 WEEKLY COMP. PRES. DOC. 2090, 2090 (Nov. 25, 2002).

<sup>112</sup> *Id.*

<sup>113</sup> Homeland Security Act of 2002 § 502(1), 116 Stat. at 2212 (codified at 6 U.S.C. § 312(1) (Supp. IV 2004)).

<sup>114</sup> *Id.* § 502(3), 116 Stat. at 2212 (codified at 6 U.S.C. § 312(3) (Supp. IV 2004)).

<sup>115</sup> *Id.* § 502(4), 116 Stat. at 2212 (codified at 6 U.S.C. § 312(4) (Supp. IV 2004)).

<sup>116</sup> *Id.* § 502(5), 116 Stat. at 2212-13 (codified at 6 U.S.C. § 312(5) (Supp. IV 2004)).

<sup>117</sup> *Id.* § 502(6), 116 Stat. at 2213 (codified at 6 U.S.C. § 312(6) (Supp. IV 2004)).

<sup>118</sup> Press Release, The White House, Homeland Security Presidential Directive/HSPD-5 (Feb. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/02/20030228-9.html>.

<sup>119</sup> *Id.*



preparedness, response, and recovery plans into one all-discipline, all-hazards plan.”<sup>120</sup> Under the authority of the HSA and HSPD-5, the NRP commits every signatory, including (but not limited to) each member of the federal executive cabinet,<sup>121</sup> to “[s]upport[] NRP concepts, processes, and structures and carry[] out their assigned functional responsibilities to ensure effective and efficient incident management.”<sup>122</sup>

The NRP is activated when the DHS Secretary declares an incident to be an “Incident of National Significance.”<sup>123</sup> It further defines *catastrophic events* as the most severe of the Incidents of National Significance:

A catastrophic event is [an] . . . incident . . . that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, national morale, and/or government functions. A catastrophic event could result in sustained national impacts over a prolonged period of time; almost immediately exceeds resources normally available to State, local, tribal, and private-sector authorities in the impacted area; and significantly interrupts governmental operations and emergency services to such an extent that national security could be threatened.<sup>124</sup>

In an event that exceeds resources normally available to state and local authorities, “[t]he primary mission is to save lives; protect critical infrastructure, property, and the environment; contain the event; and preserve national security.”<sup>125</sup> In addition, “[s]tandard procedures regarding requests for assistance may be expedited or, under extreme circumstances, suspended in the immediate aftermath of an event of catastrophic magnitude,”<sup>126</sup> and any “coordination process must not delay or impede the rapid deployment and use of critical resources.”<sup>127</sup> Recognizing that the NRP, as derived from the HSA and HSPD-5, mandates “immediate action to save lives, prevent human suffering, or mitigate property damage,” the plan provides that when facing

[i]mminently serious conditions resulting from any civil emergency . . . , [if] time does not permit approval from higher headquarters, *local military commanders and responsible officials from DOD components and agencies are authorized by DOD directive and pre-approval by the Secretary of Defense*, subject to any supplemental direction that may be provided by their DOD component, *to take necessary action to respond to requests of civil authorities* consistent with the Posse Comitatus Act (18

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<sup>120</sup> *Id.*

<sup>121</sup> See NRP, *supra* note 88, at v-viii (listing the thirty-two NRP signatories).

<sup>122</sup> *Id.* at iii.

<sup>123</sup> *Id.* at 4.

<sup>124</sup> *Id.* at 43 (emphasis added).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 44.

<sup>127</sup> *Id.*

U.S.C. § 1385). All such necessary action is referred to as “*Immediate Response*.”<sup>128</sup>

In sum, the NRP recognized that there would not always be adequate time to deploy the active military, and authorized DOD components and agencies to take “necessary action” to quell the emergency. Subject to supplemental direction from the DOD, federal troop deployment was “pre-approved” under the NRP. To be sure, that type of “immediate response” must be at the “request of civil authorities” – but because the NRP coordinates all levels of government and imposes response obligations on dozens of civil federal agencies, it is clear that the “request” could come from federal, not necessarily state or local, civil authorities.

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

#### IV. THE RECENT CLARIFYING WARNER AMENDMENT

Of course, the recent passage of the Warner Amendment removes all doubt about the President’s statutory authority to decide unilaterally to use federal troops in response to a massive disaster such as Hurricane Katrina. Following Katrina, there were a series of congressional and White House reports, each of which made it clear that the President must be free to use federal troops to prevent and respond to natural disasters of this kind. During the Warner Amendment’s consideration, the Senate Committee on Armed Services issued a report stating that the Insurrection Act’s “lack of explicit reference to such situations as natural disasters or terrorist attacks may have contributed to a reluctance to use the armed forces in situations such as Hurricane Katrina.”<sup>129</sup> The House Committee on Armed Services similarly noted that “there are a number of areas where the Department of Defense (DOD) could have improved the execution of military support during Hurricane Katrina.”<sup>130</sup> These congressional sentiments echoed White House concerns as expressed in *Lessons Learned*, which recommended that in the future, DHS and DOD “should jointly plan for Department of Defense’s support of Federal response activities as well as those extraordinary circumstances when it is appropriate for the Department of Defense to lead the Federal response.”<sup>131</sup>

In response to these broad-based concerns, Congress amended the Insurrection Act to make it clear that when the President determines during a “natural disaster, epidemic, or other serious public health emergency . . . that the constituted authorities of the State . . . are incapable of maintaining public

<sup>128</sup> *Id.* at 42-43 (emphasis added).

<sup>129</sup> S. REP. NO. 109-254, at 384 (2006).

<sup>130</sup> H.R. REP. NO. 109-452, at 370 (2006).

<sup>131</sup> TOWNSEND, *supra* note 2, at 55.

order,” he or she may “employ the armed forces, including the National Guard in Federal service.”<sup>132</sup>

V. THE CONSTITUTIONAL UNDERPINNINGS OF THE WARNER AMENDMENT

A. *Federal vs. State Power*

All fifty governors opposed the Warner Amendment. In August 2006, the National Governors Association, led by its Chair, Governor Janet Napolitano, sent a series of anti-Warner Amendment letters to lawmakers and to Defense Secretary Rumsfeld.<sup>133</sup> Governor Napolitano argued that the amendment represented “a dramatic expansion of federal authority during natural disasters that could cause confusion in the command-and-control of the National Guard and interfere with states’ ability to respond to natural disasters within their borders.”<sup>134</sup> Governor Mike Huckabee (R-Ark.) complained that the amendment “was drafted without consultation or input from governors and

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<sup>132</sup> John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1076, 120 Stat. 2083, 2404 (2006) (to be codified as amended at 10 U.S.C. § 333). The Warner Amendment states in full:

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

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

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

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

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

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

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

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

*Id.*, 120 Stat. at 2404-05.

<sup>133</sup> See NGA, *supra* note 19.

<sup>134</sup> Letter from Janet Napolitano, Ariz. Governor, et al., to Bill Frist, U.S. Senate Majority Leader, et al. (Aug. 31, 2006), available at <http://www.nga.org> (follow “Letters” hyperlink; then follow “August 31, 2006” hyperlink).

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represents an unprecedented shift in authority from governors as Commanders and [sic] Chief of the Guard to the federal government.”<sup>135</sup>

However, this criticism overlooks the principal controlling caveat within the amendment. It is not triggered until the President makes a finding, as clearly could have been made in Katrina, that a state is “unable” to respond to the disaster. As has been historically true, even serious natural disasters will normally stay within the control of the states when they maintain the ability to sustain or restore order. This is reflected in the default rule within the NRP, i.e., that disasters should be dealt with at the lowest level of government possible. Stated most pointedly, this measure does not interfere with state sovereignty because it is only triggered when there is no sovereignty within the state.

Moreover, in the “real” world, (or, perhaps put more accurately in light of Katrina, in a less dysfunctional world), adroit handling of these crises by federal officials may eliminate any conflict between the state and the federal governments even in situations where the state has difficulty handling the disaster. The NRP contemplates a coordinated, constant, and real time response among all levels of government.<sup>136</sup> If federal leadership is operating in a unified collective fashion (which did not happen in response to Katrina), it should be in real time, and it should involve constant communication with state and local leadership concerning the management of the disaster (which also did not happen). As problems arise, the federal government may skillfully be able to offer federal assistance under the guise of supplementing the state response without having to officially declare a federal takeover.

One can well imagine that at least a part of the governors’ objection to the Warner Amendment is the humiliating prospect of being formally and publicly told by the federal government to step aside in the midst of a disaster. Despite the mandates of the NRP, the responsible federal officials not only failed to regularly meet collectively during Katrina; they never met. Moreover, they only communicated with Louisiana and New Orleans in a sporadic and haphazard manner.<sup>137</sup> This haphazard management style (which defies the basic principles underlying emergency response to catastrophes) allowed the

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<sup>135</sup> Letter from Mike Huckabee, Ark. Governor, et al., to Bill First [sic], U.S. Senate Majority Leader, et al. (Aug. 6, 2006), available at <http://www.nga.org> (follow “Letters” hyperlink; then follow “August 6, 2006” hyperlink); see also Jennifer Steinhauer, *51 Governors Resist Shifting Authority over Guard*, N.Y. TIMES, Aug. 15, 2006, at A14.

<sup>136</sup> See Michael Greenberger, *False Conflict: Who’s in Charge of National Public Health Catastrophes*, ADMIN. & REG. L. NEWS, Spring 2006, at 2-3 (“[A] fair reading of the NRP is that it contemplates a coordinated, real time response with the states and localities working together with the federal government, deploying federal assets as a supplement to state and local supervision of an emergency response.”).

<sup>137</sup> See Lipton et al., *supra* note 16 (“Interviews with officials in Washington and Louisiana show that as the situation grew worse, they were wrangling with questions of federal/state authority, weighing the realities of military logistics and perhaps talking past each other in the crisis.”).

New Orleans situation to spin out of control quickly, thereby necessitating the President’s sudden and dramatic insistence that Governor Blanco surrender her control. If the spirit of the NRP is followed, and if the crisis is managed on a real time basis with continuous communication, only in a worst-case scenario would the federal government find it necessary to direct and supervise the relief effort officially.

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

B. *The Insurrection and Guarantee Clauses*

The Founding Fathers had an abiding interest in ensuring the safety and the democratic stability of the state governments. At the time of the founding, not only were many states surrounded by hostile external forces, but many residents within the states were reluctant to abide by state and federal law, especially concerning the collection of taxes.<sup>138</sup> One of the key events stoking this concern was the January 1787 Shays’ Rebellion, during which Daniel Shays, a former officer in the Continental Army, led a farmers’ insurrection against high taxes levied by Massachusetts to pay its Revolutionary War debts.<sup>139</sup> Shays’ insurgents seized a federal arsenal in Springfield, which led to a violent and deadly skirmish with a private militia force financed by wealthy Boston creditors.<sup>140</sup> Massachusetts ultimately quelled the insurrection.<sup>141</sup> However, events such as these pointed out the fragility of state institutions, including uncertainty over their ability to uphold laws within their own jurisdictions.<sup>142</sup>

As a result of this concern, the Framers included two provisions in the Constitution to ensure that the federal government had an obligation to maintain the governmental integrity of, and to enforce the federal law within, the states. The Insurrection Clause affords Congress the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>143</sup> The Guarantee Clause provides that

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<sup>138</sup> See Mazzone, *supra* note 107, at 45 (explaining the states’ unwillingness and inability to aid one another and the subsequent need for a “strong national government with responsibility for defense [to] overcome the collective-action dilemma”).

<sup>139</sup> *Id.* at 47-48.

<sup>140</sup> *Id.* at 48.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 47-49.

<sup>143</sup> U.S. CONST. art. I, § 8, cl. 15. Prior to the Constitutional Convention, the term “militia” was often defined to mean undisciplined and poorly regulated forces. Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 183 (1940).

“[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>144</sup> Again, these provisions did not merely grant authority for the federal government to act; they imposed an affirmative obligation on it. Moreover, the plain language and historical reliance on these clauses make clear that where, because of public disorder, the guarantees of federal law are in jeopardy or the democratic structure of state government is in peril, the federal government must fulfill its constitutional duty even if uninvited by the state to do so.

These two provisions form the constitutional basis for the Insurrection Act, the first version of which was passed in 1792. As noted above, that Act, in its various incarnations, authorized the deployment of federal troops or state militia under federal control to quell the Whiskey Rebellion, desegregation-related disorder in the South, and, most recently, the Rodney King riots in Los Angeles.<sup>145</sup> In each of these situations, either the affected state recognized that it was incapable of maintaining order or the President unilaterally determined that to be the case, and federal troops were used to maintain the peace.

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

### C. *The Commerce and Necessary and Proper Clauses*

Katrina had a substantial adverse impact on interstate commerce. Thousands crossed state lines in search of refuge through choked lines of egress. Goods and services necessary for survival and safety were brought into the region inconsistently and in a disorganized manner, or not at all. On a nationwide basis, industrial services and manufacturing were cut back or

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By the twentieth century, however, the term, for all intents and purposes, became well understood as referring to a federalized National Guard. *See id.* at 201-06.

<sup>144</sup> U.S. CONST. art. IV, § 4. Article IV, section four goes on to provide that the United States “shall protect each [state] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.” This latter clause has been termed the Protection Clause, and it has been deemed to be separate from the assurance of a “Republican Form of Government.” *See Mazzone, supra* note 107, at 35-36. In other words, problems may arise with the stability of state democratic processes caused neither by an invasion nor by domestic violence. When they do, it is the Assurance Clause that mandates federal intervention to stabilize democratic processes.

<sup>145</sup> *See supra* notes 102-09 and accompanying text.

terminated. The price of commodities soared throughout the nation, most notably the price of gasoline.

To the extent that the Warner Amendment affords the President the right to unilaterally insert federal troops to restore order within an area devastated by a catastrophic event, that action should be justified as appropriate under the Commerce Clause,<sup>146</sup> as it almost certainly mitigates a substantial adverse impact on interstate commerce. While some respected public health law academics have argued that recent Commerce Clause jurisprudence substantially limits congressional intrusion on the states' constitutional police powers in matters affecting the health of their citizens,<sup>147</sup> even the arguably stricter Commerce Clause tests would support the use of the Warner Amendment to deal with incidents such as Katrina. For example, although *Lopez v. United States* dictates that Congress may only regulate "those activities that substantially affect interstate commerce,"<sup>148</sup> it seems clear that relief from a catastrophic disaster is such an activity, at least in the case of a disaster with such devastating and far-reaching effects as Hurricane Katrina.

Moreover, in *Pierce County v. Guillen*,<sup>149</sup> the Court upheld a federal statute barring disclosure of federally required road safety studies in state courts, emphasizing that these studies protect "the channels of interstate commerce."<sup>150</sup> It is certainly the case that one goal of introducing federal troops in a Katrina-like catastrophe is to open up "the channels of interstate commerce," thereby bringing the Warner Amendment well within *Guillen*-like Commerce Clause doctrine.

The recent decision in *Gonzales v. Raich*<sup>151</sup> should also reduce doubts about the scope of the Commerce Clause in this regard. In *Raich*, the Supreme Court ruled 6-3 that Congress, through the Controlled Substances Act (CSA),<sup>152</sup> could regulate entirely intrastate commerce in the growth, distribution, and sale of marijuana for medicinal purposes, and preempt state legislation supporting

<sup>146</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>147</sup> See, e.g., Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 HEALTH MATRIX 265, 289-90 (2001) (discussing *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000)). But see Wendy E. Parmet, *After September 11: Rethinking Public Health Federalism*, 30 J.L. MED. & ETHICS 201, 207-09 (2002) (predicting that the Supreme Court will defer to federal authority more often in the wake of September 11th); Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. TIMES, Sept. 30, 2001, § 4, at 14 (same).

<sup>148</sup> *Lopez*, 514 U.S. at 559; see also *Morrison*, 529 U.S. at 609 (reiterating *Lopez*'s substantial effects doctrine); CHEMERINSKY, *supra* note 6, § 3.3, at 272 (discussing the substantial effects doctrine).

<sup>149</sup> 537 U.S. 129 (2003).

<sup>150</sup> *Id.* at 146 (quoting *Lopez*, 514 U.S. at 558).

<sup>151</sup> 545 U.S. 1 (2005).

<sup>152</sup> Pub. L. No. 91-513, tit. II, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801-904 (2000)).

such commerce.<sup>153</sup> The Court reasoned that the Commerce Clause was properly invoked: the production of marijuana contravenes the CSA's objective of regulating controlled substances that have "*a substantial and detrimental effect on the health and general welfare of the American people,*"<sup>154</sup> and by thus endangering the nation's public health, the production of marijuana affects interstate commerce.<sup>155</sup> In so ruling, the Court rejected the argument that "Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens."<sup>156</sup>

To be sure, Justice Stevens in *Raich*, writing for the majority, emphasized that "the activities regulated by the CSA are quintessentially economic."<sup>157</sup> It might be argued that, if the federal government is relying only on the Commerce Clause (as opposed to, for example, the Insurrection and Guarantee Clauses), the introduction of federal troops to restore public order may go beyond a strictly economic purpose.

However, Justice Stevens did not rest his opinion solely on the Commerce Clause; he also cited the Necessary and Proper Clause to justify the Court's ruling.<sup>158</sup> That reference proved to be important, because Justice Scalia concurred separately in *Raich* to make clear that he wished to avoid an isolated "substantial effects" test, instead stressing the importance of the Necessary and Proper Clause in reaching his result.<sup>159</sup> According to Justice Scalia, "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."<sup>160</sup> He therefore concluded that even non-economic activity may be prohibited "as a necessary part of a larger regulation,"<sup>161</sup> and that "however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market 'could be undercut' if those activities were excepted from its general scheme of regulation."<sup>162</sup>

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<sup>153</sup> See *Raich*, 545 U.S. at 30.

<sup>154</sup> *Id.* at 12 n.20 (emphasis added) (quoting Controlled Substances Act § 101(2), 84 Stat. at 1242 (codified at 21 U.S.C. § 801(2))).

<sup>155</sup> See *id.* at 29-32.

<sup>156</sup> *Id.* at 66 (Thomas, J., dissenting).

<sup>157</sup> *Id.* at 25 (majority opinion).

<sup>158</sup> See *id.* at 5.

<sup>159</sup> See *id.* at 34-35 (Scalia, J., concurring in judgment).

<sup>160</sup> *Id.* at 34.

<sup>161</sup> *Id.* at 40.

<sup>162</sup> *Id.* at 42 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)). *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), does not alter the above conclusion. In that case, the Supreme Court held 6-3 that the CSA did not preempt the Oregon Death With Dignity Act (ODWDA), which allowed physicians to prescribe a lethal dose of drugs covered by the



Considering *Raich*'s confirmation of federal authority over even purely local activities that substantially affect interstate commerce, any major domestic catastrophic incident such as Katrina would likely be considered a proper basis for Congress to exercise its Commerce Clause authority, particularly if its commerce powers are supplemented by the Necessary and Proper Clause. Indeed, it would be high irony if a governor, elected by the citizens of a single state, could not mount an effective governmental response but could frustrate the federal government's attempt to mitigate the disastrous commercial impact on the citizens of the other forty-nine states, none of whom elected the resisting governor.

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

#### D. *The Spending Clause*

Congress' passage of the Warner Amendment erased any doubt as to whether the President has statutory authority to invoke federal primacy through the use of federal troops to restore disorder caused by a natural disaster. As shown immediately above, the Constitution almost certainly justifies that legislation in cases of catastrophes overwhelming state and local governments. Congress could, however, add clarity to the constitutional question (much like it added clarity to the statutory situation by passing the Warner Amendment) by using the Spending Clause to condition the substantial federal aid that states receive during catastrophes on the states' willingness to turn response authority over to the federal government upon a presidential finding of state incapability.

In this regard, it is ironic that the nation's governors were so quick to oppose the Warner Amendment, because these same governors have repeatedly called upon the President to provide vast amounts of federal aid and resources when confronted with serious natural disasters. Indeed, Hurricane Katrina represented the thirtieth time in 2005 that a state asked the President to provide

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CSA upon the request of a terminally ill patient. In *Oregon*, however, the federal prohibition came not from the CSA itself, but from Attorney General Ashcroft's "interpretive rule," which the Court found did not have the force of law and therefore had no preemptive effect. *See id.* at 924-25. Interestingly, Chief Justice Roberts joined the *Oregon* dissent that would have found preemption, *see id.* at 926 (Thomas, J., dissenting), which suggests that Justice O'Connor's vote against preemption in *Raich* would have been replaced by a Roberts vote for preemption had he been on the Court at the time. Justice Thomas also dissented in *Oregon*, claiming that *Raich* was controlling and that Oregon's assisted suicide statute should therefore have been preempted. *See id.* at 939-40. His bow to stare decisis may bode well for the federal government were he to vote on the lawfulness of the Warner Amendment under the Commerce Clause.

federal financial assistance and resources in response to a major natural disaster.<sup>163</sup>

The Stafford Act authorizes the President to declare an emergency or major disaster at the request of a state governor, and to release federal funds and assistance to the state for use in the disaster response.<sup>164</sup> The Stafford Act defines an “emergency” as “any occasion or instance for which . . . Federal assistance is needed to supplement State and local efforts and capabilities . . . or to lessen or avert the threat of a catastrophe.”<sup>165</sup> A “major disaster” is defined as “any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion.”<sup>166</sup>

Two types of assistance may be utilized if the President declares a major disaster: “general federal assistance,” which includes the use of federal equipment, supplies, and personnel, as well as technical and advisory assistance;<sup>167</sup> and “essential assistance,” which includes all assistance needed to meet “immediate threats to life and property,” including the use of DOD resources.<sup>168</sup> The governor of the state in which the disaster occurred may also request the use of DOD resources, and the President shall grant the request if it is practicable and if the use of DOD resources for emergency work is essential to preserving life and property.<sup>169</sup> The “emergency work” that the DOD may perform includes “clearance and removal of debris and wreckage and temporary restoration of essential public facilities and services.”<sup>170</sup> While the federal government may offer technical advice to states and localities regarding disaster management,<sup>171</sup> the statute does not currently purport to grant the federal government primary control over the response coordination.

The provisions of the Stafford Act, as they now exist, predicate federal assistance upon a state’s request for aid and the state’s inherent recognition that the required response exceeds its own resources.<sup>172</sup> However, a state

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<sup>163</sup> Forty-eight major disasters were declared under the Stafford Act in 2005, six of which were related to Hurricanes Katrina and Rita. Emergency and major disaster declarations combined totaled 116 for 2005. See FEMA, 2005 Federal Disaster Declarations, <http://www.fema.gov/news/disasters.fema?year=2005> (last visited Apr. 1, 2007).

<sup>164</sup> See Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207 (2000).

<sup>165</sup> *Id.* § 5122(1).

<sup>166</sup> *Id.* § 5122(2).

<sup>167</sup> *Id.* § 5170a.

<sup>168</sup> *Id.* § 5170b.

<sup>169</sup> *Id.* § 5170b(c)(1).

<sup>170</sup> *Id.* § 5170b(c)(6)(B).

<sup>171</sup> *Id.* § 5170b(a)(3)(H).

<sup>172</sup> See *id.* § 5170b(c)(1) (requiring a request for assistance by a state’s governor in order for DOD resources to be dispatched).

might be overwhelmed, even after receiving federal assistance, yet remain unwilling to relinquish control of the response effort, leading to a breakdown of government services. In these circumstances, the federal government faces the scenario it did in Katrina, where it is arguably precluded from controlling the response even when presented with the possibility of unmitigated human suffering. Amending the Stafford Act and, where the President finds the state unable to respond to the disaster, conditioning a state's acceptance of Stafford Act funds upon federal takeover of the response would effectively resolve this potential problem and make the constitutional defense of the federal actions considerably easier.

The leading case here is *South Dakota v. Dole*.<sup>173</sup> In that case, a federal statute authorized the Secretary of Transportation to withhold federal highway funds from states unwilling to raise the minimum drinking age to twenty-one.<sup>174</sup> The Court sustained the statute as a valid exercise of the spending power, outlining four requirements that a spending condition had to meet in order to be held constitutional. The condition had to: (1) be stated clearly; (2) serve the general welfare; (3) be reasonably related to the purpose for which the federal funds have been allocated; and (4) not induce the states to violate an independent constitutional bar.<sup>175</sup>

The proposed amendment to the Stafford Act would certainly comply with the first three criteria. The provision could unambiguously condition the receipt of funds upon a federal takeover of the response in situations where the President determines that the state is overwhelmed and unable to make effective use of the federal resources. The condition would not only serve the general welfare, but would be created solely for that purpose. Finally, the condition would clearly relate to the purpose for which the federal funds were allocated: effective disaster response designed to save lives and property and reduce human suffering. The fourth condition is slightly more complicated, in that the Tenth Amendment could present a limitation on congressional interference with state affairs.<sup>176</sup> As mentioned earlier, all fifty governors opposed the Warner Amendment as an unnecessary interference with the states' police powers.<sup>177</sup>

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<sup>173</sup> 483 U.S. 203 (1987).

<sup>174</sup> *See id.* at 205.

<sup>175</sup> *See id.* at 207-08. For a more detailed discussion of the spending power, see JOHN E. NOWAK & RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* § 5.3 (2d ed. 2005), and NORMAN REDLICH ET AL., *UNDERSTANDING CONSTITUTIONAL LAW* § 3.05 (3d ed. 2005).

<sup>176</sup> The “independent bar condition” has not been difficult to overcome in past cases, and most recently, was not an obstacle to a statutory condition implicating the First Amendment. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203-14 (2003) (allowing Congress to condition receipt of federal technology grants on a public library's willingness to install obscenity-blocking software on its computers).

<sup>177</sup> *See supra* notes 19, 133-35 and accompanying text.

*South Dakota v. Dole* addressed any ostensible Tenth Amendment limitation by finding that the state was free to simply refuse federal funds and disregard the spending condition.<sup>178</sup> However, the Court did recognize that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>179</sup>

A condition on Stafford Act assistance should not be viewed as coercive, despite the backdrop of a major disaster. First, states have the option of receiving disaster assistance in accordance with numerous inter-jurisdictional mutual aid agreements, such as the Emergency Management Assistance Compact (EMAC), under which 20,000 civilians and 46,500 National Guard personnel were deployed to the Gulf Coast region to respond to Hurricanes Katrina and Rita.<sup>180</sup> Resources exist outside of Stafford Act assistance; a condition on Stafford Act funds would not constitute economic coercion because the federal government does not monopolize emergency response resources. Second, and even more telling, the condition upon which assistance would be based would only be activated if the President found that a state was completely unable to respond to the disaster. In that situation, it is hardly coercion to allow the federal government to predicate the dispersal of its own substantial funds and resources, including military personnel, on its takeover of the response. The state in such cases is not being compelled to act involuntarily; it is incapable of acting at all. Unlike imposing an affirmative obligation upon the state,<sup>181</sup> the federal government is merely giving the state the option to accept federal assistance contingent upon federal control of the response during a catastrophe so large that traditional state and local disaster management mechanisms are rendered useless.

The Stafford Act is a critical part of federal emergency management, and amending it in this way would clarify the federal infrastructure for disaster response and mitigate damage and human suffering by allowing a federal takeover of the response in a situation as dire as Hurricane Katrina.

#### CONCLUSION

The recent passage of the Warner Amendment creates a bright line for determining the appropriate use of federal troops during major domestic natural disasters. The amendment clarifies that under extreme circumstances, when local and state governments are overwhelmed in their efforts to respond to a catastrophic natural disaster, the federal government may use and stay in charge of federal troops to restore public order. Although this power predated

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<sup>178</sup> See *Dole*, 483 U.S. at 210.

<sup>179</sup> *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

<sup>180</sup> ‘After-Action Report’ for 2005 Hurricane Season Response Published, CONTINUITY CENT., Oct. 11, 2006, <http://www.continuitycentral.com/news02832.htm>.

<sup>181</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 171-73 (1992) (allowing Congress to condition the receipt of federal funds on a state’s establishment of radioactive waste disposal sites).

the amendment, confusion as to the state of the law resulted in delays and inaction during Hurricane Katrina that may have cost many lives and imposed great suffering on the survivors.

Similarly, the collective force of the Insurrection, Guarantee, Commerce, and Necessary and Proper Clauses should provide an adequate constitutional underpinning for the Warner Amendment as applied to a major catastrophe that disables state and local response mechanisms. Congress could remove all constitutional doubt, however, by conditioning the receipt of major disaster federal aid under the Stafford Act on the right of the federal government to control the response, if (and only if) the President determines that even with federal assistance, the disaster has overwhelmed the capabilities of the affected state and local governments.

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