

# In Katrina's Wake: Rethinking the Military's Role in Domestic Emergencies

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## Repository Citation

Scott R. Tkacz, *In Katrina's Wake: Rethinking the Military's Role in Domestic Emergencies*, 15 Wm. & Mary Bill Rts. J. 301 (2006), <https://scholarship.law.wm.edu/wmborj/vol15/iss1/11>

# IN KATRINA'S WAKE: RETHINKING THE MILITARY'S ROLE IN DOMESTIC EMERGENCIES

Scott R. Tkacz

INTRODUCTION . . . . .	301
I. LOCAL, STATE, AND FEDERAL RESPONSE TO THE KATRINA DISASTER . . .	303
II. HISTORY OF THE LIMITATION ON THE USE OF THE MILITARY IN DOMESTIC ARENAS . . . . .	307
A. <i>Posse Comitatus Act</i> . . . . .	307
B. <i>Exceptions to the Posse Comitatus Act</i> . . . . .	308
III. HISTORICAL APPLICATIONS OF THE EXCEPTIONS TO THE POSSE COMITATUS ACT . . . . .	312
A. <i>Presidential Power in Federalizing the National Guard</i> . . . . .	314
IV. OVERCOMING THE BARRIERS TO EXPANDING PRESIDENTIAL AUTHORITY IN THE USE OF FEDERAL TROOPS DOMESTICALLY . . . . .	315
A. <i>The Need for Centralized Decision-Making by a Single Individual     Is Critical in Emergency Situations</i> . . . . .	315
B. <i>"Traditional Notions" of Domestic Military Action Are Not     Supported by History</i> . . . . .	318
C. <i>Federal Military Forces Can Receive Adequate Training for     Effective Execution of Domestic Law Enforcement</i> . . . . .	324
D. <i>Active Military Participation in Domestic Law Enforcement     Does Not Necessarily Mean Permanent Domestic Deployment</i> . . . . .	326
E. <i>The President Possesses Broad Discretion in Matters Authorized     by Congress</i> . . . . .	330
F. <i>Use of the Military in Domestic Affairs Would Serve to Protect     Civilians' Constitutional Rights, Not to Abrogate Them</i> . . . . .	332
CONCLUSION . . . . .	333

## INTRODUCTION

The massive devastation wrought by Hurricane Katrina in Louisiana and Mississippi in August 2005<sup>1</sup> left behind shattered communities that will be left to pick up the pieces for months and years to come.<sup>2</sup> The alarming number of hurricanes

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<sup>1</sup> See *infra* notes 6–12 and accompanying text. On June 23, 2006, I visited New Orleans and witnessed the destruction firsthand. The severity of the damage is truly difficult to put into words.

<sup>2</sup> See, e.g., Eric Lipton, *FEMA Calls 60,000 Houses in Storm Area Beyond Repair*, N.Y. TIMES, Nov. 5, 2005, at A14; Eric Lipton, *Hurricane Evacuees Face Eviction Threats at Both Their Old Homes and New*, N.Y. TIMES, Nov. 4, 2005, at A20; Adam Nossiter et al., *New Orleans Is Still Grappling with the Basics of Rebuilding*, N.Y. TIMES, Nov. 8, 2005, at A1.

to strike the United States coastline in 2004 and 2005<sup>3</sup> suggests that history can, and likely will, repeat itself. Significant breakdowns in communication and confused emergency and law enforcement responses from local, state, and federal officials in the hours and days after Hurricane Katrina led to chaos and panic in the affected areas, endangering citizens' property and lives.<sup>4</sup> The delayed reaction to this crisis suggests the need for an expansion of existing presidential authority to use active military forces to rapidly secure the disaster area and rescue survivors.<sup>5</sup>

This Note will argue that Congress should supply the President, and by extension, the military, authority to engage in domestic law enforcement when circumstances dictate rapid action to prevent widespread loss of life and property, such as in the case of Hurricane Katrina. Part I examines the failure of the local, state, and federal response in the aftermath of Hurricane Katrina. Part II explores the history and legality of presidential authority to deploy federal troops in domestic theaters. Part III examines previous instances in which the President has used existing statutory authority to use federal troops in domestic emergencies. Part IV examines the arguments made against weakening the posse comitatus doctrine, and how they translate to modern American policy and values. Finally, Part V concludes with recommendations to modify the federal structure to give the President more flexibility in ordering federal troops into active duty in times of extreme emergency.

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As of June 2006, the most heavily affected areas of New Orleans remained deserted, and rebuilding is only in the preliminary stages. Many community services, including electricity, water, healthcare, and police protection are sporadic and unreliable.

<sup>3</sup> Six hurricanes struck the United States in 2004, including four which made landfall in Florida. ERIC S. BLAKE ET AL., NAT'L OCEANIC & ATMOSPHERIC ADMIN., THE DEADLIEST, COSTLIEST, AND MOST INTENSE UNITED STATES TROPICAL CYCLONES FROM 1851 TO 2004 (AND OTHER FREQUENTLY REQUESTED HURRICANE FACTS) app. A (2005), <http://www.nhc.noaa.gov/pdf/NWS-TPC-4.pdf>. In 2005, several powerful hurricanes developed in the Atlantic basin. Hurricane Dennis made landfall near Navarre Beach, Florida, as a Category 3 storm on the Saffir-Simpson scale. National Hurricane Center, Monthly Tropical Weather Summary (Aug. 1, 2005), [http://www.nhc.noaa.gov/archive/2005/tws/MIATWSAT\\_jul.shtml](http://www.nhc.noaa.gov/archive/2005/tws/MIATWSAT_jul.shtml). Hurricane Katrina, before coming ashore near the border of Louisiana and Mississippi, became the fourth most intense hurricane ever recorded. National Hurricane Center, Monthly Tropical Weather Summary (Sept. 1, 2005), [http://www.nhc.noaa.gov/archive/2005/tws/MIATWSAT\\_aug.shtml](http://www.nhc.noaa.gov/archive/2005/tws/MIATWSAT_aug.shtml). Hurricane Rita, in the days before striking Texas and Louisiana, was measured as the third most intense hurricane ever recorded. National Hurricane Center, Monthly Tropical Weather Summary (Oct. 1, 2005), [http://www.nhc.noaa.gov/archive/2005/tws/MIATWSAT\\_sep.shtml](http://www.nhc.noaa.gov/archive/2005/tws/MIATWSAT_sep.shtml). Hurricane Wilma became the most intense hurricane ever recorded in Atlantic waters on October 19, 2005, five days before plowing across the Florida peninsula. National Hurricane Center, Monthly Tropical Weather Summary (Nov. 1, 2005), [http://www.nhc.noaa.gov/archive/2005/tws/MIATWSAT\\_oct.shtml](http://www.nhc.noaa.gov/archive/2005/tws/MIATWSAT_oct.shtml).

<sup>4</sup> See *infra* Part I.

<sup>5</sup> See *infra* notes 13–33 and accompanying text.

## I. LOCAL, STATE, AND FEDERAL RESPONSE TO THE KATRINA DISASTER

Hurricane Katrina crashed ashore near the border of Louisiana and Mississippi on August 29, 2005<sup>6</sup> with 145-mile-per-hour winds<sup>7</sup> and a twenty- to thirty-foot storm surge.<sup>8</sup> The wind and rain from the hurricane caused the levees protecting the city of New Orleans from Lake Pontchartrain's waters to fail,<sup>9</sup> engulfing over eighty percent of the city in up to twenty feet of water.<sup>10</sup> The flooding stranded 20,000 New Orleans residents at the Louisiana Superdome, which was intended only to be a "shelter of last resort."<sup>11</sup> Thousands more were stranded on building rooftops for over two days without food or water, trying desperately to stay out of the flood-water.<sup>12</sup>

Local and state authorities struggled to respond to the overwhelmingly massive rescue and relief effort brought on by the breach of New Orleans' levees.<sup>13</sup> Louisiana National Guard troops evacuated their headquarters to the Superdome, and communications were nonexistent among the troops leading the rescue effort.<sup>14</sup> Governor Bill Richardson of New Mexico stated that 200 National Guard troops were packed and ready to go to New Orleans, but two days passed before state officials responded to

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<sup>6</sup> National Hurricane Center, Hurricane Katrina Advisory Number 27 (Aug. 29, 2005), <http://www.nhc.noaa.gov/archive/2005/pub/al122005.public.027.shtml>.

<sup>7</sup> Joseph B. Treaster & Kate Zernike, *Hurricane Slams into Gulf Coast; Dozens Are Dead*, N.Y. TIMES, Aug. 30, 2005, at A1.

<sup>8</sup> Don Hammack, *Documenting Surge Surveyors: Storm Water Topped at Least 28 Feet*, SUN HERALD (Biloxi, MS), Oct. 16, 2005, at A1. The National Hurricane Center defines storm surge as "[a]n abnormal rise in sea level accompanying a hurricane or other intense storm, and whose height is the difference between the observed level of the sea surface and the level that would have occurred in the absence of the cyclone." National Hurricane Center, Glossary of NHC/TPC Terms, <http://www.nhc.noaa.gov/aboutgloss.shtml> (last visited Aug. 21, 2006).

<sup>9</sup> John M. Barry, *After the Deluge, Some Questions*, N.Y. TIMES, Oct. 13, 2005, at A27.

<sup>10</sup> Joseph B. Treaster & N.R. Kleinfield, *New Orleans is Inundated as 2 Levees Fail; Much of Gulf Coast is Crippled; Toll Rises*, N.Y. TIMES, Aug. 31, 2005, at A1.

<sup>11</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. Underlining the desperate situation at the Superdome, Marty Bahamonde, the sole Federal Emergency Management Agency (FEMA) employee in New Orleans before Katrina arrived, stated that he was told the Superdome would be equipped with a FEMA medical team, 360,000 ready-to-eat meals and fifteen water trucks before the storm arrived. Eric Lipton, *Worker Tells of Response by FEMA*, N.Y. TIMES, Oct. 21, 2005, at A20. In fact, only five water trucks and 40,000 ready-to-eat meals had arrived before the storm. *Id.* The FEMA medical team did not arrive until one day after New Orleans flooded. *Id.*

<sup>12</sup> McFadden & Blumenthal, *supra* note 11.

<sup>13</sup> Scott Shane & Thom Shanker, *When Storm Hit, National Guard Was Deluged Too*, N.Y. TIMES, Sept. 28, 2005, at A1.

<sup>14</sup> *Id.* Most cellphones, telephone land lines, and satellite phones were disabled because of the storm, and radio frequencies were often jammed from overuse. The conditions forced some National Guard commanders to use "runners, like in World War I," to transfer information back and forth. *Id.*

Richardson's offer of assistance.<sup>15</sup> More than 250 members of the New Orleans Police Department abandoned their duties in the days following the flooding, and reports indicated that some officers even looted homes and businesses.<sup>16</sup>

In the absence of law enforcement in the city, many stranded residents looted local stores, carrying away electronics, clothing, shoes, and firearms.<sup>17</sup> Property owners defended themselves on their own using shotguns and small firearms.<sup>18</sup> By August 31, two days after the storm's landfall, the Mayor of New Orleans had ordered the city's police to abandon search and rescue efforts and return to their traditional duties of law enforcement.<sup>19</sup> Supply trucks were delayed entering the city because drivers refused to proceed without a police escort, and Baton Rouge abandoned its offer to send riot-trained officers to New Orleans after its chief administrative officer decided he did not want to place so many of his officers in harm's way.<sup>20</sup> More than 20,000 evacuees gathered at the New Orleans Convention Center, which had no food, water, medical care, or security personnel.<sup>21</sup> Thirteen of the sixteen hospitals in greater New Orleans were closed due to extensive storm damage and fear of looting.<sup>22</sup>

Communication among Louisiana officials broke down after the storm. Louisiana Governor Kathleen Blanco asked President George W. Bush for "everything you've got," which hampered the federal government's decision-making process in exactly how to act.<sup>23</sup> Blanco's aides stated that the Governor did not know that the federal government needed an itemized list for help.<sup>24</sup> However, Blanco rejected President Bush's request to turn over command and control of the National Guard troops to a single federal military commander.<sup>25</sup> The director of the Federal Emergency

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<sup>15</sup> *Id.*

<sup>16</sup> Dan Barry & Jere Longman, *A Police Department Racked by Doubt and Accusations*, N.Y. TIMES, Sept. 30, 2005, at A20.

<sup>17</sup> Felicity Barringer & Jere Longman, *Owners Take Up Arms as Looters Press Their Advantage*, N.Y. TIMES, Sept. 1, 2005, at A16.

<sup>18</sup> *Id.* One resident, John Carolan, reported that three or four men tried to take his electric generator by threatening him with a knife and a machete. He scared them away by firing warning shots over their head with a revolver. *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> James Dao et al., *New Orleans Is Awaiting Deliverance*, N.Y. TIMES, Sept. 2, 2005, at A15.

<sup>22</sup> Reed Abelson, *Can Hospitals Reopen? It's a Matter of Money*, N.Y. TIMES, Sept. 14, 2005, at C1.

<sup>23</sup> Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at A1 [hereinafter Lipton, *Breakdowns*].

<sup>24</sup> David E. Sanger, *Bush Wants to Consider Broadening of Military's Powers During Natural Disasters*, N.Y. TIMES, Sept. 27, 2005, at A18. Governor Blanco stated that she thought she had requested all federal assistance that could be given, including active-duty federal troops: "Nobody told me that I had to request that" . . . "I thought that I had requested everything they had. We were living in a war zone by then." Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1 [hereinafter Lipton, *Political Issues*].

<sup>25</sup> Michael Luo, *The Embattled Leader of a Storm-Battered State Immersed in Crisis*,

Management Agency (FEMA), Michael D. Brown, said that Governor Blanco's initial response to the disaster in Louisiana was uncoordinated and confused, preventing the agency from taking coherent action to bring the situation under control.<sup>26</sup>

The Bush administration's response to the chaos inflicted by Hurricane Katrina spurred an internal administration debate as to whether active-duty military forces could be used in relief or law enforcement roles.<sup>27</sup> The Bush administration hesitated to send active-duty military forces because they feared it would appear that the President was seizing executive authority from a female governor of another political party.<sup>28</sup> Blanco acknowledged that she was aware of the political considerations surrounding relinquishing state control to the federal government and felt pressured to do so by members of the Bush administration.<sup>29</sup> Further debate continued over whether the President even had authority to order active-duty troops into the regions affected by the hurricane if Governor Blanco resisted relinquishing control over the National Guard.<sup>30</sup> The Justice Department's Office of Legal Counsel concluded after a series

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N.Y. TIMES, Sept. 8, 2005, at A26. Governor Blanco's press secretary stated that Blanco refused the President's request because "[s]he would lose control when she had been in control from the very beginning." Elisabeth Bumiller & Clyde Haberman, *Bush Makes Return Visit: 2 Levees Secured*, N.Y. TIMES, Sept. 6, 2005, at A1.

<sup>26</sup> David D. Kirkpatrick & Scott Shane, *Ex-FEMA Chief Tells of Frustration and Chaos*, N.Y. TIMES, Sept. 15, 2005, at A1.

<sup>27</sup> Lipton, *Breakdowns*, *supra* note 23.

<sup>28</sup> Lipton, *Political Issues*, *supra* note 24. A Bush administration official 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 . . . ?" *Id.*

<sup>29</sup> Bruce Alpert, *Panel Grills La. Governor on Katrina*, TIMES-PICAYUNE (New Orleans), Feb. 3, 2006, at 1. New Orleans Mayor Ray Nagin claimed that during a meeting between President Bush and Governor Blanco four days after the hurricane struck, a discussion about federalizing the National Guard became so heated that Nagin suggested the pair "go into another room to settle their differences." Gerard Shields, *Bush Asks for \$18 Billion*, BATON ROUGE ADVOC., Feb. 3, 2006, at A1.

<sup>30</sup> Lipton, *Breakdowns*, *supra* note 23; Lipton, *Political Issues*, *supra* note 24; *see also* Gerard Shields, *Military Personnel Evaluate Confusion, Cooperation in Storm*, BATON ROUGE ADVOC., Feb. 10, 2006, at A1. Senator Joseph Lieberman highlighted the initial confusion surrounding whether the federal military should become involved in the aftermath of Hurricane Katrina:

Our committee has learned . . . of some disagreements about the degree to which the Defense Department should operate on U.S. soil. And these disagreements may have limited the military's response time and effectiveness in this case because of the initial hesitation to deploy active duty troops and to pre-position assets before Hurricane Katrina made landfall.

*Hurricane Katrina: Defense Department's Role in Response: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 109th Cong. (2006) (statement of Sen. Joseph I. Lieberman, Ranking Member, S. Comm. on Homeland Sec. & Governmental Affairs), available at [http://hsgac.senate.gov/\\_files/020906JILOpen.pdf](http://hsgac.senate.gov/_files/020906JILOpen.pdf) [hereinafter *Defense Department's Role*].

of meetings that the President had legal authority to take control of National Guard troops as well as deploy active-duty troops to the affected areas in the absence of requests by state officials.<sup>31</sup> However, the decision was a legal and political risk the administration was not willing to take, regardless of the conditions persisting in New Orleans.<sup>32</sup> Instead, the Bush administration chose to rely on mobilized National Guard troops from other states to fill the law enforcement vacuum in New Orleans, before the President finally ordered 7,200 active-duty forces into New Orleans five days after the city was flooded.<sup>33</sup>

In the wake of the massive logistical and communications problems experienced at all levels of government in the effort to respond to the effects of Hurricane Katrina, government officials have suggested that the military should play a greater role in handling such crises. On September 15, 2005, President George W. Bush stated that:

It was not a normal hurricane—and the normal disaster relief system was not equal to it. Many of the men and women of the Coast Guard, the Federal Emergency Management Agency, the United States military, the National Guard, Homeland Security, and state and local governments performed skillfully under the worst conditions. Yet the system, at every level of government, was not well-coordinated, and was overwhelmed in the first few days. It is now clear that a challenge on this scale requires greater federal authority and a broader role for the armed forces—the institution of our government most capable of massive logistical operations on a moment’s notice.<sup>34</sup>

President Bush reiterated this concept on September 27, 2005, urging Congress to evaluate extending executive authority in times of emergency so the full assets of the Department of Defense could be used to respond to catastrophic natural disasters.<sup>35</sup> President Bush said that such measures would be helpful “in certain extreme circumstances, to be able to rally assets for the good of the people. I don’t want to prejudge the Congress’s discussion on this issue, because it may require change of law.”<sup>36</sup>

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Lieberman further noted that “[t]he lack of a [military] plan led to unnecessary confusion, unnecessary bureaucratic struggles, and more human suffering than should have [occurred].” *Id.*

<sup>31</sup> Lipton, *Political Issues*, *supra* note 24.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> President George W. Bush, Address to the Nation (Sept. 15, 2005) [hereinafter Bush, Address to the Nation] (transcript available at <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html>).

<sup>35</sup> President George W. Bush, Remarks at the U.S. Dep’t of Energy (Sept. 26, 2005) [hereinafter Bush, Remarks] (transcript available at <http://www.whitehouse.gov/news/releases/2005/09/20050926.html>).

<sup>36</sup> *Id.*

Senator Joseph Lieberman echoed the President's sentiment, concluding that "[Hurricane] Katrina showed us that we need to define where that line [for military involvement in civilian affairs] is drawn."<sup>37</sup>

The Northern Command of the U.S. Department of Defense is developing a proposal for the creation of a specially-trained and equipped unit of the military's active forces to respond to catastrophic domestic events.<sup>38</sup> The proposed unit would be trained to assist state and local law enforcement with relief capabilities, working and training with National Guard units, and would be under the authority of the National Guard's governor.<sup>39</sup> Specific criteria would be outlined to determine when and how the active-duty forces would be used in natural disaster relief, but the active-duty forces would only have authority to assist in relief efforts, and not engage in law enforcement activity.<sup>40</sup> The head of the Northern Command, Admiral Timothy J. Keating, stated that creation of the unit to assist in relief and recovery operations on American soil was permissible, but any extension of the military's role in domestic law enforcement would require Congress to change existing federal laws that currently preclude the military from engaging in law enforcement activities.<sup>41</sup>

## II. HISTORY OF THE LIMITATION ON THE USE OF THE MILITARY IN DOMESTIC ARENAS

### A. *Posse Comitatus Act*

The *Posse Comitatus Act* of 1878<sup>42</sup> was enacted in an effort to reaffirm the deeply held American principle that civilian and military spheres should be kept distinctly separate.<sup>43</sup> The extensive use of federal troops serving in domestic law enforcement roles during the Reconstruction Era spurred Congress to place new limits on the

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<sup>37</sup> *Defense Department's Role*, *supra* note 30.

<sup>38</sup> Eric Schmitt & Thom Shanker, *Military May Propose an Active-Duty Force for Relief Efforts*, N.Y. TIMES, Oct. 11, 2005, at A15.

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

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

<sup>41</sup> *Id.*

<sup>42</sup> *Posse Comitatus Act* of 1878, ch. 263, 20 Stat. 145 (codified as 18 U.S.C. § 1385 (2000)).

<sup>43</sup> Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 953 (1997). The Constitution clearly places limits on the scope of federal military power. Article I, Section 8 gives Congress the power to create and fund an army and a navy, to regulate the armed forces, and to declare war. U.S. CONST. art. I, § 8, cls. 11–16. Article II, Section 2 designates the President as commander-in-chief of the armed forces, placing a civilian at the top of the military hierarchy. U.S. CONST. art. II, § 2, cl. 1. The Second Amendment provides for the creation of state militias to serve as a counterbalance to the federal military power and the Third Amendment prevents the stationing of soldiers in private homes. U.S. CONST. amends. II–III.



military's role in domestic affairs.<sup>44</sup> The ex-Confederate states were divided into military districts from the period of 1865 to 1877 as federal troops were charged with "registering the voters, supervising the election of delegates to constitutional conventions, supervising the conventions and supervising the ratification of the Fourteenth Amendment to the Constitution."<sup>45</sup> During the hotly contested presidential election of 1876 between Republican Rutherford B. Hayes and Democrat Samuel Tilden, President Ulysses S. Grant, a Republican, ordered federal troops into Florida, Louisiana, and South Carolina to protect the election canvassers and prevent widespread voting fraud.<sup>46</sup> The Republican Hayes won the election narrowly with the help of the electoral votes of Florida, Louisiana, and South Carolina; Democrats blamed the results on Grant's use of federal troops.<sup>47</sup> In response to Reconstruction in the South and the election of 1876, the Democrat-controlled House of Representatives passed a bill making it unlawful for federal troops to enforce the laws without express authorization from Congress.<sup>48</sup> President Hayes signed the bill on June 18, 1878.<sup>49</sup>

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

Congress permits the President to use federal troops at the request of state authorities.<sup>50</sup> Congress has also extended authority to the President to federalize the National Guard in instances where rebellion has made it impossible to enforce the laws of the

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<sup>44</sup> Sean J. O'Hara, Comment, *The Posse Comitatus Act Applied to the Prosecution of Civilians*, 53 U. KAN. L. REV. 767, 771–72 (2005).

<sup>45</sup> H. W. C. Furman, *Restrictions upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 94 (1960).

<sup>46</sup> *Id.* at 94–95.

<sup>47</sup> *Id.* at 95.

<sup>48</sup> *Id.* at 95–96; see also *United States v. Allred*, 867 F.2d 856, 870 (5th Cir. 1989) (stating the legislative impetus of the Posse Comitatus Act arose from the use of federal troops in elections within ex-Confederate states).

<sup>49</sup> Furman, *supra* note 45, at 96. The Posse Comitatus Act of 1878 stated:

From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress.

Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878) (codified as 18 U.S.C. § 1385 (2000)).

<sup>50</sup> 10 U.S.C. § 331 (2000) ("Whenever there is an insurrections [sic] 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.") The concept that the President has authority to intervene with force in situations where local and state law enforcement fails has origins dating to the drafting of the Constitution and the 1795 Militia Act. See *infra* notes 134–48 and accompanying text.

United States in any state or territory.<sup>51</sup> Further, the President is authorized to use the National Guard or the federal military to suppress an insurrection, domestic violence, or conspiracy.<sup>52</sup> While these three exceptions grant significant power to the President during times of emergency, they offer little in the way of specific circumstances in which the President may make use of this power.<sup>53</sup> The use of these statutes as a source of authority to take executive action has been limited to a few occurrences,<sup>54</sup> and only tangential treatment has been given to these statutes by the courts,<sup>55</sup> creating uncertainty as to exactly what statutory limits restrict the President in times of emergency.<sup>56</sup>

In 1981, Congress expanded the Posse Comitatus Act to increase the federal military's ability to share information,<sup>57</sup> equipment,<sup>58</sup> and assistance in training to local and

<sup>51</sup> 10 U.S.C. § 332 (2000) ("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>52</sup> 10 U.S.C. § 333 (2000) ("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>53</sup> Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 192 (2004).

<sup>54</sup> See *infra* Part III.

<sup>55</sup> See, e.g., *Bergman v. United States*, 565 F. Supp. 1353, 1401–03 (W.D. Mich. 1983) (holding the FBI's failure to disclose knowledge of conspiracy to attack Mississippi "Freedom Riders" foreclosed President Kennedy's ability to intervene under the provisions of 10 U.S.C. § 333); *Monarch Ins. Co. of Ohio v. District of Columbia*, 353 F. Supp. 1249, 1254–55 (D. D.C. 1973) (holding presidential discretion in exercising powers granted by the Constitution and implementing statutes to use troops and militia to suppress civil disorder is not subject to judicial review). These cases only noted that presidential authority exists to use the military against civilians; they did not attempt to define any limits to the authority. *Bergman*, 565 F. Supp. at 1401–03; *Monarch Ins.*, 353 F. Supp. at 1254–55.

<sup>56</sup> See 10 U.S.C. §§ 331–333 (2000). The statutory notes offer no further guidance on the implementation of the authority provided in these statutes.

<sup>57</sup> 10 U.S.C. § 371 (2000). The military is permitted to share information as "[t]he Secretary of Defense shall ensure, to the extent consistent with national security, that intelligence information held by the Department of Defense . . . or other civilian law enforcement matters is provided promptly to appropriate civilian law enforcement officials." *Id.*

<sup>58</sup> 10 U.S.C. § 372 (2000). Congress granted "[t]he Secretary of Defense . . . , in accordance with other applicable law, [the power to] make available any equipment . . . , base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes." *Id.*

state law enforcement agencies.<sup>59</sup> The impetus for the 1981 amendments was an armed confrontation between members of the American Indian Movement (AIM) and local, state, and federal law enforcement authorities during a seventy-one-day standoff beginning on February 27, 1973.<sup>60</sup> AIM protested the failure of the United States government to respect the federal government's treaty obligations with the Sioux Nation.<sup>61</sup> Specifically, AIM claimed the federal government abrogated Sioux sovereignty by failing to return the South Dakota Black Hills to Sioux control, which was mandated under the terms of the still-existing Fort Laramie Treaty of 1868.<sup>62</sup> During the standoff, members of the U.S. Army's Eighty-Second Airborne Division were on site to supply advice and counsel to the law enforcement authorities, supervising the transfer of armored personnel carriers, sniper rifles, ammunition, and flares, as well as providing aerial reconnaissance from military aircraft.<sup>63</sup> In trials for three separate defendants following the conclusion of the Wounded Knee standoff, the three defendants each argued that such military involvement was unlawful under the Posse Comitatus Act.<sup>64</sup>

The three Wounded Knee courts reached contradictory conclusions as to the scope of the Posse Comitatus Act.<sup>65</sup> In *United States v. Red Feather*,<sup>66</sup> the trial court found that "[t]he prevention of the use of military supplies and equipment was never mentioned in the debates, nor can it reasonably be read into the words of the Act. Only the *direct active use* of troops was forbidden, unless expressly authorized by the Constitution or by Act of Congress."<sup>67</sup> The *Red Feather* court defined "active use" in law enforcement as "arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner;

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<sup>59</sup> See 10 U.S.C. § 373 (2000).

<sup>60</sup> Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL'Y 99, 126–27 (2003). The outlaw group looted stores, took hostages, and established an armed perimeter around their area. *Id.* at 126.

<sup>61</sup> Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1644 (2000).

<sup>62</sup> *Id.*; see also Fort Laramie Treaty, U.S.-Sioux Nation, Apr. 29, 1868, 15 Stat. 635.

<sup>63</sup> Canestaro, *supra* note 60 at 127. In addition, government forces fired approximately 500,000 rounds of ammunition in an effort to end the seventy-one-day standoff. Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1097 (2002). It remains unclear, however, whether President Nixon specifically ordered the federal forces to be involved or whether the decision was made further down the chain of command. Charles Bloeser, *A Statute in Need of Teeth: Revisiting the Posse Comitatus Act After 9/11*, FED. LAW., May 2003, at 24, 28. On August 7, 1974, the day before Nixon resigned from office, he refused to comply with a subpoena for Oval Office tapes relating to the White House's activities during the Wounded Knee affair. *Id.* at 28 n.20.

<sup>64</sup> Canestaro, *supra* note 60, at 126.

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

<sup>66</sup> 392 F. Supp. 916 (D. S.D. 1975).

<sup>67</sup> *Id.* at 922 (emphasis added).

search of an area for a suspect and other like activities.”<sup>68</sup> The *Red Feather* court’s definition only highlights the confusion surrounding how far the federal military may go in participating in domestic law enforcement activities, particularly when taken in light of the other Wounded Knee trials.<sup>69</sup>

In *United States v. Jaramillo*,<sup>70</sup> the court held that although merely providing military materiel to law enforcement does not constitute a prima facie violation of the Posse Comitatus Act, the extent and pervasiveness of the military’s extensive support role were questionable.<sup>71</sup> The *Jaramillo* court found that the prosecution failed to prove that law enforcement authorities had acted in a lawful manner because the court could not find that the military personnel’s advice, counsel, equipment, and maintenance “did not contribute materially to the operation being carried out by the law enforcement officers.”<sup>72</sup>

In *United States v. McArthur*,<sup>73</sup> the Court held that the scope of the Posse Comitatus Act restricted military action only “which is regulatory, proscriptive or compulsory in nature, and causes the citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority.”<sup>74</sup> The court ruled, in light of the facts, that the military personnel maintained adequate separation between active participation and passive assistance.<sup>75</sup> “I find . . . that the government policy of loaning equipment between branches of the government extends to the loaning of expert advisors, as was done here. That is, to my mind, Colonel Warner was borrowed as a vehicle might be borrowed.”<sup>76</sup> Therefore, two of the three courts that examined the Posse Comitatus Act interpreted the restriction broadly, but all reached the conclusion that the Posse Comitatus Act restricts the use of active military troops without express congressional authorization.<sup>77</sup>

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<sup>68</sup> *Id.* at 925. The *Red Feather* court also highlighted what it considered to be “passive” law enforcement duties, such as, “advice or recommendations given to civilian law enforcement officers . . . on tactics or logistics; presence of military personnel to deliver military materiel, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment . . . ; aerial photographic reconnaissance flights and other like activities.” *Id.*

<sup>69</sup> See *infra* notes 70–77 and accompanying text.

<sup>70</sup> 380 F. Supp. 1375 (D. Neb. 1974).

<sup>71</sup> *Id.* at 1379.

<sup>72</sup> *Id.* at 1380–81.

<sup>73</sup> 419 F. Supp. 186 (D. N.D. 1975).

<sup>74</sup> *Id.* at 194.

<sup>75</sup> *Id.* at 194–95.

<sup>76</sup> *Id.* at 195.

<sup>77</sup> *Id.* at 194; *United States v. Red Feather*, 392 F. Supp. 916, 922 (D. S.D. 1975); *Jaramillo*, 380 F. Supp. at 1379.

### III. HISTORICAL APPLICATIONS OF THE EXCEPTIONS TO THE POSSE COMITATUS ACT

Presidents have been left to maneuver through the gray areas of the Act's limitations when circumstances demand immediate and decisive executive action. In an official opinion from July 1856, Attorney General Caleb Cushing proposed the question of domestic military intervention when the Governor of California requested presidential intervention to suppress an uprising:

Can the President call forth the militia of one State for the purpose of suppressing insurrection in another, or employ the land and naval forces of the United States for the same purpose, when he has sufficient knowledge of the fact of insurrection, but no request for his interposition has been made in due conformity with the conditions of the statute?<sup>78</sup>

Cushing argued that only in the gravest circumstances, when all other alternatives have failed, should the President be able to use federal military force in times of domestic emergency.<sup>79</sup>

[T]his high power of the President to cases of *doubtful* legal condition ought to be reserved for circumstances of the most exigent emergency . . . in which all the constitutional powers of the State shall have been exerted in vain to prevent or suppress domestic war, and in which also imminent or extreme public disaster can be averted only by such interposition of the Federal Government.<sup>80</sup>

Cushing believed that the request by the Governor of California for federal military assistance did not satisfy the requirements for enlisting presidential authority, because the Governor could only make such a request if the state legislature was unable to convene.<sup>81</sup> According to Cushing, the request for military action was "made by the Governor of the State, not by its legislature, and made by him without any allegation that the legislature could not be convened."<sup>82</sup> Clearly, as early as 1856, there was a general reluctance to expand presidential authority to dispatch federal troops for law enforcement purposes beyond the prescriptions of the then-existing statutes.

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<sup>78</sup> Insurrection in a State, 8 Op. Att'y Gen. 8, 14 (1856).

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

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 13.

<sup>82</sup> *Id.*

A century later, Attorney General Herbert Brownell issued an opinion regarding President Dwight D. Eisenhower's use of federal troops and the federalization of the Arkansas National Guard in the face of local resistance to school desegregation in Little Rock, Arkansas.<sup>83</sup> Brownell stated that "[i]n addition to the constitutional power in the President in such matters, a series of statutes of broad sweep enable the President to deal effectively with civil disturbances within a State when compelling circumstances are present."<sup>84</sup> Brownell believed compelling circumstances existed in Little Rock, because local law enforcement authorities were demonstrably unable to cope with the white protesters, combined with "the indifference or refusal of the Governor of the State to supply a sufficient force to quell the lawless movement."<sup>85</sup> Brownell did not believe that the Posse Comitatus Act served as a bar to presidential action, stating that "at the time the Posse Comitatus Act was enacted, the predecessors to 10 U.S.C. 332, 333 were in force and the Congress did not intend or interpret the act as impairing whatever powers the President had under those statutes."<sup>86</sup> Brownell concluded his affirmation of Eisenhower's action by stating:

When an unruly mob arrogates to itself the power to nullify a constitutionally-secured right, a statutory prescription, and a court order, it may reasonably be assumed that the danger of a fast-moving, destructive volcanic force is immediately present. Success of the unlawful assemblage in Little Rock inevitably would have led to mob rule, and a probable breakdown of law and order in an ever-increasing area. When a local and State Government is unable or unwilling to meet such a threat, the Federal Government is not impotent.<sup>87</sup>

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<sup>83</sup> Christopher S. Yo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 625–26 (2005). Eisenhower ordered 1,000 paratroopers from the 101st Airborne Division into Little Rock because "[h]e wanted [General Maxwell D.] Taylor to move quickly in order to demonstrate how rapidly the Army could respond. Within a few hours, Taylor had five hundred paratroopers of the 101st Airborne Division in Little Rock; another five hundred were there by nightfall." 2 STEPHEN E. AMBROSE, *EISENHOWER: THE PRESIDENT* 419–20 (1984).

<sup>84</sup> President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas, 41 Op. Att'y Gen. 313, 327 (1957). Brownell specifically referred to 10 U.S.C. §§ 331–333. *Id.*

<sup>85</sup> *Id.* at 328. In his opinion, Brownell highlighted the fact that Eisenhower complied with the requirements of 10 U.S.C. § 334, *id.* at 327, which requires the President to "immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time" before using federal troops. 10 U.S.C. § 334 (2000). In satisfaction of § 334, President Eisenhower issued a proclamation on September 24, 1957, ordering those involved with trying to prevent the execution of federal court orders to immediately cease and desist their activities. Proclamation No. 3204, 22 Fed. Reg. 7,628 (Sept. 25, 1957).

<sup>86</sup> 41 Op. Att'y Gen. at 330.

<sup>87</sup> *Id.* at 332.

In the face of widespread urban rioting across American cities during the summer of 1967, Attorney General Ramsey Clark sent a letter to all fifty state governors detailing the conditions under which President Lyndon B. Johnson would be willing to use federal troops to assist local law enforcement authorities.<sup>88</sup> Clark stated that there were three prerequisites to the use of federal troops to combat domestic violence.<sup>89</sup> First, there must be evidence of serious domestic violence;<sup>90</sup> second, such violence cannot be brought under control by all means of law enforcement available to the state;<sup>91</sup> and third, the legislature or the governor of the state must make a request in writing to the President to employ federal armed forces.<sup>92</sup> The requirement of a written request supported the President's required issuance of a proclamation under 10 U.S.C. § 334, but in cases of "extreme emergency," a written request would not be required.<sup>93</sup> Clark stated that even if each of the three prerequisites was satisfied, the President still retained discretion to "exercise his own judgment as to whether Federal troops will be sent, and as to such questions as timing, size of the force, and federalization of the National Guard."<sup>94</sup>

#### *A. Presidential Power in Federalizing the National Guard*

The National Guard of the individual states remains under state executive control when not federalized by Congress or the President.<sup>95</sup> The Posse Comitatus Act does not

<sup>88</sup> Letter from Ramsey Clark, Attorney Gen., to State Governors (Aug. 7, 1967), *quoted in Laird v. Tatum*, 408 U.S. 1, 3 n.2 (1972).

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

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

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* In his letter, Clark said that there was no specific definition of what consisted actionable domestic violence, only that the assessment would have to be made under the particular circumstances of the events. *Id.*

<sup>93</sup> *Id.* Clark did not define what would constitute an "extreme emergency." *Id.*

<sup>94</sup> *Id.* Clark stated in his letter that:

Preliminary steps, such as alerting the troops, can be taken by the Federal government upon oral communications and prior to the governor's determination that the violence cannot be brought under control without the aid of Federal forces. Even such preliminary steps, however, represent a most serious departure from our traditions of local responsibility for law enforcement. They should not be requested until there is a substantial likelihood that the Federal forces will be needed.

*Id.* However, in *Alabama v. United States*, 373 U.S. 545 (1963), the Supreme Court held mere preparatory action taken by the President, such as moving federal troops into areas where they might be needed, was not a violation of 10 U.S.C. § 333. *Id.* In 1963, President Kennedy stationed federal troops at bases in Alabama during the Birmingham civil rights demonstrations, but they were never used. Note, *Riot Control and the Use of Federal Troops*, 81 HARV. L. REV. 638, 650 (1968) [hereinafter *Riot Control*].

<sup>95</sup> William C. Banks, *The Normalization of Homeland Security After September 11: The Role of the Military in Counterterrorism Preparedness and Response*, 64 LA. L. REV. 735, 762 (2004).

reach the National Guard when control rests in the hands of state governors.<sup>96</sup> In 1916, Congress gave the National Guard dual status,<sup>97</sup> requiring all guardsmen to take oaths to support the United States and the President as well as the state and its governor.<sup>98</sup> An amendment to the Dick Act further authorized the President to draft the National Guard into federal service for deployment abroad.<sup>99</sup> The *Perpich* Court held that the National Guard could be called into active duty over the objections of the state's governor even if there was no pressing national emergency.<sup>100</sup> During the period for which the guardsmen serve in active federal duty, they lose their status as members of the state militia, and are no longer under the command of the governor.<sup>101</sup> The *Perpich* Court explicitly stated that once the National Guard is elevated into federal service, they become part of the regular federal military forces, subject to command of the President.<sup>102</sup>

#### IV. OVERCOMING THE BARRIERS TO EXPANDING PRESIDENTIAL AUTHORITY IN THE USE OF FEDERAL TROOPS DOMESTICALLY

There are several arguments presented by commentators on the caveats of reducing the scope of the Posse Comitatus Act. This Note deals with each issue separately to focus on the individual arguments and presents alternative conclusions as to how and why the concept of posse comitatus can be reshaped to deal with the challenges witnessed during a catastrophic disaster such as Hurricane Katrina.

##### *A. The Need for Centralized Decision-Making by a Single Individual Is Critical in Emergency Situations*

The American political structure is predicated on a series of checks and balances to prevent placing too much authority in the hands of one person.<sup>103</sup> In this context,

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<sup>96</sup> See, e.g., *United States v. Benish*, 5 F.3d 20, 25–26 (3d Cir. 1993) (holding Posse Comitatus Act inapplicable because Pennsylvania National Guard unit was not in federal service at the time in question); see also H.R. REP. NO. 100–989, at 455 (1988) (Conf. Rep.), as reprinted in 1988 U.S.C.C.A.N. 2503, 2583 (“When not in federal service, the National Guard is not subject to the Posse Comitatus Act.”).

<sup>97</sup> National Defense Act of 1916, ch. 134, § 1, 39 Stat. 166, 166 (1916).

<sup>98</sup> *Perpich v. Dep’t of Def.*, 496 U.S. 334, 343 (1990). The Court held that Congress had the authority to activate Minnesota’s National Guardsmen and send them outside the country for training, despite the objections of the state’s governor. *Id.* at 339–40.

<sup>99</sup> *Id.* at 342–43.

<sup>100</sup> *Id.* at 339–40.

<sup>101</sup> *Id.* at 347.

<sup>102</sup> *Id.* at 343–44.

<sup>103</sup> *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991) (“The abuses by the monarch recounted in the Declaration of Independence provide dramatic evidence of the threat to liberty posed by a too powerful executive.”).



although “[t]he military is likewise subject to civilian control . . . its accountability is centralized through a command authority running to the President. The centralized national command authority is not as suited as local officials are to monitor law enforcement practices . . . .”<sup>104</sup> However, the need for quick action in times of emergency dictates that the executive, as a unitary decision-maker, have broad discretion in deciding when and how to take appropriate action.<sup>105</sup> Alexander Hamilton stated that “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”<sup>106</sup>

As interpretations of the Posse Comitatus Act currently stand, the President’s ability to make rapid decisions is hampered because the complex statutory web of “this approach include[s] a convoluted command and control structure, decreased response time, and continuity-of-operations problems; it also leaves the federal response vulnerable to exploitation by the adversary.”<sup>107</sup> Only decisions at the top of the chain of command, by a single informed individual, can be reached with appropriate timeliness and legitimacy.<sup>108</sup>

The concept of a centralized chain of command with the President as commander-in-chief is the very structure utilized by the military in its traditional role as the

<sup>104</sup> Banks, *supra* note 95, at 770.

<sup>105</sup> Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting).

<sup>106</sup> THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>107</sup> Sean M. Maloney, *Domestic Operations: The Canadian Approach*, PARAMETERS, Autumn 1997, at 135, 150. Canada’s political-military structure in domestic situations is compared to that of the United States. *Id.* at 135. Maloney argues that the greater flexibility in the Canadian system is more effective because:

[L]egislation does not prescribe the exact civil-military relationship at the operational and tactical levels as it does at the national and provincial leadership levels, nor does it hamper commanders by dictating the levels of response which may be required in violent situations. The military is not overburdened with legalities. The government accepts a high reliance on military professionalism and training, and on an organization which has a higher loyalty than to elected officials. . . . [I]n all cases they have understood that there are limits to the civil authorities’ capability in terms of coordination, communications, mobility, organization, discipline, and force and have allowed the military to take over when the situation required it.

*Id.* at 148–49. The Canadian structure allows the government to deploy military forces “anywhere in or beyond Canada in the case of an emergency” without parliamentary approval. Kevin D. Hartzell, Note, *Voluntary Warriors: Reserve Force Mobilization in the United States and Canada*, 29 CORNELL INT’L L.J. 537, 563 (1996). An emergency is simply defined as “insurrection, riot, invasion, armed conflict or war, whether real or apprehended.” National Defence Act, R.S.C., ch. N–5, § 2 (2006).

<sup>108</sup> John R. Martin, Note, *Morrison v. Olson and Executive Power*, 4 TEX. REV. L. & POL. 511, 523–24 (2000).

instrument of defense for the nation.<sup>109</sup> This structure allows one person to make and direct decisions regarding the deployment and use of American military forces worldwide.<sup>110</sup> The benefit of this structure lies in the fact that the President as the sole decision-maker can take swift, decisive action in times of war or crisis without interference.<sup>111</sup>

Military affairs frequently demand unique treatment; secrecy, centralized decision-making, speed, and consistency are of unusual importance in this area. These requirements are, in large part, incompatible with the open, decentralized, frequently slow-moving give-and-take of a representative legislature. In contrast, the executive branch possesses most, if not all, of the qualities necessary for efficient and successful military decision-making.<sup>112</sup>

However, as witnessed during the Katrina disaster,<sup>113</sup> presidents do not enjoy the same discretion domestically when the military is involved.<sup>114</sup> The President and Governor Blanco bickered over who should assume authority over the National Guard,<sup>115</sup> and political and legal considerations prevented the President from making immediate moves to deploy active-duty military forces to secure New Orleans.<sup>116</sup> The lack of communication among members of the local, state, and federal governments,<sup>117</sup> combined with the near collapse of the New Orleans Police Department<sup>118</sup> and an overwhelmed and under-equipped National Guard,<sup>119</sup> left no decision-makers

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<sup>109</sup> Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 29–30.

<sup>110</sup> See *Parker v. Levy*, 417 U.S. 733, 751 (1974) (“The military establishment is subject to the control of the civilian Commander in Chief . . . and its function is to carry out the policies made by those civilian superiors.”).

<sup>111</sup> Eugene V. Rostow, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 195–96 (1988). Rostow highlighted his point regarding the value of centralized command by using nuclear weapons as an example. *Id.* Despite the enormous destructive power of nuclear weapons, the President is invested with sole control over their use. *Id.* Giving multiple decision-makers control, such as sharing control between Congress and the President, would necessarily blunt the nation’s ability to utilize the weapons should the need arise. *Id.* at 196.

<sup>112</sup> Comment, *Resolving Treaty Termination Disputes*, 129 U. PA. L. REV. 1189, 1210 (1981).

<sup>113</sup> HOMELAND SEC. COUNCIL, EXECUTIVE OFFICE OF THE PRESIDENT, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 54 (2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf> [hereinafter FEDERAL RESPONSE] (“[A]ctive duty military and National Guard operations were not coordinated and served two different bosses, one the President and the other the Governor.”).

<sup>114</sup> See, e.g., 10 U.S.C. §§ 331–333 (2000).

<sup>115</sup> See *supra* notes 23–26 and accompanying text.

<sup>116</sup> See *supra* notes 27–33 and accompanying text.

<sup>117</sup> See *supra* notes 23–24 and accompanying text.

<sup>118</sup> See *supra* note 16 and accompanying text.

<sup>119</sup> See *supra* notes 13–14 and accompanying text.

with the capacity or resources to bring the situation under control. Had the lines of authority been more clear, and the President confident he was on solid political and legal ground to dispatch federal troops<sup>120</sup> as soon as the need proved evident, there is no knowing how many lives might have been saved. Hurricane Katrina clearly proved that presidential reliance on state approval and consent for federal military support can cause devastating problems for those most affected by a disaster.<sup>121</sup>

A solution to this problem is for Congress to remove the provision in 10 U.S.C. § 331 that requires a state legislature or its governor to request that the President federalize the National Guard or deploy active-duty troops in an emergency.<sup>122</sup> This step would remove the indecision that results when a crisis is of such magnitude that it is impossible for state and local officials to make, or even communicate, informed decisions. Removal of this provision would also eliminate some of the political barriers that frustrated the federal government's response during Hurricane Katrina as a result of 10 U.S.C. § 331,<sup>123</sup> when state officials struggled to keep their status as primary decision-makers despite their inability to provide effective leadership.<sup>124</sup> The President, as commander-in-chief and centralized decision-maker, is best suited to direct coordinated action in times of extreme emergency within the domestic arena, in exactly the same role that the President assumes in foreign crises.<sup>125</sup> Modifying 10 U.S.C. § 331 would significantly streamline a process that demands centralized authority as fast as possible after cataclysmic events like Hurricane Katrina.

*B. "Traditional Notions" of Domestic Military Action Are Not Supported by History*

One argument for continuing to restrict military activity in domestic arenas is the long-standing American practice to avoid using the military in law enforcement roles.<sup>126</sup> One of the basic premises of the posse comitatus concept is to delineate the historic separation of the civilian and military spheres: "The historic democratic purpose of relying on the people is clear: to promote popular participation in law enforcement

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<sup>120</sup> See *supra* notes 27–33 and accompanying text.

<sup>121</sup> FEDERAL RESPONSE, *supra* note 113, at 54, ("[L]imitations under Federal law and [Department of Defense] policy caused the active duty military to be dependent on requests for assistance. These limitations resulted in a slowed application of . . . resources during the initial response.").

<sup>122</sup> 10 U.S.C. § 331 (2000) ("[T]he President may [deploy troops], upon the request of its legislature or of its governor if the legislature cannot be convened . . .").

<sup>123</sup> See *supra* notes 27–33 and accompanying text.

<sup>124</sup> Obviously, politics will remain a part of any president's decision to deploy active-duty troops into a crisis situation. This can never be completely avoided, but power struggles based on political affiliation could be substantially reduced with a clearer delineation of presidential authority within 10 U.S.C. § 331.

<sup>125</sup> See *supra* notes 105–12 and accompanying text.

<sup>126</sup> David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 266 (1996).

and to prevent authoritarian rule by use of the military to enforce the law."<sup>127</sup> The court in *Wrynn v. United States*<sup>128</sup> underscored this sentiment, when it stated:

The [Posse Comitatus Act] is not an anachronistic relic of an historical period the experience of which is irrelevant to the present. It is not improper to regard it, as it is said to have been regarded in 1878 by the Democrats who sponsored it, as expressing "the inherited antipathy of the American to the use of troops for civil purposes."<sup>129</sup>

There is no constitutional barrier, however to the use of the military in law enforcement.<sup>130</sup> Congress possesses the power to deploy military forces in the domestic arena at any time, and therefore has the authority to free the executive from the current restrictions of the Posse Comitatus Act.<sup>131</sup> But there remains some conflict whether Congress usurped presidential constitutional authority by the passage of the Posse Comitatus Act.<sup>132</sup> In his 1957 opinion to President Eisenhower, Attorney General Herbert Brownell, concluding Eisenhower acted within the confines of the restrictions placed upon the President by the Posse Comitatus Act, suggested that there were "grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate."<sup>133</sup>

Although the Founding Fathers were conscious of the importance of civilian oversight over military affairs when they drafted the Constitution,<sup>134</sup> this sentiment did not prevent federal forces from being used in domestic law enforcement soon after the Constitution's enactment.<sup>135</sup> The Founding Fathers recognized that the fragility of the new union might require military intervention to hold the young nation

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

<sup>128</sup> 200 F. Supp. 457 (E.D.N.Y. 1961).

<sup>129</sup> *Id.* at 465 (quoting Edwin Erle Sparks, *National Development, 1877-1885*, in 23 THE AMERICAN NATION, A HISTORY (1907)).

<sup>130</sup> Kopel & Olson, *supra* note 126, at 265.

<sup>131</sup> O'Hara, *supra* note 44, at 775; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952). The Court in *Youngstown* affirmed the notion that Congress possesses the exclusive ability to make laws, and the President the authority to execute them. *Id.* at 587-88. The President may not act unilaterally to set policy and then also prescribe the manner in which to execute them. *Id.* at 588.

<sup>132</sup> 41 Op. Att'y Gen. at 331.

<sup>133</sup> *Id.* Brownell was careful to qualify this statement by informing Eisenhower that the President's actions did in fact comply with the statutory restrictions. *Id.*

<sup>134</sup> O'Hara, *supra* note 44, at 769-70.

<sup>135</sup> Richard H. Kohn, *Using the Military at Home: Yesterday, Today, and Tomorrow*, 4 CHI. J. INT'L L. 165, 168-69 (2003).

together under certain circumstances.<sup>136</sup> When local communities and states were unable to keep order, James Madison told the Virginia Ratifying Convention, federal forces would be used to prevent “society from being destroyed.”<sup>137</sup>

From the very beginning of the American constitutional era, the military engaged in domestic law enforcement activities before the passage of the Posse Comitatus Act in 1878.<sup>138</sup> As early as 1793, President George Washington federalized state militia troops to enforce his Neutrality Proclamation, designed to prevent privateers from pirating British ships.<sup>139</sup> Shortly after, in July 1794, fierce opposition to federal liquor taxes sparked the Whiskey Rebellion, which overwhelmed local authorities in Pennsylvania.<sup>140</sup> Protesters attacked and burned the home of tax inspector John Neville.<sup>141</sup> In response, President Washington ordered the federalization of militia troops from four states despite the reluctance of Thomas Mifflin, the Governor of Pennsylvania.<sup>142</sup> Washington called forth 15,000 men from Pennsylvania, New Jersey, Maryland, and Virginia, and along with Alexander Hamilton, joined the new federalized militia to provide much-needed leadership.<sup>143</sup> Once the state militias had been federalized, “the state militias ceased to be under the jurisdiction of the governors. Organized as state units they were nonetheless the President’s men exclusively.”<sup>144</sup> Despite some commentators’ strong objections to the President’s use of federal power in putting down the insurrection rather than allowing the courts to handle the crisis,<sup>145</sup> in 1795 Congress reauthorized the President’s authority to federalize state militias in case of insurrection.<sup>146</sup> This action was significant because it allowed the President

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<sup>136</sup> *Id.* at 168. There was general agreement that the military could be used when the rule of law failed to compel obedience, but only as a last resort. *Id.* However, the drafters disagreed as to the extent that power should be exercised. *Id.* This led to granting Congress the power to “suppress Insurrections,” leaving that determination to Congress, and by extension, the President. U.S. CONST. art. I, § 8, cl. 15.

<sup>137</sup> Kohn, *supra* note 135, at 168.

<sup>138</sup> O’Hara, *supra* note 44, at 770–71.

<sup>139</sup> *Id.* at 770.

<sup>140</sup> Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 109–10 (2005).

<sup>141</sup> *Id.* at 110.

<sup>142</sup> *Id.* at 110–11. Although a federal response to a domestic insurrection technically required the state legislature or governor to make a formal request for assistance, it is unclear whether Pennsylvania ever took such action. *Id.* at 110. Mifflin, despite his misgivings regarding the President’s position, nevertheless agreed to support it. *Id.*

<sup>143</sup> Haydn J. Richards, Jr., *Redefining the Second Amendment: The Antebellum Right to Keep and Bear Arms and Its Present Legacy*, 91 KY. L.J. 311, 336 (2003).

<sup>144</sup> Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1485 (1997) (quoting GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 142–43 (1993)).

<sup>145</sup> Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 26 (2002).

<sup>146</sup> Vladeck, *supra* note 53, at 163. In fact, the 1795 Militia Act removed some barriers to the presidential emergency powers. *Id.* Unlike the 1792 Militia Act, the 1795 Militia Act removed the need for a federal court order before the President could take action, and allowed

to act "decisively, expeditiously, and, of most significance, unilaterally" in times of emergency.<sup>147</sup> The 1795 Militia Act established Congress as having the ultimate authority in determining the scope of executive power.<sup>148</sup> However, Washington's action in suppressing the Whiskey Rebellion and Congress's subsequent affirmation of such action confirmed the need for broad presidential emergency powers and set a precedent for future incursions by federal forces into domestic affairs.

The Whiskey Rebellion would not be the last time prior to the Civil War that the federal military was called on to enforce the laws. The Fugitive Slave Act of 1850 empowered federal marshals to employ a posse comitatus to return a fugitive slave to his owner.<sup>149</sup> In 1854, Attorney General Caleb Cushing issued an opinion stating active federal military forces could act as a posse comitatus to enforce the provisions of the Act:

These considerations apply as well to the military as to the civil force employed; for the *posse comitatus* comprises every person in the district or county above the age of fifteen years, whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the *posse comitatus*.<sup>150</sup>

The Fillmore and Pierce administrations in the 1850s did not hesitate to use the military to enforce the Fugitive Slave Act.<sup>151</sup> These actions sparked violence in the Northern anti-slavery states, which resented the use of force against vigilantes harboring fugitive slaves.<sup>152</sup> Maryland Senator Reverdy Johnson spoke of the ramifications of the Fugitive Slave Act of 1850:

The law in one or two instances was enforced in one sense, but how [was it] enforced? Enforced by power, by military or civil

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the President to call forth out-of-state militiamen more easily. *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Act of Sept. 18, 1850, ch. 60, § 5, 9 Stat. 462, 462–63 (repealed 1864).

<sup>150</sup> Extradition of Fugitives from Service, 6 Op. Att'y. Gen. 466, 473 (1854) (citations omitted).

<sup>151</sup> Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 262–63 (2005). One example was a contingent consisting of a company of the United States Army, a company of Marines, Massachusetts state militiamen, and Boston police to seize and return a fugitive slave, Anthony Burns, from Boston to South Carolina. *Id.* at 234 n.243.

<sup>152</sup> David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1439 n.301.

power, threatening upon each occasion when resort was had to it to involve the particular community where the attempt was made in civil strife and bloodshed.<sup>153</sup>

Yet, despite the hostility of the Northern states to the incursion of military forces in the execution of local and state laws, Congress refused to prohibit the military from domestic intervention.<sup>154</sup>

The structure of the Civil Rights Act of 1866, passed in the aftermath of the Civil War, used the Fugitive Slave Act of 1850 as a model for military intervention.<sup>155</sup> The Civil Rights Act explicitly made provisions for federal military involvement to enforce it:

[I]t shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.<sup>156</sup>

Senator Thomas Hendricks of Indiana warned that it was unnecessary for the military to be used to execute the laws, reminding his colleagues of the rifts caused by the Fugitive Slave Act of 1850 and the subsequent Civil War:

If men are guilty of crimes, let them be brought before the courts. . . . Are there any Senators here that want this to be a country governed by military power? Now, in a time of peace, when the southern armies are abandoned, when the States are rapping at your door for admission, when they wish to be heard when we legislate in regard to them; at this time of profound peace in the country, when there is a more perfect subjugation to law, . . . we propose that a law for the benefit of the colored people shall be executed at the point of the bayonet.<sup>157</sup>

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<sup>153</sup> CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866).

<sup>154</sup> Steven Lubet, *Slavery on Trial: The Case of the Oberlin Rescue*, 54 ALA. L. REV. 785, 786 n.5 (2003). The Fugitive Slave Act passed without an absolute majority in either chamber of Congress because many Northern congressmen abstained from the vote in protest. *Id.* President Fillmore signed the bill, believing slavery was constitutionally entitled to protection, despite his personal misgivings about it. *Id.*

<sup>155</sup> Robert D. Goldstein, Blyew: *Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 480 n.41 (1989).

<sup>156</sup> Act of Apr. 9, 1866, ch. 31, § 9, 14 Stat. 27, 29 (1866).

<sup>157</sup> CONG. GLOBE, 39th Cong., 1st Sess. 602 (1866).

If Congress was concerned about the traditional notion of separating the federal military from domestic activities, it was not evidenced by this legislation. Indeed, the Civil Rights Act of 1866 merely seems to have extended nearly eighty years of law enforcement intervention by the military.<sup>158</sup>

The Military Reconstruction Act of 1867 was the final piece of congressional action explicitly allowing the military the right to intervene in domestic affairs prior to the passage of the Posse Comitatus Act of 1878.<sup>159</sup> The Military Reconstruction Act was designed to bring the ex-Confederate states back into the Union by stripping them of their remaining vestiges of slavery and disenfranchisement of blacks.<sup>160</sup> The South was placed under martial law<sup>161</sup> and divided into five military districts, each governed by a federal military commander.<sup>162</sup> The Military Reconstruction Act of 1867 also provided for the establishment of military commissions or tribunals to replace local courts at the military commander's discretion.<sup>163</sup> Under Reconstruction, military rule would exist in the Southern states until they satisfied a list of conditions for their representatives to be reelected in Congress: (1) ratify the Fourteenth Amendment, (2) hold a state constitutional convention, (3) adopt a new state constitution in line with federal constitutional principles, and (4) have the new state constitution approved by Congress.<sup>164</sup> Among the pre-Posse Comitatus Act events discussed above, the Military Reconstruction Act is clearly the most expansive in scope with its explicit congressional mandate of military involvement in domestic affairs.

In their conclusions on the state of posse comitatus, some observers rely on the assumption that preventing military involvement in domestic affairs is a deeply

<sup>158</sup> See *supra* notes 134–49 and accompanying text.

<sup>159</sup> Alfreda A. Sellers Diamond, *Serving the Educational Interests of African-American Students at Brown Plus Fifty: The Historically Black College or University and Affirmative Action Programs*, 78 TUL. L. REV. 1877, 1899 n.103 (2004).

<sup>160</sup> Gabriel J. Chin, *The "Voting Rights Act of 1867": The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1590 (2004).

<sup>161</sup> Diamond, *supra* note 159, at 1899 n.103; see also *Ex parte Milligan*, 71 U.S. 2 (1866) (holding martial law constitutional when it "is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights").

<sup>162</sup> W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations*, 48 HOW. L.J. 1, 42 (2004) ("The [military] commander was to register the voters, exclude prominent Confederate leaders, and include all other male citizens 'of whatever race, color, or previous condition of servitude.'" (quoting *Reconstruction*, in 2 THE VOLUME LIBRARY 1728 (1995) (alteration in original))). The military commander also held the power to override state legislation. William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 590 (2004).

<sup>163</sup> Military Reconstruction Act, ch. 153, § 3, 14 Stat. 428 (1867) ("[W]hen in [the district military commander's] judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose.").

<sup>164</sup> Chin, *supra* note 160, at 1590.



rooted tradition within the American legal system.<sup>165</sup> However, for almost an entire century leading up to the passage of the Posse Comitatus Act, the military was intermittently used in domestic law enforcement capacities.<sup>166</sup> The passage of the Posse Comitatus Act in 1878 did not represent a return to a fundamental American tradition; instead, it came as a result of the political environment of that era.<sup>167</sup> Indeed, the passage of the Posse Comitatus Act possessed racist overtones, as congressional Democrats sought to prevent the military from further enforcing the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>168</sup> Nearly every American today likely assumes a rigid division between domestic law enforcement and military operations, but that is simply the choice of Congress, not a constitutional restriction.<sup>169</sup> Consequently, the presumption made by commentators that posse comitatus should be more strictly enforced, and even strengthened, is predicated on a misreading of the historical military-civilian relationship.

### *C. Federal Military Forces Can Receive Adequate Training for Effective Execution of Domestic Law Enforcement*

Questions arise whether federal active-duty troops—trained, prepared, and conditioned to fight foreign or invading enemies – can be safely placed in the domestic arena to serve in an entirely different capacity.<sup>170</sup> In an argument in support of the Posse Comitatus Act, one commentator argues:

Modern combat is very fast-paced: decisions are made quickly in the heat and stress of a life-and-death struggle. Soldiers are highly trained to use force in the furtherance of the mission. They are trained to respond with force when facing an adversary because

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<sup>165</sup> See, e.g., Canestaro, *supra* note 60, at 142–43.

<sup>166</sup> See generally Part IV.

<sup>167</sup> Furman, *supra* note 45, at 94–96.

<sup>168</sup> Rogers, *supra* note 162, at 47. The use of the posse comitatus law to dismantle the newly secured black enfranchisement was enormously successful—without the security guarantees ensured by the presence of federal troops,

“[f]orce and threat of force had put the whites in power. Within 10 or 15 years after 1867 the premature enfranchisement of the Negro was largely undone, and undone by veritable revolution.” Fraud in addition to force was used, including “[g]errymandering, trickery in election administration, [and] fraud in casting and counting ballots.”

Chin, *supra* note 160, at 1591–92 (quoting V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 536, 540 (1995)); see also Geoffrey Klingsporn, *The Secret Posse*, LEGAL AFFAIRS, March/April 2005, at 23 (“[T]he law was enacted for the racist purpose of preventing federal soldiers from helping black Americans by enforcing voting laws in the post-Civil War South.”).

<sup>169</sup> See, e.g., Vladeck, *supra* note 53, at 163.

<sup>170</sup> Michael T. Cunningham, *The Military's Involvement in Law Enforcement: The Threat is Not What You Think*, 26 SEATTLE U. L. REV. 699, 715–16 (2003).

the adversary is likely to do the same. Being under fire changes the landscape and changes the stakes. . . . Military personnel have different approaches to tactical situations than what is required in a law enforcement situation. The appropriate reaction in an adversarial law enforcement situation is not necessarily the use of deadly force; a more deliberative approach may be more appropriate. Conversely, military personnel involved in a combat situation need to quickly decide when deadly force should be used. Moving military personnel between these two situations may cause the soldier to misread or misunderstand a situation and use the wrong kind of force.<sup>171</sup>

In addition, this position argues that the posse comitatus law should be strengthened because “[s]oldiers are taught to violently and effectively destroy the enemy and their training does not include sensitivity to constitutional limitations on search, seizure, and the use of reasonable force.”<sup>172</sup>

It cannot be disputed that it would be dangerous to send armed troops into a hostile environment for which they have not been trained, but these problems can be overcome. President Bush’s call to broaden federal authority in times of crisis,<sup>173</sup> through Admiral Timothy Keating, head of the United States Northern Command,<sup>174</sup> does not envision calling on untrained federal troops.<sup>175</sup> Rather, it would prepare specially-trained and equipped soldiers capable of performing a wide range of tasks in the event of a catastrophic domestic emergency.<sup>176</sup> Under one concept, these so-called “special response forces” could receive beneficial training with National Guard units for domestic emergency situations, because the National Guard trains and prepares for assuming law enforcement functions.<sup>177</sup> This training would also prepare active forces to coordinate equipment and communication with their local and state counterparts,<sup>178</sup> which was a significant problem experienced by the early responders in the aftermath of Hurricane Katrina.<sup>179</sup> Therefore, concerns over the lack of proper training<sup>180</sup> can be

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<sup>171</sup> *Id.*

<sup>172</sup> Christopher H. Lytton, *America's Borders and Civil Liberties in a Post-September 11th World*, 12 J. TRANSNAT'L L. & POL'Y 197, 204 (2003).

<sup>173</sup> See Bush, Address to the Nation, *supra* note 34, at 3, 4.

<sup>174</sup> Schmitt & Shanker, *supra* note 38.

<sup>175</sup> Murray Light, Editorial, *Northern Command Makes Sense*, BUFF. NEWS, Oct. 23, 2005, at I3.

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

<sup>177</sup> Schmitt & Shanker, *supra* note 38.

<sup>178</sup> FEDERAL RESPONSE, *supra* note 113, at 95.

<sup>179</sup> Geoff Fein, *Military Looking at Migrating Some Capabilities to Civilian Side*, 228 DEF. DAILY (Access Intelligence, LLC, Rockville, Md.), Oct. 13, 2005, available at 2005 WLNR 17654408.

<sup>180</sup> See *supra* notes 171–73 and accompanying text.

ameliorated, if and when there is recognition of the benefits using federal troops can bring to stabilizing dangerous situations within the United States. Preparedness and planning would reduce the dangers of casting the military in an unfamiliar role. Instead, it would be a readily available force that could respond to the unique challenges of domestic law enforcement when the need arises.

Another potential benefit to a specially trained, prepared, and equipped federal active-duty contingent would be its ability to respond to a wide variety of natural disasters, whether it be hurricane, earthquake, flooding, tsunami,<sup>181</sup> tornado, or some other kind of catastrophic emergency. This is particularly true for situations in which local and state authorities are ill-prepared and unable to handle the scope of the disaster. In the wake of Hurricane Katrina, it is clear that local law enforcement authorities are not always better trained to deal with the specific circumstances of a natural disaster than a dedicated team of experienced federal troops. The experience in New Orleans illustrates the fact that local and state law enforcement agencies<sup>182</sup> cannot be expected and prepared to handle a sudden, widespread emergency. Therefore, a federal first-responder force would be beneficial in providing law enforcement and rescue support to stabilize what could develop into a potentially life threatening situation for thousands of American citizens.<sup>183</sup>

#### *D. Active Military Participation in Domestic Law Enforcement Does Not Necessarily Mean Permanent Domestic Deployment*

Many recent arguments regarding the erosion of the Posse Comitatus Act center on the increasing use of the active federal military in domestic counterterrorism—a permanent and ongoing demonstration of military force within the United States.<sup>184</sup>

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<sup>181</sup> FEMA posits that tsunamis, while rare, do pose a direct threat to the United States:

The greatest risk to the United States is believed to be a tsunami that would be generated by an earthquake along the Cascadia fault off the coast of Washington, Oregon, and northern California. Similar to those along the northern coast of Sumatra, a Cascadian earthquake would be very large, would result in a tsunami, and would provide only a few minutes of warning.

*Tsunami Losses Mount*, CLAIMS, Feb. 1, 2005, at 212, available at 2005 WLNR 22076025. Since 1946, three tsunamis striking the United States coastline have resulted in fatalities. *Id.* Although there is a reduced vulnerability to tsunamis on the East Coast of the United States, FEMA maintains that there is a significant threat, which could result in significant property damage and loss of life. *Id.* Half of the population of the United States lives in coastal zones. Editorial, *Fair Warning: U.S. Should Help Poorer Nations Protect Themselves From Tsunamis*, SARASOTA HERALD TRIB., Jan. 18, 2005, at A16.

<sup>182</sup> See *supra* Part I.

<sup>183</sup> This could potentially prevent a repeat of the scenario in New Orleans, where National Guardsmen were unable to enter the city because of rampant lawlessness, and hospitals had to close because of the fear of looting. See *supra* notes 17–22 and accompanying text.

<sup>184</sup> See, e.g., Canestaro, *supra* note 60, at 134–42; see also Steven G. Brandl, *Back to the*

“The [Posse Comitatus Act] remains as much a symbol of our nation’s subordination of military to civilian control, and to the distaste of military involvement in domestic law enforcement, as it is a set of legal strictures.”<sup>185</sup> Further, “[t]he new Constitution mirrored the founders’ keen desire to prevent the rise of a standing military as a sort of Praetorian Guard, responsible to none but itself, forever meddling in civilian politics and agitating for military adventurism.”<sup>186</sup> There is a strong sentiment that any involvement of the military in law enforcement activities will lead to “mission creep”<sup>187</sup> and install the military as an ongoing, permanent law enforcement apparatus operating within the United States.<sup>188</sup>

The fear of giving the President, and by extension, the military, greater freedom for involvement in domestic matters is analogous to the events in Vietnam following the 1964 Gulf of Tonkin Resolution, which laid the foundation for eventual full-scale war in Vietnam.<sup>189</sup> A unanimous vote in the House of Representatives<sup>190</sup> and a nearly unanimous vote in the Senate<sup>191</sup> authorized the President “to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requiring assistance in defense of its freedom.”<sup>192</sup> By the time the conflict concluded, the war was the longest in American history, at the

*Future: The Implications of September 11, 2001 on Law Enforcement Practice and Policy*, 1 OHIO ST. J. CRIM. L. 133, 146–47 (2003).

<sup>185</sup> Banks, *supra* note 95, at 741.

<sup>186</sup> Jack H. McCall, Jr. & Brannon P. Denning, *Mission Im-posse-ble: The Posse Comitatus Act and the Use of the Military in Domestic Law Enforcement*, 39 TENN. B.J., June 2003, at 27.

<sup>187</sup> “Mission creep” can generally be defined as the changing of goals, objectives, and deployment duration in the middle of a military mission. See, e.g., Martin D. Carcieri, *Operational Need, Political Reality, and Liberal Democracy: Two Suggested Amendments to Proposition 209-based Reforms*, 9 SETON HALL CONST. L.J. 459, 464 n.24 (1999); Mark T. Uyeda, Note, *Presidential Prerogative Under the Constitution to Deploy U.S. Military Forces in Low-Intensity Conflict*, 44 DUKE L.J. 777, 813 n.187 (1995). One such example of mission creep is the 1969 expansion of the American aerial bombing campaign at the height of the Vietnam War. Nicole Barrett, Note, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429, 433 (2001). President Nixon ordered bombing campaigns to attack North Vietnamese positions in Cambodia and Laos. *Id.* By the time those bombing operations ceased in 1973, the United States had dropped more bombs on Laos than it had dropped during the entirety of World War II. *Id.* at 434.

<sup>188</sup> McCall & Denning, *supra* note 186, at 32; see also Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 371 (2005) (“The concern is that ‘mission creep’ will result in which the military becomes adjuncts of internal security agencies including law enforcement, prosecutors, and domestic intelligence, that had been entirely civilian in nature.”).

<sup>189</sup> Jules Lobel & George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045, 1061 (2005).

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

<sup>191</sup> *Id.*

<sup>192</sup> Gulf of Tonkin Resolution, Pub. L. No. 88–408, 78 Stat. 384 (1964) (repealed 1971).

expense of nearly 58,000 American lives.<sup>193</sup> At the time, congressional lawmakers did not fully appreciate the scope and duration of the power they were handing to the President to have almost unfettered control over military action.<sup>194</sup> The Gulf of Tonkin Resolution typified the dangers when Congress cedes too much power and provides too little oversight over the presidential conduct of military action.<sup>195</sup>

Certainly, a revision of the Posse Comitatus Act to give the President expanded authority to employ the military in domestic law enforcement must contain counter-balances to prevent a repeat of the mission creep experienced during the Vietnam Era.<sup>196</sup> The President cannot be given a blank check to deploy the military in perpetuity. For instance, the President should not deploy federal troops to stabilize an area struck by disaster and then allow them to remain there to fight drug trafficking long after the immediate emergency has passed. There must be strict limits on the duration and objectives of the deployment so control can be turned back to the local and state law enforcement agencies as soon as possible.

The 1973 War Powers Act<sup>197</sup> can be used as a model for how a revised Posse Comitatus Act and its exceptions can be structured to give the President adequate authority while leveling some restrictions on the exercise of that expanded power. In an attempt to reassert congressional authority over the constitutional war-making power,<sup>198</sup> the War Powers Act imposes a notice requirement on the President when military troops engage in combat activities abroad:

In the absence of a declaration of war, in any case in which United States Armed Forces are introduced . . . the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—(A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement.<sup>199</sup>

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<sup>193</sup> Lobel & Loewenstein, *supra* note 189, at 1061.

<sup>194</sup> Louis Fisher, *War and Spending Prerogatives: Stages of Congressional Abdication*, 19 ST. LOUIS U. PUB. L. REV. 7, 23–25 (2000).

<sup>195</sup> Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1426 (2005).

<sup>196</sup> See *supra* notes 189–95 and accompanying text.

<sup>197</sup> War Powers Act of 1973, 50 U.S.C. §§ 1541–48 (2000). This Note does not address the underlying constitutionality of the War Powers Act.

<sup>198</sup> Comment, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of a Legislative Veto After Chadha*, 132 U. PA. L. REV. 1217, 1218 (1984).

<sup>199</sup> 50 U.S.C. § 1543(a) (2000).

In addition, the Act sets a durational limit on presidential discretion over military engagement by stating:

Within sixty calendar days . . . , the President shall terminate any use of United States Armed Forces . . . unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.<sup>200</sup>

Whether this statute has been successful in actually limiting the President from unilaterally using military force without the consent of Congress is unclear.<sup>201</sup> The concept of congressional time limits and notice requirements on presidential authorization of domestic military deployment can be applied to the posse comitatus statutes.

To ameliorate concerns over the potential for mission creep, a statutory construction modeled on the War Powers Act could set time limits; perhaps ten days. A ten-day window would give mobilized federal troops enough time to secure the affected areas to allow local and state authorities to regroup and assess the situation. The window would also give rescuers protection, assistance, and security in potentially dangerous situations. A ten-day limit would not, however, give the military an opportunity to become entrenched in any one place without express congressional approval for extended deployment, should that become necessary. Before or at the end of the ten-day window, federal troops acting in their law enforcement capacity would either withdraw from the region and turn all law enforcement duties back over to local and state authorities, or in extreme circumstances have their deployment extended through consultation between the President and Congress. President Bush addressed this very point:

I do want [Congress] to think about a circumstance that requires a lot of planning and a lot of assets immediately on the scene in

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<sup>200</sup> 50 U.S.C. § 1544(b) (2000).

<sup>201</sup> There has been some reluctance on the part of Congress to demand that the President comply with the War Powers Act. Edward Keynes, *The War Powers Resolution: A Bad Idea Whose Time Has Come and Gone*, 23 U. TOL. L. REV. 343, 349 (1992). At least three instances in which the President perfunctorily met the reporting requirements to Congress were President Ford's action to recover the S.S. Mayaguez in May 1975, President Carter's decision to send troops to rescue the American hostages in Tehran, Iran in April 1980, and President Reagan's invasion of Grenada in October 1983. *Id.* at 349 n.34, 350-51.

order to stabilize. And so what I was speculating about was a scenario which would require federal assets to stabilize the situation, primarily DOD assets—DOD assets, and then hand back over to Department of Homeland Security, for example. And I think it's very important for us as we look at the lessons of Katrina to think about other scenarios that might require a well-planned significant federal response right off the bat to provide stability.<sup>202</sup>

A short-term durational requirement would provide serious safeguards preventing the federal usurpation of law enforcement duties that are rightfully in the hands of local authorities.

Similarly, a notice requirement modeled on 50 U.S.C. § 1543(a) would require the President to keep Congress and the proper state authorities (such as the governor and state legislature) informed of the decision to take action, the duration expectations of the deployment, and the reasons necessitating the use of federal troops. Congress could then fill its proper consultative role while preserving its ultimate authority to limit either the scope or the duration of the use of federal troops. As a result, the balance of power between the President and Congress would be protected and clearly delineated. The threat of mission creep would thus be significantly reduced.

#### *E. The President Possesses Broad Discretion in Matters Authorized by Congress*

When Congress expressly grants authority to the President, the President enjoys broad discretion to use that authority to the fullest extent.<sup>203</sup> The Supreme Court highlighted this when it upheld President Carter's freezing of Iranian assets in response to the seizure and hostage taking of American embassy workers in Tehran, Iran on November 4, 1979.<sup>204</sup>

When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."<sup>205</sup>

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<sup>202</sup> Bush, Remarks, *supra* note 35, at 4.

<sup>203</sup> See *Dalton v. Specter*, 511 U.S. 462, 476 (1994) ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review."); see also *Monarch Ins. Co. of Ohio v. District of Columbia*, 353 F. Supp. 1249, 1254–55 (D. D.C. 1973).

<sup>204</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 654, 662 (1981).

<sup>205</sup> *Id.* at 668 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

The Supreme Court affirmed this principle a decade later by stating, "Where a statute . . . commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available."<sup>206</sup>

The Supreme Court recognized the need for broad presidential discretion in 1862 when it stated, "Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him* . . ."<sup>207</sup> The President is perfectly suited to this role, because "the President is unique in the federal system. The President is only one of two elected officials with a national constituency and represents the 'single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations.'"<sup>208</sup>

Americans expect the President to use all the tools available to him to provide leadership and respond to national crises.<sup>209</sup> Former White House Press Secretary Scott McClellan acknowledged this view, stating, "He is the president, and . . . it is his responsibility when it comes to the federal government's role in these hurricanes."<sup>210</sup> Politically, the President is accountable to all Americans when he fails, regardless of whether he had all the tools necessary to accomplish the task at hand.<sup>211</sup> For this reason Congress must not set up the President, and the federal government as a whole, to fail the next time a major disaster strikes. Congress must recognize and respond to the lessons learned from Hurricane Katrina, and streamline the President's statutory authority to act quickly when the time comes. Unquestionably, in times following such catastrophic disasters, the President needs all available tools at his disposal in order to meet the expectations of all Americans to provide leadership when it matters most.<sup>212</sup>

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<sup>206</sup> *Dalton*, 511 U.S. at 477.

<sup>207</sup> *The Prize Cases*, 67 U.S. 635, 670 (1862).

<sup>208</sup> Jonathan Turley, "From Pillar to Post": *The Prosecution of American Presidents*, 37 AM. CRIM. L. REV. 1049, 1077 (2000) (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 653 (Jackson, J., concurring)).

<sup>209</sup> Leo P. Martinez, *Tax Legislation and Democratic Discourse: The Rhetoric of Revenue and Politics*, 4 NEV. L.J. 510, 511 (2004).

<sup>210</sup> Richard W. Stevenson, *After Katrina's Lesson, Bush Is Heading to Texas*, N.Y. TIMES, Sept. 23, 2005, at A1.

<sup>211</sup> See Nathaniel Fick, Editorial, *An Honest Victory*, N.Y. TIMES, Sept. 20, 2005, at A29 ("President Bush's . . . accepting responsibility for the federal government's slow response to Hurricane Katrina was commendable, if overdue. Though it has been derided by some as political expediency, the president's acknowledgment was a necessary first step . . .").

<sup>212</sup> Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 963 (2001) ("In times of war or other national emergency, citizens expect strong leadership from the president in his role as commander-in-chief of the armed forces.").



*F. Use of the Military in Domestic Affairs Would Serve to Protect Civilians' Constitutional Rights, Not to Abrogate Them*

One of the most frequently noted arguments against military involvement in domestic law enforcement matters is the erosion of American civil liberties at the hands of the military.<sup>213</sup> Although these are legitimate concerns, a look back at the history of military intervention in domestic matters supports the counter-argument that such intervention may be needed to *protect* civil liberties.<sup>214</sup> The passage of the Posse Comitatus Act was partly a result of the military's presence to enforce civil rights under the then newly passed Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>215</sup> The Posse Comitatus Act thus prevented the military from enforcing the Reconstruction laws that were so anathema to the ex-Confederate states.<sup>216</sup> In a similar vein, President Eisenhower responded with military force when white protesters, combined with the state government's refusal to intervene, threatened to prevent the enforcement of a court order ordering racial integration of the Little Rock school system.<sup>217</sup> These two examples support the assertion that military intervention can be used to protect civil liberties, and that it is sometimes necessary to do so. The President must become involved when the lives and property of citizens are threatened and state and local authorities are unwilling or unable to do so.

To alleviate the concerns over the potential abridgement of civil liberties, Congress can install safeguards such as limiting the duration of domestic military engagement, requiring notification, and providing specialized training for a quick-response military force designed to deal with the constitutional protections afforded citizens.<sup>218</sup> Obviously, no situation can be handled perfectly, particularly when disasters strike and lawlessness prevails. Yet a limited duration force with specialized training may

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<sup>213</sup> See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304, 331 (1946) (Murphy, J., concurring) ("Civil liberties and military expediency are often irreconcilable."); John P. Jurden, *Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards*, 184 MIL. L. REV. 1, 16 (2005) ("The constitutional framers preferred a civilian militia to a standing army because of the restrictions on civil liberties that military culture threatens."); Kohn, *supra* note 135, at 182 ("[I]t is likely that the military will be used internally, perhaps in ways that threaten civil liberties . . ."); Geoffrey M. Wyatt, *The Third Amendment in the Twenty-First Century: Military Recruiting on Private Campuses*, 40 NEW ENG. L. REV. 113, 120–21 (2005) ("And, indeed, other civil liberties have proven equally flimsy when the rights of civilians have been infringed in the name of military necessity . . .").

<sup>214</sup> See *supra* notes 83–87, 159–64 and accompanying text; see also FEDERAL RESPONSE, *supra* note 113, at 54 (the military "demonstrated that . . . it was one of the only Federal departments that possessed real operational capabilities to translate Presidential decisions into prompt, effective action on the ground").

<sup>215</sup> Furman, *supra* note 45, at 95–96.

<sup>216</sup> Chin, *supra* note 160, at 1590.

<sup>217</sup> See *supra* notes 83–87 and accompanying text.

<sup>218</sup> See *supra* notes 174–84, 203 and accompanying text.

very well be more effective in safely handling and defusing a combustible domestic disturbance situation, such as in New Orleans after Hurricane Katrina. An undermanned, underequipped, and overwhelmed police force could perhaps be more dangerous than helpful because of the panic and desperation to restore order at any cost. In that event, the citizens who would suffer most are those who are in need of emergency services and rescue assistance, and local law enforcement authorities would have to choose between restoring order and helping afflicted residents. That is a choice that should not have to be made.

#### CONCLUSION

The tragic events in New Orleans in the aftermath of Hurricane Katrina made painfully clear the state of the nation's readiness to adequately respond to a catastrophic natural disaster. In order to prevent local, state, and federal authorities from grappling for authority to take control of an already chaotic situation, a series of changes to the Posse Comitatus Act should be made in conjunction with the formation of a dedicated active duty unit trained to respond to such events. These advances can significantly increase the effectiveness of a future disaster response. Accordingly, Congress must give the President authority to command all of the resources and expertise of the American active duty military, by furnishing the President greater leeway in asserting control over domestic law enforcement. In doing this, appropriate safeguards traced from the lines of current presidential war-making powers in foreign arenas can be applied to the domestic front. The pitfalls of over-militarization within the United States can be neutralized by allowing the President to exercise this expanded power under only limited circumstances.

First, to structure the President's power most effectively, Congress should amend 10 U.S.C. § 331 to remove the requirement forcing the President to wait for a request from a state governor or legislature for federal military assistance in a disaster situation.<sup>219</sup> This avoids unnecessary reliance on state officials who may or may not be fully aware or capable of making a formal request for federal military assistance in an extreme emergency.<sup>220</sup> Further, it prevents state officials from withholding necessary requests based on mere political considerations.<sup>221</sup> The President is best positioned to serve as a centralized decision-maker in his capacity as commander-in-chief of the military in emergency situations,<sup>222</sup> and the American people expect the President to marshal the federal government and to coordinate an effective response when disaster strikes.<sup>223</sup>

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<sup>219</sup> See *supra* note 50 and accompanying text.

<sup>220</sup> See *supra* notes 23–26 and accompanying text.

<sup>221</sup> See *supra* notes 27–32 and accompanying text.

<sup>222</sup> See *supra* notes 103–25 and accompanying text.

<sup>223</sup> See *supra* notes 210–13 and accompanying text.

Second, appropriate checks and balances can be placed on presidential authority by restricting any federal domestic military deployment to short durations, such as ten days, which would be ample time for military forces to accomplish their mission of providing stability and control to the affected areas.<sup>224</sup> Coupled with a provision requiring the President to notify and inform Congress and state officials of the mission's goals and expected duration, this achieves the appropriate constitutional balance between Congress and the President to ensure the exercise of federal power does not overstep its bounds.<sup>225</sup>

Third, to ensure that the military response is effective and within the bounds of citizens' constitutional rights, a special unit of active-duty troops should be created, maximizing their training in law enforcement roles and familiarizing them with the proper rules of engagement in domestic law enforcement settings.<sup>226</sup> This can be created as a safer and more effective alternative to local and state law enforcement agencies, which cannot be relied on to meet all of the challenges posed by a catastrophic disaster.<sup>227</sup> These three concepts will streamline the federal response in a major crisis, and undoubtedly save life, limb, and property.

Finally, these recommendations are made with the knowledge that federal military forces have historically been removed from domestic law enforcement affairs in most cases, but also with the recognition that in the course of this nation's history, there have been occasions in which their active participation has been vital to keeping order.<sup>228</sup> The recommendations are not as radical as they may seem at first glance; the federal military has historically had an important role since the drafting of the Constitution.<sup>229</sup> Yet, circumstances have changed since 1878 and we must learn from the recent events experienced during Hurricane Katrina. Catastrophic disaster will eventually strike our nation again, and these proposed changes will go far in ensuring that the federal government can take swift action when it does.

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<sup>224</sup> See *supra* note 203 and accompanying text.

<sup>225</sup> See *supra* note 203 and accompanying text.

<sup>226</sup> See *supra* notes 174–84 and accompanying text.

<sup>227</sup> See *supra* notes 13–22 and accompanying text.

<sup>228</sup> See *supra* notes 78–94, 134–70 and accompanying text.

<sup>229</sup> See *supra* notes 134–48 and accompanying text.