

DOD RESPONSE TO NATURAL DISASTERS – WHY THE NATIONAL GUARD IS OFF LIMITS

BY

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USAWC STRATEGY RESEARCH PROJECT

**DOD RESPONSE TO NATURAL DISASTERS – WHY THE NATIONAL GUARD IS
OFF LIMITS**

by

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ABSTRACT

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The Insurrection Act authorizes the President to unilaterally federalize the National Guard when he finds an "insurrection, domestic violence, unlawful combination, or conspiracy . . . hinders the execution of the laws . . ." During Hurricane Katrina the Department of Justice was of the opinion the authority extended beyond "insurrections" in the traditional sense of the term, to natural disasters where a loss of public order has occurred. Despite apparent legal authority, and a desire to achieve unity of command over military forces, the President chose not to federalize the Guard over the objection of the Governor. The issue of command and control of Guard forces in major disasters resulted in an amendment to the Insurrection Act intended to "clarify" the President's authority. The amendment resulted in a backlash from the states which argued the amendment "changed more than 100 years of well established and carefully balanced state-federal and civil-military relationships." In January 2008 the amendment was repealed, calling into question the validity of previous opinions that the President's original authority extended to natural disasters. This essay will examine the history of the Insurrection Act, will analyze the rationale behind the 2007 amendment and it's

subsequent repeal, and address the extent, if any, to which the President's authority has been diminished.

DOD RESPONSE TO NATURAL DISASTERS – WHY THE NATIONAL GUARD IS OFF LIMITS

Hurricane Katrina was arguably the worst natural disaster the United States has ever faced. Katrina devastated 90,000 square miles, made 770,000 people homeless, and had a death toll of 1,464 in Louisiana alone.¹ Even before the flood-waters began receding, the blame game began. New Orleans Mayor C. Ray Nagin was “characterized as an irrational and incompetent local official who lost control of his city [and] his police force.”² Mayor Nagin, in-turn, blamed Louisiana Governor Kathleen Blanco, accusing her of “talking too much, and working too little”³ and President Bush came under enormous criticism for allegedly responding too slowly with Federal Assistance.

One of the criticisms of the Bush administration was an apparent delay in deploying federal troops to assist in the emergency response. It has been alleged troop deployment was delayed based on Governor Blanco’s refusal to cede control of her National Guard to the federal government and a perception, at the highest levels, that the Posse Comitatus Act limited the response federal troops could make.⁴ In the aftermath of the storm, in what some would argue was a knee jerk reaction to these criticisms, one of the exceptions to the Posse Comitatus Act, the Insurrection Act, was amended to clarify the President’s authority to unilaterally federalize National Guard troops and use federal forces in response to “natural disasters, epidemics, serious health emergencies, terrorists attacks, or other conditions when the authorities of the state are incapable of maintaining public order.”⁵ The amendment, which at first blush appears to expand the President’s authority under the Insurrection Act, was met with

universal criticism from State Governor's who argued, "Section 1076 stands to potentially undermine governors' authority over the National Guard, which ultimately could place the safety and well being of citizens in jeopardy."⁶ Congressional testimony included recommendations to "Preserve the ability of the state governors to direct the emergency response in their respective states through the repeal of Section 1076 of the 2007 Defense Authorizations Act which changed more than 100 years of well established and carefully balanced state-federal and civil-military relationships. As written, the Act does not require the president to contact, confer or collaborate in any way with the governor before seizing control of the state's National Guard."⁷ So vehement were the objections, in January of 2008 the amendment was repealed.

This paper will examine one consequence the repeal of Public Law 109-364, section 1076 may have on the President's Authority to unilaterally federalize the National Guard in responding to natural disasters. The repeal of an amendment originally intended only to clarify the president's authority, may ultimately undermine the authority the president had under the original (pre-2007) legislation.

The Posse Comitatus Act

Before examining the extent of the President's authority to federalize the Guard under the Insurrection Act, one must consider the Insurrection Act in context with the Posse Comitatus Act and understand the Posse Comitatus Act's origins, applicability and scope.

Posse Comitatus is defined as: "The power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases, as to aid him in keeping the peace, in pursuing and

arresting felons, etc.”⁸ The Posse Comitatus Act specifically states, “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned for not more than two years, or both.”⁹ The act, in effect, criminalizes the use of the Army and the Air Force as a posse comitatus to execute or enforce the laws of the United States. Only if “expressly” authorized by the constitution or act of Congress may the Army or Air Forces be used in a law enforcement role. As will be discussed below, perhaps the most significant of those exceptions is the Insurrection Act.

Origins of The Posse Comitatus Act

Though the Posse Comitatus Act can be directly linked to the use of the armed forces during reconstruction following the civil war, its roots can be traced back to the birth of the United States and is a “reaffirmation of long standing American tradition.”¹⁰ The fear of military involvement in domestic matters can be traced to our nation’s initial break from the imperial power of England. In decrying King George’s use of his armies to persecute colonists, the Declaration of Independence declares, “He [King George] has . . . sent hither swarms of Officers, to harass our People, and eat out their substance. He has kept amongst us, in times of peace, Standing Armies without the Consent of our legislature. He has affected to render the Military independent and superior to the Civil Power.”¹¹ With these concerns in the forefront of the minds of our founding fathers, the Articles of Confederation severely limited the maintenance of a standing Army.¹² In debating the constitution one founding father is quoted as saying, “It ill behooves a democracy to become overly fond of its soldiery.”¹³

In the years leading up to the Civil War the concerns of the founding fathers begin to manifest themselves. Under the Fugitive Slave Act federal marshals were allowed to employ a posse comitatus to secure the return of fugitive slaves to their owners.¹⁴ This authority included the use of military forces as part of the posse comitatus.¹⁵ Immediately following the Civil War it was necessary to use military forces to support reconstruction in the South. The founding father's fears of an Army overly involved in domestic affairs, however, became reality when troops were sent as a posse comitatus to support federal marshals at polling places in the south during the 1876 presidential election. "This misuse of the military in an election – the most central event to a democracy – led Congress to enact the Posse Comitatus Act in 1878."¹⁶

Perhaps the best expression of the origins of the Posse Comitatus Act and intent behind it can be found in the 1981 Congressional testimony of William H. Taft, Department of Defense General Counsel, in which he states, "The [PCA] expresses one of the clearest political traditions in Anglo-American history: that using military power to enforce the civilian law is harmful to both civilian and military interests. The authors of the [PCA] drew upon a melancholy history of military rule for evidence that even the best intentioned use of the Armed Forces to govern the civil population may lead to unfortunate consequences. . . ."¹⁷

Applicability of the PCA

The specific language of the Posse Comitatus Act extends its prohibition only to the Army and the Air Force, conspicuously omitting the Navy and Marine Corps. Department of Defense policy, however, has extended the prohibitions of the Posse Comitatus Act to include the Navy and Marine Corps.¹⁸ DoD Directive 5525.5

specifically extends the prohibitions of the Posse Comitatus Act to the Navy and Marine Corps, however, it recognizes that the Act does not apply to the State militias, referred to in modern times as the National Guard, when the Guard is under the command and control of the State Governor, i.e., it has not been Federalized.¹⁹

The proper role of the National Guard in responding to natural disasters, and control of the Guard during such events, is at the heart of the controversy over the amendments made to the Insurrection Act. Before going further, a discussion of the role of the National Guard in responding to Natural Disasters is required.

The National Guard

The National Guard traces its origins to the colonial militias which were used to provide for the common defense of the community and consisted of every able bodied white man. Under Article I, Section 8, clauses 15 and 16, and Article II, Section 2, clause 1 of the U.S. Constitution, the Federal government was given authority to organize, arm, and discipline the militia, and to call the militia in to federal service in order to execute the laws of the United States, to suppress insurrection, and to repel invasion.²⁰ With the passage of the Dick Act in 1903 and the National Defense Acts of 1916 and 1920, the modern National Guard was forged and formally made part of the federal reserve of the Army (and later the Air Force). This gave the federal government a more active role in training and organizing the militias and enhanced federal authority over the guard, particularly in the areas of equipping and training. "As a result of this history, the National Guard is neither a purely state nor a purely federal organization. Rather it is both a state and federal organization."²¹

State Active Duty

When not in federal service pursuant to federalization under the authority of Article II, Section 2 of the Constitution, the National Guard is in State status under the command and control of its respective state or territorial governor. When responding to natural disasters such as hurricanes, earthquakes, fires and floods, a state's governor frequently calls upon the National Guard to assist local authorities in responding to the disaster using the Guards unique capabilities, including equipment and a ready pool of trained and available manpower. Some have argued that the National Guard is a State governor's most significant resource in responding to a significant disaster at the state level.²² Prior to 9/11, National Guardsmen responding to natural disasters did so primarily in what is commonly referred to as a "state active duty," or "SAD" status.²³ As mentioned above, when in an SAD status, guardsmen are under the command and control of the governor. Additionally, they are paid for by the state, with state appropriations, pursuant to state law.²⁴ Many of the privileges and immunities available to federal forces may not be available to SAD forces, e.g. the Federal Tort Claims Act (FTCA), Servicemembers Civil Relief Act (SCRA), and Uniformed Services Employment and Re-Employment Rights Act (USERRA) do not extend to SAD. Finally, when in an SAD status, Guard personnel are not subject to the Uniformed Code of Military Justice, but are disciplined under their individual state code of military justice.

Title 32 Status

Section 502(f) of Title 32 of the United States Code is the authority under which National Guardsmen perform their weekend drills and two weeks of Annual Training. The traditional interpretation of section 502(f) is that only duty related to training can be

performed.²⁵ Immediately following 9/11 President Bush announced National Guardsmen would be used to supplement security in our Nations' Airports. Despite an opinion by the DoD General Counsel that Title 32 funds were restricted to training missions, the President authorized the use of 32 U.S.C.502(f) to place guardsmen in the airports, under the command and control of the Governors, but paid for with federal funds.²⁶

The advantage of using the "Title 32" status is that National Guard personnel called to active duty under this authority receive all the pay and allowances of the federal military pay system and receive all the immunities and protections of federal law, including the FTCA, SCRA and USERRA. Another advantage, especially from the state perspective, is that the forces remain under the command and control of the Governor, and, accordingly, are not subject to the limitations of the Posse Comitatus Act.

In the case of hurricane Katrina, both SAD and Title 32 Status were used for National Guard personnel responding to the effected areas of Louisiana and Mississippi. Initially, all personnel were summoned to duty in an SAD status. Shortly after the initial deployment of personnel, however, the National Guard Bureau asked the Secretary of Defense to approve the retroactive transfer of all participating National Guard personnel from SAD to duty under Title 32. "The purpose of this request was to equalize pay and benefits for all national Guard personnel rather than having their compensation based on disparate state and territorial laws."²⁷ On September 7, 2005, the request was approved.²⁸

Federal – “Title 10” Status

Finally, National Guard personnel can be called into a purely federal status under constitutional and statutory authorities. The statutory authorities under which the National Guard can be federalized are derived from Article I, Section 8, Clause 15 of the Constitution, which states, “The Congress shall have power . . . To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions.” Congress has provided limited delegation of this authority through specific legislation. For example, under 10 U.S.C. 12304, the President can call up to 200,000 reservists for up to 270 days to augment the active duty force during operational missions.²⁹

When in a federal status, National Guard forces are under the command and control of the president, are subject to the UCMJ (versus a state code of justice when in a Title 32 or SAD status), and, significantly, like all federal forces, are subject to the Posse Comitatus Act unless an exception applies. Notably, the Insurrection Act is a statutory provision that provides for the “federalization” of the militia and is a statutory exception to the Posse Comitatus Act. This, of course, begs the question of when, and under what circumstances, the Insurrection Act can be used to federalize the militia.

Exceptions to the PCA

The Posse Comitatus prohibits the use of federal forces to “execute the laws” of the United States, unless expressly authorized. DoD Directive 5525.5 considers direct assistance to law enforcement as executing the laws and “prohibits the following forms of direct assistance: Interdiction of a vehicle, vessel, aircraft, or other similar activity; A search or seizure; An arrest, apprehension, stop and frisk, or similar activity, and; Use

of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.”³⁰ The Directive goes on to recognize exceptions to the Posse Comitatus Act that are “expressly authorized by the Constitution or Act of Congress” including, “[a]ctions taken pursuant to DoD responsibilities under 10 U.S.C. §§331-334 [the Insurrection Act], relating to the use of the military forces with respect to insurgency or domestic violence or conspiracy that hinders the execution of State or Federal law in specified circumstances.”³¹

The Insurrection Act

Perhaps the most significant exception to the Posse Comitatus Act, and the authority under which the President would most likely federalize the National Guard in responding to a domestic emergency, is the Insurrection Act.

History of the Insurrection Act

Article 1, Section 8 of the Constitution specifically empowers the Congress, not the president, “To provide for the calling forth of the militia to execute the laws of the union, suppress insurrection and repel invasion.”³² Like the Posse Comitatus Act, it is important to place the Insurrection Act in proper historical context to fully understand the intent behind the Act. In ratifying the Constitution, there was much debate over the extent the military could be used in domestic matters. In recognizing the unease of the country on the use of regular troops in domestic matters, Alexander Hamilton is quoted as saying, “but the employing of regular troops avoided, if it be possible to effect order without their aid; otherwise there would be a cry at once. ‘The cat is let out; we now see for what purpose an army was raised.’”³³ In advocating the use of the militia, versus regular forces, in domestic matters, Hamilton states, “If the Federal government can

command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force [referring to a standing army]. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions.”³⁴

With the Founder’s concerns in the backdrop, the predecessor of the Insurrection Act, the Militia Act of 1792, was passed. The Militia Act allowed the President, “in case of an insurrection in any state, against the government thereof” to call forth the militia “to suppress such insurrection.” As the Militia Act constituted a delegation to the president of Congressional authority to call forth the militia under Article 1, Section 8 of the constitution, there was much debate over the extent and scope of the delegation. From the ensuing congressional debate, “a consensus emerged that the delegation of the powers to the president should be as restricted as possible”³⁵

Similar to the present day Insurrection Act, the first section of the Militia Act authorized the use of the militia to enforce the law only upon “application of the legislature of such state, or the executive . . .”³⁶ The second section of the Militia Act permitted the use of the militia “whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings.”³⁷ This second section did not require a request from the state.

Historical Uses of the insurrection Act

The first, and perhaps most well known, use of the Militia Act was President Washington’s response to the Whiskey Rebellion in 1794. Notably, in his proclamation

to disperse, in addition to citing the provisions of the Militia Act as his authority for calling forth the militia, Washington also cites his authority under Article II, Section 3 of the Constitution to “take care that the laws be faithfully executed” as a legal basis for his actions against individuals rebelling against a federal excise tax on spirits.³⁸ Though the President clearly had independent Constitutional authority to enforce the excise tax, the authority to “call forth the militia,” however, came from the Militia Act.

Since that first use, the Militia Act was invoked on numerous occasions including the issuance of a “cease and desist proclamation” by President Adams that quelled Freis’ Rebellion of 1799,³⁹ and again in response to the Burr Conspiracy of 1807.⁴⁰ As a result of the Burr Conspiracy the Militia Act was amended to what was to become known as the Insurrection Act of 1807. The Act of 1807 continued to mirror the original Militia Act but, significantly, expanded the president’s authority to include the power to call forth regular forces, as opposed to just the militia.⁴¹

In 1808, president Jefferson cited the Insurrection Act “in ordering the dispersal of and a military response to ‘persons combined, or combining and confederating together on Lake Champlain . . . for the purpose of forming insurrections against the authority of the laws of the United States,’”⁴²

An incident that perhaps best reflects the intent of the Insurrection Act, and the intended limits on the president’s power to “federalize” the militia, is the Tariff Nullification controversy of 1832-1833. In December of 1832, in protest against tariffs placed on imports, South Carolina threatened to defy federal authority by repudiating the tariffs and passing their own replevin laws under which the South Carolina courts could be used to recover property seized by the federal government for tariff violations.

Tensions heightened as the state postured and threatened to call forth its militia, while at the same time federal regulars were called into the state in to secure federal facilities.

Recognizing the constitutional and statutory limits he had in calling forth the militia under the Insurrection Act, President Jackson wrote, “notwithstanding all their tyranny and blustering conduct, until some act of force is committed, or there is some assemblage of armed force. . . to resist the execution of the laws of the United States, the Executive of the United States has no legal and constitutional power to order the militia into the field to suppress it, and not then until his proclamation commanding the insurgents to disperse has been issued.”⁴³ Jackson accurately portrayed the extent of his authority under the Insurrection Act.

In 1871, “in response to the behavior of the Klu Klux Klan and widespread lawlessness throughout the south, Congress passed the Civil Rights Act” that contains the language found in the contemporary Insurrection Act.”⁴⁴ Notably, this “modern” version of the Insurrection Act was enacted just five years prior to passage of the Posse Comitatus Act. The Insurrection Act, in its current form, can be found at 10 U.S.C. §§ 331-334.

In analyzing the current Act it is important to note Section 331 requires a request from the State before the president may invoke the Act to call forth the militia to suppress an insurrection. Section 332 does not require such a request from the state, however, the President must find that “unlawful obstructions, combinations or assemblages, or rebellion against the authority of the United States make it impractical to enforce the laws of the United States by ordinary course of judicial proceedings.”⁴⁵ Section 332 appears to be a reflection of the President’s constitutional duty to ensure

the laws of the United States are “faithfully executed” under Article II, Section 3 of the Constitution and gives him the authority to use the Armed Forces in fulfilling that duty.⁴⁶

Section 333 of the Act is the section most likely to be invoked to call forth the militia in the case of a natural disaster in which the Governor does not request, or refuses to request, assistance. Like section 332, section 333 does not require a request for assistance from the state, but does require a finding that the “insurrection, domestic violence, unlawful combination, or conspiracy, . . . 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” (Emphasis added). As will be discussed in detail below, it was section 333 that was substantially amended by the 2007 NDAA.

In the modern era, Executive Orders issued by the President have rarely specified which section of the Insurrection Act was being invoked in federalizing the Guard. In the Civil Rights cases of the late fifties and sixties, the Guard was federalized under the Insurrection Act over the objection of Governors to enforce the constitutional rights of African Americans under the 14th Amendment. Perhaps the most well know case is “the stand in the school house door” in which Governor George Wallace ceremoniously blocked the entrance of two African American students from entering the University of Alabama’s Foster Auditorium. Wallace, the governor of Alabama, yielded to one of his own National Guard commanders, who stated, “Governor Wallace, it is my sad duty to inform you that the National Guard has been federalized. Please stand

aside so that the order of the court can be accomplished.”⁴⁷ This action was clearly authorized under Section 332 and 333 of the Insurrection Act as the State refused to enforce and protect the constitutional rights of the students involved.

Notably, since WWII, the Insurrection Act has been used only ten times to Federalize the Guard, and in the case of responding to natural disasters, always at the request of the state or territorial Governor, and never over the objection of the Governor of the State.⁴⁸ Only in those cases where the state failed or refused to enforce or protect the constitutional rights of its citizens, such as in the case of Governor Wallace, was the Insurrection Act used to federalize the Guard over the objection of the State’s governor.

Hurricane Katrina - The Storm

The Robert T. Stafford Disaster Relief Act is the mechanism under which state governments normally request and receive federal assistance in responding to emergencies and disasters that exceed their capabilities. The Federal Emergency Management Agency coordinates the federal response by acting as a clearing house for requests for assistance from the state to the federal government. There are thirteen primary Emergency Response Functions (ESFs) under the Federal Response Framework, all with primary federal agencies and supporting federal agencies. Though DoD is not the primary for any of these ESF’s, they are a potential supporting agency on all and federal military assets, including personnel, can be utilized under the Stafford Act in responding to emergencies. Notably, however, federal military personnel used under the Stafford Act are not exempt from the PCA unless the President invokes the Insurrection Act. Additionally, assistance provided under the Stafford Act requires a

specific request from the Governor of the effected state to the President for a Declaration of a State of Emergency.

On August 27, 2005, the Governor of Louisiana, Governor Kathleen Blanco, asked for a presidential declaration of emergency under the Stafford Act and the President issued the required declaration of emergency opening up the federal spigot of relief capabilities. When asked by the Bush administration what she specifically needed in terms of Federal Assistance, Blanco reportedly asked for “everything you’ve got.” At the time of this request, Governor Blanco had already ordered all of her available National Guard assets to State Active Duty. Additionally, assistance from other state National Guard units was being coordinated under the Emergency Management Assistance Compact (EMAC) between the states.

By August 27, 2005, NORTCOM had already activated Joint Task Force (JTF) Katrina to command DoDs efforts in the federal response. On or about September 2, 2005, the administration approached Governor Blanco requesting she relinquish control of her National Guard to JTF Katrina in order to achieve Unity of Command under the DoD JTF.⁴⁹ Governor Blanco “balked at giving up control of the Guard as Justice Department officials said would have been required by the Insurrection Act if those [federal] combat troops were to be sent in before order was restored.”⁵⁰ Governor Blanco refused “to permit DoD’s JTF Katrina to assume control of the evacuation efforts and to assume command of the National Guard personnel in Louisiana.”⁵¹

After Louisiana refused to relinquish control of the guard to federal authority, a compromise was offered in which the JTF Katrina commander would accept a commission in the LARNG and command both Federal and State Forces under a dual

hated command authorized by 32 U.S.C. § 325. Again, Governor Blanco rejected the proposal, stating she feared “losing control of the Guard and undermining the efforts of Major General Bennet Landreneau,” Louisiana’s Adjutant General and the Director of the Louisiana Office of Homeland Security and Emergency Preparedness.⁵²

As stated in a 2005 Congressional Research Service Report, the controversy over control of the Guard in major domestic emergencies “has highlighted the possible political element in the conduct of relief operations. If state authorities wish to retain control of the National Guard, which may be the largest resource at their command, at what point can or should presidential authority be invoked to override state authority?”⁵³ It was this “political element” of the decision not to unilaterally federalize the Guard under the Insurrection Act that prompted the 2006 amendments to the Insurrection act “clarifying” the president’s authority to call forth the militia in responding to domestic emergencies. It is this author’s opinion that the amendments to the act not only magnified the political element of federalizing the Guard over the objections of a State Governor, but brought forth a fundamental constitutional question regarding the extent of the congressional delegation of their Article 1, Section 8 authority. It was this very question that I believe prompted the ill-advised amendment of the Insurrection Act that created the storm, after the storm.

The Amendment of the Insurrection Act – the NDAA of 2007, Public Law 109-364, Section 1076

In response to the political friction encountered in trying to achieve unity of command following Katrina, Senator John Warner sent a letter to the Department of Defense stating, “while the [Posse Comitatus] Act does not apply to the National Guard while under the control of the governor, the command and control of such forces, . . .

presents its own problems.” “The use of the National Guard under title 32, U.S.Code, presents the federal government with a situation in which the federal government is expected to provide funding while leaving command and control to the States. The Insurrection Statutes found in chapter 15 of title 10, U.S. Code, do bypass the Posse Comitatus Act, but they were enacted . . . to deal with primarily different situations.”⁵⁴

Senator Warner goes on to recommend DoD review the Insurrection Statutes and those statutes governing the federalization of the National Guard with a view toward amending the same.⁵⁵ Senator Warner concludes by stating, “The President should not have to worry about misperceptions by the public based upon outdated wording that does not accurately describe what the armed forces may be doing in a particular emergency.”⁵⁶ Little did Senator Warner know that his initiative to amend the Insurrection Statutes would further add to the confusion and “misperception” and ultimately lead to a diminution of presidential authority.

On September 30, 2006, Congress amended the Insurrection Act as part of the National Defense Authorization Act of 2007, renaming the chapter, “Enforcement of the Laws to Restore Public Order.” “The bill passed with little fanfare, but delivered a significant impact on the Presidents authority over the National Guard.”⁵⁷

Sections 331 and 332 of the Act were unchanged. Section 333, however, appeared to expand the presidents Authority over the guard by providing for their federalization, over a governor’s objection, in situations short of “insurrection, domestic violence, unlawful combination, or conspiracy . . .” The amendment extended the President’s authority to “natural disaster, epidemic, serious health emergency, terrorist attack, or other conditions when the President determines that the authorities of the

state are incapable of maintaining public order.”⁵⁸ Figure 1, below, depicts a side by side comparison of the relevant portions of 10 U.S.C. § 333 with amendments in bold.

Original Insurrection Act of 1807	As amended by 2007 NDAA (P.L. 109-364, Sec. 1076)
§ 333. Interference with State and Federal law The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it— (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.	§ 333. Major public emergencies; interference with State and Federal law (a) USE OF ARMED FORCES IN MAJOR PUBLIC EMERGENCIES.— (1) The President may employ the armed forces, including the National Guard in Federal service, to— (A) restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that— (i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and (ii) such violence results in a condition described in paragraph (2); or (B) suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2). (2) A condition described in this paragraph is a condition that— (A) so hinders the execution of the laws of a State or possession, as applicable, and of the United States within that State or possession, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State or possession are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (B) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. (3) In any situation covered by paragraph (1)(B), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

Figure 1

Though Department of Justice officials and others would argue the new language just clarified the President's pre-existing authority under the Insurrection Act⁵⁹, subsequent repeal of the amendment calls into question the true intent of Congress and whether they view their delegation of authority as extending to natural disasters where a Governor specifically demands to retain control of the state's militia.

The flow chart depicted in Figure 2, below, provides a reasonable interpretation of the impact of the 2007 NDAA amendment. The 2007 amendment emphasizes the event, versus the result of the event that would trigger the application of the Insurrection Act. By amending the statute, it is implied the original statute required an "insurrection, domestic violence, unlawful combination, or conspiracy . . ." before the act applied. The new language appears to expand the statute by stating that, even in the absence of an insurrection or domestic violence, the President could federalize the militia in response to "natural disaster, epidemic, serious health emergency, terrorist attack, or other conditions when the President determines that the authorities of the state are incapable of maintaining public order." Figure 2, below, illustrates this logic.

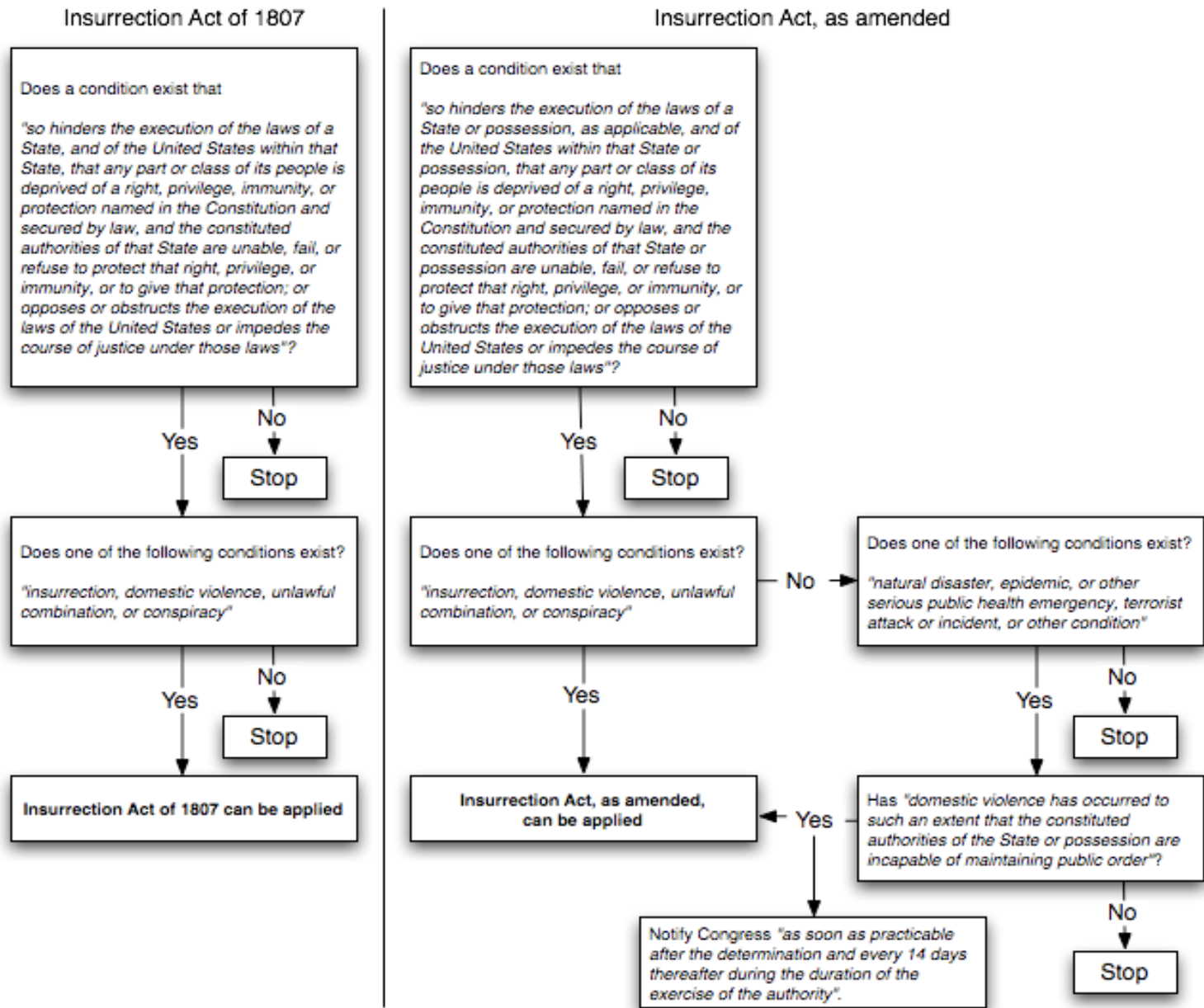


Figure 2⁶⁰

Perhaps the most compelling evidence that Congress did not intend the Insurrection Act to apply to natural disasters absent a request from the state is the tremendous backlash that occurred when the Amendment was “slipped into the defense bill with little study” and no debate.⁶¹

The Strom after the Strom – the Repeal of 1076

Senator Patrick Leahy of Vermont led the charge for the states opposing the amendments to the Insurrection Act, stating, “we certainly do not need to make it easier for Presidents to declare martial law. Invoking the Insurrection Act and using the military for law enforcement activities goes against some of the central tenants of our democracy. It creates needless tension among the various levels of government – one can easily envision governors and mayors in charge of an emergency having to constantly look over their shoulders while someone who has never visited their communities gives the orders.”⁶² In another statement Leahy argued, “The changes to the Insurrection Act will allow the President to use the military, including the National Guard, to carry out law enforcement activities without the consent of a governor. When the Insurrection Act is invoked posse comitatus does not apply. Using the military for law enforcement goes against one of the founding tenets of our democracy, and it is for that reason that the Insurrection Act has only been invoked on three occasions in recent history. The implications of changing the Act are enormous, but this change was just slipped in the defense bill as a rider with little study. Other congressional committees with jurisdiction over these matters had no chance to comment, let alone hold hearings on, these proposals.”⁶³

All fifty-four state and territorial governors joined together condemning the amendment and demanding its repeal. In a resolution adopted by all state governors they stated, “section 1076 [the amendment] stands to potentially undermine a governor’s authority over the National Guard, which ultimately could place the safety and well being of citizens in jeopardy.”⁶⁴ The governors resolved to support the proposition that they, “retain control over the domestic use of their own National Guard

forces . . . in all but two instances: (1) if the application of lethal military force is required to repel an invasion or attack against the United States; and/or (2) if National Guard forces in state active duty or Title 32 status are being used to resist a lawful order of the executive or judicial branch of the federal government .”

In Congressional hearings that followed the amendment of the Insurrection Act the groundswell of opposition continued with witness after witness lamenting the potential for the usurpation of the State’s authority over its militia by the federal government, all pleading for the repeal of 1076. In testifying before the Senate Committee on Homeland Security and Governmental Affairs, one witness requested Congress, “preserve the ability of state Governors to direct the emergency response within their respective states through the repeal of Section 1076 of the 2007 NDAA which changed more than 100 years of well established and carefully balanced state-federal and civil-military relationships.”

Storm Damage - the Second Order Effect of the Repeal of 1076

In responding to the outcry from the states, on January 29, 2008, Congress repealed the 2007 amendment to the Insurrection Act, calling into serious question previous interpretations of the President’s authority to unilaterally federalize the Guard. The Department of Justice and others were of the opinion that that, even before the amendments the President had the authority to unilaterally take control of the state militia to restore public order, even in the absence of an “insurrection.” This position begs the question of why, then, was it necessary to amend the Insurrection Act to include “natural disaster, epidemic, serious health emergency, and terrorist attack” as conditions under which the Act would apply? If Congress had already delegated this

authority, why was it necessary for them to add the additional language? Some, like Senator Warner, might argue the amendment was necessary to clarify the President's authority.

That the amendment may have further confused the issue of the President's authority is a gross understatement. When one considers the subsequent repeal of the amendment, and the stated basis for the appeal, a strong argument presents itself that Congress explicitly did not delegate such authority under Section 333, and that only upon the request and with the consent of the Governor under Section 331 can the President federalize the guard in responding to a natural disaster. The intent of Congress in repealing the amendments is further articulated by Congressional correspondence to the Secretary of Defense.

In advising the Secretary of Defense and Chairmen of The Joint Chiefs of Staff of the repeal of the amendment to the Insurrection Act, Senators Bond and Leahy, and Congressmen Taylor and Davis advise DoD that, "we understand that General Victor E. Renuart, Jr., the Commander of United States Northern Command, asked in a January 18, 2008 memo that the Department of Defense pursue legislative changes in Congress that would ease involuntary federalization of the National Guard during natural disasters. In repealing recent changes to the Insurrection Act . . . , Congress rejected such authority . . . Be assured we would work against any encroachment on states rights, and advise you against supporting what would be a futile legislative request." ⁶⁵

Clearly, Congress recognized the amendment to the Insurrection Act as an encroachment on states rights and, in repealing the amendments, sent a strong

message that the President's authority to unilaterally federalize the Guard was restrictive, and not permissive.

Conclusion

Under Article 1, Section 8 of the Constitution, it is Congress, not the President, that is authorized to "call forth the militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." One of the statutes through which Congress has delegated this power to the President is the Insurrection Act, through which Congress dictates the conditions under which the militia can be called forth. Though amending the Insurrection Act to add natural disasters as a condition under which the President could unilaterally federalize the guard may have been intended only to clarify the President's original authority under the delegation, Congress's subsequent repeal of the language, and the legislative history behind the repeal, calls into serious question the President's authority to unilaterally federalize the National Guard in response to a natural disaster. Though some would argue the repeal is just a reflection of the "political element of the conduct of relief operations,"⁶⁶ legislation is often, if not always, merely the codification of political policy. Regarding the politics of federalizing the Guard in response to a natural disaster over the objection of a state's Governor, Congress has spoken through legislation. As Senators Bond and Leahy, and Congressmen Taylor and Davis bluntly stated, "In repealing recent changes to the Insurrection Act . . . , ***Congress rejected such authority*** . . . Be assured we would work against any encroachment on states rights, and advise you against supporting what would be a futile legislative request."⁶⁷ Congress has spoken. In responding to natural disasters, the consent of the state should be obtained prior to federalizing the guard.

Endnotes

¹ Congressional Research Service, *Rebuilding Housing After Hurricane Katrina: Lessons Learned and Unresolved Issues*, (Washington, D.C.: Library of Congress, December 19, 2006), 1

² Robert E. Pierre, "New Orleans Mayor Faces Tough Questions," *Washington Post*, 10 September 2005, sec. A, p. 14.

³ Ibid.

⁴ Eric Lipton, Eric Schmidt and Tom Shanker, "Political Issues Snarled Plans for Troop Aid," *The New York Times*, 9 September 2005; available from <http://www.nytimes.com/2005/09/09/national/nationalspecial/09military.html>; Internet; accessed 2 February 2008.

⁵ *John Warner National Defense Authorization Act*, Public Law 109-364, sec. 1076 (2007)

⁶ The Council of State Governments, "Resolution in Support of The Governors' Power To Control the National Guard," Puerto Rico , 13 June 2007 available from <http://www.csg.org/pubs/Documents/National%20Guard%20Resolution.pdf>, accessed 5 January 2008

⁷ U.S. Congress, Senate, Committee on Homeland Security and Governmental Affairs, *The Military's Role In Disaster Response: Progress Since Hurricane Katrina*, Testimony of Major General John W. Libby, The Adjutant General, Main National Guard; 110th Cong., 19 July 2007, available from Lexis-Nexis/Congressional; accessed 10 January 2008.

⁸ Black's Law Dictionary, 6th ed., (St. Paul, Minnesota: West, 1990) 1162

⁹ The Posse Comitatus Act, U.S. Code, vol. 18, sec. 1385 (2000)

¹⁰ Matthew Carlton Hammond, "The Posse Comitatus Act: A Principle in Need of Renewal," *Washington University Law Quarterly* 75 (Summer 1997): 954

¹¹ *The Declaration of Independence*, paras 12-14, (U.S. 1776)

¹² *Articles of Confederation and Perpetual Union*, Article VI, (U.S. 1777) available from www.yale.edu/lawweb/avalon/artconf.htm, accessed 8 February 2008.

¹³ DeWitt C. Smith, Jr., "From Yesterday's Fears to Today's Realities." *Parameters* 1 (1977): 90-94

¹⁴ *Fugitives From Labor, Reclamation of Fugitive Slave Act*, 31st Cong., 1st Sess., ch. 60, 9 Stat. 462, 462-63 (September 18, 1850)

¹⁵ Opinion of The United States Attorney General, *Extradition of Fugitives From Service*, 27 May 1854, 6 Op. Att'y General 466, 473; 1845 U.S. AG Lexis 55. Available from www.lexis.com

¹⁶ Matthew Carlton Hammond, "The Posse Comitatus Act: A Principle in Need of Renewal," *Washington University Law Quarterly* 75 (Summer 1997): 955, citing H.W.C. Furman, "Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act," *Military Law Review* 85 (1960): 95.

¹⁷ U.S. Congress, House of Representatives, Committee on the Judiciary, Subcommittee on Crime, *The Posse Comitatus Act: Hearing on H.R. 3519*, 97th Cong., 1st Sess. 10-11 (1981) [hereinafter *PCA Hearing*], at 16 (testimony of William H. Taft, Gen. Counsel, U.S. Dep't of Defense) (quoting an Aug. 6, 1979 report on the PCA by the Departments of Justice and Defense).

¹⁸ DoD Directive 5525.5 states, "DoD guidance on the Posse Comitatus Act (reference (v)), as stated in enclosure 3, is applicable to the Department of the Navy and the Marine Corps as a matter of DoD policy, with such exceptions as may be provided by the Secretary of the Navy on a case-by-case basis."

¹⁹ U.S. Constitution, art.1, sec. 8, cl.15 and 16.

²⁰ Ibid, and U.S. Constitution, art. 2, sec. 2, cl. 1.

²¹ Congressional Research Service, *Hurricane Katrina: DoD Disaster Response* (Washington, D.C.: Library of Congress, September 19, 2005)

²² Daniel Crockett, "The Insurrection Act and Executive Power to Respond with Force to Natural Disasters," 55 www.law.berkeley.edu/library/disasters/Crockett.pdf -, accessed 2 march 2008

²³ Prior to 9/11, 32 U.S.C. 502(f) was used exclusively for "training and administering" the national Guard and was not extended to operational duties. Following President Bush's declaration to place National Guard Forces in airports following 9/11, the "other duty" language in 32 U.S.C. 502(f) was used to justify the use of federal training funds to pay guardsmen performing duty in airports.

²⁴ Many states incorporate by reference, or use the federal military pay scheme to compensate soldiers and airmen on SAD. However, many provide modified pay schemes, e.g., New York pays soldiers performing SAD a minimum of that earned by an E-5 on federal active duty so that an E-1 makes at least what an E-5 would make. (NY Military Law Section 210.)

²⁵ Chris Rofrano and William Berkson, "Status Issues In The National Guard," briefing slides, Office of Chief Counsel, National Guard Bureau, Washington, D.C. (2007) available from www.ngb.army.mil/jointstaff/ps/ja/conference/2007/NG_Status_Issues.ppt, accessed 1 March 2008.

²⁶ Ibid., 18.

²⁷ Congressional Research Service, *Hurricane Katrina: DoD Disaster Response* (Washington, D.C.: Library of Congress, September 19, 2005), 8

²⁸ Acting U.S. Secretary of Defense Gordon England, "Hurricane Katrina Relief Efforts," memorandum for Secretary of the Army, Acting Secretary of the Air Force, Washington, D.C., 7 September 2005.

²⁹ U.S. Code, vol. 10, sec. 12304 (2006)

³⁰ DoD Directive 5525.5, para .E4.1.3

³¹ Ibid.

³² U.S. Constitution, art.1, sec. 8.

³³ Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1798-1878*. (Washington, D.C.: Center for Military History, United States Army, 1988), 32

³⁴ Alexander Hamilton, James Madison and John Jay, *The Federalist Papers, Federalist 29*, (New York, 1787), reprinted with introduction by Charles Kesler, (New York: Penguin Group, 2003) 179

³⁵ Coakley, 22.

³⁶ *The Militia Act of 1792*, 2nd Cong., 1st Sess. Chapter 28, 1 Stat. 264, 2 May 1792, available from www.lexis.com, accessed 1 Feb 2008.

³⁷ Ibid.

³⁸ The Papers of George Washington, "The Whisky Insurrection," available from <http://gwpapers.virginia.edu/documents/whiskey/index.html> ; accessed March 2, 2008

³⁹ Coakley, 72

⁴⁰ Ibid., 80. In an opinion to President Jefferson, James Madison indicated the Militia Act limited the presidents authority to the use of militia, not regular forces. Accordingly, Jefferson's proclamation references the Neutrality Act, not the Militia Act, as justification for the use of regular forces.

⁴¹ Daniel Crockett, "The Insurrection Act and Executive Power to Respond with Force to Natural Disasters," *Boalt Hall School of Law, Law 224.9, Disasters & the Law*, (Spring 2007) 6 available from www.law.berkeley.edu/library/disasters/Crockett.pdf, accessed 2 March 2008 , citing Chapter 39, 9th Congress (March 3, 1807)

⁴² Ibid. citing Proclamation By the President of The United States, American State Papers, 10th Cong., No.258, April 19, 1808.

⁴³ Coakley, .91, citing a letter from President Jackson to Joel R. Poinset, 7 February 1833.

⁴⁴ Crockett, 7

⁴⁵ *The Insurrection Act* U.S. Code, vol. 10, sec. 332 (2006)

⁴⁶ Crockett, 6, citing Chapter 39, 9th Cong. (March 3, 1807)

⁴⁷ U.S. Congress, Senate, Committee on the Judiciary, *Readiness of The Army and Air National Guard*, 110th Cong. 1st Sess., 24 April 2007 (Testimony of LTG H. Stephen Blum, Chief, National Guard Bureau)

⁴⁸ Ibid.

⁴⁹ U.S. Congress, Senate, Committee on Homeland Security and Governmental Affairs, *Hurricane Katrina, a Nation Still Unprepared*; 109th Congress, May 2006, 520 (Executive Summary)

⁵⁰ Eric Lipton, Eric Schmidt and Tom Shanker, "Political Issues Snarled Plans for Troop Aid," *The New York Times*, 9 September 2005; available from <http://www.nytimes.com/2005/09/09/national/nationalspecial/09military.html>; Internet; accessed 2 February 2008.

⁵¹ Congressional Research Service, *Hurricane Katrina: DoD Disaster Response* (Washington, D.C.: Library of Congress, September 19, 2005) 14

⁵² ABA Standing Committee on the Law and National Security, *Hurricane Katrina Task Force Subcommittee Report*, (Washington, D.C.: ABA Standing Committee on the Law and National Security, February 2006) 27 available from www.abanet.org/natsecurity/publications/hurricane_katrina_report_2006_2.pdf

⁵³ Congressional Research Service, *Hurricane Katrina: DoD Disaster Response* (Washington, D.C.: Library of Congress, September 19, 2005) 14

⁵⁴ Senator John Warner, memorandum for U.S. Secretary of Defense Donald Rumsfeld, 14 September 2005.

⁵⁵ Ibid.

⁵⁶ Ibid

⁵⁷ Garrett P. Jensen, *DoD Disaster Response: "Unity of Command Versus Unity of Effort*, (Carlisle Barracks: U.S. Army War College, 17 May 2007), 8

⁵⁸ *John Warner National Defense Authorization Act*, Public Law 109-364, sec. 1076 (2007)

⁵⁹ Michael Greenberger, "Did the Founding Fathers Do 'A Heckuva Job'?" Constitutional Authorization for The Use of Federal Troops to Prevent the Loss of a Major American City," *Boston University Law Review* 87 (April 2007) 405-406 "Appeasement, even during the crisis, was thought to be necessary because the Bush administration then believed the PCA barred deployment of troops to restore order. The investigation into the legality of invoking the Insurrection Act, an exception to the PCA that would allow federal troops to enforce civil law, even in the absence of state agreement, led to 'a flurry of meetings at the Justice Department, the White House and other agencies' and erupted into a 'fierce debate.'" The White house instructed the Justice Department's Office of Legal Counsel (OLC) to resolve the issue. The OLC finally 'concluded that the federal government had authority to move in even over the objection of local officials.'"

⁶⁰ Flow chart available from http://en.wikipedia.org/wiki/Insurrection_Act, accessed 6 February 2008.

⁶¹ Statement of Senator Leahy on September 19, 2006; available from <http://leahy.senate.gov.press/200609/091906a.html>

⁶² Ibid.

⁶³ Remarks of Senator Patrick Leahy, Conference Report, Congressional Record, September 29, 2006. <http://leahy.senate.gov/press/200609/092906b.html>

⁶⁴ The Council of State Governments, "Resolution in Support of The Governors' Power To Control the National Guard," Puerto Rico , 13 June 2007 available from <http://www.csg.org/pubs/Documents/National%20Guard%20Resolution.pdf>, accessed 5 January 2008

⁶⁵ U.S. Senators Patrick Leahy and Kit Bond and U.S. Representatives Tom Davis and Gene Taylor, memorandum for Secretary of Defense and Chairman of the Joint Chiefs of Staff, Washington, D.C., 7 February 2008.

⁶⁶ Congressional Research Service, *Hurricane Katrina: DoD Disaster Response* (Washington, D.C.: Library of Congress, September 19, 2005) 14

⁶⁷ U.S. Senators Patrick Leahy and Kit Bond and U.S. Representatives Tom Davis and Gene Taylor, memorandum for Secretary of Defense and Chairman of the Joint Chiefs of Staff, Washington, D.C., 7 February 2008.

