

2007]

829

## A CALL TO ARMS: CIVIL DISORDER FOLLOWING HURRICANE KATRINA WARRANTS ATTACK ON THE POSSE COMITATUS ACT

*Ashley J. Craw\**

### INTRODUCTION

For weeks, the country watched as one of the largest natural disasters in United States history swept through the Gulf region, flattening and flooding the coastlines of Louisiana and Mississippi. On August 29, 2005, Hurricane Katrina struck land,<sup>1</sup> causing approximately 1.1 million families to be displaced and an estimated \$100 billion in cleanup and repairs.<sup>2</sup> For many Americans, the widespread crime and looting that engulfed the region in the days following Katrina proved to be more shocking than the flooded streets, ravaged coastlines, and leveled homes in Louisiana and Mississippi. In one widely disseminated scene, New Orleans police officers were accused of looting boarded up stores and stealing new automobiles from a local dealership.<sup>3</sup> In another, two New Orleans police officers were dismissed for brutally beating a man in the French Quarter of New Orleans.<sup>4</sup>

These shocking media images begged many to question the current state of natural disaster response law in the United States. Why did crime and looting in a major U.S. city proliferate so expeditiously?<sup>5</sup> Why did it take state and local law enforcement almost a week to quell the civil unrest?<sup>6</sup> Why did the federal government play such a minimal role in helping

---

\* George Mason University School of Law, Juris Doctor Candidate, May 2008; Managing Editor, *GEORGE MASON LAW REVIEW*, 2006-2007; George Mason University, B.A., Communication, B.A.I.S., Conflict Resolution, May 2004. Many thanks to Professor Joseph Zengerle for his mentorship during the writing of this Comment and afterwards and to my husband, Nikolaus Keapproth, and my parents, John and Kim J. Craw, for their unwavering support.

<sup>1</sup> *THE WORLD ALMANAC AND BOOK OF FACTS 2007*, at 302 (2007) [hereinafter *WORLD ALMANAC*].

<sup>2</sup> *Evacuation of Hurricane—Struck U.S. City of New Orleans Nears Completion; Death Toll, Cost Estimates Grow; U.S. President Bush Faces Sharp Criticism*, *FACTS ON FILE WORLD NEWS DIG.*, Sept. 8, 2005, at 597A1 [hereinafter *Evacuation of Hurricane*].

<sup>3</sup> *American Morning* (CNN television broadcast Dec. 27, 2005) (Westlaw, Transcript No. 122707CN.V74), available at 2005 WLNR 21009003.

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

<sup>5</sup> See Charles M. Madigan, *The Tempest Revealed*, *CHICAGO TRIB.*, Sept. 11, 2005, at 1.

<sup>6</sup> *Id.*

state and local law enforcement restore civil order in the immediate wake of this natural disaster?<sup>7</sup>

The answers to many of these questions can be found in the interplay between state and federal law concerning allowable methods for law enforcement in a crisis. The United States has a long-standing principle of separating civilian and military authority and prohibiting the use of the military in domestic law enforcement roles.<sup>8</sup> The notion that the proper role of the military is not to enforce the laws of the United States upon its citizenry was solidified in 1878 when Congress passed the Posse Comitatus Act (“PCA”).<sup>9</sup> The Act, as codified, 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 the Air Force<sup>10</sup> as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>11</sup>

Many scholars maintain that the Act’s underlying rationale embodies traditional notions of separation of military and civilian authority as “one of the fundamental precepts of our form of government.”<sup>12</sup> However, as exceptions to the PCA demonstrate, there are times when the military may be used to enforce domestic laws for a limited purpose and duration.<sup>13</sup> This Comment will argue that Congress should enact another exception to the PCA to allow the military to share in domestic law enforcement responsibilities in the immediate wake of a natural disaster for the limited purpose of quelling chaos, crime, looting, and civil unrest.

Part I of this Comment will examine the creation and evolution of the PCA, focusing on its practical application in the Reconstruction Era, as well as the legislative intent driving the creation of the Act. This part will further explore the exceptions that Congress has carved out of this Act; particularly the Insurrection Act. Part II will examine the unique social con-

---

<sup>7</sup> See Eric Lipton et al., *Storm and Crisis: Government Assistance; Breakdowns Marked Path From Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at 11.

<sup>8</sup> Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principal in Need of Renewal*, 75 WASH. U. L.Q. 953, 953 (1997).

<sup>9</sup> Act of June 18, 1878, ch. 263, 20 Stat. 145.

<sup>10</sup> The Air Force was added to the text of this Act in 1956. See Act of Jan. 3, 1956, Pub. L. No. 84-1028, § 18(a), 70A Stat. 626.

<sup>11</sup> 18 U.S.C. § 1385 (2000).

<sup>12</sup> *Posse Comitatus Act: Hearing on H.R. 3519 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 97th Cong., 10-11 (1981) [hereinafter *PCA Hearing*] (statement of Edward S.G. Dennis, Jr., Chief, Narcotics and Dangerous Drug Sec., Crim. Div., U.S. Dep’t of Justice); Hammond, *supra* note 8, at 955.

<sup>13</sup> See *infra* notes 62-82 and accompanying text.

sequences of a widespread natural disaster and will focus on the chaos following Hurricane Katrina. This Part also will discuss why current capabilities to quell crime, looting, and civil disorder following a natural disaster are inadequate to remedy such a situation. Finally, Part III will make a policy recommendation for Congress to enact an exception to the PCA allowing for military enforcement of domestic law in times of civil unrest following a large-scale natural disaster. Affectionately coined the “Natural Disaster Act” and closely mirroring the Insurrection Act, this exception would provide a better mechanism for relief efforts and the timely cessation of civil disorder following a large scale natural disaster.

## I. BACKGROUND OF THE POSSE COMITATUS ACT

Literally translated, the term “Posse Comitatus” means “the force of a county.”<sup>14</sup> Specifically, the PCA references “the common law power of a county sheriff to summon a ‘posse’—consisting of any able-bodied person over the age of fifteen years—to assist him in keeping the peace, pursuing and arresting felons, and suppressing riots.”<sup>15</sup> Therefore, the PCA literally forbids the use of military as a posse comitatus to keep peace domestically.<sup>16</sup>

### A. *Creation of the Act*<sup>17</sup>

The PCA has its legislative roots in the Reconstruction period following the Civil War.<sup>18</sup> In 1861, Congress began to allow the president to send military troops to enforce domestic laws in the South.<sup>19</sup> By the end of the Civil War in 1865, the prevalence of service members in the southern states continued to rise.<sup>20</sup> In 1867, Congress enacted the Reconstruction Act,<sup>21</sup>

---

<sup>14</sup> OXFORD ENGLISH DICTIONARY 171 (2d ed. 1989); see also BLACK’S LAW DICTIONARY 1162 (6th ed. 1990) (defining “posse comitatus” as “power or force of the county”).

<sup>15</sup> Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 389 (2003); see also *United States v. Hart*, 545 F. Supp. 470 (D.N.D. 1982), *aff’d*, 701 F.2d 749 (8th Cir. 1983).

<sup>16</sup> Kealy, *supra* note 15, at 384.

<sup>17</sup> This Comment will focus on the historical exceptions and legislative intent of the PCA. Because it is not imperatively relevant to the thesis of this comment, the “creation of the act” and other background information will be used to give the reader context, but will not be explored in depth.

<sup>18</sup> Brian L. Porto, *Construction and Application of Posse Comitatus Act (18 U.S.C.A. § 1385)*, and *Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute Laws*, 141 A.L.R. FED. 271, 281 (1997).

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

<sup>20</sup> See *id.*

which expressly permitted the use of military to maintain civil order and enforce law in the southern states by dividing those states into military districts to be governed by a military commander.<sup>22</sup> Under the authority of the Reconstruction Act, military personnel intervened in labor disturbances, suppressed illegal production of whiskey, and guarded polling booths during elections.<sup>23</sup> The use of military to control the southern states was so extensive that scholars have argued, “Never before or after, within the continental boundaries of the United States, did [the military] exercise police and judicial functions . . . or deal with domestic violence on the scale it did in the eleven ex-Confederate states from 1865 to 1877.”<sup>24</sup>

In the late 1870s, concerns about military presence in the southern states began to come to the forefront of American political debate.<sup>25</sup> The military had been used to perform a broad range of law enforcement responsibilities in the southern states for over a decade.<sup>26</sup> Southerners were outraged by the sheer length of time that the military policed the southern states and the ever-increasing scope of their responsibilities.<sup>27</sup> Southerners contended that continued military regulation stemming from the Civil War relegated their states to second-class status vis-à-vis the northern states.<sup>28</sup> Their sentiment gained momentum after President Grant, a Republican, sent troops to “monitor” and “safeguard” polling booths during the presidential election of 1876.<sup>29</sup> When Republican candidate Rutherford B. Hayes won the election, South Carolina, Louisiana, and Florida disputed the election results as skewed and argued that President Grant used the military to influence polling.<sup>30</sup>

To calm the public outcry, Congress enacted and President Hayes signed into law the Posse Comitatus Act of 1878.<sup>31</sup> The PCA repealed the Reconstruction Act of 1867 by authorizing criminal sanctions for anyone

---

<sup>21</sup> Act of Mar. 2, 1867, ch. 153; 14 Stat. 428.

<sup>22</sup> *Id.*; see also Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 89-90 (1975).

<sup>23</sup> Meeks, *supra* note 22, at 90.

<sup>24</sup> ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878* 268 (1988).

<sup>25</sup> See Porto, *supra* note 18, at 281-82.

<sup>26</sup> See COAKLEY, *supra* note 24.

<sup>27</sup> See Hammond, *supra* note 8, at 960; Meeks, *supra* note 22, at 89.

<sup>28</sup> See *id.*

<sup>29</sup> DOMESTIC OPERATIONAL LAW HANDBOOK 8 (2001), available at [https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/a693f8e3dc1bd33585256a39006f2f9d/\\$FILE/Doplaw%20Handbook.pdf](https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/a693f8e3dc1bd33585256a39006f2f9d/$FILE/Doplaw%20Handbook.pdf) [hereinafter DOPLAW HANDBOOK].

<sup>30</sup> DOPLAW HANDBOOK, *supra* note 29.

<sup>31</sup> See H.W.C. Furman, *Restrictions upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 95-96 (1960).

who used the Army for domestic law enforcement purposes.<sup>32</sup> One of the most obvious purposes of the PCA was to prevent any future military intrusion into the election process.<sup>33</sup> This was meant to help maintain the sanctity representative democracy by ensuring that free and unbiased elections alone would determine political representation.

In addition to helping ensure a free electoral process, Congress hoped to restore stable law enforcement systems in the southern states, which had become reliant on federal military efforts during Reconstruction.<sup>34</sup> In the Reconstruction Era, it was politically vital for Congress to ensure that the war-torn southern states regain internal structure and stability, particularly in their Tenth Amendment policing powers.<sup>35</sup> Thus, the legislative intent driving the PCA was to: (1) prevent military intervention in elections; and (2) boost equality between the northern and southern states by providing the southern states with an opportunity to grow and maintain a stable police force.<sup>36</sup>

## B. *Evolution*

Since its enactment in 1878, the PCA has evolved in a number of ways. Specifically, the text of the Act has undergone a variety of cosmetic changes,<sup>37</sup> while the substance of the Act remains largely unchanged.<sup>38</sup> In

---

<sup>32</sup> 18 U.S.C. § 1385 (2000); *see also* Porto, *supra* note 18, at 281-82.

<sup>33</sup> *See, e.g.*, United States v. Allred, 867 F.2d 856, 870-71 (5th Cir. 1989); Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948); United States v. Hartley, 486 F. Supp. 1348, 1356 n.11 (M.D. Fla. 1980), *aff'd*, 678 F.2d 961 (11th Cir. 1982); James P. O'Shaughnessy, Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 Am.Crim.L.Rev. 703, 706 (1976).

<sup>34</sup> *See* Kealy, *supra* note 15, at 395.

<sup>35</sup> *See* Jack H. McCall, Jr. & Brannon P. Denning, *Mission Im-posse-ble: The Posse Comitatus Act and Use of the Military in Domestic Law Enforcement*, 39 TENN. B.J. 26, 29 (2003) ("[M]any Southerners tended to regard the maintenance of troops in their states as victor's justice or rule by the bayonet to suppress their civil rights").

<sup>36</sup> Kealy, *supra* note 15, at 394; *see* Furman, *supra* note 31, at 93-95. It is my argument that the action Congress took in enacting the PCA in 1878 was a result of the specific problems with military at polling booths and southern states rights. It can also be argued that there is a more general principal underlying the separation of military and police, which serves as a backdrop for this legislation. For a more detailed look at the history behind separating military and police responsibilities see Charles Bloeser, *A Statute in Need of Teeth: Revisiting the Posse Comitatus Act after 9/11*, 50 FED. LAW. 24, 26 (2003); *PCA Hearing*, *supra* note 12, at 10-11. For a more detailed history of how the rationale for limiting the domestic power of military had its roots in British control of the colonies and the Revolutionary period, see Kealy, *supra* note 15, at 389-92.

<sup>37</sup> In 1878, the PCA read:

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

addition to making minor revisions to the statutory text, Congress has enacted a number of exceptions to the PCA that authorize the use of the military for domestic law enforcement purposes in specific situations.<sup>39</sup> Although the judiciary has yet to interpret the Act directly, courts have explored the scope of the Act and interpreted its role in modern society.<sup>40</sup>

### 1. Judicial Interpretation

Since its inception, the PCA has not been employed in its formal criminal prosecutorial role.<sup>41</sup> Therefore, there has been no opportunity for direct judicial interpretation of the Act.<sup>42</sup> However, the Act has surfaced indirectly, allowing courts an opportunity to interpret various aspects of its scope.<sup>43</sup> Courts have held that the Act, as implied by its text, only applies to the Army and Air Force.<sup>44</sup> In addition, the Department of Defense and internal military regulations require the Navy<sup>45</sup> and Marine Corps<sup>46</sup> to abide by the same standard as the Army and Air Force for *posse comitatus* con-

---

may be expressly authorized by the Constitution or by act of Congress . . . any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor . . . .  
Act of June 18, 1878, ch. 263, §15, 20 Stat. 145, 152 (codified as amended at 18 U.S.C. § 1385 (2000)).  
Presently, the text of the PCA reads:

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

<sup>38</sup> Compare Act of June 18, 1878, § 15, with 18 U.S.C. § 1385; see also Kealy, *supra* note 15, at 398 (“Congress has only slightly amended the PCA since its passage.”).

<sup>39</sup> See STEPHEN E. YOUNG, *THE POSSE COMITATUS ACT OF 1878: A DOCUMENTARY HISTORY* xvi n.35 (2003).

<sup>40</sup> See Sean J. O'Hara, Comment, *The Posse Comitatus Act Applied to the Prosecution of Civilians*, 53 U. KAN. L. REV. 767, 773-74 (2005).

<sup>41</sup> CHARLES DOYLE, CONG. RESEARCH SERV., *USE OF THE MILITARY TO ENFORCE CIVILIAN LAW: POSSE COMITATUS ACT AND OTHER CONSIDERATIONS* 2 (1988).

<sup>42</sup> See *PCA Hearing*, *supra* note 12, at 10. The lack of opportunity for judicial interpretation will continue because application of the PCA is seldom challenged in the courts. See *id.*

<sup>43</sup> See *infra* notes 44-61 and accompanying text.

<sup>44</sup> *United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991); *United States v. Roberts*, 779 F.2d 565, 567 (9th Cir. 1986).

<sup>45</sup> 10 U.S.C. § 375 (2000); 4 DEPARTMENT OF DEFENSE, DIRECTIVE 5525.5, *DoD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS* ¶ 3 (1986) (extending the PCA's application to the Navy and Marine Corps “as a matter of DoD policy”).

<sup>46</sup> See 10 U.S.C. § 375; GlobalSecurity.org, Marine Corps Organization, <http://www.globalsecurity.org/military/agency/usmc/overview.htm> (last visited Feb. 4, 2007) (“The Marine Corps, within the Department of the Navy, is organized as a general purpose ‘force in readiness’ to support national needs.”).

cerns. However, courts have held that the Coast Guard and the National Guard remain unhindered by the Act.<sup>47</sup>

Not only have courts interpreted who must abide by the Act, they have also explored the scope of what is and is not permissible military action under the PCA.<sup>48</sup> Courts have interpreted the Act generally to hold that active participation by the military violates the Act, whereas passive participation does not.<sup>49</sup> For instance, one court held that unlawful active participation occurred when Air Force servicemen used an Air Force helicopter to search for a civilian escapee.<sup>50</sup> The court reasoned that the service member's active participation in the search constituted a law enforcement activity and violated the PCA.<sup>51</sup> Following this same rationale, another court held that the transportation of a prisoner already in federal custody by Army personnel on an Army helicopter did not violate the PCA, because Army personnel were passively assisting police forces and not actively enforcing the law.<sup>52</sup> It follows that the distinction between the permissible and forbidden use of military equipment and personnel turns on whether the military is used to actively enforce the law through searching for or apprehending a civilian, or merely assisting in the routine functions of holding previously arrested prisoners.<sup>53</sup>

This distinction between passive and active participation was more clearly delineated by the Eighth Circuit and affirmed by the Supreme Court in *Bissonette v. Haig*, a case arising out of the military occupation of Wounded Knee in 1973.<sup>54</sup> Plaintiffs alleged that military personnel and equipment were used to create roadblocks around the Wounded Knee Indian reservation and to search the reservation's inhabitants.<sup>55</sup> The court held that the test to identify violations of the PCA concerned whether military personnel regulated, forbade, or compelled certain conduct by civilians.<sup>56</sup>

---

<sup>47</sup> See *United States v. Chaparro-Almeida*, 679 F.2d 423, 425 & n.7 (5th Cir. 1982) (noting that the Coast Guard is under the authority of the Department of Transportation, and not the Department of Defense); *Jackson v. State*, 572 P.2d 87, 93 (Alaska 1977) (“[T]he law enforcement role established for the Coast Guard by Congress indicates that Congress did not intend to make the Posse Comitatus Act applicable to the United States Coast Guard.”); see also 14 U.S.C. §§ 2, 89 (2000) (stating that the Coast Guard is charged with law enforcement duties).

<sup>48</sup> See *infra* notes 49-61 and accompanying text.

<sup>49</sup> *Porto*, *supra* note 18, at 287-89.

<sup>50</sup> *Wrynn v United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961).

<sup>51</sup> *Id.*

<sup>52</sup> *United States v. Gerena*, 649 F. Supp. 1179, 1182 (D. Conn. 1986).

<sup>53</sup> Compare *Gerena*, 649 F. Supp. at 1182, with *Wrynn*, 200 F. Supp. at 465.

<sup>54</sup> *Bissonette v. Haig*, 800 F.2d 812, 813 (8th Cir. 1986) (en banc), *aff'g* 776 F.2d 1384 (8th Cir. 1985), *aff'd*, 485 U.S. 264 (1988).

<sup>55</sup> *Bissonette v. Haig*, 776 F.2d 1384, 1386 (8th Cir. 1985), *aff'd en banc*, 800 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988).

<sup>56</sup> *Bissonette*, 776 F.2d at 1390.

Using this test, the Court held that the military did not violate the PCA when it provided personnel, planes, advice, and supplies for surveillance at Wounded Knee.<sup>57</sup> Conversely, the Court held that military personnel manning roadblocks and performing armed patrols did violate the PCA because this presence regulated civilian action.<sup>58</sup> Thus, the *Bissonette* court drew a clear distinction between passive military support and active military action.

Further distinctions between permissible and forbidden action have come in conjunction with the Military Support for Civilian Law Enforcement Agencies Act.<sup>59</sup> This Act allows defense personnel to operate equipment and passively assist civilian agencies in law enforcement, but forbids direct participation in civilian law enforcement operations.<sup>60</sup> For example, military personnel are prohibited from administering DUI tests such as a blood test, as this action constitutes direct participation in civilian law enforcement.<sup>61</sup> Thus, it is generally understood that passive assistance by the military is acceptable, but active participation in law enforcement efforts is not.

## 2. Statutory Exceptions

The PCA expressly states that Congress may enact exceptions to the Act, as the needs of a modern society continuously grow.<sup>62</sup> This societal evolution has required Congress to ease many of the PCA's rigid restrictions.<sup>63</sup> Over the years, Congress has enacted over twenty-five exceptions to the PCA.<sup>64</sup> Many of these exceptions are construed narrowly, including an exception that allows for use of the military to investigate an assassination,

---

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* While the Court did not demand criminal sanctions for this "violation" of the PCA, it did allow Plaintiff's Fourth Amendment claim of improper search due to violation of the PCA. *Id.* at 1390-91.

<sup>59</sup> Military Support for Civilian Law Enforcement Agencies Act, 10 U.S.C. § 374 (2000) (amended 2006); see *U.S. v. Johnson*, 410 F.3d 137, 147 (4th Cir. 2005).

<sup>60</sup> 10 U.S.C.A. § 374(c). The text of this section reads:

The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available to any Federal, State, or local civilian law enforcement agency to operate equipment for purposes other than described in subsection (b)(2) only to the extent that such support does not involve direct participation by such personnel in a civilian law enforcement operation unless such direct participation is otherwise authorized by law.

<sup>61</sup> *Johnson*, 410 F.3d at 147.

<sup>62</sup> See 18 U.S.C. § 1385 (2000).

<sup>63</sup> See O'Hara, *supra* note 40, at 775.

<sup>64</sup> See YOUNG, *supra* note 39, at xvi-xvii (citing CHARLES DOYLE, CONG. RESEARCH SERV., THE POSSE COMITATUS ACT & RELATED MATTERS 21(2000)). In note 35, Young provides a brief summary of each statutory exception.

kidnapping, or assault of the President of the United States<sup>65</sup> or a Member of Congress.<sup>66</sup> Other provisions are broader in scope, such as an exception allowing military personnel to provide assistance in countering illegal drug activity upon the request of federal or state law enforcement agencies.<sup>67</sup>

There is currently no existing exception to the PCA in the continental United States during times of natural disaster.<sup>68</sup> However, a variety of statutes tiptoe around the issue. For example, 42 U.S.C. § 5170b(c)(1) authorizes the governor of a state in which a large scale disaster has occurred to request that the President allow the Department of Defense to undertake “emergency work which is made necessary by such incident and which is essential for the preservation of life and property.”<sup>69</sup> However, the language of the Act is narrow. Since the language does not specify that military personnel can enforce domestic laws, the statute does not constitute a true exception to the PCA.<sup>70</sup> Other statutes also tread closely around a general natural disaster exception to the PCA.<sup>71</sup> For instance, the Governors of Guam,<sup>72</sup> the Virgin Islands,<sup>73</sup> and Puerto Rico<sup>74</sup> may request military assis-

---

<sup>65</sup> 18 U.S.C. § 1751 (2000).

<sup>66</sup> 10 U.S.C. § 351 (2000).

<sup>67</sup> 10 U.S.C. § 374(b)(1)(A) (2000).

<sup>68</sup> See Ryan McGeeney, *Bringing the 'Posse' into 2006*, ORACLE (Tampa, Fla.), Jan. 11, 2006 (“Creeping under the radar—ever since Hurricane Katrina made scrambled eggs out of Louisiana and Mississippi—has been President Bush's suggestion that we ‘rethink’ the Posse Comitatus Act of 1878.”).

<sup>69</sup> This section of the PCA states:

During the immediate aftermath of an incident which may ultimately qualify for assistance under this title or title V of this act, the Governor of the State in which such incident occurred may request the President to direct the Secretary of Defense to utilize the resources of the Department of Defense for the purpose of performing on public and private lands any emergency work which is made necessary by such incident and which is essential for the preservation of life and property. If the President determines that such work is essential for the preservation of life and property, the President shall grant such request to the extent the President determines practicable. Such emergency work may only be carried out for a period not to exceed 10 days.

42 U.S.C. § 5170b(c)(1) (2000) (amended 2006).

<sup>70</sup> Compare *id.* (allowing Department of Defense Officials to conduct “any emergency work which is made necessary”) with 48 U.S.C. § 1422 (2000), and 48 U.S.C. § 1591 (2000) (stating specifically that the Governor of a U.S. territory “may summon the posse comitatus or call out the militia or request assistance of the senior military or naval commander of the Armed Forces of the United States.”). The latter statutes make an explicit exception to the PCA, where 42 U.S.C. § 5170b(c)(1) does not. Therefore it is unlikely that Congress intended 42 U.S.C. § 5170b(c)(1) to allow for a natural disaster exception to the PCA.

<sup>71</sup> See 48 U.S.C. § 1422; 48 U.S.C. § 1591.

<sup>72</sup> The text of this section reads:

Whenever it becomes necessary, in case of disaster, invasion, insurrection, or rebellion, or imminent danger thereof, or to prevent or suppress lawless violence, he may summon the posse comitatus or call out the militia or request assistance of the senior military or naval commander of the Armed Forces of the United States in Guam, which may be given at the discretion of such commander if not disruptive of, or inconsistent with, his Federal responsi-

tance in cases of disaster, invasion, insurrection, or lawless violence.<sup>75</sup> These statutes allow for a natural disaster exception to the PCA, but they apply only to U.S. territories and not to the fifty states.

Finally, two additional exceptions to the PCA have been carved out for situations of insurrection<sup>76</sup> and chemical, biological, and nuclear attacks.<sup>77</sup> The Insurrection Act allows the President to use military force to control civil unrest in times of insurrection against state or local government.<sup>78</sup> This action can be initiated by either the state legislature or governor during a time of insurrection.<sup>79</sup> An insurrection is defined as a “violent revolt against an oppressive authority, usu[ally] a government.”<sup>80</sup> The Insurrection Act does not apply to natural disasters, because the rioting and civil unrest resulting from a natural disaster does not constitute “an orga-

---

bilities. He may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, proclaim the island, insofar as it is under the jurisdiction of the government of Guam, to be under martial law. The members of the legislature shall meet forthwith on their own initiative and may, by a two-thirds vote, revoke such proclamation.

48 U.S.C. § 1422 (concerning the powers of the Governor of Guam).

<sup>73</sup> The text of the statute reads:

Whenever it becomes necessary, in case of disaster, invasion, insurrection, or rebellion or imminent danger thereof, or to prevent or suppress lawless violence, he may summon the posse comitatus or call out the militia or request assistance of the senior military or naval commander of the Armed Forces of the United States in the Virgin Islands or Puerto Rico, which may be given at the discretion of such commander if not disruptive of, or inconsistent with, his Federal responsibilities. He may, in case of rebellion or invasion or imminent danger thereof, when the public safety requires it, proclaim the islands, insofar as they are under the jurisdiction of the government of the Virgin Islands, to be under martial law. The members of the legislature shall meet forthwith on their own initiative and may, by a two-thirds vote, revoke such proclamation.

48 U.S.C. § 1591 (concerning the powers of the Governor of the Virgin Islands).

<sup>74</sup> *See id.*

<sup>75</sup> *See supra* notes 72-74 and accompanying text.

<sup>76</sup> The full text reads:

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

10 U.S.C. § 331 (2000); *see also* 10 U.S.C. § 332 (2000) (referring to the President’s ability to Federalize state National Guard troops). This section of the statute states:

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>77</sup> 10 U.S.C. § 332.

<sup>78</sup> *Id.* § 331.

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

<sup>80</sup> BLACK’S LAW DICTIONARY 823 (8th ed. 2004).

nized and armed uprising against authority or operations of government.”<sup>81</sup> While the Insurrection Act would allow for military intervention in a situation remarkably similar to the chaos and civil unrest that followed Hurricane Katrina, the PCA forbids using the military to enforce domestic law during a natural disaster.<sup>82</sup>

## II. ANALYSIS OF THE UNIQUE SITUATION CREATED BY NATURAL DISASTERS AND THE INADEQUACY OF CURRENT RELIEF STRUCTURES

While there is no formula to predict the collective human reaction to a natural disaster,<sup>83</sup> one recurring reaction adds a disturbing and personal element to the destructive force of nature. Crime, looting, and general civil disorder can often arise in the wake of a natural disaster,<sup>84</sup> creating unique strains on rescue<sup>85</sup> and evacuation<sup>86</sup> efforts. Further, current mechanisms to maintain and restore order following a natural disaster are inadequate, as proven by Hurricanes Hugo and Katrina.<sup>87</sup>

### A. *Civil Unrest in Natural Disasters Generally*

Natural disasters are unpredictable events, and similarly, the human response to such disasters is largely volatile.<sup>88</sup> However, psychologists have studied the human response to a large-scale crisis as a phenomenon of collective behavior.<sup>89</sup> Following a natural disaster, “a widespread search for

---

<sup>81</sup> *Id.* (“Insurrection is distinguished from rout, riot, and offense connected with mob violence by the fact that in insurrection there is an organized and armed uprising against authority or operations of government, while crimes growing out of mob violence, however serious they may be and however numerous the participants, are simply unlawful acts in disturbance of the peace which do not threaten the stability of the government or the existence of political society.” (quoting 77 C.J.S. *Riot* § 29 (1994))); *see also* 45 AM. JUR. 2d *Insurrection* § 1 (1999) (“An insurrection has been defined as a rising against civil or political authority, but as something more than a mob or riot. It is a rising against civil or political authority: the open and active opposition of a number of persons to the execution of law in a city or a state.”).

<sup>82</sup> *See* 10 U.S.C. § 331 (2000); *and supra* notes 3-7 and accompanying text.

<sup>83</sup> *See* Sandra K. Schneider, *Governmental Response to Disasters: The Conflict Between Bureaucratic Procedures and Emergent Norms*, 52 PUB. ADMIN. REV. 135, 138 (1992).

<sup>84</sup> *See, e.g., id.*

<sup>85</sup> *See CNN Security Watch Special: Is America Prepared? Part 1* (CNN television broadcast Sept. 25, 2005) (LEXIS, Transcript No. 092501CN.V79) [hereinafter *CNN Security Watch*].

<sup>86</sup> *See* David Hill, *Crime Hindered Evacuation*, HILL (Wash., D.C.), Sept. 14, 2005, at 14.

<sup>87</sup> *See infra* notes 166-171 and accompanying text.

<sup>88</sup> Schneider, *supra* note 83, at 136.

<sup>89</sup> *See id.* at 136-37.

meaning occurs among the affected population.”<sup>90</sup> That population looks internally to discover how to deal with such an unanticipated event.<sup>91</sup> Often, as the situation is unprecedented and unfamiliar, the norms arising from a disaster situation differ widely from pre-disaster norms.<sup>92</sup> Therefore, the disaster victim may develop new or uncharacteristic behaviors to comprehend and give meaning to their new environment,<sup>93</sup> including criminal activity and civil unrest.<sup>94</sup> This is particularly true when law enforcement personnel are not present to maintain order and regulate the boundaries of permissible behavior.<sup>95</sup> Kathleen Tierney, director of the Natural Hazards Research Center at the University of Colorado at Boulder, stated, “under conditions of extreme uncertainty and extreme desperation *where law enforcement is not present*, that new norms can emerge within groups that . . . legitimize behavior . . . even on the part of the otherwise very law-abiding people.”<sup>96</sup>

While images of this human catastrophe may still be fresh in policymakers’ minds concerning Hurricane Katrina, this was hardly the first instance of widespread civil unrest in recent years.<sup>97</sup> On September 18, 1989, Hurricane Hugo crashed into the U.S. Virgin Islands, leaving in its wake over \$1 billion in damage.<sup>98</sup> As a consequence of this widespread destruction, deviant behavior became the norm.<sup>99</sup> Local officials and first responders were unable to control this behavior, which “implicitly encouraged” more acts of looting and pillaging.<sup>100</sup> Civil unrest made it extremely difficult to administer aid and disaster relief.<sup>101</sup> It was not until federal law enforcement agents and the U.S. military were deployed that order was restored,<sup>102</sup> allowing aid and assistance to reach the area.<sup>103</sup>

---

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at 137.

<sup>92</sup> *See id.* at 137-38.

<sup>93</sup> Schneider, *supra* note 83, at 137.

<sup>94</sup> *Id.* at 138.

<sup>95</sup> *See, e.g., id.* at 138-39; *The NewsHour with Jim Lehrer: Update Hurricane Katrina; Newsmaker; Breakdown; Relief Effort* (PBS television broadcast Sept. 1, 2005) (LEXIS, Transcript No. 8345) [hereinafter *NewsHour*].

<sup>96</sup> *NewsHour, supra* note 95 (emphasis added).

<sup>97</sup> *See* Schneider, *supra* note 83, at 138.

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

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

<sup>100</sup> *Id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See* 48 U.S.C.A. § 1591 (2000) (authorizing the governor of the Virgin Islands to “summon the posse comitatus or call out the militia or request assistance . . . of the Armed Forces of the United States” in cases of “disaster, invasion, insurrection, or rebellion or imminent danger thereof, or to prevent or suppress lawless violence”).

<sup>103</sup> Schneider, *supra* note 83, at 138.

The human crisis that followed Hugo in 1989 was similar to the reaction to Katrina in 2005.<sup>104</sup> On August 29, 2005, Hurricane Katrina battered the Gulf Coast region, damaging or destroying parts of Louisiana and Mississippi.<sup>105</sup> The widespread carnage of Katrina displaced over a million households.<sup>106</sup> This large-scale devastation was compounded by the resultant deviant behavior surrounding the disaster.<sup>107</sup> Police in New Orleans began to arrest people for looting evacuated storefronts as early as August 27, 2005, two days before Katrina even touched land.<sup>108</sup> By October 1, 2005, the Jefferson Parish Sheriff's Office alone arrested over 275 people for looting.<sup>109</sup> Among the stolen items were video games, DVDs, DVD players, and other electronics.<sup>110</sup> Captain Kerry Najolia, deputy commander of the New Orleans Sheriff's Office SWAT team, sarcastically noted that the stolen electronics represented goods "that everybody needs during a hurricane when there's no electricity."<sup>111</sup> Further, many stolen items were found in automobiles that had also been stolen following Katrina.<sup>112</sup> In Jefferson, Louisiana alone, approximately 135 automobiles had been reported stolen by October 1, 2005, with many of these vehicles surfacing all over the country.<sup>113</sup> The theft of automobiles was not limited to unlawful citizens of the disaster zone, but also included first responders to the crisis, such as members of the New Orleans Police Department.<sup>114</sup> Specifically, several New Orleans police officers were under investigation for stealing automobiles from a local dealership.<sup>115</sup>

Additionally, after Katrina's landfall, reports of rapes, shootings, and stabbings filled the airwaves, causing panic and fear among the Katrina evacuees.<sup>116</sup> New Orleans Mayor Ray Nagin reportedly stated that there were "hundreds of armed gang members killing and raping people inside the [S]uperdome."<sup>117</sup> While the validity of such reports and rumors is still

---

<sup>104</sup> See *infra* notes 105-21 and accompanying text.

<sup>105</sup> WORLD ALMANAC, *supra* note 1, at 302.

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

<sup>107</sup> See *NewsHour*, *supra* note 95.

<sup>108</sup> See Michelle Hunter, *Jeff Arrests 275 in Katrina Looting*, NEW ORLEANS TIMES PICAYUNE, Oct. 1, 2005, at B1.

<sup>109</sup> *Id.*

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

<sup>111</sup> *Id.*

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

<sup>113</sup> *Id.*

<sup>114</sup> See *American Morning*, *supra* note 3.

<sup>115</sup> See *id.*

<sup>116</sup> See Adam Harvey, *False Crimes in City of Neglect—Katrina Rescues Needlessly Delayed*, SUNDAY TELEGRAPH (N.S.W.), Oct. 9, 2005, at 48.

<sup>117</sup> *Id.*

under investigation, the fearful reaction to this and other statements was quite real.<sup>118</sup>

Fear of violent crime, whether fact or pure rumor, combined with widespread looting, hindered the response effort in two ways. First, worries of crime and looting stalled evacuation efforts, as able-bodied men and women were fearful to leave their property.<sup>119</sup> A local poll taken by Susan Howell, a professor at the University of New Orleans Survey Research Center, revealed that perceptions of crime and issues concerning home safety were the most determinative factors influencing New Orleans residents' willingness to evacuate during a disaster.<sup>120</sup> Thus, fears of looting and crime endangered many residents who refused to evacuate in a timely fashion,<sup>121</sup> which in turn increased the number of stranded citizens in need of rescue.

Second, civil unrest delayed aid and assistance, as first responders had to restore order before relief could be administered.<sup>122</sup> The process of restoring order in New Orleans took approximately one week,<sup>123</sup> and it was a primary concern of first responders.<sup>124</sup> Susan Neely, former Assistant Secretary for Public Affairs at the U.S. Department of Homeland Security, stated that "the big concern is the huge diversion of first responder resources to contain the civil unrest."<sup>125</sup> Moreover, according to Police Chief Joseph Estey, president of the International Association of Police Chiefs, "[L]awlessness . . . [is] something that needs to be dealt with very ruthlessly and very, very quickly in terms of establishing order and letting people know that that's not going to be tolerated."<sup>126</sup> Therefore, one of the first priorities in responding to a natural disaster must be to maintain law and civil order so that assistance, aid, and evacuation efforts can run more smoothly and effectively.

---

118 Hill, *supra* note 86.

119 *See id.*

120 *Id.*

121 *See id.*

122 *See CNN Security Watch*, *supra* note 85.

123 *See* Press Release, Entergy Corp., Entergy Implements Business Continuity Plan by Establishing Interim Corporate Headquarters in Jackson Metro Area; Company Intends Return to New Orleans (Sept. 4, 2005), available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/09-04-2005/0004099943&EDATE=> [hereinafter Entergy Press Release].

124 *See CNN Security Watch*, *supra* note 85.

125 *Id.*

126 *NewsHour*, *supra* note 95.

## B. *The State of Current Natural Disaster Response Systems*

### 1. General Structure of Response Systems

For the past fifty years, natural disaster response systems have been orchestrated from the bottom up.<sup>127</sup> As natural disasters are generally understood to be a local phenomenon, the local level is the primary center for the development and implementation of natural disaster response systems.<sup>128</sup> These systems may be fortified by mutual aid agreements that allow neighboring jurisdictions to be called for emergency assistance services.<sup>129</sup> However, when local authorities become strained, the local chief elected official may declare a local emergency and request assistance directly from state authorities.<sup>130</sup> States may respond to this request by sending state agencies, such as the Departments of Transportation or Health, to provide assistance.<sup>131</sup> However, as a general principle, a state's agencies do not have sufficient resources to maintain such an effort either over a long period of time or a vast disaster area.<sup>132</sup> Therefore, "when significant and prolonged assistance may be needed by one or more counties or cities, the Governor may declare a state of emergency to mobilize the full range of state resources. This may include large measures, such as the use of funds sufficient to deal with the impact of the disaster, or the activation of the National Guard . . . ." <sup>133</sup>

The progression of disaster response at the federal level is much like that at the state level.<sup>134</sup> A Governor may request federal assistance, administered by the relevant federal agency.<sup>135</sup> However, federal assistance may not become fully available to a state until the President has determined that the state and local authorities have exhausted their resources and the President makes a Presidential Disaster Declaration.<sup>136</sup> Once this declaration has been made, the Federal Emergency Management Agency ("FEMA") coor-

---

<sup>127</sup> Walter Green & Joanne Lapetina, *How the Disaster Response System Works*, RAMIFICATIONS (Richmond, Va.), Dec. 2001, at 12, 12, available at <http://www.ramdocs.org>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Green & Lapetina, *supra* note 127.

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

<sup>135</sup> *See id.*

<sup>136</sup> *Id.*; see PERI Presidential Disaster Declaration Site, <http://www.peripresdecusa.org/mainframe.htm> (last visited Feb. 6, 2007).

dinates federal efforts in responding to requests by the state.<sup>137</sup> Even when the federal government becomes involved in a natural disaster response effort, the local government retains decision-making responsibilities and requests outside aid.<sup>138</sup> State and federal authorities merely assist local authorities by providing them with funding, personnel, and other resources as requested.<sup>139</sup>

## 2. Current Law Enforcement Mechanisms

In most aspects of disaster response and relief, state governors may request various forms of specific federal assistance to aid in disaster response efforts.<sup>140</sup> For example, the U.S. Department of Transportation may be asked to assist in the evacuation of a disaster area,<sup>141</sup> to clear roads and inspect bridges,<sup>142</sup> or aid in the reconstruction following a disaster.<sup>143</sup> Further, the U.S. Department of Housing and Urban Development and the U.S. Department of Health and Human Services may be asked to assist in the creation and maintenance of temporary housing for evacuees, as well as to assist in rebuilding or finding permanent housing for displaced persons.<sup>144</sup> Thus, the appropriate federal agencies may provide assistance requested in their areas of specialization.

However, imagine the scenario, like Katrina, where one of the most pressing and immediate needs of local first responders is assistance in restoring law and order. In such a situation, from who in the federal government may the state governor seek assistance? Under the PCA's current restrictions, the Department of the Defense and the U.S. military may not respond to such a request for assistance in law enforcement efforts.<sup>145</sup> Without the possibility of federal assistance in law enforcement, states are

---

<sup>137</sup> Green & Lapetina, *supra* note 127, at 13.

<sup>138</sup> *See id.* at 12-13.

<sup>139</sup> *See id.*

<sup>140</sup> *See id.* at 12.

<sup>141</sup> *See, e.g., Update: United States Government Response to Aftermath of Hurricane Katrina*, STATES NEWS SERVICE, Sept. 3, 2005.

<sup>142</sup> *See id.*

<sup>143</sup> *See Emergency Highway Aid Headed for Mississippi*, STATES NEWS SERVICE, Sept. 13, 2005.

<sup>144</sup> *See, e.g., Bernardi: HUD is Moving Quickly to Provide Homes and Hope to Hurricane Victims*, STATES NEWS SERVICE, Sept. 27, 2005; *Collins, Lieberman Seek Better Housing Aid for Katrina Victims*, STATES NEWS SERVICE, Mar. 14, 2006.

<sup>145</sup> 18 U.S.C. § 1385 (2000); *U.S. Northern Command Support to Hurricane Katrina Disaster Relief*, STATES NEWS SERVICE, Aug. 31, 2005 [hereinafter *Northern Command*] ("As stated in the Posse Comitatus Act, USNORTHCOM and the military may not act in a law enforcement capacity within the United States.").

forced to request aid from the National Guards of other states.<sup>146</sup> Each of these efforts must be specifically coordinated, costing valuable time to call up and organize.<sup>147</sup>

While troops may not be allowed to assist in any law enforcement efforts, they are still deeply engrained in disaster relief mechanisms of the status quo. The Stafford Act allows the President to send in federal troops after a national emergency has been declared.<sup>148</sup> They may be asked to perform a wide range of duties in response to natural disasters, including assisting in evacuation efforts and distributing aid.<sup>149</sup> Thus, the military already plays a major role in disaster response, but is prohibited from engaging in law enforcement functions.<sup>150</sup>

As noted previously, courts have interpreted the PCA to hold that active participation in law enforcement duties by military personnel violates the PCA.<sup>151</sup> Assume military personnel were deployed to a disaster area to administer food and other supplies. During the course of such an activity, a service member witnessed the looting of a local store. In this situation, the service member would not be permitted to arrest or detain the perpetrator, as that would constitute an active law enforcement measure in violation of the PCA.<sup>152</sup> Further, imagine a similar hypothetical situation, in which a local police officer arrives at the scene to affect the arrest of the looter. There is a prolonged struggle between the officer and the perpetrator, and the officer requests assistance from a service member to aid in the detention and capture of the looter. In this scenario as well, the service member may not assist the officer in the arrest without violating the PCA.<sup>153</sup> Therefore,

---

<sup>146</sup> See Harold Nevin & Carlos Bertha, Role of the National Guard and Reserves in the Domestic Role of the Military, <http://www.usafa.af.mil/jscope/JSCOPE01/Nevin-Bertha01.html> (last visited Feb. 18, 2007).

<sup>147</sup> See *id.*

<sup>148</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, § 302, 88 Stat. 143, 146-47 (1974) (codified as amended at 42 U.S.C. § 5170a (2000)); see e.g., *Northern Command*, *supra* note 145.

<sup>149</sup> See *infra* notes 209-15 and accompanying text.

<sup>150</sup> Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 79, 82 (2000).

<sup>151</sup> See O'Hara, *supra* note 40, at 773-74; *supra* Part I.B.1. I would like to reiterate that the only *direct* violation of the PCA occurs when a commander deploys troops as a posse comitatus. However, courts have held that *indirect* violations of the PCA occur when military forces actively participate in law enforcement duties. See *supra* Part I.B.1.

<sup>152</sup> See *Bissonette v. Haig*, 776 F.2d 1384, 1390 (8th Cir. 1985), *aff'd mem.*, 485 U.S. 264 (1988) (holding that the test for violation of the Act concerned whether or not military personnel regulate, forbid, or compel certain conduct by civilians). Thus, it is intuitive that the detention or arrest of looters would actively regulate the civilian conduct of stealing.

<sup>153</sup> See *id.* Following the same analysis as above, any active participation in the arrest or detainment of civilians would violate the PCA.

where service members are already deeply ingrained in the disaster relief, the PCA's limitations seem both arbitrary and an obstacle to timely disaster management.

### 3. Current Mechanisms in the Wake of a Natural Disaster Are Inadequate

Restoring order in the wake of a natural disaster is vital to efficient evacuation and assistance efforts.<sup>154</sup> However, status quo mechanisms are not adequate to maintain law and order, as evidenced by the proliferation of looting and crime in the immediate aftermath of Hurricanes Hugo<sup>155</sup> and Katrina.<sup>156</sup> There are many factors that contribute to the inadequacies of the status quo. First, disaster areas are often so large that there simply is not enough manpower to police the region.<sup>157</sup> Second, there is a lack of structure to coordinate efforts on local, state, and federal levels.<sup>158</sup> Third, there are simply not enough personnel to handle immediate law enforcement concerns, as state and local police lack manpower and are often themselves victims of the disaster.<sup>159</sup>

#### a. Disaster Areas Can Be Huge

One of the major impediments to effectively maintaining order during natural disasters is the sheer size of the area in need of policing.<sup>160</sup> On September 3, 2005, President George W. Bush stated, "The magnitude of responding to a crisis over a disaster area that is larger than the size of Great Britain has created tremendous problems that have strained state and local capabilities."<sup>161</sup> In fact, White House reports indicate that Hurricane Katrina was one of the largest natural disasters in the history of the United States, with damage to over 90,000 square miles in Louisiana, Mississippi, and Alabama.<sup>162</sup> Hurricane Hugo similarly left a sizable disaster area, reaping

---

<sup>154</sup> See *supra* Part II.A.

<sup>155</sup> Schneider, *supra* note 83, at 138.

<sup>156</sup> See Aaron Sharockman et al., *City of Sorrow New Orleans Looks Hard for First Step*, St. Petersburg Times, Sept. 1, 2005, at 1A, available at 2005 WLNR 13773720.

<sup>157</sup> See *Evacuation of Hurricane*, *supra* note 2.

<sup>158</sup> David S. Broder, Op-Ed., *The Right Minds for Recovery*, WASH. POST, Sept. 29, 2005, at A23.

<sup>159</sup> See *infra* notes 173-83 and accompanying text.

<sup>160</sup> See *Evacuation of Hurricane*, *supra* note 2.

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

<sup>162</sup> Office of the White House Press Sec'y, Fact Sheet: America Responds to the Katrina Disaster (Sept. 3, 2005), <http://www.whitehouse.gov/news/releases/2005/09/20050903-3.html>.

carnage in Puerto Rico, St. Thomas, San Juan, St. Croix, and Guadeloupe, not to mention damage to the South Carolina coastline.<sup>163</sup>

Therefore, due to the sheer size of the disaster area left in the wake of a major natural catastrophe, there are simply not enough first responders to manage the situation.<sup>164</sup> This can be particularly troubling when the maintenance of civil order is the first priority in responding to such a crisis.<sup>165</sup> In order to adequately cover the disaster area and to ensure law and order throughout a vast disaster area, more first responders are needed to perform basic law enforcement functions in the immediate wake of a natural disaster.

b. Lack of Structure to Coordinate Efforts on Local, State and Federal Levels

Another inadequacy of our existing disaster response system is that there currently are no clear structures to coordinate efforts among local, state, and federal levels of government.<sup>166</sup> The lack of a procedural mechanism to coordinate actions among multiple levels of government is one of the few weaknesses of the United States Constitution.<sup>167</sup>

The federal system of divided power and responsibility is one of the glories of the Founders' work, a scheme that has helped preserve individual liberty and the flexibility needed to run a continent-size nation. But when a task requires those separate governments to work together, there is no ready forum in which they can meet.<sup>168</sup>

Lack of such a coordination mechanism is compounded by the fact that every state and locality has its own disaster relief plan.<sup>169</sup> "Currently, very little is known about [large-scale trends in] state-level disaster response," as response strategies are highly varied by state.<sup>170</sup> Some states have developed fairly robust disaster response plans and procedures, while others do not.<sup>171</sup> However, as natural disasters occur so infrequently, most state-level emergency management agencies have extremely small staffs,

---

<sup>163</sup> Schneider, *supra* note 83, at 138-39.

<sup>164</sup> See *Evacuation of Hurricane*, *supra* note 2.

<sup>165</sup> See *CNN Security Watch*, *supra* note 85.

<sup>166</sup> Broder, *supra* note 158.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See Green & Lapetina, *supra* note 127, at 12-13.

<sup>170</sup> DENNIS S. MILETI, *DISASTERS BY DESIGN: A REASSESSMENT OF NATURAL HAZARDS IN THE UNITED STATES* 226 (1999).

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

requiring states to coordinate relief efforts with other agencies.<sup>172</sup> Therefore, there is no clear or consistent structure to coordinate disaster relief among the many agencies involved.

c. National Guard and Local Police do not Provide Enough Manpower to Maintain Order

Quelling looting and restoring civil order in the wake of a natural disaster are among the most pressing issues facing first responders, as proper relief and evacuation efforts cannot occur properly in a state of civil chaos.<sup>173</sup> This activity is currently limited only to state and local law enforcement authorities and National Guard troops.<sup>174</sup> However, as proven by Hurricane Katrina, these groups are not robust enough to quell civil disorder in a timely fashion.<sup>175</sup> There are a variety of reasons why both local police and the National Guard are inadequate to handle civil unrest immediately following a natural disaster.

First, local police forces lack the sheer numbers required to effectively police disaster areas.<sup>176</sup> For example, the police force in New Orleans was already strained and undermanned, consisting of only 1,500 officers.<sup>177</sup> By September 5, 2005, only two-thirds of the New Orleans Police Force reported to work.<sup>178</sup> Thus, only 1,000 New Orleans police officers were available to quell crime and looting.<sup>179</sup> Unless you assume that the remaining police officers worked greater than twelve-hour shifts per day and postponed any vacation or sick leave in light of the disaster, a force of approximately 500 officers was left to police the entire city of New Orleans.<sup>180</sup>

Second, state and local police officers are often the actual victims of a natural disaster.<sup>181</sup> For instance, the homes of seventy percent of the New Orleans Police Force were reportedly damaged or destroyed by Hurricane Katrina.<sup>182</sup> Many local police officers had to evacuate and safeguard their

---

<sup>172</sup> Schneider, *supra* note 83, at 136.

<sup>173</sup> See *supra* notes 119-26 and accompanying text.

<sup>174</sup> See *supra* notes 140-44 and accompanying text.

<sup>175</sup> See Sharockman et al., *supra* note 156.

<sup>176</sup> See *infra* notes 177-80 and accompanying text.

<sup>177</sup> *A Police Force in Chaos*, Editorial, WASH. TIMES, Sept. 10, 2005, at A12, available at 2005 WLNR 14357597.

<sup>178</sup> *Evacuation of Hurricane*, *supra* note 2.

<sup>179</sup> *Evacuation of Hurricane*, *supra* note 2; see also *A Police Force in Chaos*, *supra* note 177.

<sup>180</sup> Two thirds of 1,500 officers is 1,000 officers. If all officers work twelve-hour shifts, then half of the officers will be working at any given time. Half of 1,000 officers is 500 officers.

<sup>181</sup> See *Evacuation of Hurricane*, *supra* note 2; *CNN Security Watch*, *supra* note 85.

<sup>182</sup> *CNN Security Watch*, *supra* note 85.

own families, adding further stress to the chaos following a disaster.<sup>183</sup> The trauma of property loss, injury, death, and evacuation of family members, along with the pressures of rescue efforts and limiting lawlessness reportedly led two New Orleans police officers to commit suicide in the week following Katrina's landfall.<sup>184</sup>

Third, National Guard troops are often slow in providing relief to a disaster area.<sup>185</sup> Typically, members of the National Guard are required to serve one weekend per month drilling and training, as well as two weeks per year in a condensed, full-time training program.<sup>186</sup> National Guard troops carry out otherwise civilian lives, living at home with their families and working in civilian employment.<sup>187</sup> Therefore, National Guard response to a disaster can be delayed, as troops must be called to duty, be notified that they must report to duty, actually report to duty, and then be organized and deployed to a disaster site.<sup>188</sup> This multi-tiered process of calling and deploying National Guard troops is cumbersome, inefficient, and may be reliant on infrastructure (roads, communication networks, etc.) damaged in the disaster.<sup>189</sup> This was evidenced by the National Guard's response in Hurricane Katrina. Although Hurricane Katrina made landfall on Monday, August 29, 2005,<sup>190</sup> National Guard troops did not arrive to the area until Friday, September 2, 2005.<sup>191</sup> As lawlessness ensued immediately following the hurricane,<sup>192</sup> this delay of four days in responding to the crisis meant that National Guard troops played a minimal role in maintaining civil order.

Fourth, National Guard units lack the equipment and resources necessary to respond effectively to a national emergency.<sup>193</sup> This was especially

---

<sup>183</sup> Mike Dunn, *Strain Forges Stronger NOPD; Officers Carry on Despite Conditions*, ADVOCATE (Baton Rouge), Sept. 5, 2005 at 1-2B.

<sup>184</sup> *Id.*

<sup>185</sup> See *Evacuation of Hurricane*, *supra* note 2.

<sup>186</sup> Army National Guard, Guard Training, <http://www.arng.army.mil/training.aspx> (last visited Feb. 8, 2007).

<sup>187</sup> See *id.*

<sup>188</sup> See ANGELITO L. GUTIERREZ, USAWC STRATEGY RESEARCH PROJECT, HOW DOES THE NATIONAL GUARD BECOME RELEVANT, READY AND REACTIVE? iii (2004), <http://www.strategicstudies.institute.army.mil/ksil/files/000120.doc>. ("The process by which the Guard is activated and deployed in response to a national emergency is hindering its responsiveness to the needs of the Nation. The validation requirement within the mobilization process is redundant and unnecessary.")

<sup>189</sup> See *id.* at 2 ("There simply are not enough transportation assets to simultaneously move the Guard in an expeditious manner . . .").

<sup>190</sup> WORLD ALMANAC, *supra* note 1.

<sup>191</sup> See Julian Borger & Jamie Doward, *Bush Sends Marines as Flood Fury Grows*, THE OBSERVER (London), Sept. 4, 2005, at 1.

<sup>192</sup> See *supra* Part II.A.

<sup>193</sup> See Rick Maze, *Lawmakers Look to Give Guard Better Gear; Officials Discuss Military's Role in Disaster Ops*, AIR FORCE TIMES, Oct. 10, 2005, at 9 ("Lawmakers are concerned about some of the

true for the most basic needs of rescuers, such as medical supplies and trucks capable of carrying victims and equipment through the rising waters.<sup>194</sup> Further, the National Guard units were not equipped with adequate technology, which resulted in communication difficulties.<sup>195</sup> This required Katrina rescuers to rely on “human runners” to ensure proper communication.<sup>196</sup>

Finally, there are so many needs following a large-scale catastrophe that more manpower is needed at the initial stages of response. As Police Chief Joseph Estey explains:

It's such a desperate situation, and there are so many needs to fill. There's the rescue component. There's a response. That's a security component. There's a law enforcement component. And it is an overwhelming task to do all of those, so, you know, unfortunately, you have to stage and respond as best you can with what resources you have. And you're trying to do all of that with a very limited number of resources and an inability to get people there quickly and, you know, address all of those needs at once.<sup>197</sup>

### III. WHY A NATURAL DISASTER ACT MIRRORING THE INSURRECTION ACT WOULD PROVIDE A BETTER MECHANISM TO QUELL CIVIL UNREST

Due to the aforementioned inadequacies of the law enforcement component of current natural disaster response systems, Congress should pass a statutory exception to the PCA allowing the military to keep the peace and prevent chaos immediately following a large-scale natural disaster. The text of such a Natural Disaster Act (“NDA”) could read:

Whenever there is large scale natural disaster in one or more of the states, the President may, upon the request of the state's Governor,<sup>198</sup> call into Federal service 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 maintain civil peace, enforce domestic law, and prevent or quell chaos,<sup>199</sup> so long as such activities are ‘essential for the preservation of life and property.’<sup>200</sup> Any activi-

---

serious equipment deficiencies in the National Guard and the need for larger emergency stockpiles, particularly medical supplies, which surfaced during relief efforts following hurricanes Katrina and Rita.”).

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

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

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

<sup>197</sup> NewsHour, *supra* note 95.

<sup>198</sup> As per 48 U.S.C. § 1422 (2000) and 48 U.S.C. § 1591 (2000), the Governor has ultimate control and decision-making authority during times of natural disaster. *See supra* notes 71-75 and accompanying text.

<sup>199</sup> This text closely resembles the text of the Insurrection Act, 10 U.S.C. § 331 (2000).

<sup>200</sup> 42 U.S.C. § 5170b(c)(1) (2000) (amended 2006).

ties conducted in accordance with this Act shall terminate no later than 10 days after the President calls such groups into service,<sup>201</sup> unless the Governor requests an extension.<sup>202</sup>

#### A. *Need for Clear Statutory Language Concerning Coordination Efforts*

The status quo currently lacks a mechanism to coordinate local, state and federal responses to large-scale natural disasters.<sup>203</sup> This is particularly true concerning the coordination of law enforcement efforts.<sup>204</sup> This lack of coordination was manifest in the response to Hurricane Katrina.<sup>205</sup> As House Homeland Security Committee Member Bennie G. Thompson stated:

The abysmal response to this summers' [sic] hurricanes leads many to believe that the mechanisms and procedures established under the National Response Plan (NRP) for responding to terrorist attacks, natural disasters and other threats won't be carried out. A clear concise and workable response plan is crucial to the security and safety of Americans and must be implemented immediately.<sup>206</sup>

One way to remedy this lack of structure would be to provide statutory guidelines for how and when military troops could be used for law enforcement functions following a natural disaster. Such a statute could constitute a first step toward a clearer and more concise response plan.

#### B. *Why NDA Over Other Solutions*

As previously noted, status quo methods to quell civil unrest and lawlessness are inadequate to maintain law and order.<sup>207</sup> This is primarily due to lack of manpower in state and local police forces, as well as slow reaction time on the part of the National Guard.<sup>208</sup> This lack of manpower, combined with the vast disaster area in need of policing, creates a situation in

---

<sup>201</sup> The second section of text mirrors the 10 day limitation on troops found in 42 U.S.C. § 5170b(c)(1).

<sup>202</sup> Potentially, troops may be needed to perform law enforcement functions for more than 10 days. This clause creates a mechanism by which Governors have the option to request additional time if necessary.

<sup>203</sup> See Broder, *supra* note 158; see also *supra* Part II.B.3.b.

<sup>204</sup> See *supra* notes 140-53 and accompanying text.

<sup>205</sup> Press Release, House Committee on Homeland Security—Democratic Office, Committee Democrats Question Whether the Administration is Prepared to Respond to the Avian Flu (Oct. 19, 2005).

<sup>206</sup> *Id.*

<sup>207</sup> See *supra* Part II.

<sup>208</sup> See *supra* notes 176-92 and accompanying text.

which first responders are set up to fail. Amending the PCA to allow military personnel to enforce domestic laws in the wake of a natural disaster would be a much more efficient method to react to civil unrest after a natural disaster. First, the U.S. military currently performs a wide range of duties in disaster relief, and therefore is already deeply engrained in the disaster relief process. Second, military forces are already trained and organized. Third, the U.S. military is highly mobile and can be deployed expeditiously to restore order.

1. U.S. Military Already Has a Huge Presence in the Disaster Response Effort

It was noted after Katrina that “the military ended up playing a central role in the federal government's relief work.”<sup>209</sup> This was largely due to the sheer number of troops deployed to the disaster site.<sup>210</sup> At its peak, military forces reached nearly 72,000, with almost 50,000 National Guardsmen and 22,000 active duty personnel in the Gulf Coast.<sup>211</sup> This created a total deployment for Katrina more than twice the size of the military response to Hurricane Andrew.<sup>212</sup> However, use of troops in disaster relief is not a new phenomenon.<sup>213</sup> Military personnel have been sent to provide relief in natural disasters since the late nineteenth century.<sup>214</sup> Under the current system, military personnel are able to perform a wide range of functions in disaster relief efforts, such as coordinating evacuation efforts, providing aid and medical care, and assisting in search and rescue operations.<sup>215</sup> Therefore, creating a natural disaster exception to the PCA would result in a minimal expansion of the military's role in natural disaster response to include law enforcement efforts for a limited time. As the military already has a significant presence in disaster relief, it should also be allowed to perform the

---

<sup>209</sup> Keith J. Costa, *Rumsfeld Confirms DoD Has No Plans to Alter Posse Comitatus*, INSIDE THE PENTAGON, Oct. 13, 2005, available at 2005 WLNR 16594722.

<sup>210</sup> See *Hurricane Katrina: The Defense Department's Role in the Response: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 109th Cong. 4-7 (2005) (statement of Paul McHale, Assistant Secretary of Defense for Homeland Defense), available at [http://hsgac.senate.gov/\\_files/020906McHale.pdf](http://hsgac.senate.gov/_files/020906McHale.pdf).

<sup>211</sup> *Id.* at 6.

<sup>212</sup> *Id.* at 4.

<sup>213</sup> See Carter L. Burgess, *The Armed Forces in Disaster Relief*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1957, at 71, 71-72.

<sup>214</sup> See *id.*

<sup>215</sup> See *id.* at 73-75 (describing the variety of functions of the Armed Services); see also Costa *supra* note 209.

most pressing obstacle facing first responders—maintenance of law and civil order.

## 2. Military Troops Are Already Organized and Trained to Perform Law Enforcement and Peacekeeping Operations

As evidenced by Hurricanes Katrina and Hugo, local police forces alone are inadequate to maintain order following a natural disaster.<sup>216</sup> Compounding this problem is the long period of time it takes for National Guard troops to be called up and organized.<sup>217</sup> In the aftermath of a natural disaster, such time is at a premium, particularly when civil unrest and chaos ensue. Unlike a National Guard unit, which must be called up and organized before it can be deployed,<sup>218</sup> the U.S. military is already organized into standing units.<sup>219</sup> United States Senator John Warner, Chairman of the Senate Armed Services Committee stated, “[t]he only entity in the United States that has the personnel, the equipment, the training, and the logistical capacity to lend support to the National Guard and other state entities in an emergency of this scale . . . is the Department of Defense.”<sup>220</sup>

One common concern regarding use of the military for domestic law enforcement purposes is that military training and law enforcement training are vastly different.<sup>221</sup> Opponents to a change in the PCA argue that the role of the military is to fight wars against international powers.<sup>222</sup> Moreover, opponents argue that the military is trained to defeat the enemy and shoot to kill, not to conduct basic law enforcement and policing functions.<sup>223</sup> However, the nature and role of the military has been evolving over the past few decades. U.S. military troops already perform domestic law enforcement and policing functions.<sup>224</sup> For instance, in Iraq, U.S military forces currently perform a variety of law enforcement functions while they train native

---

<sup>216</sup> See *supra* notes 176-84 and accompanying text.

<sup>217</sup> See *supra* notes 185-92 and accompanying text.

<sup>218</sup> See GUTIERREZ, *supra* note 188.

<sup>219</sup> Congressional Budget Office, Making Peace While Staying Ready for War: The Challenges of U.S. Military Participation in Peace Operations, <http://www.cbo.gov/showdoc.cfm?index=1809&sequence=5> (last visited Feb. 18, 2007).

<sup>220</sup> Vince Crawley, *Laws on Military's Homeland Role May Get Review*, FED. TIMES, Sept. 26, 2005, at 6.

<sup>221</sup> See Mackubin Thomas Owens, *Maintaining the Divide*, Nat'l Rev., Oct. 26, 2005, available at <http://www.nationalreview.com/owens/owens200510260824.asp>.

<sup>222</sup> *Id.*

<sup>223</sup> Julian E. Barnes & Kenneth T. Walsh, A Uniform Response? (Military's Involvement in Disaster Relief), U.S. NEWS & WORLD REP., Oct. 3, 2005, at 28, available at 2005 WLNR 15260326.

<sup>224</sup> See *Fox Special Report with Brit Hume: Political Headlines* (Fox News Network television broadcast June 8, 2004) (LEXIS, Transcript No. 060801cb.254).

Iraqis for these policing responsibilities.<sup>225</sup> In addition, the U.S. military is increasingly being used as a peacekeeping force.<sup>226</sup> In June 2004, former Secretary of Defense Donald Rumsfeld, stated at a press conference, “the United States recognizes the increasing role for peacekeepers in the world and the importance of it.”<sup>227</sup> Therefore, it is reasonable to believe that the military is adequately trained to maintain peace and order following a major natural disaster.

### 3. Military Can Be Expeditiously Deployed

One of the most pressing and timely issues for first responders to a natural disaster area is maintaining law and order.<sup>228</sup> Civil unrest and chaos prevent efforts to evacuate a disaster area<sup>229</sup> and to provide relief to victims.<sup>230</sup> Therefore, expediency in restoring law and order is the key to effective relief efforts. Due to the time-sensitive nature of law enforcement demands following a natural disaster, the most effective first responders would be those that could react immediately. Such a body of responders would be the U.S. armed forces, which are already trained, organized, and prepared to respond on short notice.<sup>231</sup> The United States always keeps a force ready to be deployed anywhere in the world at a moment’s notice at the direction of the President.<sup>232</sup> For example, the 82nd Airborne Division has been deployed to Honduras, Saudi Arabia, Kosovo, Afghanistan, and Kuwait to respond instantaneously to a crisis.<sup>233</sup> Further, according to President George W. Bush, the U.S. military is “the institution of our government most capable of [carrying out] massive logistical operations on a moment’s notice.”<sup>234</sup> It would naturally follow that the U.S. military personnel would be the quickest, non-local first responders to a natural disaster.

Regrettably, due to the PCA, the President is unable to utilize the expediency and skills of the U.S. military domestically. For instance, General

---

<sup>225</sup> Pail Richter, *The Conflict in Iraq; Rapid Personnel Shifts Hinder U.S. Efforts to Rebuild Iraq*, L.A. TIMES, Nov. 17, 2005, at A1.

<sup>226</sup> See Secretary of Defense Donald Rumsfeld, Secretary Rumsfeld Holds Media Availability, as Released by the Department of Defense (June 5, 2004), 2004 WL 1235898 (F.D.C.H.).

<sup>227</sup> *Id.*

<sup>228</sup> See *CNN Security Watch*, *supra* note 85.

<sup>229</sup> Hill, *supra* note 86, at 14.

<sup>230</sup> See *CNN Security Watch*, *supra* note 85.

<sup>231</sup> See Burgess, *supra* note 213, at 71.

<sup>232</sup> Barnes & Walsh, *supra* note 223.

<sup>233</sup> *Id.*

<sup>234</sup> Megan Scully, *Rumsfeld Demurs When Asked About Changing Posse Comitatus*, NAT’L JOURNAL’S CONGRESS DAILY, Sept. 21, 2005, 2005 WLNR 14901024.

Peter Pace, Chairman of the Joint Chiefs of Staff, stated that the military was not able to move as expeditiously following Katrina as it could have if the disaster occurred in international waters.<sup>235</sup> While the 82nd Airborne Division was ordered to assist relief efforts in New Orleans, the order came almost a week after Katrina hit land.<sup>236</sup> Furthermore, the efforts of the 82nd Airborne Division focused solely on giving assistance and relief to hurricane evacuees and not on suppressing crime and looting on the streets of New Orleans.<sup>237</sup> By contrast, the U.S. military was able to provide fast and efficient relief to tsunami victims in the Indian Ocean on December 26, 2004<sup>238</sup> because the crisis occurred overseas, where the PCA does not apply.<sup>239</sup>

In this respect, the U.S. military has proven its ability to respond expeditiously to natural disaster scenarios. U.S. troops can and have been deployed to disaster worldwide to assist in peacekeeping, law enforcement, and disaster relief.<sup>240</sup> This quick response could be replicated in the United States, allowing the armed forces to provide domestic disaster relief more swiftly than other organizations.

#### 4. There Would Be a Sufficient Check on Military Power

One of the most common concerns of allowing military enforcement of domestic laws are excess and abuse, the exact problems that led to the enactment of the PCA in 1878.<sup>241</sup> However, the proposed Natural Disaster Act includes a number of safeguards intended to recognize state sovereignty and prevent long-term military presence in the affected state(s).

First, the state governor has the discretion to decide whether federal troops will be permitted to perform law enforcement duties. As in 48 U.S.C. §§ 1422 and 48 U.S.C. § 1591, the decision to use armed forces in a law enforcement capacity is at the discretion of the Governor in the Natural Disaster Act.<sup>242</sup> This would enable governors to maintain control of the use

---

<sup>235</sup> Crawley, *supra* note 220.

<sup>236</sup> Barnes & Walsh, *supra* note 223.

<sup>237</sup> See *supra* notes 209-15 and accompanying text.

<sup>238</sup> 2004 Indian Ocean Earthquake, [http://en.wikipedia.org/wiki/2004\\_Indian\\_Ocean\\_earthquake](http://en.wikipedia.org/wiki/2004_Indian_Ocean_earthquake) (last visited Feb. 9, 2007).

<sup>239</sup> Crawley, *supra* note 220. The Posse Comitatus Act is an Act of Congress. Therefore, the Act only limits domestic activity and does not apply to international intervention. *Id.*

<sup>240</sup> See Burgess, *supra* note 213, at 71-72.

<sup>241</sup> See Stewart Powell, *Bush considers changes to Posse Comitatus Act; Both right and left wary of giving domestic police power to military*, HOUS. CHRON., Oct. 2, 2005, at A18.

<sup>242</sup> 48 U.S.C. § 1422 (2000); 48 U.S.C. § 1591 (2000). The text of these Acts states that the Governor "may summon the posse comitatus . . . or request assistance of . . . the Armed Forces." Therefore,

of military as a law enforcement entity in their respective states. Therefore, the Natural Disaster Act would merely give state and local authorities another tool to respond to natural disasters, but would not require or compel such action.

Second, the length of time the military is allowed to serve in a law enforcement capacity would be limited to ten days, following the text of 42 U.S.C. § 5170b(c)(1).<sup>243</sup> This would prevent any long term or sustained military law enforcement presence, one of the major fears of opponents to changes in the PCA.<sup>244</sup> The Natural Disaster Act includes an exemption for the governor to waive the 10-day requirement based on the unique demands and logistical factors that follow a major natural disaster.<sup>245</sup> The governor is given the discretion to dismiss the military as soon as law and order is restored.<sup>246</sup>

Third, the Uniform Code of Military Justice would continue to hold any service member accountable for actions committed in the line of duty.<sup>247</sup> Wanton disregard for the law would be severely punishable, just as police officers performing similar acts would be punished.<sup>248</sup> To further ensure accountability, military personnel conducting domestic law enforcement tasks could be held accountable in civilian courts for any violations of the law or excessive force.<sup>249</sup>

## CONCLUSION

Natural disasters leave a trail of devastation and destruction behind them. The fury of nature is nameless, faceless, and cannot be stopped or slowed down. In a sense, the people and government of this nation are helpless to stop such acts of nature, and often the only appropriate response is to move out of the way. However, the man-made destruction, civil unrest, crime, and looting that arise in the wake of such natural disasters can be prevented. The United States needs adequate structures in place to react swiftly and efficiently in the aftermath of a natural disaster. Particularly, we

---

the Governor of each territory has ultimate control and decision-making authority during times of natural disaster.

<sup>243</sup> 42 U.S.C.A. § 5170b(c)(1) (2000) (amended 2006) (“Such emergency work may only be carried out for a period not to exceed 10 days”).

<sup>244</sup> See Powell, *supra* note 241.

<sup>245</sup> See *supra* text accompanying notes 201-202.

<sup>246</sup> See *supra* text accompanying notes 201-202.

<sup>247</sup> Michael O’Hanlon, *Let Military Keep Order in Disasters*, BALTIMORE SUN, Oct. 6, 2005, at 17A.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

need structures to maintain social order during times of widespread devastation.

The creation of a statutory exception to the PCA, closely mirroring the Insurrection Act, to provide narrowly for military intervention to enforce law and maintain civil order in the wake of a large-scale natural disaster, would be a more efficient method to suppress civil unrest than status quo efforts. Hurricane Katrina has demonstrated that current response methods are not sufficient to maintain civil order following a natural disaster.<sup>250</sup> The sheer size of the area to be policed and the lack of structure to coordinate efforts between state and federal officials make current methods insufficient.<sup>251</sup> Military units are already formed, trained, and can be deployed expeditiously in a natural disaster situation.<sup>252</sup> This structure and ability to respond instantaneously is exactly what is crucial in the aftermath of natural disasters. Further, allowing military intervention in narrow situations of large-scale natural disasters for the limited time sufficient to maintain order would align with the legislative intent of the PCA.<sup>253</sup>

Unlike the wrath of nature, the crime and looting that follows a natural disaster can be minimized. However, this human catastrophe can only be lessened or even prevented if steps are taken to provide a structured and timely reaction to large-scale natural disasters. The Natural Disaster Act would provide a structure and mechanism for this much-needed relief and would help to prevent the human catastrophe of Katrina in future disasters.

---

<sup>250</sup> See *supra* Part II.B.3.

<sup>251</sup> See *supra* Part II.B.3.a.

<sup>252</sup> See *supra* Part III.B.

<sup>253</sup> See *supra* Part I A.