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The Commandeerer in Chief

Jason Mazzone

THE COMMANDEERER IN CHIEF

*Jason Mazzone**

As Hurricane Katrina demonstrated, federalism can impede the government's ability to plan for and respond to emergencies. Many emergencies transcend federalist divisions of power and responsibility, rendering unclear which level of government should respond. In addition, while emergencies may require a coordinated response by local, state, and national government, getting different levels of government to work together in times of crises is difficult. Further, even when states and localities call for outside assistance, they tend to resist undue federal interference in their affairs; a national government that lacks experience working with local actors on the ground can find it difficult to implement relief programs. Given the widely recognized failures of the government's response to Katrina and the urgent need for reform, some federal officials have proposed that, in a future emergency, rather than try to work with state and local response personnel, the federal government should simply deploy the military to take over the relief effort. This Article presents an alternative solution: emergency commandeering. This solution would allow the federal government, when it responds to certain kinds of emergencies, to call into periods of mandatory federal service the emergency response personnel of the state in which the emergency occurs, and, if necessary, emergency response personnel from other states. These state employees—police, firefighters, emergency medical technicians, urban search and rescue teams, and public health specialists—would serve with compensation under the command of the President. Emergency commandeering allows the national government to mount an effective response, one that draws upon the skills and experiences of state and local personnel, without the hindrance of multiple command structures or other forms of state and local resistance. Emergency commandeering is authorized by the Constitution, consistent with federalism, and, compared to the alternative of sending the military into our streets, good for democracy.

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* Associate Professor of Law, Brooklyn Law School. I am grateful for the support of the Brooklyn Law School Dean's Summer Research Stipend Program.

Cedant arma togae.

—Cicero[1]

INTRODUCTION

Emergencies challenge federalism. For one thing, emergencies do not abide by the "distinction" that "the Constitution requires . . . between what is truly national and what is truly local."[2] Rather than correspond neatly to the particular divisions of government the system has devised, emergencies traverse geographic and political boundaries and demand responses from administrative units that (aside from being affected by the same incident) might have little in common. Hurricanes and their aftermath are rarely confined to a single town or a single state; earthquakes ignore state lines; contaminated food can produce simultaneous public health crises in New York City, Chicago, and San Francisco. Even when emergencies do arise in distinct locations, they often have broader regional or national effects. Thus, while the airplanes hijacked by terrorists on September 11, 2001, struck three specific sites (Manhattan, Washington, D.C., and Somerset County, Pennsylvania), the effects of those attacks—political, economic, and social—radiated throughout the country.

In addition, when an emergency transcends the preexisting structural divisions of political authority, it can be unclear just who is supposed to respond. If, for example, an airplane from Boston's Logan Airport hits an office building in Manhattan, are New York City officials responsible for organizing the response effort because they are closest to the scene? Or does responsibility fall on state government (which might have greater resources), or on the federal government (because an aviation incident is a national concern)? If travelers from Asia bring avian flu to Southern California, are local officials responsible for organizing inoculations and quarantine because health is the business of local government? Or should federal officials take charge because if the disease is not contained, it will produce a national crisis? A nuclear weapon might be smuggled to the United States by sea: who should be responsible for checking cargo containers that arrive in Newark en route to Des Moines? In the absence of some corrective mechanism, federalism can easily produce a failure of government. Unless issues of authority and responsibility are resolved well in

1 CICERO, DE OFFICIIS 78 (Walter Miller trans., MacMillan Co. 1921) (literally translating to "[l]et arms yield to the toga" and more loosely "[l]et military power give way to civilian authority").

2 United States v. Morrison, 529 U.S. 598, 617–18 (2000) (citing United States v. Lopez, 514 U.S. 549, 568 (1995)).

advance, it is possible, perhaps even likely, that no level of government will prepare sufficiently for or respond satisfactorily to an emergency when it does occur. When responsibility is dispersed, the overall response can easily prove inadequate.

Further, in many emergencies an effective response requires the contributions of officials from multiple levels of government—local, state, and national—as well as the use of resources from multiple governmental units.[3] Here, too, federalism presents obstacles. Where responsibility for mounting the response is or can be divided up among multiple power holders, the effectiveness of the response often depends upon the ability of these power holders to cooperate, or at least to coordinate their actions. This might be beyond the system's capacities. Federalism does not necessarily include built-in mechanisms for suspending the normal independent operations of the existing divisions of governmental authority and getting the parts of the system to work together as one. Dilemmas of collective action can easily thwart an adequate emergency response: officials at one level of government might refuse to provide assistance beyond what they perceive to be in their own immediate interest or they might refuse to cede control over their own resources. Even if a powerful coordinator—for instance the national government—has the necessary will to force coordination—its efforts, particularly if made in the heat of the moment—might be undermined by resistance and incompetence on the ground.[4]

Finally, federalism also risks a long-term pathology because the experience with failure might not readily lead to learning and implementing necessary reforms. In a centralized system of government, responsibility for responding to emergencies is clear: it lies, ultimately, with the officials who occupy the center. Perhaps the central government will not respond adequately (it might lack sufficient personnel and resources, the necessary organizational skills, or simply the inclination). But if there is a failure of governmental response, the blame, by definition, rests at the center. By contrast, in a federal system of government, where authority and responsibility are divided up and dispersed, blame is not so easily assigned. As a formal matter, it may

3 *See, e.g.*, Wendy E. Parmet, *After September 11: Rethinking Public Health Federalism*, 30 J.L. MED. & ETHICS 201, 201–04 (2002) (discussing the roles of multiple levels of government in responding to bioterrorism).

4 *See* Audio tape: Hurricane Katrina: Where Do We Go From Here? (Sept. 8, 2005) (transcript available at http://www.brookings.edu/comm/events/20050908.pdf) (noting that "our response as a nation is highly interdependent" and "if one layer of government or one agency within one layer of government gets [things] catastrophically wrong, the entire response will be handicapped as a result of that").

be uncertain which level of government (national, state, or local) bears responsibility for responding to any particular kind of emergency: the U.S. Constitution says nothing, for example, about hurricanes. Even if one level of government assumes responsibility and mounts a response, resulting deficiencies might be attributed to interference by or the shortcomings of another level of government. State government can say that it didn't know the crisis was coming because the federal government had information it didn't share; that the federal government didn't come through with anticipated resources and assistance; and that when the state itself tried to act, federal bureaucrats got in the way. The federal government can claim that it stood ready but nobody asked for its help, and out of respect for state sovereignty it was not more proactive; that when the requests did come, they were too late; and that when federal officials went to the scene to provide assistance, state officials, guarding their turf, undermined the response. Each government can assert that it did what was required of it and that the response would have succeeded but for the inadequacies of somebody else. In sum, federalism can fail to produce an adequate response to particular emergencies—and, even worse, by clouding assessments of fault, never manage to correct its past inadequacies.

Hurricane Katrina, causing massive destruction in Louisiana, Mississippi, and Alabama in August 2005, vividly illustrated these weaknesses of federalism during times of emergency. Katrina's impact was not confined to the Gulf Coast states. New Orleans, home to thousands of residents and businesses affected directly by the hurricane, is also one of the nation's largest ports and a center for oil and gas production and delivery.[5] Katrina therefore drove up energy prices around the nation.[6] Katrina also quickly became the concern of other states when displaced residents from affected communities sought refuge further north.[7] These consequences are not surprising: major damage to any modern American city will inevitably have national effects. Yet despite ample warning about Katrina's arrival and likely impact, no government—national, state, or local—adequately prepared vulnerable communities and their populations. After Katrina struck, the governmental response remained sluggish

5 Port of New Orleans—Lousiana, USA, http://www.portno.com/pno_pages/about_overview.htm (last visited Oct. 29, 2007).

6 *See* Jad Mouawad, *Now in the Rearview Mirror: Low Gasoline Prices*, N.Y. TIMES, Apr. 8, 2006, at C1.

7 *See, e.g.*, Peter Grier, *The Great Katrina Migration*, CHRISTIAN SCI. MONITOR, Sept. 12, 2005, at 1, 1, *available at* http://www.csmonitor.com/2005/0912/p01s01-ussc.html.

and disorganized. "Katrina was a national failure," reported the House Select Committee charged with investigating the governmental performance, adding that the failure represented "an abdication of the most solemn obligation to provide for the common welfare."[8] Even with all of its post-9/11 emergency planning and preparation, the nation seemed paralyzed to respond with any degree of efficiency to a predictable disaster at home.

Federalism has rightly received a good part of the blame for the deficient response to Katrina.[9] Even after Katrina had destroyed large swaths of the Gulf States and had overwhelmed state and local response capacities, federalism concerns prevented the national government from taking charge of the response. Speaking on August 31, 2005, two days after Katrina had made landfall, and with much of New Orleans under water, Homeland Security Secretary Michael Chertoff explained: "[W]e come to assist local and state authorities. Under the Constitution, state and local authorities have the principal first line of response obligation. . . . [T]he federal government does not supersede the state and local government."[10] Indeed, state and local officials, though desperate for assistance, actively resisted federal overreaching. In the days after Katrina, President George W. Bush asked Louisiana Governor Kathleen Blanco to place the state's National Guard under the control of federal officials so they could

8 SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR & RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE, H.R. REP. NO. 109-377, at x (2006) [hereinafter FAILURE OF INITIATIVE], *available at* http://www.gpoaccess.gov/serialset/creports/katrina.html.

9 *See* David S. Broder, *The Right Minds for Recovery*, WASH. POST, Sept. 29, 2005, at A23 ("The failure to respond to [Katrina] exposed one of the few real structural weaknesses in our Constitution: a mechanism to coordinate the work of local, state and national governments."); Eric Lipton et al., *Breakdowns Marked Path From Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at A1 ("The fractured division of responsibility . . . meant no one person was in charge. . . . The power-sharing arrangement . . . prove[d] disastrous."); Erin Ryan, Federalism, Subsidiarity, & the Tug of War Within: How the New Federalism Failed Katrina Victims & What We Can Learn 13, 47 (Apr. 4, 2006) (unpublished manuscript, on file with author) (concluding that the failure of "the United States government [to] properly protect, feed, and evacuate its own . . . came down to the vehemence with which federal leadership hewed to their principled reading of the constitutional balance of powers between the state and national governments"). *But see* Richard A. Posner, *Our Incompetent Government*, NEW REPUBLIC, Nov. 14, 2005, at 23, 25 (suggesting that federalism was not to blame, but the failure to adhere to "principles of federalism [that] teach that government responsibilities should be pushed down to the lowest level at which they can be performed effectively—but not lower," such that disasters exceeding capacities of state and local governments are a federal responsibility).

10 CNN REPORTS, KATRINA: STATE OF EMERGENCY 46 (2005).

coordinate the overall response.[11] Concerned with yielding control over state resources, the Governor refused the request.[12] As a result, federal and state personnel mounted independent responses to the hurricane's aftermath, working without the benefits of a single command structure. While people perished in New Orleans and other towns, governmental officials argued about who was in charge.[13] Katrina also amply demonstrated how federalism provides cover for errors: beginning almost immediately after Katrina struck, local, state, and federal officials all criticized each other for the failure to prepare and respond.[14]

Reflecting on the failures during Katrina, one commentator says: "We need to 'stop federalism' before it kills again."[15] Yet fixing feder-

11 Michelle Millhollon & Mark Ballard, *Blanco Coolly Greets Bush; Friction Between State, Federal Government Shows in Visit*, ADVOC. (Baton Rouge), Sept. 6, 2005, at 1A. New Orleans officials reportedly supported the proposal. On September 1, Mayor Ray Nagin met with President Bush and reportedly demanded: "We just need to cut through this and do what it takes to have a more controlled command structure. If that means federalizing it, let's do it." Evan Thomas, *How Bush Blew It*, NEWSWEEK, Sept. 19, 2005, at 26, 40 (reporting on an interview with Senator David Vitter); *see also* DOUGLAS G. BRINKLEY, THE GREAT DELUGE 562–71 (2006) (describing interactions between the White House and the governor with respect to this proposal). Some reports suggest that the White House proposal extended to police forces. *See* Nicholas Lemann, *Insurrection*, NEW YORKER, Sept. 26, 2005, at 67, 67 ("[T]he Administration tried to persuade the governor of Louisiana, Kathleen Blanco, to issue an official request that the federal government take control of the Louisiana National Guard and the New Orleans police.").

12 *See* Karen Tumulty et al., *4 Places Where the System Broke Down*, TIME, Sept. 19, 2005, at 34, 38.

13 *See, e.g.*, Lipton et al., *supra* note 9 ("[T]he crisis in New Orleans deepened because of a virtual standoff between federal officials and besieged authorities in Louisiana."); Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1 ("Interviews with officials in Washington and Louisiana show that as the situation grew worse, they were wrangling with questions of federal/state authority.").

14 *See* Susan B. Glasser & Josh White, *Storm Exposed Disarray at the Top*, WASH. POST, Sept. 4, 2005, at A1 (reporting statement by a Louisiana official that "fundamentally the first breakdown occurred at the local level"); Scott Shane et al., *After Failures, Officials Play Blame Game*, N.Y. TIMES, Sept. 5, 2005, at A1 (reporting complaints by New Orleans Mayor Ray Nagin that "[a] bunch of people are the boss" and "[t]he state and federal government are doing a two-step dance"); Jim VandeHei, *Officials Deal with Political Fallout by Pointing Fingers*, WASH. POST., Sept. 5, 2005, at A17 (reporting that "Bush administration officials . . . questioned local efforts to rescue thousands of people who were stranded for days without food, water and shelter" while "Louisiana officials pushed back against the White House . . . for offering a tentative and insufficient response . . . and then trying to shift the blame to the state and local governments").

15 Stephen M. Griffin, *Stop Federalism Before it Kills Again: Reflections on Hurricane Katrina*, 21 ST. JOHN'S J. LEGAL COMMENT. 527, 538 (2007).

alism, putting in place institutional structures to deal adequately with emergencies, is not easy.[16] When emergencies are of a kind and a degree that they overwhelm localities and states, an effective response requires the assistance of the national government. However, the national government itself will be ineffective if it cannot quickly and efficiently coordinate and work with state and local personnel. This is because the employees of state and local governments vastly outnumber federal civil personnel, and state and local personnel are the ones in the immediate vicinity of an emergency when it occurs. Therefore, even if federal officials take charge of the response, they necessarily depend upon state and local personnel to implement the response on the ground.[17] Required, then, is a mechanism to ensure that when federal officials take over an emergency response, their program is effectuated at the state and local level. However, federalism does not itself provide any such mechanism. Indeed, federalism actively resists seamless implementation of federal programs by state and local governments.

In the wake of Katrina, some federal officials proposed their own dramatic solution to the problems federalism presents in times of emergency: during an emergency, the federal government will bypass civilian workers entirely and deploy the national military in their place.[18] This proposal had an obvious appeal.[19] It would end federal

16 The House Select Committee on Katrina, while identifying numerous instances in which government might perform better in the future, found no "simple answer to improving state and federal integration [in times of emergency]." FAILURE OF INITIATIVE, *supra* note 8, at 223. Federalism, after all, could not simply be abandoned. "Local control and state sovereignty are important principles rooted in the nation's birth," the Committee explained, and these principles "cannot be discarded merely to achieve more efficient . . . operations on American soil." *Id.*

17 In 2000 (the most recent year for which firm data exists) there were 565,915 full-time local police in 12,666 departments in the United States, and 87,028 full-time state police in forty-nine state departments (Hawaii has no state police). *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2003, at 42 tbl.1.27 (Ann L. Pastore & Kathleen Maguire eds., 31st ed. 2005), *available at* http://albany.edu/sourcebook. In addition to state and local police, there were 3070 sheriffs' offices with 293,823 full-time officers, and 1376 "special jurisdiction" departments with 69,650 employees responsible for policing airports, public housing, colleges, and the like. *Id.* By comparison, in 2002, there were 90,168 federal officers authorized to carry firearms and make arrests. Of these, 19,101 (or 21%) were immigration agents and 14,305 (15.9%) were assigned to the Bureau of Prisons. *Id.* at 69 tbl.1.72.

18 *See, e.g.*, IRWIN REDLENER, AMERICANS AT RISK 160–65 (2006).

19 *See* FAILURE OF INITIATIVE, *supra* note 8, at 15 ("[T]he call for increasing the military's role in domestic affairs is easy to grasp. Who else can respond the way the military can? Who else can stand up when others have fallen?").

dependence on state and local personnel—by sending, in their place, federal troops, who know how to take orders from the top, and who will get the job done.[20] The President appeared to consider this possibility during Katrina,[21] subsequently asked Congress to consider the option,[22] and soon called on Congress for specific executive authority to mount a military response to future domestic emergencies.[23] Not surprisingly, state governors have not favored this approach.[24] For instance, Governor Jeb Bush of Florida took the view that "federalizing emergency response to catastrophic events would be a disaster as bad as Hurricane Katrina."[25] In addition, as many critics have pointed out, the use of troops in domestic emergencies (currently prohibited in many circumstances under the Posse Comitatus Act of 1878[26]) raises new problems.[27] While the military could supply the federal government with the personnel to carry out an effective response, pro-

20 *See* REDLENER, *supra* note 18, at 161 (reporting comment by former Secretary of State Colin L. Powell that "[w]hat you . . . have in the military that is of enormous use—and does not exist in civilian life—is command and control," making military forces "uniquely qualified for a major domestic emergency").

21 The President stated in his Jackson Square speech on September 15, 2005: "[A] challenge on this scale requires greater federal authority and a broader role for the armed forces." President's Address to the Nation on Hurricane Katrina Recovery from New Orleans, Lousiana, 4 WEEKLY COMP. PRES. DOC. 1405, 1408 (Sept. 15, 2005).

22 *See* Jim VandeHei & Josh White, *Congress Asked to Consider Placing Pentagon in Charge of Disaster Response*, WASH. POST, Sept. 26, 2005, at A12 (reporting the President's statement that "a very important consideration for Congress to think about" is whether "there [is] a natural disaster—of a certain size—that would . . . enable the Defense Department to become the lead agency in coordinating and leading the response effort").

23 Eric Schmitt & Thomas Shanker, *Military May Propose an Active-Duty Force for Relief Efforts*, N.Y. TIMES, Oct. 11, 2005, at A15; Chris Strohm, *Officials Consider Quicker Federalization, Use of Military in Disaster Response*, GOVERNMENT EXECUTIVE.COM, Sept. 20, 2005, http://www.govexec.com/dailyfed/0905/092005c1.htm. The President also suggested that in the event of an influenza pandemic he would deploy the military to enforce quarantines. *See CNN Live at Daybreak* (CNN television broadcast Oct. 5, 2005) (transcript available at http://transcripts.cnn.com/transcripts/0510/05/lad.03.html) (quoting President George W. Bush noting that to enforce a quarantine "[o]ne option is the use of a military that's able to plan and move" and that he had put that option "on the table").

24 *See* Press Release, Nat'l Governors Ass'n, NGA Statement on Federalizing Emergencies (Oct. 13, 2005), *available at* http://www.nga.org (follow "News Room" hyperlink; then follow "News Release Archive" hyperlink; then follow "NGA Statement on Federalizing Emergencies" hyperlink under "10/13/2005") ("Governors are responsible for the safety and welfare of their citizens and are in the best position to coordinate all resources to prepare for, respond to and recover from disasters.").

25 Jeb Bush, Op-Ed., *Think Locally on Relief*, WASH. POST, Sept. 30, 2005, at A19.

26 18 U.S.C. § 1385 (2000); *see infra* Part I.B.1.

27 *See infra* note 28.

fessional soldiers—armed and ready for warfare—might produce order at the price of liberty.[28]

In light of these various considerations, Congress adopted a compromise measure.[29] In October 2006, as part of a military appropriations bill, Congress authorized the President to deploy military forces, including National Guard units under federal command, to states and localities following a natural disaster or other emergency.[30] However, the President's authority is limited to deploying troops in order to implement law and order when state government is unable to maintain control such that federal rights are put in jeopardy or there is opposition to the enforcement of federal laws.[31] Although limiting military intervention to instances where federal interests are at risk, the statute enhances executive powers in times of emergency. It remains to be seen, in a future emergency, how these new powers will be used and the results of deploying the military to restore order.

This Article offers an alternative solution to the problems of federalism in times of emergency, a solution based on largely forgotten provisions of the Constitution that were used regularly in the early history of the nation. The solution is to allow the national government, when it responds to certain kinds of emergencies, to call into periods of mandatory federal service the emergency response personnel of the state in which the emergency occurs and, where necessary, emergency response personnel from other states. During emergencies, these state employees—police, firefighters, emergency medical technicians, urban search and rescue teams, and public health specialists—would serve with compensation under the command of the Pres-

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28 *See, e.g.*, Spencer Ackerman, *Coup de Grâce*, NEW REPUBLIC, Oct. 31, 2005, at 10, 10 ("[E]liminating the . . . [restrictions under the Posse Comitatus Act] would lead to abuses as the active-duty military begins supplementing civilian police."); Charles J. Dunlap Jr., *Putting Troops on the Beat*, WASH. POST, Sept. 30, 2006, at A17 ("Midnight searches by well-armed troops might fly in Baghdad . . . but certainly not in Baltimore."); Mark Sappenfield, *Battle Brews over a Bigger Military Role*, CHRISTIAN SCI. MONITOR, Dec. 13, 2005, at 3, 3 ("[T]he mere mention of the Defense Department taking a leading role in disaster response is enough to send governors and civil libertarians scurrying for tar and feathers.").

29 All fifty governors opposed the change. *See* Letter from the Nat'l Governors Ass'n to Bill Frist, Majority Leader, U.S. Senate, Harry Reid, Minority Leader, U.S. Senate, & Dennis Hastert, Speaker, U.S. House of Representatives (Aug. 1, 2006) (on file with author), *available at* http://www.nga.org (click "Letters" hyperlink under "Federal Relations"; then follow "August 6, 2006" hyperlink).

30 *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1076, 120 Stat. 2083, 2404 (2006) (to be codified at 10 U.S.C. § 333).

31 *See id.*

ident, as Commander in Chief. With the power to place in federal service these state and local personnel, the federal government would be able to direct the response effort without being stymied by the vagaries of state and local bureaucracies. Once the emergency was over, the basis for calling into service the state and local personnel would evaporate, and they would return to their regular jobs with state and local governments.

During Katrina, then, the President would have been able to federalize police officers, firefighters, search and rescue workers, hazardous waste crews, and other emergency personnel in Louisiana, Mississippi, and Alabama. There would have been no need for the governors of those states or for local officials to consent to federalization: the order would have issued directly to the chiefs of police, fire, and other departments. In addition to federalizing the personnel within an affected state, the national government would also have been entitled to deploy to New Orleans and other towns law enforcement and emergency response personnel from other states. Again, the order would have issued directly to the police department in Arkansas, the leader of the search and rescue team in Texas, and so on.

To modern ears, and from a federalism perspective, my proposal might seem extraordinary—crazy, even. But it is, I argue in this Article, a reasonable solution to the problems federalism presents in times of emergency. Moreover, my proposal is in harmony with principles of federalism—more so than deploying federal troops to displace the civil personnel of states and localities. For constitutional lawyers, the obvious specific objection to my proposal is that it is a form of unconstitutional commandeering: the Supreme Court of the United States has ruled that under the Tenth Amendment, the federal government may not commandeer state legislatures[32] or executive personnel.[33] However, the anticommandeering objection is misplaced. Justice Stevens had it right, I contend, when, in his dissent in the *Printz* case (decided in 1997), he argued that even if a ban on commandeering invalidated the federal statute at issue in the case—a statute requiring local sheriffs to perform firearms background checks—the ban should not apply, or not apply equally, in times of emergency. Stevens stated:

32 *See* New York v. United States, 505 U.S. 144, 176 (1992) (invalidating provisions of the Low-Level Radioactive Waste Policy Amendments Act because the Constitution prohibits Congress from commandeering state legislatures).

33 *See* Printz v. United States, 521 U.S. 898, 933 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act because the Constitution prohibits Congress from commandeering state executive officials to enforce federal law).

> Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or . . . the threat of an international terrorist, may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment . . . that forbids the enlistment of state officers to make that response effective?[34]

In other words, a blanket rule against commandeering would be inconsistent with the national government's power and responsibility to respond to certain kinds of emergencies.

This Article shows that application of the Court's anticommandeering doctrine in times of emergency would be inconsistent with the mechanisms the Constitution creates for the federal government to respond to emergencies. In provisions largely forgotten in modern times, the Constitution specifically authorizes the federal government to commandeer state personnel in periods of emergency. In the eighteenth century, the principal personnel of state government were the state's militiamen: militia units, operating under the authority of the state, were responsible for maintaining security, keeping order, quelling disturbances, and enforcing the state's laws.[35] By the time of the Constitutional Convention, it had become clear that in certain emergency situations, a state's own militia, operating alone, would be inadequate to the task of mounting a response. Disturbances like Shays' Rebellion in western Massachusetts in January 1787 had highlighted the need for a federally coordinated response to the most serious emergencies arising within the states.[36] Yet the revolutionary generation deplored the idea of allowing the federal government to maintain and deploy large numbers of federal troops (or other federal professionals).[37] The result of these competing con-

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34 *Id.* at 940 (Stevens, J., dissenting) (citation omitted).

35 *See generally* LAWRENCE DELBERT CRESS, CITIZENS IN ARMS 81 (1982) (describing the role of militias in early American state governments); JOHN K. MAHON, THE AMERICAN MILITIA 32–46 (1960) (discussing state militia in the 1790s); S.T. Ansell, *Legal and Historical Aspects of Militia*, 26 YALE L.J. 471, 474–80 (1917) (describing the historical development of the American militia).

36 *See generally* DAVID P. SZATMARY, SHAYS' REBELLION 120 (1980) ("The crisis atmosphere engendered by agrarian discontent strengthened the resolve of the nationalists and shocked some reluctant localists into an acceptance of a stronger national government, thereby uniting divergent political elements of commercial society in the country at large.").

37 *See, e.g.*, H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 463–70 (2000) (describing colonial hostility to strong centralized armies).

cerns—a need for a federal response, but a fear of large numbers of federal troops—was that the 1789 Constitution permitted the federal government to commandeer, on a temporary basis, state militiamen in order to deal with three kinds of emergencies: invasions, insurrections, and opposition to federal law. Article I of the Constitution authorizes Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[38] Article II makes the President "Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States."[39] So as to ensure those militiamen would be trained and equipped when called into periods of federal service, Article I further gives Congress power to "provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States."[40] Together, these provisions authorized the federal government to respond to emergencies and gave it the necessary resources to do so—without the need to deploy the national military or other federal personnel in large numbers. Nothing about the Tenth Amendment suggests that it altered this power of the national government to place state militiamen in federal service under these circumstances.

In accordance with these constitutional provisions, the early Congress put in place the statutory mechanisms for national commandeering of militiamen in order to respond to emergencies in any part of the country. Congress specified with great care how militiamen were to be trained and equipped and the circumstances under which they could be called into federal service. In the ensuing decades, in responding to emergencies—including defending frontiers, putting down insurrections, and quelling opposition to federal laws—the national government regularly relied upon state militiamen under temporary federal command.

Understanding the constitutional provisions for emergency commandeering and their early uses by the national government to respond to emergencies has important implications for modern emergencies. The militia units of 1789 no longer exist. However, the federal government's emergency commandeering power should be understood today to apply to the modern emergency response personnel of state and local governments. Notably, the Constitution does not define the term "militia," and, in exercising its commandeering powers, the early Congress itself determined which inhabitants of a

38 U.S. CONST. art. I, § 8, cl. 15.

39 *Id.* art. II, § 2, cl. 1.

40 *Id.* art. I, § 8, cl. 16.

state comprised the militia for constitutional purposes. Congress is, I suggest in this Article, permitted to specify that within the meaning of the Constitution, the militia comprises the states' police officers, firefighters, and other emergency responders. In dealing with emergencies, the federal government is entitled to call these state employees into federal service. Further, just as the federal government once deployed militia units from one state to another, the emergency commandeering power allows the federal government today to dispatch one state's response personnel to other states.

In recognizing these constitutional provisions for federal commandeering of state personnel and how the provisions might apply to modern emergencies, it is important to keep in mind some significant limitations. The Constitution specifically restricts commandeering to times of invasion, insurrection, and opposition to federal law. Some kinds of emergencies—for example, a terrorist attack—clearly fall within these parameters. Other emergencies—for example, a forest fire—are less obviously within the scope of national power. Still, many emergencies will trigger the commandeering power because of their secondary effects: as events in New Orleans following Katrina showed, natural disasters frequently produce riots and other forms of lawlessness that satisfy the Constitution's conditions for federal deployment of state personnel.

A renewed understanding of the Constitution's emergency commandeering provisions (and their limits) offers the best option for enhancing the nation's ability to respond effectively to many kinds of emergencies, without the need to send the national military into our towns and onto our streets. Future domestic incidents—the detonation of a nuclear device in a city, a chemical weapon attack, a widespread influenza outbreak, or a major earthquake—could easily dwarf Katrina's impact.[41] In learning from Katrina and preparing for the next—and potentially more devastating—emergency, the possibility of emergency commandeering must be given serious consideration.

Part I provides an overview of the governmental structures currently in place for responding to emergencies. These structures reflect the basic idea of American federalism that, to the extent possible, governmental functions should be pushed down to the lowest, most local, level. Part II uses Hurricane Katrina as a case study to demonstrate how these structures inhibit the government's ability to

41 For example, a crude nuclear weapon detonated in midtown Manhattan during the day would kill up to 200,000 people, destroy buildings in a five-mile radius, and render much of New York City uninhabitable for decades. REDLENER, *supra* note 18, at 70.

prepare for emergencies, prevent their occurrence, and respond when they happen. Put simply, an emergency on the scale of Katrina required a kind of governmental coordination that the existing framework did not allow and in many respects impeded. Together, Part III and Part IV present the emergency commandeering solution. Part III lays the constitutional and historical framework for federal commandeering of state emergency response personnel in times of emergency. Part IV discusses how emergency commandeering would work in the modern context and the circumstances in which it is proper. Part V shows why emergency commandeering is consistent with federalism and good for democracy.

I. EMERGENCY MANAGEMENT IN THE UNITED STATES

As a matter of national policy, the responsibility for preparing for and responding to emergencies is located at the lowest practicable level of government.[42] Accordingly, there exists a "pull" system, under which states are expected to make a specific request (a pull) for federal emergency assistance before any is provided.[43] A federal push (a response without a specific state request) is limited to unusual circumstances, where damage is so massive that state and local officials are not even able to request federal help.[44] These federalism principles underlie the major federal statutory and regulatory schemes governing the provision of emergency relief, discussed briefly in this Part.

A. Civil Emergency Relief Provisions

1. Stafford Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 ("Stafford Act")[45] makes available federal assistance and

42 As the House Committee charged with investigating the Katrina response explained at the outset of its report:

> [I]n the event of an emergency, state and local government officials bear primary responsibilities under both the National Response Plan and their own laws and directives. Throughout federal, state and local planning documents the general principle is for all incidents to be handled at the lowest possible organizational and jurisdictional level.

FAILURE OF INITIATIVE, *supra* note 8, at 18.

43 *See* THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 18 (2006) [hereinafter LESSONS LEARNED], *available at* http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf.

44 *See* FAILURE OF INITIATIVE, *supra* note 8, at 31.

45 Pub. L. No. 100-707, 102 Stat. 4689 (codified as amended in scattered sections

federal funding in cases of "emergency"[46] or "major disaster."[47] The statute authorizes the President to declare an emergency or major disaster and appoint a Federal Coordinating Officer to oversee the provision of federal aid.[48] Before the President can issue the declaration, the governor of the affected state must make a specific request to the President and certify that the disaster or emergency is "of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary."[49] The state must also implement its own state emergency plan and provide information to the federal government about state resources committed to the response.[50]

Upon declaring a major disaster, the President is authorized to direct federal agencies to use their resources—including personnel, equipment, and supplies—in support of state and local assistance efforts; coordinate disaster relief provided by federal agencies, private organizations, and state and local governments; provide technical and advisory assistance to the state; and assist the state with distribution of supplies.[51] Federal agencies can also give assistance "essential to meeting immediate threats to life and property resulting from a major disaster" including providing federal personnel and supplies, distributing medicine and food, and performing work and services on public and private lands.[52] The governor can request the President to direct the Secretary of Defense to make available the resources of the

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of 42 U.S.C.). The Act amended the Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143.

46 Under the Act, an emergency is "any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe." 42 U.S.C. § 5122(1) (2000).

47 A "major disaster" is defined as a

> natural catastrophe . . . or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance . . . to supplement the efforts and available resources of States, local governments, and disaster relief organizations.

Id. § 5122(2).

48 *See id.* § 5143.

49 *Id.* §§ 5170, 5191(a).

50 *See id.* The President is also authorized to issue a declaration sua sponte if "the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority." *Id.* § 5191(b).

51 *See id.* § 5170a.

52 *Id.* § 5170b(a).

Department of Defense "for the purpose of performing on public and private lands any emergency work . . . which is essential for the preservation of life and property" for a period of ten days.[53] The Act also authorizes the President to provide housing and other assistance to individuals affected by the disaster.[54] After declaring an emergency, the President can direct federal agencies to use resources in support of state and local emergency assistance efforts "to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe"; coordinate disaster relief; provide technical and advisory assistance to the state; provide aid to affected individuals; and assist the state with distribution of supplies.[55] In providing support, federal agencies are permitted under the Act to "accept and utilize the services or facilities of any State or local government, or of any agency, office, or employee thereof, with the consent of such government."[56] The President is also permitted to employ relief organizations like the Red Cross and the Salvation Army.[57] Funding is capped at $5 million per emergency declaration unless the President determines there is a continuing need and notifies Congress that the ceiling must be exceeded;[58] there is no funding limit for major disasters.[59]

2. Homeland Security Act and FEMA

Following the terrorist attacks of September 11, 2001, Congress passed the Homeland Security Act of 2002.[60] The Act created the Department of Homeland Security (DHS), the lead agency for coordinating federal disaster and emergency response and recovery assistance with state and local authorities.[61] Under the Act, the mission of DHS includes preventing terrorist attacks within the United States;

53 *Id.* § 5170b(c)(1).

54 *See id.* §§ 5174, 5177–84.

55 *Id.* § 5192(a)(1).

56 *Id.* § 5149(a).

57 *See id.* § 5152(a)–(b).

58 *Id.* § 5193.

59 *See id.*

60 Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 5, 6, 18, 44, 49 U.S.C.).

61 6 U.S.C. § 111(b) (Supp. IV 2004). Within the White House there also exists the Office of Homeland Security, charged with "develop[ing] and coordinat[ing] the implementation of a comprehensive national strategy to secure the United States from terrorist attacks." Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001). In addition, the President's Homeland Security Advisory Council advises the President on homeland security matters. Exec. Order No. 13,260, 67 Fed. Reg. 13,241 (Mar. 19, 2002).

reducing the nation's vulnerability to terrorism; minimizing the damage and assisting in the recovery from terrorist attacks that do occur; and serving as a focal point for natural and manmade crises and emergency planning.[62] The Act organized DHS into four major "directorates" with specified functions: Border and Transportation Security; Emergency Preparedness and Response; Science and Technology; and Information Analysis and Infrastructure Protection.[63] Key provisions of the Act are directed at increased cooperation among federal, state, and local governments and between government and private entities.[64]

The Homeland Security Act brought twenty-two preexisting federal agencies with 180,000 employees under the auspices of DHS.[65] Among these agencies was the Federal Emergency Management Agency (FEMA).[66] FEMA had been created in 1979, following years of criticism of the dispersal of emergency response functions throughout the federal government, to coordinate within a single entity the federal response to emergencies.[67] The Homeland Security Act made FEMA part of DHS's Emergency Preparedness and Response (EPR) Directorate—along with the Department of Health and Human Services' Office of Emergency Management, the FBI's National Domestic Preparedness Office, the Energy Department's Nuclear Incident Response team, and other emergency entities.[68] FEMA's mandate became to enhance the capacity of state and local governments to respond to disasters; coordinate federal response agencies; and provide financial assistance to state and local governments and directly to citizens in case of disasters.[69] EPR as a whole was responsible for overseeing domestic disaster preparedness training; providing federal support for recovery from terrorist acts and natural disasters; promoting the effectiveness of emergency responders; and formulating a federal

62 6 U.S.C. § 111(b).

63 *See id.* §§ 121, 181, 201, 311.

64 *See, e.g., id.* § 112(c) (directing the secretary of DHS to: coordinate with state and local governments and private entities with respect to planning, equipment, and training and exercise activities; coordinate and consolidate communications systems with state and local governments and private entities; and distribute warnings and information to state and local government personnel and to the public).

65 *See Homeland Security Accountability and Performance Evaluation Process: Hearings on H.R. 2886 Before the H. Select Comm. on Homeland Security*, 108th Cong. 5 (2003) (statement of Bruce M. Carnes, Chief Financial Officer, Department of Homeland Security) (discussing the creation of DHS).

66 6 U.S.C. § 313.

67 Exec. Order No. 12,148, 3 C.F.R. 412 (1979).

68 6 U.S.C. § 313.

69 *Id.* § 317.

emergency response plan for natural disasters, attacks, and hazards.[70] EPR was also responsible for coordinating with state, local, and public safety organizations to develop a comprehensive national crisis management system; in the event of a national emergency, EPR had authority to command federal response teams working with personnel at the local and state levels.[71] In July 2005, DHS Secretary Michael Chertoff reorganized the Department of Homeland Security, abolishing EPR; he transferred preparedness functions to a new Preparedness Directorate, leaving FEMA a separate DHS entity dealing exclusively with response and recovery.[72] Under the National Response Plan, FEMA now has primary responsibility for coordinating the federal response to all emergencies.[73]

3. National Response Plan

In 2004, DHS released a "National Response Plan" (NRP),[74] a single operational plan for responding to emergencies, including terrorist attacks and natural and accidental disasters, along with a "National Incident Management System" (NIMS)[75] to manage the implementation of the NRP. The NRP was used for the first time during Hurricane Katrina.[76] The NRP creates an overall framework for responding to emergencies.[77] In essence, it sets out which federal agencies are responsible for specific emergency functions, and provides a road map for agencies to interact with state and local governments, nongovernmental organizations, and the private sector in preventing, preparing for, and responding to emergencies. Throughout the plan,

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70 *Id.* § 312.

71 *Id.*; *see also* KEITH BEA, CONG. RESEARCH SERV., TRANSFER OF FEMA TO THE DEPARTMENT OF HOMELAND SECURITY app. A, at 12–22 (2002), *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-2793:1 (summarizing FEMA's responsibilities).

72 Michael Chertoff, U.S. Sec'y of Homeland Sec., Second Stage Review Remarks (July 13, 2005) (transcript available at http://www.dhs.gov/xnews/speeches/speech_0255.shtm).

73 *See infra* Part I.A.3.

74 DEP'T OF HOMELAND SEC., NATIONAL RESPONSE PLAN (2004) [hereinafter NATIONAL RESPONSE PLAN], *available at* http://www.dhs.gov/xlibrary/assets/NRP_FullText.pdf.

75 DEP'T OF HOMELAND SEC., NATIONAL INCIDENT MANAGEMENT SYSTEM (2004) [hereinafter NATIONAL INCIDENT MANAGEMENT SYSTEM], *available at* http://www.fema.gov/pdf/emergency/nims/nims_doc_full.pdf.

76 Press Release, Dep't of Homeland Sec., United States Government Response to the Aftermath of Hurricane Katrina (Sept. 1, 2005), *available at* https://www.dhs.gov/xnews/releases/press_release_0727.shtm.

77 *See* NATIONAL RESPONSE PLAN, *supra* note 74, at 2.

localism is favored: the plan states under its "Planning Assumptions and Considerations" that "[i]ncidents are typically managed at the lowest possible geographic, organizational, and jurisdictional level."[78]

Though the NRP is an "all-hazards plan"[79] designed to apply to a variety of emergencies, it is limited to "actual or potential Incidents of National Significance."[80] Incidents of national significance are emergencies that "[o]ccur . . . with little or no warning," "[i]nvolve significant or multiple geographic areas," and "[r]esult in numerous casualties; fatalities; displaced people; property loss; disruption of normal life-support systems, essential public services, and basic infrastructure; and significant damage to the environment."[81] In particular, emergencies and major disasters declared by the President under the Stafford Act are incidents of national significance for purposes of the NRP.[82] The NRP is also triggered whenever a federal agency requests the assistance of DHS, multiple federal agencies are involved in responding to an incident (such as in the case of threatened acts of terrorism), or the President directs DHS to manage a domestic incident.[83] Still, even in the event of incidents of national significance, state government remains responsible for performing its traditional functions like law enforcement; the federal government provides support only after a specific request from a state.[84]

There are thirty-two "signatory partners" to the NRP.[85] These include the Departments of Defense, Justice, and State; the Central Intelligence Agency; the Environmental Protection Agency; and the American Red Cross.[86] These partners serve as a primary or support agency in one or more of the fifteen "Emergency Support Functions" (ESFs) under the NRP.[87] ESFs are the vehicles through which the resources of relevant federal agencies are funneled.[88] The Primary Agency is responsible for overall coordination of the federal response.[89] Support Agencies provide additional assistance at the request of the Primary Agency.[90] For example, ESF #13, "Public Safety

78 *Id.* at 6.
79 *Id.* at 1.
80 *Id.* at 3.
81 *Id.* at 6.
82 *See id.* at 7.
83 *See id.* at 4.
84 *See id.* at 88.
85 *Id.* at v–viii.
86 *See id.*
87 *See id.* at 11.
88 *See id.*
89 *See id.*
90 *See id.*

and Security," is intended to "provide[ ] a mechanism for coordinating and providing Federal-to-Federal support or Federal support to State and local authorities to include non-investigative/non-criminal law enforcement, public safety, and security capabilities and resources."[91] ESF #13 specifies that while "[i]n most incident situations, local jurisdictions have primary . . . responsibility for law enforcement activities," federal resources can supplement state and local resources when they are overwhelmed.[92] ESF #13 sets out the various federal agencies and their functions in providing law enforcement assistance to states and localities.[93] DHS and the Department of Justice are the primary agencies under this support function.[94]

Incident Annexes provide information about contingencies that require unique application of the NRP in specialized hazardous incidents including biological hazards and terrorism.[95] Recognizing that in especially dire conditions the infrastructure of government might be destroyed such that state and local responders might be unable even to request federal assistance, the NRP allows for a proactive federal response in limited circumstances. Under the NRP's "Catastrophic Incident Annex," when a "catastrophic incident" occurs, DHS has authority to initiate the federal response without waiting for a request from a state or local government: the system switches from the traditional pull to a push function.[96] However, the Annex includes an operating presumption that federal resources deployed pursuant to this provision will wait at staging areas and only be employed when requested by the local command.[97] No catastrophic incident has ever been declared under the NRP.

When the NRP is activated, various personnel and entities coordinate support on the ground. The Secretary of DHS is responsible for declaring the existence of an incident of national significance and for naming a Principal Federal Official (PFO) to manage the response.[98] Response efforts are coordinated and carried out in the field through

91 *Id.* emergency support function annexes, at ESF #13-1.

92 *Id.*

93 *See id.*

94 *See id.*

95 *See id.* incident annexes, at INC-i.

96 *See id.* catastrophic incident annex, at CAT-1 to CAT-4. Catastrophic incidents are defined as "any natural or manmade incident, including terrorism, that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, national morale, and/or government functions." *Id.* at CAT-1.

97 *See id.* at CAT-2.

98 *See id.* at 9. Secretary Chertoff declared Katrina an Incident of National Significance on September 1, 2005 (the first such declaration under the NRP) and

incident command posts, state and local operations centers, regional response coordination centers, joint field offices, and joint operations centers.[99] At DHS headquarters, the Homeland Security Operations Center and the National Response Coordination Center provide managerial support and coordinate activities on the ground; the Interagency Incident Management Group, a coalition of federal governmental representatives, facilitates interagency coordination.[100]

4. Federal Funding

The federal government provides substantial funding to state and local governments to prepare for and respond to emergencies. The Department of Homeland Security administers a large federal grant program to fund first responders. For fiscal year 2006, DHS allocated $1.7 billion under its Homeland Security Grants Program to states, urban areas, and territories to prepare for and respond to terrorist attacks and other disasters.[101] The program includes five separate kinds of grants: the State Homeland Security Grant Program ($544.5 million in fiscal year 2006); the Urban Areas Security Initiative ($757.3 million); the Law Enforcement Terrorism Prevention Program ($396 million); the Metropolitan Medical Response System ($29.7 million); and the Citizen Corps Program ($19.8 million).[102] Other federal agencies also provide grants to states and localities.[103]

5. EMAC

During emergencies, states often require assistance from other states. Under the Emergency Management Assistance Compact (EMAC), approved by Congress in 1996,[104] participating states have

appointed Michael Brown as the PFO. Press Release, Dep't of Homeland Sec., *supra* note 76.

99 NATIONAL RESPONSE PLAN, *supra* note 74, at 19–21.

100 *See id.* at 22–23.

101 Press Release, Dep't of Homeland Sec., DHS Announces $1.7 Billion in Homeland Security Grants (May 31, 2006), *available at* http://www.dhs.gov/xnews/releases/press_release_0921.shtm.

102 *Id.*

103 For example, the Department of Health and Human Services provides funding for countering bioterrorism. Press Release, Dep't of Health & Human Servs., HHS Announces Bioterrorism Aid for States, Including Special Opportunity for Advance Funding (Mar. 20, 2003), *available at* http://www.hhs.gov/news/press/2003pres/20030320.html. The Centers for Disease Control and Prevention fund various health related programs. *See* About CDC Funding and Procurement, http://www.cdc.gov/about/business/funding.htm (last visited Oct. 29, 2007).

104 *See* Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877 (1996).

pledged to help other member states overwhelmed by disasters.[105] EMAC creates a mechanism for an affected state to request a variety of resources from other states, including National Guard personnel.[106] A requesting state has responsibility for reimbursing other states for the cost of their assistance.[107]

B. The Military and Emergencies

The military also plays a role in preventing and responding to emergencies. The Department of Defense (DOD) distinguishes between "homeland security" and "homeland defense." Homeland security is "a concerted national effort to reduce America's vulnerabilities, prevent terrorist attacks within the United States, and minimize the damage and recover from attacks that do occur."[108] DOD contributes to homeland security in three ways. First, DOD conducts military missions abroad.[109] Second, DOD is responsible for "homeland defense."[110] Homeland defense, then, is the "protection of U.S. sovereignty, territory, domestic population, and critical infrastructure against external threats and aggression or other threats as directed by the President."[111] Such threats might materialize internally.[112] Third, DOD provides "Civil Support" to a lead civil agency in three general circumstances: support to civil agencies in cases of domestic emergencies and disasters; support to civilian law enforcement including counter terrorism support; and support for responding to civil disturbances in accordance with the President's constitutional authority to suppress insurrections.[113] Support is provided only when other fed-

105 *See* Emergency Management Assistance Compact Homepage, http://www.emacweb.org (last visited Oct. 29, 2007). All fifty states have joined EMAC, as have the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. *See id. See generally* Alan D. Cohn, *Mutual Aid: Intergovernmental Agreements for Emergency Preparedness and Response*, 37 URB. LAW. 1, 22–26 (2005) (describing the EMAC's basic protocol for state-to-state disaster assistance and discussing some of the inherent limitations of the system).

106 Nat'l Guard, The National Guard's Role in Homeland Defense: EMAC Fact Sheet, http://www.ngb.army.mil/features/HomelandDefense/emac/factsheet.html (last visited Oct. 29, 2007).

107 *See* EMAC, How Does EMAC Work?, http://www.emacweb.org/?142 (last visited Oct. 29, 2007).

108 JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-26, HOMELAND SECURITY, at I-3 fig. I-2 (2005), *available at* http://ftp.fas.org/irp/doddir/dod/jp3_26.pdf.

109 *Id.*

110 *Id.*

111 *Id.*

112 *See id.* at vi.

113 *Id.* at I-3, IV-4 to IV-7.

eral, state, and local resources are overwhelmed.[114] Numerous regulatory provisions govern the provision of civil support.[115] Domestically, United States Northern Command (NORTHCOM), established October 1, 2002, has command and control of DOD homeland defense efforts and is responsible for coordinating military assistance to civil authorities.[116]

In addition to regular military forces, the National Guard provides emergency assistance. Federal law creates two overlapping but distinct organizations: the National Guard of the states and the National Guard of the United States.[117] Individuals who enlist in a state National Guard are simultaneously enlisted in the National Guard of the United States, as part of the Enlisted Reserve Corps of the Army.[118] When ordered into active federal service, members of the National Guard are relieved from state service.[119] States are required to train National Guard units in accordance with army and air force standards[120] and the army and air force specify the equipment guard units must maintain.[121] There are more than 450,000 members of the National Guard in 3200 communities around the country.[122]

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114 *See id.* at IV-1.

115 *See, e.g.*, Department of Defense Directive No. 3025.1, Military Support to Civil Authorities (MSCA) (Jan. 15, 1993), *available at* http://www.dtic.mil/whs/directives/corres/pdf/302501p.pdf; Department of Defense Directive No. 3025.12, Military Assistance for Civil Disturbances (MACDIS) (Feb. 4, 1994), *available at* http://www.dtic.mil/whs/directives/corres/pdf/302512p.pdf; Department of Defense Directive No. 3025.15, Military Assistance to Civil Authorities (Feb. 18, 1997), *available at* http://www.dtic.mil/whs/directives/corres/pdf/302515p.pdf.; Department of Defense Directive No. 5525.5, DoD Cooperation with Civilian Law Enforcement Officials (Jan. 15, 1986), *available at* http://www.dtic.mil/whs/directives/corres/pdf/552505p.pdf.

116 *See* About U.S. Northern Command, http://www.northcom.mil/about/index.html (last visited Oct. 29, 2007).

117 National Defense Act Amendments of 1933, ch. 87, 48 Stat. 153 (repealed 1956). The National Guard originated in the 1903 Dick Act, ch. 196, 32 Stat. 775 (promoting the efficiency of the militia and forming the Organized Militia as the "State National Guard," in accordance with the organization of the army, and with federal funds and army instructors), and the 1916 National Defense Act, ch. 134, 39 Stat. 166 (making the National Guard part of the army). The Supreme Court understands the National Guard to be equivalent to the "militia" in the Constitution. *See* Perpich v. Dep't of Def., 496 U.S. 334, 347–51 (1990).

118 *See* 10 U.S.C. § 101(c)(2)–(3) (2000); 32 U.S.C. § 101(5) (2000).

119 32 U.S.C.A. § 325(a) (West Supp. 2007).

120 32 U.S.C. § 501(a) (2000).

121 *Id.* § 701.

122 *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 411, 120 Stat. 2083, 2170 (2006) (authorizing for fiscal year 2007 reserve end strengths of 350,000 for the Army National Guard and 107,000 for the Air

States may call state Guard units to active status, in which case they operate under the command of the governor and are funded by the state government.[123] National Guard forces also operate under two federal provisions: Title 10 and Title 32. Title 10 governs all federal military forces: active duty, reserve, and the National Guard when federalized.[124] National Guard forces operating under Title 10 are funded by the federal government and are under the command of the Commander in Chief.[125] Guard units can also be deployed in Title 32 status, under which the units remain under the command of the governor[126] but support federal war efforts and so receive federal funding.[127] Congress has authorized the use of the armed forces, including the National Guard (and in certain circumstances the militia) to respond to insurrections, ensure the enforcement of federal law, and to protect federal constitutional rights.[128]

1. The Posse Comitatus Act

Enacted out of opposition to federal troops' activities (including guarding polling stations) in the South during Reconstruction,[129] the 1878 Posse Comitatus Act[130] prohibits the active duty military from

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National Guard); Clyde A. Vaughn, *Army National Guard: An Integral Part of Army Strong*, ARMY, Oct. 2007, at 133, 134 (reporting that as of April 2007 there were 350,821 soldiers in the Army National Guard); Bob Haskell, Guard Has Banner Year for Recruiting, Retention, AIR FORCE LINK, Oct. 11, 2006, http://www.af.mil/news/story.asp?id=123028845 (reporting that at the end of fiscal year 2006 there were 346,288 members of the Army National Guard and 105,660 members of the Air National Guard for a combined strength of 451,948 members); E-mail from Emanuel Pacheco, Office of Pub. Affairs, Nat'l Guard Bureau, to author (Oct. 11, 2007 10:31 EST) (reporting a guard membership of 458,000 in 3,200 communities).

123 *See, e.g.*, N.Y. MIL. LAW § 6 (McKinney 1990) ("[W]henever it shall be made to appear to the governor that there is a breach of the peace, riot, resistance to process of this state or disaster or imminent danger thereof, the governor may order into the active service of the state . . . all or any part of the organized militia.").

124 Title 10 is entitled "Armed Forces" and § 101 defines the National Guard as falling under that Title's purview. *See* 10 U.S.C.A. § 101 (West. Supp. 2007).

125 10 U.S.C.A. §§ 331–332, 12406 (West 1998 & Supp. 2007).

126 *See, e.g.*, 32 U.S.C. § 502 (2000).

127 *See id.* § 502(f) (authorizing the calling up of the National Guard for "training or other duty"); *see also id.* §§ 106, 113 (providing for appropriations to the National Guard).

128 *See infra* Part III.D.

129 During House debates over the Act, southern Democrats, who had gained seats in the 1876 election, targeted in particular the President's use of troops as a posse. 7 CONG. REC. 3850 (1878).

130 Ch. 263, 20 Stat. 145 (codified as amended at 18 U.S.C. § 1385 (2000)).

performing law enforcement functions within the United States.[131] Exceptions to the statutory prohibition include National Guard forces on state active duty or under Title 32;[132] federal troops under the authority of the President to quell insurrections;[133] and narcotics work authorized by Congress.[134] The Posse Comitatus Act also does not apply to the Coast Guard.[135] Congress has also specified that the military may provide "indirect" assistance to civil law enforcement so long as the assistance is not "direct participation."[136] Troops may, for example, provide assistance with emergency search and rescue efforts or supply equipment and intelligence; the support, however, may not take the form of law enforcement—for example, making arrests.[137]

2. State Militia Laws

States have militia, organized into different categories.[138] In New York, for instance, the militia is divided into the organized militia and the unorganized militia. The organized militia comprises the Army National Guard, Navy National Guard, Air National Guard, the inactive National Guard, the New York Naval Militia, the New York Guard when organized, and other State defense forces created by the governor.[139] The unorganized militia consists of "all able-bodied male

131 *Id.*

132 Philip Oates, *Supporting the National Strategy for Homeland Security: The Role of the National Guard, in* FIRST TO ARRIVE 163, 165–66 (Juliette N. Kayyem & Robyn L. Pangi eds., 2003).

133 *See* 10 U.S.C.A. §§ 331–334 (West 1998 & Supp. 2007).

134 Under the 1989 National Guard Counter-Drug Support Program (CDSP), National Guard personnel in Title 32 status are permitted to provide support to drug law enforcement agencies. *See* 10 U.S.C. § 371 (2000 & Supp. IV 2004).

135 *See* 14 U.S.C. § 89 (2000) (authorizing the Coast Guard to perform law enforcement functions).

136 10 U.S.C. § 375 (2000).

137 *See id.* § 382.

138 *See, e.g.*, ALA. CODE § 31-2-5 (LexisNexis 1998) ("The unorganized militia shall consist of all able-bodied male resident citizens . . . who have declared their intention to become citizens of the United States, between the ages of seventeen and forty five, and of such other persons, male and female, as may, upon their own application, be enlisted or commissioned therein . . . ."); ALASKA STAT. § 26.05.010 (2006) ("The militia of the state consists of all able-bodied citizens of the United States and all other able-bodied persons who have declared their intention to become citizens of the United States, who reside in the state, who are at least 17 years of age, and who are eligible for military service under the laws of the United States or this state."); FLA. STAT. ANN. § 250.02(1) (West Supp. 2007) ("The militia consists of all able-bodied citizens of this state and all other able-bodied persons who have declared their intention to become citizens.").

139 N.Y. MIL. LAW § 2.1 (McKinney 1990).

residents of the state between the ages of seventeen and forty-five" except those who are already serving in the organized militia or are on the reserve or retired list.[140] States make their governors the commander in chief of their militia forces.[141] States also have provisions for placing the state militia under federal command.[142]

C. *Miscellaneous Emergency Provisions*

A variety of other federal laws provide for the federal government to take action during health crises, environmental catastrophes, wars, or other emergency situations.[143] For example, the Defense Against Weapons of Mass Destruction Act of 1996 provides for a federal response to nuclear, chemical, or biological weapons of mass destruction.[144] Continuity of government plans provide for, among other things, evacuation of government personnel during times of emer-

140 *Id.* § 2.2. State statutes also allow the governor to organize the State Guard, distinct from the National Guard. *See, e.g.*, S.D. CODIFIED LAWS § 33-14-1 (Supp. 2007) (authorizing the governor to organize the "South Dakota State Guard" in order "to protect life and property in this state").

141 *See, e.g.*, COLO. REV. STAT. § 28-3-104 (2007) ("The governor shall be the commander in chief of the military forces except so much thereof as may be in the actual service of the United States and may employ the same for the defense or relief of the state, the enforcement of its laws, the protection of life and property therein, the implementation of the Emergency Management Assistance Compact, and for the training of the military forces for all appropriate state missions.").

142 *See, e.g.*, N.Y. MIL. LAW § 4 (McKinney 1990) ("[T]he powers of the United States . . . may be exercised over the militia of the state.").

143 *See, e.g.*, 7 U.S.C. § 2273 (2000) (authorizing federal assistance to states for search and rescue); 10 U.S.C. § 12301 (2000 & Supp. IV 2004) (providing for ordering reserve forces to active duty during time of war or emergency); 33 U.S.C.A. §§ 1257–1387 (West 2001 & Supp. 2007) (authorizing the President to respond to discharges of oil and hazardous substances into navigable waters); 42 U.S.C. § 243(a) (2000) (authorizing the Secretary of Health and Human Services to accept assistance from state and local authorities to enforce federal quarantine laws; requiring the Secretary to assist states in the prevention and suppression of communicable diseases); 42 U.S.C. § 264 (2000 & Supp. IV 2004) (authorizing the Surgeon General to pass and enforce regulations to prevent the spread of communicable diseases including for quarantining affected individuals under some circumstances); 42 U.S.C. § 266 (2000 & Supp. IV 2004) (providing for the quarantine of infected individuals in time of war to protect the armed forces); 42 U.S.C.A §§ 9601–9627 (West 2005 & Supp. 2007) (authorizing the President to respond to the release of hazardous substances, pollutants, and contaminants); 44 U.S.C. § 3505 (2000 & Supp. IV 2004) (assigning responsibility to senior executive agency officials to secure federal government information systems); 50 U.S.C. § 82 (2000) (authorizing the President in times of war to take over factories).

144 Pub. L. No. 104-201, § 1413, 110 Stat. 2714, 2719–20 (codified as amended at 50 U.S.C.A. § 2313 (West 2003 & Supp. 2007)).

gency and the operation of government from secure locations.[145] There are also various federal mitigation programs directed at long-term risk reduction.[146] More generally, in exercising emergency powers, the President and other federal officers are subject to the provisions of the National Emergencies Act.[147] The Act requires an emergency declaration and specification of the emergency powers being exercised, and imposes time limits on the use of emergency powers.[148]

State laws set out the powers and responsibilities of the governor and state agencies during times of emergency.[149] Consider, for example, emergency laws in place in Louisiana. Under the Louisiana Constitution, the Governor is "commander-in-chief of the armed forces of the state" and "may call out these forces to preserve law and order, to suppress insurrection, to repel invasion, or in other times of emergency."[150] The constitution provides for an "Interim Emergency Board" comprising of the governor and other high-ranking officials to appropriate state funds in times of emergencies.[151] Under statutory law, the governor of Louisiana is responsible for "meeting the dangers to the state and people presented by emergencies or disasters."[152] In times of emergencies and disasters, the governor can issue executive orders that have the force of law and "[u]tilize all available resources

145 *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., CONTINUITY OF GOVERNMENT CRS-5 (2005), *available at* http://www.fas.org/sgp/crs/RS21089.pdf (summarizing statutory and regulatory provisions).

146 For example, various federal mapping programs, like FEMA's National Flood Insurance Program, map specific hazards. *See* 42 U.S.C. § 4101 (2000); *see also* FEMA: National Flood Insurance Program, http://www.fema.gov/plan/prevent/fhm/index.shtm (last visited Oct. 29, 2007) (offering references and resources related to flood hazard mapping). Mitigation programs include the Hazard Mitigation Grant Program, 42 U.S.C.A. § 5170 (West 2003 & Supp. 2007); the National Earthquake Hazard Reduction Program, 42 U.S.C.A. § 7704 (West 2003 & Supp. 2007); the National Hurricane Program, FEMA: National Hurricane Program, http://www.fema.gov/plan/prevent/nhp/index.shtm (last visited Oct. 29, 2007); and the Fire Prevention and Control Act, 15 U.S.C.A. §§ 2201–2231 (West 1998 & Supp. 2007).

147 50 U.S.C. §§ 1601–1651 (2000).

148 *Id.* §§ 1621–1622, 1639.

149 *See, e.g.*, ALA. CODE § 22-12-1 (LexisNexis 2007) (detailing quarantine laws); CONN. GEN. STAT. § 19a-131 (Supp. 2007) (setting out responsibilities of the Public Health Emergency Response Authority); MONT. CODE ANN. § 10-3-101 (2005) (specifying the governor's powers and duties in emergencies). *See generally* DOMESTIC WMD INCIDENT MANAGEMENT LEGAL DESKBOOK app. b-state, at B-1 to B-24, *available at* http://biotech.law.lsu.edu/blaw/DOD/manual/index.htm (collecting state statutory provisions).

150 LA. CONST. art. IV, § 5.

151 *Id.* art. VII, § 7.

152 LA. REV. STAT. ANN. § 29:724(A) (2007).

of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster or emergency."[153] Many states also have their own emergency management authorities.[154] A majority of states have adopted emergency legislation based on the Model State Emergency Health Power Act.[155] The Act allows the governor of a state to take control of public health, transportation, business, and law enforcement during a public health crisis, including by ordering quarantines and forced vaccinations, and by seizing any supplies needed to respond to the crisis.[156]

II. KATRINA AND FEDERALISM

This Part examines how these various emergency provisions played out in the context of Hurricane Katrina. The discussion begins with a brief overview of Katrina's impact and the nature of the government's preparations and response. It next examines how federalism interfered with relief efforts and hindered the government's response to the hurricane. The discussion then turns to the specific problem of maintaining security during Katrina and the role of the military.

A. Katrina's Impact

Impacting a region spanning some 93,000 square miles, Hurricane Katrina was the most expensive natural disaster, and among the deadliest, in the history of the United States.[157] Katrina made landfall at Buras, Louisiana, on the morning of August 29, 2005, causing death and physical damage across Louisiana and in the coastal communities of Mississippi and Alabama.[158] When its levees breached, much of New Orleans was quickly submerged; entire sections of the city were

153 *Id.* § 29:724(D)(2). The Louisiana legislature can terminate the state of disaster or emergency at any time with a petition signed by a majority of the surviving members of either house. *Id.* § 29:724(B)(2).

154 For a directory, see FEMA: State Offices and Agencies of Emergency Management, http://www.fema.gov/about/contact/statedr.shtm (last visited Oct. 29, 2007). For a directory of state homeland security offices, see GEORGE D. HADDOW & JANE A. BULLOCK, INTRODUCTION TO EMERGENCY MANAGEMENT 348–57 (2d ed. 2006).

155 *See* CTR. FOR LAW & THE PUB. HEALTH, GEORGETOWN & JOHNS HOPKINS UNIVS., THE MODEL STATE EMERGENCY HEALTH POWERS ACT (MSEHPA) STATE LEGISLATIVE ACTIVITY 1 (2006), http://www.publichealthlaw.net/MSEHPA/MSEHPA%20Leg%20Activity.pdf (reporting that as of July 15, 2006, forty-four states and the District of Columbia had passed legislation based on the Act).

156 MODEL STATE EMERGENCY HEALTH POWERS ACT §§ 501–507, 601–608, 701–702 (Ctr. for Law & the Pub. Health, Georgetown & Johns Hopkins Univs. 2001).

157 LESSONS LEARNED, *supra* note 43, at 5. This report estimates that Katrina caused $96 billion in damage. *Id.* at 7.

158 *See* BRINKLEY, *supra* note 11, at 133, 159.

obliterated.[159] In western Mississippi, the storm surge reached thirty-four feet and extended inland ten miles; hurricane force winds reached as far as Jackson and ripped up thousands of homes along the way, rendering swaths of the state uninhabitable.[160] Waveland, Mississippi, was simply wiped off the map.[161] In Alabama, Katrina produced large-scale flooding and substantial wind damage in coastal towns.[162] All told, 1330 people died—the majority from New Orleans, many of whom were elderly—while thousands of others were injured.[163] Some 300,000 homes were rendered uninhabitable,[164] and 770,000 people were displaced.[165] Weeks after Katrina, 1831 children were still missing.[166] Katrina produced massive and long-lasting environmental damage;[167] it ruined agricultural, forestry, fishing, and other industries in the affected regions;[168] and, according to the Department of Energy, it caused "unprecedented damage" to the nation's energy sector.[169]

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159 *See id.* at 181–226.

160 *See id.* at 147–80.

161 *News Hour with Jim Lehrer* (PBS television broadcast Sept. 7, 2005) (transcript available at http://www.pbs.org/newshour/bb/weather/july-dec05/miss_9-7.html) (quoting Mississippi Governor Haley Barbour, stating that "Waveland, Mississippi has no inhabitable structures—none").

162 BRINKLEY, *supra* note 11, at 545–46.

163 LESSONS LEARNED, *supra* note 43, at 33; *see also* OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., A PERFORMANCE REVIEW OF FEMA'S DISASTER MANAGEMENT ACTIVITIES IN RESPONSE TO HURRICANE KATRINA 4–5 (2006) [hereinafter PERFORMANCE REVIEW], *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-32_Mar06.pdf (reporting that Hurricane Katrina caused 1326 deaths (1096 in Louisiana, 228 in Mississippi and 2 in Alabama); displaced more than 700,000 people and destroyed 300,000 homes).

164 LESSONS LEARNED, *supra* note 43, at 7.

165 *Id.* at 8.

166 Barbara Kantrowitz & Karen Breslau, *Some Are Found, All Are Lost*, NEWSWEEK, Sept. 19, 2005, at 50, 51.

167 *See* Louisiana Hurricane Resources, Energy Oil, & Gas, http://www.laseagrant.org/hurricane/archive/oil.htm (last visited Oct. 29, 2007) (reporting how damage to the oil infrastructure spilled millions of gallons of oil into the region's waterways).

168 *See* Spencer S. Hsu, *In Mississippi, Katrina Yields Bitter Harvest*, WASH. POST, Mar. 12, 2006, at A3 ("All told, Mississippi's agriculture, forestry and marine industries—which account for one-third of the jobs and economic product of . . . [the] state—lost more than $10 billion.").

169 LESSONS LEARNED, *supra* note 43, at 34.

B. The Government's Response

By widespread consensus, the response to Katrina at all levels of government—federal, state, and local—was deficient.[170] Though there was ample warning that Katrina would require a massive deployment of personnel and resources to the affected region, government officials made insufficient advance preparations, and, after the hurricane hit, were unable to respond quickly or effectively. Americans watched with astonishment the broadcasted evidence of governmental ineptitude: people huddled on rooftops begging to be rescued; bodies floating down streets (unless they were tied up to lampposts); nursing home residents left to fend for themselves; refugees stranded on Interstate 10; elderly people pushed around in shopping carts; and the wheelchair-bound left to rot in the sun.[171]

Evacuation is an obvious precaution when a hurricane looms. However, government officials failed to evacuate large numbers of residents from Katrina's path, a failure that produced avoidable casualties and required dangerous post-landfall rescues.[172] The government also had inadequate plans for post-landfall evacuations: "Despite years of recognition of the threat that was to materialize in Hurricane Katrina, no one—not the federal government, not the state government, and not the local government—seem[ed] to have planned for an evacuation of [New Orleans] from flooding through breached lev-

170 *See, e.g.*, Lewis H. Lapham, *The Simple Life: Hurricane Relief*, HARPER'S MAG., Dec. 2005, at 9, 9 (describing "the government's murderously incompetent response to Hurricane Katrina"); Michael Mayo, *Katrina Reveals Some Hard, Frightening Truths*, S. FLA. SUN-SENTINEL, Sept. 4, 2005, at 1B (stating that "the federal government's flat-footed, incompetent and utterly indifferent response in the critical days after the storm made a terrible situation worse"); Andrew Sullivan, *Earth to the President: Warnings Ignored at Your Peril—Katrina's Wake*, AUSTRALIAN, Sept. 5, 2005, http://www.theaustralian.news.com.au/story/0,25197,16492678-2703,00.html ("The seeming inability of the federal or city authorities to act swiftly or effectively to rescue survivors or maintain order posed fundamental questions about the competence of George W. Bush's administration and local authorities."); S.T. Karnick, *New Age Conservatism*, NAT'L REV. ONLINE, Nov. 13, 2006, http://author.nationalreview.com/?q=Mjc0MA=&p=MjAwNg= (follow "New Age Conservatism" hyperlink) ("[T]he Republicans threw away their reputation for competence and the value of limited government with their inept response to the Katrina disaster.").

171 *See, e.g.*, FAILURE OF INITIATIVE, *supra* note 8, at 74, 114, 294–95; *CNN Newsnight Aaron Brown: Nursing Home Deaths; Missing Children; Homeless Police Officers; Hospital Horror* (CNN television broadcast Sept. 13, 2005) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0509/13/asb.02.html).

172 *See* FAILURE OF INITIATIVE, *supra* note 8, at 114.

ees."[173] For example, there were not enough buses to transport people to safer ground, and there was a shortage of drivers.[174]

FEMA's response to Katrina has received particular rebuke. FEMA "seemed unable to implement lessons that should have been learned well in advance of Katrina."[175] FEMA failed to pre-position adequate supplies and to secure contracts with suppliers.[176] It lacked sufficient knowledge about and failed to communicate adequately with other federal agencies that could furnish supplies.[177] FEMA failed to implement procedures for accepting and managing charitable donations and assistance from abroad[178] and for integrating faith-based and nongovernmental organizations into relief efforts.[179] The Agency performed poorly in providing emergency housing to victims and making available direct rental assistance.[180] As measured by its staffing, training, and planning, FEMA was ill-prepared for a catastrophic event,[181] and the Agency did not even have an effective system for assessing state readiness or determining preparedness standards states needed to meet.[182]

With Katrina, the National Response Plan clearly failed its first test. Despite advanced warnings about the magnitude of the storm, critical elements of the Plan were executed late, ineffectively, or not at all.[183] Many federal agencies, it turned out, did not even understand their roles and responsibilities under the NRP.[184] Incredibly, despite the significant role the NRP assigns to DHS (and to FEMA in particular), that department had not made preparations for an emergency of Katrina's scale.[185] DHS and FEMA turned out to have inadequate numbers of trained and experienced staff to implement the NRP;[186]

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173 *Id.* at 123.

174 *See id.* at 119–22.

175 *Id.* at 13.

176 LESSONS LEARNED, *supra* note 43, at 44–45.

177 *See id.* at 45.

178 *See id.*

179 *See id.* at 49; *see also* BRINKLEY, *supra* note 11, at 554 ("Over and over again, FEMA actually stopped truckloads of supplies, water, or ice on some bureaucratic pretext or other.").

180 *See* LESSONS LEARNED, *supra* note 43, at 50.

181 *See* PERFORMANCE REVIEW, *supra* note 163, at 109.

182 *See id.* at 138. This report recommends that DHS provide states with training on the components of the National Preparedness System and develop a mechanism to measure a state's response capacities. *Id.* at 140.

183 *See* FAILURE OF INITIATIVE, *supra* note 8, at 131, 133–34 (reporting that DHS was unduly slow in designating Katrina an incident of national significance).

184 *See id.* at 143–44; LESSONS LEARNED, *supra* note 43, at 53.

185 *See* FAILURE OF INITIATIVE, *supra* note 8, at 153–54.

186 *See id.* at 155–56.

FEMA's response teams were not ready to respond[187] and lacked experience working with other federal agencies and coordinating with their state counterparts, the very things the NRP is designed to accomplish.[188]

C. *The Problem of Federalism*

A commitment to federalism hampered relief efforts. For one, it produced unnecessary delay. In hewing to the federalist notion that the national government should not intervene until invited, the NRP did not take adequate account of situations, like Katrina, where local government could be so affected by an emergency that it would be unable even to make a request for federal assistance.[189] Hence, on Monday, August 29, 2005, with the hurricane making landfall, FEMA Director Michael Brown directed all emergency responders from outside the region to stay away until local authorities specifically requested their help: "The response to Hurricane Katrina must be well coordinated between federal, state, and local officials to most effectively protect life and property."[190] U.S. Fire Administrator R. David Paulison added, "It is critical that fire and emergency departments across the country remain in their jurisdictions until such time as the affected states request assistance."[191] Consistent with this approach, National Guardsmen were ordered to prevent emergency responders even from entering New Orleans.[192]

Much of the failed response resulted from the absence of a clear command structure to direct the relief effort.[193] Local governments lost command centers and could not coordinate with each other.[194] Local police departments were largely crippled: "[t]he New Orleans Police Department . . . lost command and control over . . . [officers who] reported to work. This resulted in delays in determining where problems were, dispatching officers to those locations, and otherwise

187 *Id.* at 158.

188 *See id.* at 152.

189 *See* LESSONS LEARNED, *supra* note 43, at 42, 52.

190 Press Release, Fed. Emergency Mgmt. Agency, First Responders Urged Not To Respond to Hurricane Impact Areas Unless Dispatched by State, Local Authorities (Aug. 29, 2005) (internal quotation marks omitted), *available at* http://www.fema.gov/news/newsrelease.fema?id=18470; *see also* BRINKLEY, *supra* note 11, at 254 (discussing the emergency responders' reaction to the FEMA press release).

191 Press Release, Fed. Emergency Mgmt. Agency, *supra* note 190.

192 BRINKLEY, *supra* note 11, at 254.

193 *See, e.g.*, *id.* at 194–95.

194 FAILURE OF INITIATIVE, *supra* note 8, at 184.

planning and prioritizing operations."[195] State command centers also experienced operational weaknesses that undermined unity of command.[196] When the abilities of state and local governments to issue commands and exercise control are impaired, the national government can play an important role in coordinating response efforts. However, during Katrina there was no unified federal command structure in place.[197] The Joint Field Office, meant to provide a single location to coordinate all federal agencies, was not established quickly enough and the Principal Federal Officer was sluggish in naming and assembling his staff.[198] As a result, "agencies independently deployed resources, operated autonomously, and generated disparate reporting streams back to Federal authorities locally and in Washington."[199] Not surprisingly, this led to "an often inconsistent and inaccurate operating picture of the disaster area[,] . . . duplication of efforts, gaps in addressing requests for assistance, and the inefficient allocation of resources."[200] Notably, these problems were not merely the result of poor execution of the NRP but also revealed some fundamental defects in the readiness of federal government personnel.[201] Damage to communications infrastructure exacerbated the problem of coordinating the work of emergency response personnel. Throughout the Gulf region, there was a "massive" failure of communications systems.[202] The New Orleans Police Department simultaneously lost its radio system, cellular communications, and landlines.[203] In the absence of adequate communications networks to share information from those at the scene, local, state, and federal officials were "forced to depend on a variety of conflicting reports from a combination of media, government and private sources, many of which continued to provide inaccurate or incomplete information throughout the day, further clouding the understanding of what was occurring in New Orleans."[204]

All of this undermined a coordinated response on the ground. Though federal search and rescue personnel joined state and local

195 *Id.* at 195.

196 *See id.* at 186–87.

197 *See id.* at 189–90.

198 *See* LESSONS LEARNED, *supra* note 43, at 42.

199 *Id.*

200 *Id.*

201 *See id.* at 50 ("Insufficient planning, training, and interagency coordination are not problems that began and ended with Hurricane Katrina.").

202 FAILURE OF INITIATIVE, *supra* note 8, at 163.

203 *See* BRINKLEY, *supra* note 11, at 202.

204 LESSONS LEARNED, *supra* note 43, at 35.

personnel,[205] these joint operations were disordered.[206] For example, the NRP had made no provision for specialized urban search and rescue teams that rescue victims trapped in collapsed structures to work together with more generalized civil search and rescue teams.[207] Seemingly vital federal resources, like Department of Interior personnel with expertise in water rescues, were not used at all.[208] While thousands of people were eventually evacuated from the affected region, the evacuation process was haphazard: "Federal and State officials often had difficulty coordinating the departures and destinations of the . . . buses, trains, and aircraft involved in the evacuations. . . . Buses and flights of evacuees were sometimes diverted, while en route, to new destinations without the knowledge of officials at either the original or new destinations."[209] In the absence of clear lines of command, federal and state officials squabbled about who was responsible for recovering bodies of victims, leading to delays in recovery efforts.[210]

With all of these problems of coordination, it would be reasonable to expect radical revisions to the National Response Plan. Here, though, the principal governmental reports on Katrina remain cautious. The House Commission endorsed the inescapable conclusion that, during incidents like Katrina where local and state governments are incapacitated, the federal government should be proactive and not wait for state and local officials to "pull" for federal help.[211] Nonetheless, the Commission concluded: "Implementing a push system—a proactive federal response—does not require federalization of the dis-

205 *See* FAILURE OF INITIATIVE, *supra* note 8, at 38.

206 *See id.* at 194.

207 *See* LESSONS LEARNED, *supra* note 43, at 38.

208 *See id.*

209 *Id.* at 40.

210 *See id.* at 48. Given all of the failures during Katrina, it is well to note what did work. The House Committee concluded that EMAC "successfully provided unprecedented levels of response and recovery personnel and assets to the Gulf coast in record time." FAILURE OF INITIATIVE, *supra* note 8, at 132. EMAC facilitated assistance from forty-eight states and allowed the deployment of 67,891 personnel (19,481 civilians and 48,477 National Guard) to Louisiana and Mississippi. *Id.* at 144. California, for example, deployed eight Swift Water Rescue teams to the region. BRINKLEY, *supra* note 11, at 415. EMAC was especially critical for sending law enforcement personnel and National Guard units for security. *See* FAILURE OF INITIATIVE, *supra* note 8, at 144–45. The Coast Guard, operating as part of the Department of Homeland Security, also performed well. "Although the Coast Guard had only 45,000 uniformed and civilian employees, they outshone the National Guard, FEMA, the Red Cross, and everybody else rolled into one" and evacuated some 35,000 people. BRINKLEY, *supra* note 11, at 213–14.

211 FAILURE OF INITIATIVE, *supra* note 8, at 132.

aster or the usurping of state authority."[212] Instead, while "a push system is a proactive response by the federal government, it still requires notification and full coordination with the state."[213] So too, the White House in its report urges greater provision in the National Response Plan for a federal push of resources[214] and for a unified command within the federal response structure.[215] At the same time, that report is also careful to limit federal initiatives: while "Americans have the right to expect that the Federal government will effectively respond to a catastrophic incident," the report notes, "the Federal government cannot and should not be the Nation's first responder."[216] Accordingly, the proper "culture of preparedness," will involve "*partnership*[*s*] among all levels of government," with local government responsible for mounting the immediate response to "the vast majority of incidents" and state governors required to meet their "sovereign responsibilities to protect their residents."[217] Only in a "catastrophic event" should the federal government share in these obligations.[218]

D. Security

In the aftermath of Katrina, there was looting and violent crimes were committed against residents of affected communities, particularly New Orleans, and against emergency response personnel.[219] (There were also some reports of police officers themselves engaged in looting stores.[220]) Historian Douglas Brinkley reports that "[a]ll sense of law was expunged from New Orleans within hours of the hurricane's passing. . . . With gangs and crime a way of life at the best of times in New Orleans, renegades continued coming out in large numbers."[221] Lawlessness delayed and interfered with relief efforts.[222]

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212 *Id.* at 136.

213 *Id.*

214 *See* LESSONS LEARNED, *supra* note 43, at 52.

215 *See id.* at 52, 70.

216 *Id.* at 52.

217 *Id.* at 81.

218 *Id.*

219 *See* Walt Philbin, *Widespread Looting Hits Abandoned Businesses*, TIMES-PICAYUNE (New Orleans), Aug. 30, 2005, at A19. Some initial reports proved exaggerated. Robert E. Pierre & Ann Gerhart, *News of Pandemonium May Have Slowed Aid*, WASH. POST, Oct. 5, 2005, at A8.

220 *See* BRINKLEY, *supra* note 11, at 361–63.

221 *Id.* at 362.

222 LESSONS LEARNED, *supra* note 43, at 57 ("[L]awlessness in New Orleans significantly impeded—and in some cases temporarily halted—relief efforts and delayed restoration of essential private sector services such as power, water, and telecommunications."); Associated Press, *New Orleans Mayor Order Looting Crackdown*, MSNBC.COM,

In addition to the National Guard,[223] law enforcement personnel from other states and federal officers were important to restoring security in New Orleans.[224] By September 3, some 1600 federal law enforcement personnel were in New Orleans.[225] Following a request on September 4 by the Louisiana governor under the Emergency Federal Law Enforcement Assistance Act,[226] additional federal law enforcement personnel were dispatched.[227] Federal law enforcement personnel on the scene included officers from the Department of Homeland Security, the Department of Justice, the Department of Agriculture, the Department of the Treasury, the Department of Veterans' Affairs, the Environmental Protection Agency, and the Postal Inspection Service; their work included protecting federal property and providing assistance to local law enforcement.[228] Other cities and states also sent law enforcement personnel. For example, the New York Police Department (NYPD) contributed 300 officers to restore order in New Orleans.[229] However, the use of law enforcement personnel from other jurisdictions was not entirely smooth. It required officers from different jurisdictions, with different rules and policies—for example, on the use of force—to figure out on the spot how to work together.[230] Federalism also created some more basic problems: Louisiana and Mississippi insisted on deputizing federal law enforcement officers or swearing them in as peace officers under state law on the ground that they would be enforcing state laws.[231] In Louisiana this process was especially cumbersome because a state police attorney needed to be present to swear in federal agents.[232]

Sept. 1, 2005, http://www.msnbc.msn.com/id/9063708/ (describing how police officers stopped rescue efforts to respond to looting).

223 *See infra* Part II.E.

224 *See* FAILURE OF INITIATIVE, *supra* note 8, at 249–53.

225 LESSONS LEARNED, *supra* note 43, at 40–41.

226 42 U.S.C. §§ 10501–10513 (2000).

227 LESSONS LEARNED, *supra* note 43, at 41.

228 FAILURE OF INITIATIVE, *supra* note 8, at 252–56, 397–416; LESSONS LEARNED, *supra* note 43, at 41.

229 LESSONS LEARNED, *supra* note 43, at 127.

230 *See id.* at 58. The White House concludes that while the deployment of federal law enforcement helped to restore order, "it was clear that Federal law enforcement support to State and local officials required greater coordination, unity of command, collaborative planning and training with State and local law enforcement, as well as detailed implementation guidance." *Id.* Among the White House's recommendations for improving the national response to emergencies are proposals for greater federal control and deployment of security personnel. *See id.* at 88, 102–04.

231 FAILURE OF INITIATIVE, *supra* note 8, at 256–57; LESSONS LEARNED, *supra* note 43, at 41.

232 LESSONS LEARNED, *supra* note 43, at 58.

E. The Role of the Military

During Katrina, impressive numbers of active duty military and National Guard personnel performed both emergency relief and security functions. State active duty and Title 32 National Guard units in Louisiana and Mississippi operated under the command of the governors of those states.[233] By September 3, 22,000 National Guard soldiers and airmen were activated; within the week more than 50,000 Guardsmen from forty-nine states were deployed to the region through EMAC.[234] Title 10 active duty forces operated under the command of the President: 14,232 were in the region by September 5.[235] U.S. Army soldiers assisted state and local officials with medical treatment, debris clearing, evacuation, and search and rescue; the Marine Corps helped with search and rescue and rebuilding infrastructure; the U.S. Navy provided equipment; and the U.S. Air Force provided recovery and relief services.[236]

However, the use of these different forces also produced problems of coordination.[237] Separate command structures for the active duty military and National Guard forces under state control hindered joint operations and produced duplicate efforts.[238] The National Guard did not have adequate knowledge of DOD plans and procedures;[239] FEMA at times requested assistance from DOD without knowing that state forces had been deployed to fill the same needs;[240] and confusion about the status and proper functions of the various National Guard units caused delay.[241] National Guard personnel were also not properly trained to perform tasks asked of them—in particular, dealing with large numbers of civilians at the Superdome and other refuges.[242] The failure of DOD and state officials to have engaged in joint planning and training for emergencies exacerbated

233 Under Title 32 status, National Guard troops remain under the control of the state's governor but are paid with federal funds. Because they are under state control they can perform law enforcement functions. *Id.* at 42 & n.147.

234 *Id.* at 202; PERFORMANCE REVIEW, *supra* note 163, at 62.

235 LESSONS LEARNED, *supra* note 43, at 43.

236 *See id.* at 131.

237 *See id.* at 43 (reporting that despite the "critical" contributions of these military personnel, "[a] fragmented deployment system and lack of an integrated command structure for both active duty and National Guard forces exacerbated communications and coordination issues during the initial response").

238 FAILURE OF INITIATIVE, *supra* note 8, at 201, 219; LESSONS LEARNED, *supra* note 43, at 55.

239 *See* FAILURE OF INITIATIVE, *supra* note 8, at 219.

240 *See* LESSONS LEARNED, *supra* note 43, at 55.

241 FAILURE OF INITIATIVE, *supra* note 8, at 229.

242 *See id.* at 230.

the federal-state tension.[243] There were also some very practical obstacles: National Guard, active duty military, and state and local emergency responders lacked interoperable communications equipment and other devices.[244]

In sum, federalism meant there was a dual military response rather than an integrated response.[245] Though this was quickly understood to be a problem, it was not easy to overcome.[246] Governors of the Gulf States refused to relinquish command of National Guard units in their states.[247] On September 2, 2005, the White House presented Governor Blanco with a proposal for a "Mutually Exclusive Chain of Command," under which a single commander would have "dual status" as chief of the Louisiana National Guard—subject to the Governor's orders—and of federal troops (including federalized National Guard units); the commander would be loyal to both the President and the Governor.[248] Blanco refused the proposal.[249] When the White House sought to establish unified command over police and state National Guard units in Louisiana, state officials also rejected that proposal as akin to martial law.[250]

F. Summary

Katrina demonstrated the shortcomings of existing governmental emergency response plans and procedures within our federal system. Chief among these problems is the difficulty of producing an adequate response when governmental functions are divided. The remainder of the Article sets forth a solution.

III. SAVING FEDERALISM FROM ITSELF

Emergencies are not a new kind of problem. The Americans who wrote and ratified the Federal Constitution understood that emergencies would arise that would require a governmental response. The ratifying generation also understood that some emergencies would overwhelm the capacities of local and state government, and require

243 *See id.* at 222.

244 *See id.* at 226–28; LESSONS LEARNED, *supra* note 43, at 43.

245 *See* FAILURE OF INITIATIVE, *supra* note 8, at 222.

246 *See, e.g.*, PERFORMANCE REVIEW, *supra* note 163, at 64 ("National Guard and active duty troops provide critical resources, but improved coordination with FEMA is needed to ensure adequate support.").

247 *See* FAILURE OF INITIATIVE, *supra* note 8, at 221.

248 *Id.*

249 *Id.*

250 *See id.* at 483 (supplementary report of Rep. Cynthia A. McKinney).

national assistance. In particular, if security broke down and states were unable to maintain control, the national government would play a critical role in mustering and deploying the necessary resources to restore order. At the same time, the members of the ratifying generation were committed to federalism: while there is an important role for the national government during emergencies, it should not simply displace local and state governments.

The result of these considerations was that the 1789 Constitution gave the national government responsibility and authority to respond to emergencies; in particular, security threats. However, the Constitution tied the national government's response to its use of state resources. Avoiding the need for a large standing army under national control, the Constitution permitted the federal government to commandeer, on a temporary basis, state militiamen in order to deal with three general kinds of emergencies involving security concerns: invasions, insurrections, and organized opposition to federal law. This Part considers those constitutional provisions and how, implemented with legislation, they provided the basis for the new national government to respond to a variety of emergencies. Understanding the constitutional provisions for emergency commandeering and their historical uses reveals how the national government today can deploy state and local resources when emergencies arise.

A. Constitutional Provisions

The Framers of the Constitution understood that in a federal system of government, in which power is divided and dispersed, special attention needs to be given to matters of security. Shays' Rebellion, on the eve of the Constitutional Convention, demonstrated that there would come times when states would be unable to take care of their own security needs—and that a threat in one state could easily spill over into other states and affect the nation as a whole.[251] Under the Articles of Confederation, however, Congress had no authority to intervene to protect a state (and lacked the resources in any event). The states pledged in the Articles "to assist each other, against all force,"[252] but there was no provision to enforce the requirement, no provision by which a troubled state could demand the assistance of its neighbors.

By widespread agreement, some mechanism was needed in the new Constitution by which outside resources could be brought into an

251 *See generally* Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 47–49 (2005) (discussing Shays' Rebellion and its importance in the period of ratification).

252 ARTICLES OF CONFEDERATION art. III (U.S. 1781).

individual state to maintain security.[253] Simply relying on other states to come voluntarily to the assistance of a troubled state was not a realistic solution because states far from a trouble spot had little incentive to deploy their personnel and resources. As Alexander Hamilton identified the issue, "While danger is distant, its impression is weak; and while it affects only our neighbors, we have few motives to provide against it."[254] Memories of how some states had borne a disproportionate burden in the Revolutionary War made this problem clear.[255]

One approach, in a federal system of government, is to assign the entire responsibility for security to the national government and make sure it has sufficient resources to get the job done. This solution bypasses the states and thereby avoids the reluctance of state governments to participate in security beyond their own borders or their own interests. At the Philadelphia Convention, and at the state ratifying conventions, centralization of security powers was a constant theme.[256] *The Federalist* also presented lengthy arguments in favor of augmenting national authority to provide security from both foreign and domestic threats.[257]

Yet simply centralizing security raises other problems. Chief among these to the ratifying generation was the threat nationalized security powers poses to liberty. For Americans of the 1780s, who

253 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 231–32 (photo. reprint 1996) (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891) [hereinafter ELLIOT'S DEBATES].

254 *Id.* at 232 (reporting the statements of Alexander Hamilton before the Convention of the State of New York on June 17, 1788).

255 *See id.* at 231–32 (discussing the disproportionate burden of the state of New York); *id.* at 343–44 (reporting the statement of Robert Livingston making a similar point).

256 When the Philadelphia Convention got underway with Edmund Randolph enumerating the defects in the Articles of Confederation and presenting the Virginia Plan, he began with the problem of maintaining security. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 29–30 (Adrienne Koch ed., Ohio Univ. Press 1984) (1840) (noting "1. that the confederation produced no security against foreign invasion . . . . 2. that the federal government could not check quarrels between states, nor a rebellion in any, not having constitutional power nor means to interpose according to the exigency"); *id.* at 29 ("The Character of [the new federal] government ought to secure 1. against foreign invasions: 2. against dissentions between members of the Union, or seditions in particular states . . . .").

257 *See* THE FEDERALIST No. 4, at 21 (John Jay) (Jacob E. Cooke ed., 1961) (explaining how a strong national government will "apply the resources and power of the whole to the defence of any particular part"); *id.* No. 23 (Alexander Hamilton), at 149 (arguing in favor of making the national government "the guardian of the common safety"); *id.* (explaining that the national government will "make suitable provisions for the public defence" because it is the "representative of the WHOLE" and so "will feel itself most deeply interested in the preservation of every part").

knew all about abuses by Redcoats, the particular incarnation of the threat was the standing national army: professional soldiers, under the command of a national government, interfering with the rights of the people in the name of maintaining law and order.[258] In contrast to the militia—members of the local community, operating under local control—security powers in the hands of a national government and its professional soldiers risked tyranny.

These competing concerns—the need to ensure adequate security, but the fear of centralized power—resulted in constitutional provisions that struck a balance. Article I of the Constitution gives Congress powers to "declare War," "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval forces."[259] The Constitution also authorizes Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and to "provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States," while "reserving to the States . . . the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[260] Article II makes the President "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[261] Article IV confers positive obligations on the federal government to "guarantee" the states "a Republican Form of Government" and to "protect" each state "against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."[262]

Together, these provisions represent a means of providing security, while avoiding an undue concentration of security powers. The Constitution assigns the federal government an obligatory security role: Article IV makes the federal government responsible for protecting the states from invasions. The national government is also required to protect states from domestic violence when the states ask for help. A state that faces a security threat is therefore not depen-

258 *See generally* Bernard Donahoe & Marshall Smelser, *The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787-1788*, 33 REV. POL. 202 (1971) (describing the dispute during the constitutional ratification process concerning the inclusion and scope of Congress' power "to raise and support armies").

259 U.S. CONST. art. I, § 8.

260 *Id.*

261 *Id.* art. II, § 2.

262 *Id.* art. IV, § 4.

dent for aid on the good will of other states. In fulfilling its security obligations, the national government can either deploy federal troops or call into federal service militia units. While the national government has power to create and maintain armed forces, as a check on the need to maintain a large standing army, the Constitution authorizes the national government to call into periods of federal service the militia of the states, under the President's command. Federalists emphasized over and over how the availability of the militia would prevent the need for a standing army and protect liberties.[263]

In addition to repelling invasions and suppressing insurrections, the national government is authorized to use the militia for a third purpose: to "execute the Laws" of the United States.[264] What does that mean? Article II requires that the President "take Care that the Laws be faithfully executed."[265] Read together, these two provisions might suggest that Congress can authorize the President to deploy the militia in the course of putting into effect any and all federal laws: militiamen could be required to serve as postal clerks, tax collectors, customs inspectors, and all of the other agents of the federal bureaucracy. A more likely understanding is that the militia can be called into federal service not to carry out federal law in the first instance, but in response to situations where federal laws are being resisted: when the implementation of federal laws is opposed with violence. When militiamen are armed and trained according to congressional specifications, they are prepared for a security role; reading these provisions in the context of other Article I grounds for calling forth the militia (to repel invasions and suppress insurrections) also suggests that executing the laws of the Union has a security flavor. Further, Article II itself suggests that the normal mechanism will be for federal civil officers to enforce the laws: the President "shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."[266] Those commissioned officers, distinct from the

263 *See* 3 ELLIOT'S DEBATES, *supra* note 253, at 381 (reporting the statement of James Madison before the Convention of the Commonwealth of Virginia on June 14, 1788) ("The most effectual way to guard against a standing army, is to render it unnecessary. The most effectual way to render it unnecessary, is to give the general government full power to call forth the militia . . . ."); THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 257, at 184–85 (stating that the militia is "the only substitute that can be devised for a standing army; [and] the best possible security against it, if it should exist"); *id.* NO. 46 (James Madison), at 321 (arguing that given the option of calling forth the militia, the federal government would never need an army bigger than 30,000 men).

264 U.S. CONST. art. I, § 8.

265 *Id.* art. II, § 3.

266 *Id.*

militia,[267] are the people who will ordinarily administer federal laws. The militia will intervene only to overcome opposition.

Evidence from the Virginia ratifying convention supports this interpretation. On June 14, 1788, General Green Clay asked "to be informed why the Congress were to have power to provide for calling forth the militia, to put the laws of the Union into execution."[268] James Madison's explanation focused on the provision as limited to implementing federal laws that have generated opposition and resistance on the ground—Congress' power was not a general power to use the militia to carry out all federal programs, but rather was closely tied to suppressing insurrections and repelling invasions. Madison stated:

> If resistance should be made to the execution of the laws . . . it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. . . . If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary.[269]

The militia, Madison noted, would only be called forth to execute the laws when "resistance to the laws required it" because the sheriff's "posse . . . were insufficient to overcome the resistance to the execution of the laws."[270] Where, however, "the civil power was sufficient," the use of the militia "would never be put in practice."[271] On the other hand, Madison observed that in order to make use of the militia to execute federal laws, resistance did not have to rise to the level of an invasion or insurrection: "There are cases in which the execution of the laws may require the operation of militia, which cannot be said to be an invasion or insurrection. There may be a resistance to the laws which cannot be termed an insurrection."[272] For example, "a riot d[oes] not come within the legal definition of an insurrection. There might be riots, to oppose the execution of the laws, which the civil

267 The states retain the power to appoint officers of the militia even when called into federal service. *Id.* art. I, § 8.

268 3 ELLIOT'S DEBATES, *supra* note 253, at 378 (reporting the statement of General Green Clay before the Convention of the Commonwealth of Virginia on June 14, 1788).

269 *Id.* at 378 (reporting the statement of James Madison before the Convention of the Commonwealth of Virginia on June 14, 1788).

270 *Id.* at 384.

271 *Id.*

272 *Id.* at 408.

power might not be sufficient to quell."[273] The point was hammered home in response to Patrick Henry's concerns. Henry argued that because it made no specific provision for Congress to use civil powers to enforce federal laws, the Constitution dangerously allowed for the use of military powers in the first instance.[274] George Nicholas offered a rebuttal. The Constitution, Nicholas argued, did not say "the civil power shall not be employed," and therefore it did not alter the normal governmental practice that "[t]he civil officer is to execute the laws on all occasions."[275] If, however, the laws were "resisted, this auxiliary power is given to Congress of calling forth the militia to execute them, when it shall be found absolutely necessary."[276] Edmund Randolph, agreeing with Nicholas' interpretation, stressed the need for "common sense [as] the rule of interpreting this Constitution."[277] Since there was no "exclusion of civil power," or a suggestion "that the laws are to be enforced by military coercion in all cases," the proper inference was that "when the civil power is not sufficient, the militia must be drawn out."[278]

B. Statutory Provisions

In accordance with these constitutional provisions, the early Congress put in place the statutory mechanisms for national commandeering of militiamen in order to respond to emergencies in any part of the country. Congress specified how militiamen were to be trained and equipped and the circumstances under which they could be called into federal service. In the ensuing decades, in responding to emergencies—including defending frontiers, putting down insurrections, and quelling opposition to federal laws—the national government regularly relied upon state militiamen, who served with compensation under temporary federal command. Reconstruction-era statutes, built upon these early laws, provided the basis for the national government to quell violence in the South and enforce federally protected rights.[279]

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273 *Id.* at 410.

274 *See id.* at 387 (reporting the statements of Patrick Henry before the Convention of the Commonwealth of Virginia on June 14, 1788).

275 *Id.* at 392 (reporting the statements of George Nicholas before the Convention of the Commonwealth of Virginia on June 14, 1788).

276 *Id.*

277 *Id.* at 400 (reporting the statements of Edmund Randolph before the Convention of the Commonwealth of Virginia on June 14, 1788).

278 *Id.*

279 The history is not all rosy. Federalists argued that the Militia Clause of Article I and the Protection Clause of Article IV gave Congress power to pass the 1798 Sedition

1. Early Statutes

On May 2, 1792, Congress enacted the first general authorization for federal use of the militia, entitled "An act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions."[280] The statute set out procedures for the President to call forth the militia in accordance with the three uses permitted under Article I of the Constitution.[281] The Act authorized the President, in times of "imminent danger of invasion . . . to call forth such number of the militia of the state or states most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion."[282] In the event of an insurrection, the Act authorized the President, upon application by the affected state, "to call forth such number of militia of any other state or states, as may be applied for, or as he may judge sufficient to suppress such insurrection."[283] The Act also authorized the President to deploy militiamen "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, or by the powers vested in the [federal] marshals."[284] Before the militia could be used for this purpose, the Act required that a district judge or a Supreme Court Justice certify that this condition existed.[285] In using the militia to execute federal laws, the President was first required to call forth the militia of the state in which the obstruction to the laws existed: if that state's militia refused to comply or was ineffective, the President could call forth militia from other states, but only if Congress was not in session to respond to the problem and only until thirty days after Congress resumed its session.[286] Before any federal deployment of the militia, the President was also required to issue an order directing insurgents to disperse.[287] Federal service was limited to periods of three months per year, with militiamen paid at the same rate as regular troops.[288]

Act. *See* 9 ANNALS OF CONG. 2985–92 (1799) (setting out arguments in favor of the Act).

280 Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, 264 (repealed 1795).

281 *See supra* notes 257–61 and accompanying text.

282 Act of May 2, 1792, § 1, 1 Stat. at 264.

283 *Id.*

284 *Id.* § 2, 1 Stat. at 264.

285 *Id.*

286 *Id.*

287 *Id.* § 3, 1 Stat. at 264.

288 *Id.* § 4, 1 Stat. at 264.

Six days after Congress put in place the first statutory mechanisms for the President to call forth the militia, Congress passed "An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States."[289] This statute implemented Congress' powers to "provide for organizing, arming, and disciplining, the Militia."[290] For more than a century, this was the only federal statute under which the militia was organized. The Act enrolled every "free able-bodied white male citizen" between the ages of eighteen and forty-five in the militia company "within whose bounds such citizen shall reside."[291] Congress therefore believed it was entitled to define, for purposes of the Federal Constitution, *who* comprised the militia (rather than defer to the practices of the states), a point that will become important when we consider the modern applications of the Constitution's militia clauses.[292] Much of the internal organization of militia units was left up to the states. Congress specified that the militia was to be "arranged into divisions, brigades, regiments, battalions and companies, as the legislature of each state shall direct."[293] The Act required militiamen to equip themselves with muskets, bayonets, and other gear.[294] Because the requirement that militiamen furnish their own arms and equipment proved impractical, Congress soon enacted programs for lending out arms,[295] for purchasing and reselling arms to the states for their militiamen to use,[296] and eventually equipped the militia itself.[297]

Two additional early statutes bear mentioning. On February 28, 1795, Congress reenacted the May 2, 1792 statute but removed two of

289 Act of May 8, 1792, ch. 33, 1 Stat. 271 (repealed 1903).

290 U.S. CONST. art. I, § 8.

291 Act of May 8, 1792, § 1, 1 Stat. at 271.

292 Though, perhaps questioning its own authority in this regard, or concerned about the ability to enforce its definition, Congress did allow the states to exempt classes of individuals from militia service. *Id.* § 2, 1 Stat. at 272.

293 *Id.* § 3, 1 Stat. at 272.

294 *Id.* § 1, 1 Stat. at 271.

295 Act of May 28, 1798, ch. 47, § 12, 1 Stat. 558, 560 (repealed 1802) (authorizing militia called into federal service to borrow arms and artillery from federal arsenals, with "proper receipts and security" and acceptance of responsibility for "the accidents of . . . service").

296 Act of July 6, 1798, ch. 65, §§ 1–2, 1 Stat. 576, 576 (appropriating $400,000 for the purchase of 30,000 stands of arms, to be made available for sale to the states and their militia—with unsold arms available for borrowing by militiamen called into federal service).

297 Act of Apr. 23, 1808, ch. 55, §§ 1–3, 2 Stat. 490, 490–91 (appropriating $200,000 annually to purchase arms for distribution to the states in proportion to their militia enrollments).

its restrictions on the President's powers.[298] The new law eliminated the requirement that a district judge or Supreme Court Justice certify that there existed opposition to the laws.[299] The new law also removed the provision that permitted the President to call forth militia from other states only if the Congress was not in session.[300] On March 3, 1807, upon a request by Jefferson in the wake of the Burr conspiracy,[301] Congress also authorized the use of regulars to respond to domestic disturbances whenever the use of the militia was permitted.[302]

2. Reconstruction Violence

In response to increasing violence by the Ku Klux Klan and the inability or unwillingness of local authorities to stop it, on April 20, 1871, Congress passed the "Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."[303] Among other things, this statute, known as the Ku Klux Klan Act, authorized the use of troops and the militia to enforce federal rights.[304] Congress could point to two sources of authority to enact this statutory provision. The Fourteenth Amendment gives Congress specific power to enforce its terms by "appropriate legislation."[305] Consistent with the early understandings of Article I, Congress could also provide for the deployment of the militia to suppress insurrections and enforce federal laws that were opposed.[306]

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298 Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C.A §§ 331–335 (West 1998 & Supp. 2007)).

299 *Id.* § 2.

300 *Id.*

301 *See generally* Mazzone, *supra* note 251, at 114–16 (discussing the Burr conspiracy and the passage of the March 3, 1807 statute).

302 Act of Mar. 3, 1807, ch. 39, 2 Stat. 443, 443 (current version at 10 U.S.C. §§ 331, 335 (West 1998 & Supp. 2007)).

303 Ku Klux Klan (Civil Rights) Act of 1871, ch. 22, 17 Stat. 13. In *United States v. Harris*, 106 U.S. 629 (1883), the Supreme Court invalidated as exceeding Congress' powers section 2 of the Act, which outlawed conspiracies to deprive persons of rights or privileges protected under state law. *Id.* at 644.

304 *See* Ku Klux Klan (Civil Rights) Act § 3, 17 Stat. at 14.

305 U.S. CONST. amend. XIV, § 5; *see also* ERIC FONER, RECONSTRUCTION, 1863–1877, at 454–56 (1988) (describing the debates over Congress' power to pass the statute).

306 *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. at 72–73 (1871) (reporting arguments by Michigan Representative Austin Blair in favor of the Act on these grounds). The statute also authorized the President to suspend habeas corpus. *See* Ku Klux Klan (Civil Rights) Act § 4, 17 Stat. at 14–15.

C. *The Militia and the Posse—Executive Interpretations*

At two moments, straddling the Civil War, and each involving issues of race, the executive branch issued important interpretations of the federal power to use the militia. The first was the enforcement of the Fugitive Slave Act of 1850; the second, the quelling of violence during Reconstruction.

1. Enforcement of the Fugitive Slave Act

Part of the Compromise of 1850 and signed into law by President Millard Fillmore,[307] the Fugitive Slave Act of 1850[308] created local commissioners, appointed by the U.S. circuit courts, to assist in the recapture of runaway slaves.[309] Under the Act, a slave owner could obtain a certificate for the return of a fugitive slave upon simple proof of ownership to the commissioner or to a federal judge.[310] Once the certificate issued, the U.S. marshal was required to ensure return of the slave to the owner.[311] The Act also authorized the commissioner, or federal judge, to call out the posse comitatus to assist the marshal.[312] In addition, the Act punished individuals who helped slaves escape.[313]

Though the Fugitive Slave Act faced tremendous opposition in the North, President Fillmore took the position that, as President, he was duty bound to enforce the Act.[314] Fillmore also asserted that under the Constitution he had inherent power (without the need for congressional authorization) to use the military to enforce the law.[315] Hence, in February 1851, after a Boston mob freed the fugitive slave Shadrach and sent him to Canada, the Secretary of War directed the Boston commander to be ready to provide troops to aid in the recapture of Shadrach should the marshal present a certificate in accordance with the 1850 Act.[316] Fillmore also issued a proclamation in which he called on "all well-disposed citizens to rally to the support of

307 ELBERT B. SMITH, THE PRESIDENCIES OF ZACHARY TAYLOR AND MILLARD FILLMORE 185–89, 195 (1988).

308 Ch. 60, 9 Stat. 462 (1850) (repealed 1864).

309 *Id.* § 1, 9 Stat. at 462.

310 *Id.* § 6, 9 Stat. at 463.

311 *Id.* § 5, 9 Stat. at 462.

312 *Id.*

313 *Id.* § 7, 9 Stat. at 464.

314 SMITH, *supra* note 307, at 239–41 (reporting on Fillmore's consistent efforts to enforce the Act).

315 *See* ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISODERS, 1789–1878, at 128–30 (1988).

316 *Id.* at 129.

the laws of their country" and "command[ed] all officers, civil and military, and all other persons, civil or military . . . within the vicinity of this outrage" to "aid[ ] and assist[ ] by all means in their power in quelling this and other such combinations and assisting the marshal and his deputies in recapturing the . . . prisoner [Shadrach]."[317]

In response to a Senate request for information about the incident, Fillmore replied with a strong assertion of executive power: "[S]o far as depends on me, the laws shall be faithfully executed, and all forcible opposition to them suppressed; and to this end I am prepared to exercise, whenever it may become necessary, the power constitutionally vested in me, to the fullest extent."[318] Fillmore conceded that deployment of the militia needed to conform to congressional legislation, including the 1795 Militia Act.[319] On the other hand, he stated, because "the army and navy are, by the [C]onstitution, placed under the control of the Executive," the President was entitled to deploy regulars to enforce federal law as he saw fit.[320] Moreover, Fillmore claimed, "[A]ll citizens, whether enrolled in the militia or not, may be summoned as members of the posse comitatus, either by the marshal or a commissioner, according to law, and . . . it is their duty to obey such summons."[321] The only thing that "may be doubted" was "whether the marshal or a commissioner can summon as the posse comitatus an organized militia force, acting under its own appropriate officers, without the consent of such officers."[322] Fillmore suggested that "[t]his point may deserve the consideration of Congress."[323]

The Senate Judiciary Committee, though saying nothing about inherent executive authority to use regulars, took a broad view of the reach of the power of the U.S. marshals to summon the posse comitatus.[324] The posse comitatus, the committee concluded, included regu-

317 Millard Fillmore, Proclamation of Feb. 18, 1851, *reprinted in* 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 109, 110 (James D. Richardson ed., 1899) [hereinafter MESSAGES AND PAPERS], *available at* http://www.gutenberg.org/files/10951/10951-h/10951-h.htm.

318 Millard Fillmore, Statement to the Senate of the United States (Feb. 21, 1851), *in* JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 203, 207 (1851), *available at* http://memory.loc.gov/ammem/amlaw/lwsjlink.html (follow "31st, 1849-51" hyperlink; then follow "Second Session: December 2, 1850 to March 3, 1851" hyperlink).

319 *See id.* at 206.

320 *Id.*

321 *Id.* at 207.

322 *Id.*

323 *Id.*

324 *See* S. REP. NO. 31-320, at 1 (1852) (reporting on the message of the President on the case of forcible resistance to the execution of the laws in Boston).

lars and the militia. "Because men are soldiers or sailors," the committee reasoned, "they cease not to be citizens; and while acting under the call and direction of the civil authority, they may act with more efficiency, and without objection, in an organized form, under appropriate subordinate command."[325] In other words, marshals had authority to use the posse comitatus to enforce civil law; the posse comitatus included the local men who were also members of the armed forces and the militia. In addition, the committee noted, under the 1795 and 1807 Acts, should federal laws be opposed, the President can call forth the militia and regulars.[326]

Two years later, the Judiciary Committee's view took concrete effect. In May 1854, abolitionists in Boston made repeated efforts to rescue Anthony Burns to prevent his return under the Fugitive Slave Act to his Virginia owner.[327] With the approval of President Franklin Pierce, the U.S. marshal in Boston requested and obtained regular troops to aid local militia forces in preventing Burns' rescue and maintaining order in the city.[328] Attorney General Caleb Cushing issued an opinion setting out the legal basis for the marshal to use militia units and regulars to carry out federal law.[329] Tracking the Senate Committee's earlier understanding of the powers of federal marshals, Cushing explained:

> A Marshal of the United States, when opposed in the execution of his duty, by unlawful combinations, has authority, to summon the entire ablebodied force of his precinct, as a *posse comitatus.*
>
> The authority comprehends, not only bystanders and other citizens generally, but any and all organized armed force, whether mili-

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325 *Id.*

326 *See id.* Small contingents of federal troops were used on occasion to quell slave riots, including in New Orleans, Louisiana; Norfolk, Virginia; and Newbern, North Carolina during periods of agitation in the spring and summer of 1831. *See* COAKLEY, *supra* note 315, at 92–94.

327 *See generally* ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS 63–68, 207–19 (1999) (describing failed attempts to free Burns).

328 *See* COAKLEY, *supra* note 315, at 134.

329 *See* 6 Op. Att'y Gen. 466 (1854). Cushing's opinion departed from the "Mansfield Doctrine," the name given to the opinion of Lord Chief Justice Mansfield, in the context of the London riots of 1780, that civil disturbances should be quelled by civil authorities and the posse comitatus, not by military authorities, and that even if soldiers comprised the posse comitatus, they should be deemed to be acting in a civil capacity and therefore subject to civilian laws. *See generally* David Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders,* 57 IOWA L. REV. 1, 49–51 (1971) (explaining that Cushing departed from about seventy years of acceptance of the Mansfield Doctrine in America).

> tia of the State, or officers, soldiers, sailors, and marines of the United States.[330]

According to this approach, the marshal, charged under the 1789 Judiciary Act with enforcing federal law,[331] need not even consult the President before using regulars and the militia as part of the posse comitatus.

2. Reconstruction Violence

In its efforts to quell violence during Reconstruction, the executive branch affirmed that a U.S. marshal could call on the assistance of militia units and regulars as part of the posse comitatus, but set limits on the circumstances in which the marshal could exercise this authority. On August 20, 1868, in response to a request from the marshal in the Northern District of Florida for military assistance, Attorney General William M. Evarts set out the circumstances under which a marshal could call on regulars and militiamen.[332] Citing the 1789 Judiciary Act, Evarts thought that a marshal had broad power to call for help in carrying out his duties: "[T]he only measure of the assistance which you have power to command is its necessity for the execution of your duty, and upon your discreet judgment under your official responsibility, the law reposes the determination of what force each particular necessity requires."[333] The power of a marshal, Evarts explained, was "equivalent to that of a sheriff,"[334] and therefore included "as a resort in necessity, the whole power of the precinct (county or district) over which the officer's authority extends."[335] Evarts therefore adopted Cushing's view that this "power of the precinct" reached '"every person in the district or county above the age of 15 years, whether civilians or not, and including the military of all

330 6 Op. Att'y Gen. at 466; *see also id.* at 473 ("[T]he *posse comitatus* comprises every person in the district or county above the age of fifteen years . . . including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshal.").

331 *See* Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (stating that the marshal has the duty "to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint as there shall be occasion, one or more deputies").

332 FREDERICK T. WILSON, FEDERAL AID IN DOMESTIC DISTURBANCES: 1787–1903, S. DOC. NO. 67-263, at 104–05 (1922) [hereinafter FEDERAL AID] (quoting letter from William M. Evarts, U.S. Attorney Gen., to the U.S. Marshal of the N. Dist. Fla. (Aug. 20, 1868)).

333 *Id.* at 104 (citing the Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87).

334 *Id.*

335 *Id.*

denominations—militia, soldiers, marines—all of whom are alike bound to obey the commands of a sheriff or marshal.'"[336] However, Evarts stated that a marshal should not "confound[ ]" his "special duty and authority" in the execution of process[337] with the more general "duty and authority of suppressing disorder and preserving the peace, which . . . belongs to the civil authorities of the States."[338] Nor should a marshal confuse his role with

> the authority and duty of the President . . . in the specific cases of the Constitution and under the regulations of the statutes, to protect the States against domestic violence, or with his authority and duty, under special statutes to employ military force in subduing combinations in resistance to the laws of the United States.[339]

In the absence of any specific direction from the President, Evarts stated, these functions are not "shared by the subordinate officers of the Government" like marshals.[340] According to Evarts, these specifications and divisions of power operated to permit a military response where necessary while safeguarding liberty.[341] So too, following disturbances in New Orleans, on September 1, 1868, the commander for the District of Louisiana, General Robert C. Buchanan, acting on instructions from Ulysses Grant, issued orders broadly defining the role the military could play in dealing with resistance to the law.[342] According to Buchanan, a sheriff had authority to call on troops as part of the posse comitatus to deal with opposition to state law; a federal marshal had the same authority when it came to enforcing federal law.[343]

D. Modern Statutes

Federal law defines the militia and authorizes the President to call it forth. According to Title 10 of the U.S. Code:

> The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of

336 *Id.* (quoting Attorney General Cushing).

337 *Id.*

338 *Id.* at 104–05.

339 *Id.* at 105.

340 *Id.*

341 *See id.*

342 *Id.* at 122–23 (quoting Circular No. 2, Department of Lousiana, New Orleans (Sept. 1, 1868)).

343 *See id.* However, the military commander should determine whether any request for the assistance of troops was necessary. *See id.*

> the United States and of female citizens of the United States who are members of the National Guard.[344]

The militia is divided into the "organized militia," consisting of the National Guard and the Naval Militia, and the "unorganized militia," which includes everyone else.[345] The law provides exemption from militia service for active duty members of the armed forces and government officials and religion-based exemptions from combat.[346] Under Title 10, the President is authorized to call into federal service militia units in response to a state's request for assistance in suppressing an insurrection.[347] The President can also deploy the militia along with regulars, to suppress obstructions to the enforcement of federal law (without the need for any request from a state).[348]

In October 2006, as part of the John Warner National Defense Authorization Act for Fiscal Year 2007,[349] Congress made some important modifications to the President's powers to use military force to protect Fourteenth Amendment rights. Prior to these changes, federal statutory law, originating in the Ku Klux Klan Act of 1871 and codified in § 333 of Title 10, required the President to take actions, including the use of the militia and armed forces, to suppress insurrections within states that interfered with Fourteenth Amendment rights and to ensure the execution of federal laws.[350] The October 2006 amendments to § 333, with the subtitle "Use of the Armed

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344 10 U.S.C. § 311(a) (2000); *see also id.* § 101(c)(2), (4) (specifying that the "Army National Guard" and the "Air National Guard" refers to "that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia" that is a land (or air) force; trained and with officers appointed in accordance with the Militia Clauses of the Constitution; is organized, armed, and equipped at federal expense; and is federally recognized); 32 U.S.C. § 101(4), (6) (2000) (same).

345 10 U.S.C. § 311(b) (2000).

346 *See id.* § 312(b).

347 *See id.* § 331. The modern statute grows out of a series of earlier laws: Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795); Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C.A §§ 331–335 (West 1998 & Supp. 2007)); Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C.A §§ 331–335 (West 1998 & Supp. 2007)); Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281 (current version at 10 U.S.C.A. §§ 331–335 (West 1998 & Supp. 2007)); and parts of the Ku Klux Klan (Civil Rights) Act of 1871, ch. 22, §§ 3–4, 17 Stat. 13, 14–15 (expired in part in 1873 and current version at 10 U.S.C.A. § 333 (West Supp. 2007)). The Justice Assistance Act, 42 U.S.C.A. § 10501 (West 2005 & Supp. 2007) and implementing regulations also authorize federal law enforcement assistance to the states upon their written request.

348 10 U.S.C.A § 332 (West Supp. 2007).

349 109 Pub. L. No. 109-364, 120 Stat. 2083 (2006).

350 *See* Ku Klux Klan (Civil Rights) Act of 1871, ch.22, §3, 17 Stat 13, 14.

Forces in Major Public Emergencies," added, as a basis for the President to intervene, the need to restore order following an emergency.[351] The amended § 333, reproduced here as a footnote,[352] also appears to work some other significant changes. The original § 333 required the President to take action;[353] the new version simply grants authorization.[354] The original section allowed the President to call

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351 *See* John Warner National Defense Authorization Act for Fiscal Year 2007, § 1076, 120 Stat. at 2404 (to be codified at 10 U.S.C. § 333)

352 Section 333 now reads:

(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.

(b) Notice to Congress—The President shall notify Congress of the determination to exercise the authority in subsection (a)(1)(A) as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of that authority.

Id. §1076, 120 Stat. 2083, 2404–05 (to be codified at 10 U.S.C. § 333).

353 Act of Aug. 10, 1956, ch. 1041, 70A Stat. 15, 15 ("The President . . . shall take such measures as he considers necessary to suppress . . . any insurrection . . . .").

354 10 U.S.C.A. § 333 (West Supp. 2007) ("The President may employ the armed forces . . . to . . . suppress . . . any insurrection . . . .").

the militia into federal service;[355] the new version says nothing about the militia and refers only to "employ[ing] the armed forces, including the National Guard in Federal service."[356]

Title 10 is not the only current provision of the United States Code dealing with the use of the militia. Still in existence is the law enacted in the Civil War era allowing the President to declare a state in insurrection against the United States, prohibit commerce with that state, and seize goods flowing to and from that state.[357] Additional scattered statutory provisions allow for the President to use the militia in specified circumstances.[358] Federal magistrates are also authorized to use the militia to execute warrants and enforce judicial processes.[359]

E. Historical Practices

The Constitution authorizes the federal government to commandeer the states' militias and deploy regulars in order to respond to certain types of emergencies.[360] Beginning with laws passed in the

355 Act of Aug. 10, 1956, ch. 1041, 70A Stat. at 15 ("The President, by using the militia or the armed forces, or by any other means, shall take such measures as he considers necessary . . . .").

356 10 U.S.C.A. § 333 (West Supp. 2007). A comparison with other provisions of Title 10 suggests that the militia is distinct from the "armed forces." *See* 10 U.S.C. § 331 (2000) (distinguishing the two). Critics of the October 2006 amendment complained that it was inconsistent with federalism to give the President, in times of natural disasters and other emergencies, increased authority over the National Guard and power to use the military to restore public order. *See* 152 CONG. REC. S10,808–10 (daily ed. Sept. 29, 2006) (statement of Sen. Leahy), *available at* http://leahy.senate.gov/press/200609/092906b.html (describing as "incredible" the "changes . . . [that] allow the President to use the military, including the National Guard, to carry out law enforcement activities without the consent of a governor"); David S. Broder, *Governors Wary of Change on Troops*, WASH. POST, Aug. 6, 2006, at A5 (discussing opposition to the provision among governors). Little attention has been given to how the statute removes the President's former authority under § 333 to deploy the militia.

357 Act of July 31, 1861, ch. 32, 12 Stat. 284 (1861) (current version at 50 U.S.C. § 205 (2000)); Act of July 13, 1861, ch. 3, § 5, 12 Stat. 255, 257 (1861) (current version at 50 U.S.C. § 205 (2000)).

358 *See* 22 U.S.C. §§ 461–462 (2000) (allowing the use of militia to capture vessels and to require enemy ships to depart the United States); 50 U.S.C. § 220 (2000) (authorizing the President to use the militia of the United States to prevent the release of vessels and cargo detained by customs officers).

359 *See* 42 U.S.C. § 1989 (2000) (specifying that a magistrate judge is allowed to appoint an individual to execute process and that individual can "summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged").

360 *See supra* Part III.A.

earliest years of the Republic, Congress has provided the statutory mechanisms for the President to call forth and deploy militia units under federal command and to send regular troops to affected sites.[361] This subpart considers some of the many historical occasions on which these constitutional and statutory provisions were put into practice. Well known are the federal government's uses of troops to implement school desegregation orders in the 1950s and 1960s[362] and to quell modern urban riots.[363] But these are the tail end of a much longer history of deploying military force in response to violence. Recognizing in particular how, from its earliest days, the federal government has relied upon state militia and regulars to suppress opposition to federal laws lays the groundwork for thinking about the broad power of the modern federal government to commandeer state personnel in times of emergency.[364]

1. Taxes: The Whiskey Rebellion and Fries' Rebellion

Opposition to tax laws during the Whiskey Rebellion in the early 1790s and Fries' Rebellion in 1799 presented the government early grounds to deploy the militia to enforce federal laws. The underlying events of the Whiskey Rebellion require only brief recitation.[365] As part of Alexander Hamilton's 1790–1791 financial plan, the federal

361 *See supra* Part III.B.

362 In September 1957, President Eisenhower sent troops to Little Rock, Arkansas, and federalized the state's National Guard. *See* Exec. Order No. 10,730, 3 C.F.R. 89 (Supp. 1957). President Kennedy federalized the National Guard and sent troops to the University of Mississippi in September 1962, *see* Exec. Order No. 11,053, 3 C.F.R. 254 (Supp. 1962), and in June 1963 to the University of Alabama, *see* Exec. Order No. 11,111, 3 C.F.R. 182 (Supp. 1963). For an overview of these events see generally RICHARD KLUGER, SIMPLE JUSTICE 754–59 (1976).

363 For example, during 1967 and 1968 President Johnson deployed troops, in response to requests from state governors, to respond to urban disturbances in Detroit, Chicago, and Baltimore; Johnson, acting as Commander in Chief of the D.C. militia, also used troops in Washington, D.C. *See* Exec. Order No. 11,364, 32 Fed. Reg. 10,907 (July 24, 1967); Exec. Order No. 11,403, 3 C.F.R. 107 (1968); Exec. Order No. 11,404, 3 C.F.R. 108 (1968); Exec. Order No. 11,405, 3 C.F.R. 109 (1968). More recently, George H.W. Bush, upon request of the governor, sent federal troops to respond to the riots that broke out in Los Angeles following the verdict in the Rodney King beating case on April 29, 1992. *See* Exec. Order No. 12,804, 3 C.F.R. 298 (1992); Proclamation No. 6427, 3 C.F.R. 44 (1992).

364 The early national government also mobilized the militia to "repel invasions," notably during the War of 1812. For a detailed discussion of the use of the militia in these circumstances, see Mazzone, *supra* note 251, at 116–21.

365 *See generally* WILLIAM HOGELAND, THE WHISKEY REBELLION (2006) (chronicling the Whiskey Rebellion); THOMAS P. SLAUGHTER, THE WHISKEY REBELLION (1986) (tracing the context, chronology, and consequences of the Whiskey Rebellion).

government imposed an excise tax on distilled whiskey.[366] Opposition to the tax was especially strong among cash-strapped farmers in western Pennsylvania where, beginning in the fall of 1791, federal tax collectors were attacked.[367] In September 1792, President George Washington issued a proclamation "exhort[ing] all persons whom it may concern to refrain and desist from all unlawful combinations and proceedings whatsoever having for object or tending to obstruct the operation of the laws," and promising that "all lawful ways and means will be strictly put in execution for bringing to justice the infractors thereof and securing obedience thereto."[368] After a period of relative quiet, in the spring of 1794, attacks on tax collectors in western Pennsylvania renewed. Opposition to the tax also broke out in parts of Georgia, Kentucky, and North and South Carolina.[369] On July 17, 1794, when federal marshals served court orders requiring distillers to appear in federal court in Philadelphia, a mob—which included many members of the state militia—attacked and burned the home of Inspector John Neville in Bower Hill.[370] Regulars arrived from Pittsburgh to defend Neville, and one protester was killed in the ensuing confrontation.[371] On August 4, Supreme Court Associate Justice James Wilson certified, pursuant to the May 2, 1792 Act, that the "laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal of that district."[372] On August 7, Washington issued a second proclamation directing the protesters to disperse before September 1 or face a military response.[373] On August 14, Secretary of War Henry Knox ordered militia units from Pennsylvania, New Jersey, Maryland, and Virginia into federal command to enforce the law.[374] With some 15,000 militiamen deploying to western Pennsylvania, the insurgents

366 *See* SLAUGHTER, *supra* note 365, at 95–105.

367 *See id.* at 109–14.

368 George Washington, Proclamation of Sept. 15, 1792, *reprinted in* 1 MESSAGES AND PAPERS, *supra* note 317, at 124, 124–25.

369 *See* SLAUGHTER, *supra* note 365, at 117–19.

370 *See id.* at 180.

371 *See id.* at 179–81.

372 Letter from Justice James Wilson to the President of the United States (Aug. 4, 1794), *in* 1 AMERICAN STATE PAPERS: MISCELLANEOUS 85, 85 (William S. Hein & Co., Inc. 1998) (1834).

373 *See* George Washington, Proclamation of Aug. 7, 1794, *reprinted in* 1 MESSAGES AND PAPERS, *supra* note 317, at 158, 158–60.

374 *See* COAKLEY, *supra* note 315, at 39; Letter from Henry Knox, Sec'y of War, to Thomas Mifflin, Governor of Pa. (Aug. 7, 1794), *in* 4 PENNSYLVANIA ARCHIVES 2d ser. 122, 122–23 (John B. Linn & William H. Egle eds., Harrisburg, Pa., B.F. Meyers 1876).

swiftly retreated, resolving at a gathering on October 24 at Parkinsons' Ferry to comply with the tax law and to end their fighting.[375] Most of the insurgents in the Whiskey Rebellion ultimately were pardoned.[376] The exercise had cost the national government more than a million dollars in militia pay and expenses.[377] The whiskey tax law itself was repealed after the election of 1800.[378] But the national government had demonstrated its willingness to use the militia to prevent opposition to the enforcement of federal law. Writing to Edmund Pendleton, George Washington stated that "no money could have been more advantageously expended, both as it respects the internal peace and welfare of this country, and the impression it will make on others" and that "[t]he spirit with which the militia turned out in support of the [C]onstitution and the laws of our country" was "the most conclusive refutation" of the claim that with independence from Great Britain "we should be unable to govern ourselves, and would soon be involved in confusion."[379]

The federal government also used the militia to execute federal tax laws during Fries' Rebellion in 1799.[380] In the summer of 1798, Congress passed a revenue law that imposed taxes based on the value of property—federal tax commissioners were required to determine the value of homes by taking account of "their situation, their dimensions or area, their number of stories, the number and dimensions of their windows, the materials whereof they are built whether wood, brick or stone, the number, description and dimensions of the outhouses appurtenant to them, etc."[381] When federal "measurers" arrived in southeastern Pennsylvania, they faced violence from homeowners who resented the intrusion on their domestic lives.[382] Men threw the measurers out onto the street; women poured boiling water on them from the upper levels of their homes.[383] In Bethlehem, on

375 *See* COAKLEY, *supra* note 315, at 59–60.

376 *See* SLAUGHTER, *supra* note 365, at 219–20.

377 Act of Dec. 31, 1794, ch. 6, § 1, 1 Stat. 404, 404–05 (appropriating $1,122,569.01 for militia expenses during the Whiskey Rebellion).

378 *See* SLAUGHTER, *supra* note 365, at 226.

379 Letter from President George Washington to Edmund Pendleton (Jan. 22, 1795), *in* 13 THE WRITINGS OF GEORGE WASHINGTON 32, 34 (Worthington C. Ford ed., New York, G.P. Putnam's Sons 1892).

380 *See generally* WILLIAM W.H. DAVIS, THE FRIES REBELLION 1798–99, at 38–56 (photo. reprint 1969) (1899) (providing a history and analysis of the conflict); PAUL D. NEWMAN, FRIES'S REBELLION 60–87 (2004) (discussing the use of the militia to enforce tax laws).

381 Act of July 9, 1798, ch. 70, § 9, 1 Stat. 580, 586.

382 *See* COAKLEY, *supra* note 315, at 70.

383 *Id.*

March 7, 1799, one hundred men under the leadership of John Fries attacked the local marshal, Samuel Nichols, and set free seventeen insurgents that Nichols had arrested.[384] A local judge notified Secretary of State Timothy Pickering that the laws were opposed.[385] On March 12, President John Adams issued a proclamation directing the insurgents "to disperse and retire peaceably to their respective abodes" and threatening a military response.[386] On March 20, Secretary of War James McHenry directed Pennsylvania Governor Thomas Mifflin to provide nine troops of militia cavalry and two troops of volunteers from the Philadelphia region, who would join a contingent of regulars under the command of Brigadier General William McPherson of the Pennsylvania militia.[387] In early April, under McHenry's orders, McPherson marched the troops to the region of the disturbances—and resistance to the law ended immediately.[388] Fries was convicted of treason and other ringleaders were convicted of resisting the law, but on May 21, 1800, Adams pardoned them all.[389] Again, the federal government had demonstrated its ability and willingness to deploy the militia to ensure the enforcement of federal law.

2. Embargos and Tariffs

In 1808 and 1809, President Thomas Jefferson authorized the deployment of militiamen and regulars to quell opposition to the federal embargo laws.[390] These laws, designed to force England and France to respect American rights to neutral trade in the context of the Napoleonic Wars, prohibited vessels and goods from leaving American ports.[391] Opposition to the laws was especially strong among the residents of the Lake Champlain region of northern Vermont who depended for their livelihood upon trade with Canada.[392] In anticipation of smuggling and other acts of resistance to the

384 *Id.* at 71.

385 *Id.*

386 John Adams, Proclamation of Mar. 12, 1799, *reprinted in* 1 MESSAGES AND PAPERS, *supra* note 317, at 286, 287.

387 COAKLEY, *supra* note 315, at 73.

388 *Id.* at 73–76.

389 John Adams, Proclamation of May 21, 1800, *reprinted in* 1 MESSAGES AND PAPERS, *supra* note 317, at 303, 304.

390 The Embargo Act was passed on December 22, 1807. *See* Embargo Act of 1807, ch. 5, 2 Stat. 451 (repealed 1809). The Act was amended several times in 1808. *See, e.g.*, Supplemental Embargo Act of 1808, ch. 8, 2 Stat. 453.

391 *See generally* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 324–45 (1926) (discussing the embargo laws).

392 *See* BENNETT MILTON RICH, THE PRESIDENTS AND CIVIL DISORDER 31–34 (1941).

embargo, Jefferson instructed the federal collector in Vermont to arm and man vessels, authorized the federal marshal to raise his posse, and instructed the Secretary of War to call on the governor to deploy the militia if necessary to quell resistance.[393] In May 1808, the governor deployed a militia detachment to Windmill Point.[394] Opposition to the laws thereafter hardened, with a town meeting in Franklin County resolving never to submit to the embargo.[395] In August 1808, Jefferson ordered a detachment of the United States Artillery to Franklin County to quell resistance.[396] On January 7, 1809, Congress enlarged the scope of the embargo laws and authorized the President to deploy regulars and militiamen

> for the purpose of preventing the illegal departure of any ship or vessel . . . and also for the purpose of preventing and suppressing any armed or riotous assemblage of persons, resisting the custom-house officers in the exercise of their duties, or in any manner opposing the execution of the laws laying an embargo, or otherwise violating, or assisting and abetting violations of the same.[397]

Jefferson immediately wrote to the governor of each of the states

> request[ing] you, as commanding officer of the militia of your State, to appoint some officer of the militia, of known respect for the laws, in or near to each port of entry within your State, with orders, when applied to by the collector of the district, to assemble immediately a sufficient force of his militia, and to employ them efficaciously to maintain the authority of the laws respecting the embargo.[398]

Jefferson's use of the militia to enforce the embargo laws was short-lived. The embargo proved an economic disaster and, responding to intense popular pressure, Congress repealed the general embargo in March 1809 and implemented the more limited Non-Intercourse Act.[399] Nonetheless, the incident demonstrated that the executive branch considered the use of the militia to be the proper way to enforce a federal law that faced resistance on the ground.

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393 *See* FEDERAL AID, *supra* note 332, at 41.

394 *Id.*

395 *Id.* at 42.

396 *Id.*

397 Act of Jan. 9, 1809, ch. 5, § 11, 2 Stat. 506, 510.

398 Letter from President Thomas Jefferson to the Governors of the United States (Jan. 17, 1809), *in* FEDERAL AID, *supra* note 332, at 43, 43.

399 Non-Intercourse Act, ch. 24, 2 Stat. 528 (1809) (repealed 1815) (allowing for the resumption of commercial intercourse except with Britain and France). *See generally* BURTON SPIVAK, JEFFERSON'S ENGLISH CRISIS 186–97 (1979) (recounting the efforts in Congress leading to the repeal).

The federal government could also deploy regulars to quell opposition to federal law. Hence, when in November 1832 a convention in South Carolina voted to "nullify" the Federal Tariff Act of 1832[400] and resist the enforcement of the law,[401] President Andrew Jackson readied federal troops in Charleston to enforce federal authority.[402] Jackson also made plans to use South Carolina Unionists, along with volunteers from other states, as part of the posse comitatus.[403] In February 1833, Congress passed a "force act," authorizing the use of any necessary military force to quell opposition to the laws.[404] A compromise, in which Congress reduced the federal tariffs and South Carolina rescinded its nullification resolution, averted a crisis.[405]

3. Civil War and Reconstruction

When the Confederacy formed in February 1861, the federal government framed its response within the existing legal structures for the use of military power to enforce federal law. Lincoln's proclamation of April 15, 1861, calling on 75,000 militiamen to suppress the rebellion in the Confederate states,[406] tracked the constitutional and statutory provisions that gave the President authority to deploy the militia to overcome resistance to federal laws.[407] On July 13, 1861, in

400 Act of July 14, 1832, ch. 227, 4 Stat. 583 (repealed 1833).

401 *See* Act of Dec. 20, 1832, ch. 3, 1832 S.C. Acts 15 (nullification ordinance).

402 *See* WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR 265–81 (1966).

403 *See* COAKLEY, *supra* note 315, at 94–102. In his proclamation of December 10, 1832, Jackson denounced South Carolina's assertion of a power to nullify federal law and he vowed to enforce the law. *See* Andrew Jackson, Proclamation of Dec. 10, 1832, *reprinted in* 2 MESSAGES AND PAPERS, *supra* note 317, at 640, 643.

404 Act of Mar. 2, 1833, ch. 57, § 5, 4 Stat. 632, 634.

405 FREEHLING, *supra* note 402, at 292–96.

406 Abraham Lincoln, Proclamation of Apr. 15, 1861, *reprinted in* 6 MESSAGES AND PAPERS, *supra* note 317, at 13, 13.

407 *See id.* On April 19, Lincoln issued a proclamation that put in place a blockade on the ports of the secessionist states and the next day ordered an addition of nineteen vessels to the navy. Abraham Lincoln, Proclamation of Apr. 19, 1861, *reprinted in* 6 MESSAGES AND PAPERS, *supra* note 317, at 14, 14–15. On May 3, Lincoln ordered an increase in the size of the army by 22,714 men, an increase in the navy by 18,000 men and directed that provision be made for 42,032 volunteers for a term of three years. *See* Abraham Lincoln, Proclamation of May 3, 1861, *reprinted in* 6 MESSAGES AND PAPERS, *supra* note 317, at 15, 16. On August 6, 1861, Congress sanctioned these actions. *See* Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326, 326 (specifying that "all the acts, proclamations, and orders of the President . . . after . . . [March 4, 1861], respecting the army and navy . . . and calling out or relating to the militia or volunteers from the States, are hereby approved and . . . made valid . . . as if they had been issued and done under the previous express authority and direction of the Congress").

the guise of a customs revenue law, Congress amended the Act of February 28, 1795,[408] to provide that when the President directed insurgents to disperse and the insurgents (i) failed to comply and (ii) claimed to act under the authority of a state, and (iii) the state's officials did not repudiate the claim and put down the rebellion, the President could declare the inhabitants of a state or part of the state in "insurrection against the United States."[409] As a result, the President could prohibit commerce with the rebel state and seize its goods and vessels.[410] Pursuant to this authority, on August 16, 1861, Lincoln declared the Confederate states to be in insurrection.[411]

During Reconstruction, federal troops quelled riots in the former Confederate states, including large-scale racial disturbances at Norfolk, Virginia in April 1866 and at Memphis, Tennessee, in May of the same year.[412] New Orleans had a long and volatile experience with federal troops responding to violence in connection with disputes over the legitimacy of governmental operations. In July 1866, federal troops implemented martial law in the city when, during a convention that claimed authority to revise the state constitution but was opposed by the mayor as an illegal gathering, violence broke out between the supporters of the convention and the local police.[413] So too, in September 1874, President Grant dispatched troops to restore order in New Orleans upon a request for assistance under Article IV of the Constitution by Governor William Pitt Kellogg, whose authority was challenged by rivals who claimed they had won the 1872 state elections.[414] Elsewhere, in May 1871, in response to growing racial violence, and pursuant to the Ku Klux Clan Act of 1871,[415] Grant deployed troops to several counties in South Carolina and suspended

408 Ch. 36, 1 Stat. 424.

409 Act of July 13, 1861, ch. 3, § 5, 12 Stat. 255, 257 (current version at 50 U.S.C. § 205 (2000)).

410 *See id.* §§ 5–6, 12 Stat. at 257 (providing for the suspension of commercial intercourse with state in insurrection); *supra* note 357 and accompanying text.

411 Abraham Lincoln, Proclamation of Aug. 16, 1861, *reprinted in* 6 MESSAGES AND PAPERS, *supra* note 317, at 37, 37–38.

412 *See* COAKLEY, *supra* note 315, at 273–80.

413 *See id.* at 280–87. President Johnson's handling of the incident produced widespread criticism and contributed to the success of the Radicals in the 1866 congressional elections. *Id.* at 287.

414 *See* FEDERAL AID, *supra* note 332, at 124–39; JOE GRAY TAYLOR, LOUISIANA RECONSTRUCTED 1863–1877, at 291–96 (1974); TED TUNNELL, CRUCIBLE OF RECONSTRUCTION, 1862–1877, at 202–04 (1984).

415 Ch. 22, 17 Stat. 13 (requiring the President to take steps to enforce the Fourteenth Amendment).

habeas corpus in those counties.[416] Hundreds of members of the Ku Klux Klan were arrested and prosecuted in federal court.[417] In addition, after repeated pleas by the governor of Mississippi, Grant sent troops to Vicksburg in the fall of 1874 to restore peace when municipal elections produced racial violence that prevented elected officials from taking office.[418] In December 1876, Grant also stationed troops at the statehouse in Columbia, South Carolina, to protect the members of the state legislature following a period of agitation in the city.[419]

4. Labor Disputes

Federal troops have been deployed with some frequency during labor disputes—often with the justification that the deployment was to maintain law and order rather than to take sides in the dispute. For example, in July 1877, during a period of widespread labor uprisings, governors of nine states called on President Rutherford B. Hayes for federal assistance in maintaining order. Though Hayes might have intervened in order to protect the delivery of the mails and interstate commerce (both were interrupted in some areas) he sent troops for the specific reason of enforcing the mandates of the federal courts

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416 *See* FEDERAL AID, *supra* note 332, at 103.

417 *See id.*

418 *See* NICHOLAS LEMANN, REDEMPTION 63–99 (2006) (recounting the events).

419 *See* FEDERAL AID, *supra* note 332, at 160–61. On December 9, 1876, the House requested that Grant provide copies of orders and communications relating to the use of troops in Virginia, South Carolina, Louisiana, and Florida. Report from President Ulysses Grant to the House of Representatives (Jan. 22, 1877), *in* 7 MESSAGES AND PAPERS, *supra* note 317, at 418. Grant penned a report in which he emphasized that "troops of the United States have been but sparingly used, and in no case so as to interfere with the free exercise of the right of suffrage." *Id.* at 419. Grant wrote that in the states in question there was "no doubt whatever in my mind that intimidation has been used, and actual violence, to an extent requiring the aid of the United States Government." *Id.* In justifying his deployment of troops, Grant pointed to various constitutional and statutory grounds. In Florida and in Louisiana, he wrote, "soldiers . . . were stationed at such points in each State as were most threatened with violence, where they might be available as a posse for the officer whose duty it was to preserve the peace and prevent intimidation of voters," and that this "disposition of the troops seemed to me reasonable and justified by law and precedent, while its omission would have been inconsistent with the constitutional duty of the President of the United States 'to take care that the laws be faithfully executed.'" *Id.* at 419–20. Grant also cited Article IV, Section 4 of the Constitution and the statutory provisions authorizing the use of troops to prevent insurrections and execute federal laws. *Id.* at 420. Grant further invoked, as historical precedent, uses of troops to quell the Whiskey Rebellion and to enforce the Fugitive Slave Act. *See id.* at 421.

and to protect federal property.[420] During the Pullman Strike in the summer of 1894, Grover Cleveland sent federal troops to Chicago to prevent the obstruction of the mails, protect interstate commerce, and ensure the operations of the federal courts.[421] In December 1907, President Theodore Roosevelt sent federal troops to Goldfield, Nevada, at the request of the governor for assistance in quelling a miners' strike.[422] Roosevelt directed that the troops act only to maintain order at the scene of the strike.[423] President Woodrow Wilson, also at the request of the governor, sent federal troops to Ludlow, Colorado, in April 1914 to maintain order following violent strikes at coalmines.[424] In September 1919, Secretary of War Newton D. Baker

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420 *See* S. SPECIAL COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS, 93D CONG., A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES 32–33 (Comm. Print 1974); FEDERAL AID, *supra* note 332, at 162–75; RICH, *supra* note 392, at 72–86.

421 *See* FEDERAL AID, *supra* note 332, at 196–99; RICH, *supra* note 392, at 91–99. The Pullman strikes resulted in an important affirmation of federal power in the prosecution of Eugene Debs, President of the American Railway Union and a strike leader. *See In re* Debs, 158 U.S. 564, 578–79, 582 (1895), *abrogated on other grounds by* Bloom v. Illinois, 391 U.S. 194 (1968). Debs (along with other union leaders) had been held in contempt for violating an injunction issued by the U.S. circuit court and sentenced to a prison term of six months. *See* RICH, *supra* note 392, at 105–06. He sought a writ of habeas corpus in the Supreme Court, arguing that he had been denied the right to a jury trial. *Id.* at 106. Rejecting the argument, Justice Brewer, for a unanimous Supreme Court, wrote sweepingly of the federal government's authority to intervene to enforce federal laws:

> "[T]he government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."
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> . . . The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

In re Debs, 158 U.S. at 578–79, 582 (quoting *Ex parte* Siebold, 100 U.S. 371, 395 (1879)).

422 RICH, *supra* note 392, at 125–29.

423 *Id.* at 129. The troops were withdrawn when Secretary of State Elihu Root advised the President that since there was no evidence that the state legislature could not be convened, deployment of troops at the request of the governor for this purpose was improper. *See id.* at 129–35.

424 *See id.* at 140–42.

sent federal troops to maintain order in Omaha, Nebraska, following labor riots and racial violence.[425] The following month, troops were dispatched to Gary, Indiana, at the governor's request to end violence by striking steel workers.[426] President Warren Harding sent troops to the southern border of West Virginia in September 1921, at the state's request, to quell violence related to miner strikes.[427]

F. Summary

The Framers of the Constitution recognized that federalism presents obstacles to responding to emergencies, and included constitutional provisions to resolve the problem. The federal government is permitted to call into temporary service state government personnel—the militia—in order to respond to emergencies when they occur; from its earliest days, Congress has provided the statutory mechanisms to allow the President to deploy quickly members of state militia units to the site of emergencies; the President has used his authority on numerous occasions throughout our history. Though the Constitution authorizes the use of regular troops instead of the militia (and the federal government has elected to use regular troops in some circumstances), the availability of the militia is designed to give the federal government a way to respond to emergencies while using, rather than bypassing, state resources.

IV. EMERGENCY COMMANDEERING

For a good part of this nation's history, the national government made use of the constitutional provisions that authorize it to commandeer state militia units to respond to emergencies. In light of the failures of Katrina, it is time to consider how those provisions can be put to use in modern times. Though the militia of 1789 no longer exists, there is, I argue in this Part, a useful way to understand the federal government's emergency commandeering powers today. This Part proposes that the Constitution authorizes the national government to commandeer state and local emergency response personnel—police, firefighters, emergency medical technicians, urban search and rescue teams, and public health specialists—and deploy them to the sites of modern emergences. Just as in earlier times the national government deployed militiamen to respond to emergencies, today the national

425 *See id.* at 154–55.

426 *See id.* at 156–57.

427 *See id.* at 164–67.

government should be entitled to call into federal service the emergency response personnel of modern state and local governments.[428]

A. Statutory Provisions

Congress should pass a statute authorizing the federal government to commandeer law enforcement and other state and local personnel in times of emergency. The emergency commandeering statute, passed pursuant to Congress' power under Article I, Section 8 to "provide for calling forth the Militia,"[429] would authorize the President to call into periods of mandatory federal service the relevant state and local personnel for the purposes of "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions."[430] The statute should set out the circumstances in which state personnel can be used for these purposes, including which personnel can be used and from which states, the procedures for placing them under federal control, and the period of time in which they can be required to serve.[431] Pursuant to that statutory authorization, and in accor-

428 I recognize that in some communities, fire fighters, medical response personnel, and other responders might be volunteers rather than employees of the local or state government. In particular, of the 1,088,950 firefighters in the United States in 2002, 822,850 were volunteers and 266,100 were career firefighters. *See* FED. EMERGENCY MGMT. AGENCY & NAT'L FIRE PROT. ASS'N, A NEEDS ASSESSMENT OF THE U.S. FIRE SERVICE 15 (2002) [hereinafter NEEDS ASSESSMENT], *available at* http://www.usfa.dhs.gov/downloads/pdf/publications/fa-240.pdf. There also exist vast numbers of "private police." *See generally* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1173–76 (1999) (discussing the increasing popularity of private patrols and other security personnel). I recognize also that local response efforts might involve a combination of public and private resources—for example, private emergency medical services might bear principal responsibility for providing immediate victim care and hospitals might be private institutions. My analysis in this Article is limited to the commandeering of state and local personnel. However, given the ability of the federal government to define broadly the militia, the federal government could also, if needed, call into service private individuals—doctors, security guards and the like. *But see* Michael H. LeRoy, *Compulsory Labor in a National Emergency: Public Service or Involuntary Servitude? The Case of Crippled Ports*, 28 BERKELEY J. EMP. & LAB. L. (forthcoming 2007) (manuscript at 40–46), *available at* http://ssrn.com/abstract=992771 (discussing Thirteenth Amendment limitations on the government's power to compel work by civilian workers during emergencies).

429 U.S. CONST. art. I, § 8, cl. 15.

430 *Id.*

431 During the War of 1812, disputes arose as to whether states could contest a federal determination that circumstances satisfied the conditions for which the Constitution permits use of the militia. The national government took the position that states had no power to second-guess a federal determination; states eventually accepted this understanding. *See* Mazzone, *supra* note 251, at 116–25 (discussing the disputes and their resolution). The Supreme Court also took the view that federal

dance with its terms, when the emergency condition arises, the President will be entitled to issue the call to duty and take command of the relevant state personnel. The statute should also provide that when the emergency ends, the state personnel will return to the control of state government.

The authorizing statute should give the President discretion to determine how best to deploy available resources to respond to an emergency. In some kinds of emergencies, especially those that are localized, the President will call into federal service state personnel from the state in which the emergency arises. In other emergencies, the President will call on personnel from other states and send them to the scene of the incident. In some emergencies, the President will rely entirely on state and local personnel. In other emergencies, state personnel will serve along with military personnel, federalized National Guard troops, and other federal employees. In still other emergencies, the President might elect to forego using state personnel entirely and respond with federal personnel: the availability of state and local emergency response personnel is not a requirement that the President use them.

The old militia did not serve under federal command for free and neither would modern state and local emergency response personnel. The authorizing statute should therefore specify that the federal government is responsible for paying for the use of state personnel. Covered costs would include, of course, the salary of workers. In addition, the federal government should cover associated costs, such as for equipment, uniforms, transportation, medical care, and housing during periods of service away from home. Congress could decide that the federal government will pay state and federal personnel directly during periods of federal service. Alternatively, the federal government could reimburse state and local governments for the expenses incurred in using their employees.

In order for law enforcement and other state personnel to perform effectively when called into federal service, Congress should also require as a statutory matter that they receive advance training (again, at federal expense) in relevant emergency procedures and practices. Congress' power to pass this requirement would lie in the provision of Article I, Section 8 empowering Congress to "provide for organizing,

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power was exclusive, accepting that under the 1795 Militia Act, "the authority to decide whether the exigency has arisen, belongs exclusively to the President, and . . . his decision is conclusive upon all other persons." Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827) (upholding a fine against a militiamen who refused to report to duty).

arming, and disciplining, the Militia."[432] The White House report on Katrina recommends national training programs for emergency response personnel[433] and other programs to standardize response capabilities.[434] Indeed, FEMA and other federal governmental agencies currently offer, on a voluntary basis, various training programs for law enforcement and other state and local employees;[435] private entities also conduct relevant training sessions.[436] These programs should be expanded upon to ensure that state and local personnel have the requisite skills when called into federal service. For instance, the Centers for Disease Control might provide training in detecting and handling biological and chemical agents, decontamination procedures, and the implementation of quarantine measures. The Bureau of Alcohol, Tobacco, Firearms and Explosives can teach identification and destruction of explosive materials and devices. The Food and Drug Administration and the Department of Health and Human Services can provide instruction on deploying medical devices and treatments in the event of an emergency. The FBI's Hazardous Materials Response Unit can train local responders in responding to incidents involving hazardous materials.[437] In practice, the federal government might elect to give every responder common training. The government might instead give certain law enforcement officers, or other personnel, specialized training in specific tasks. For instance, one police department in a city might have special training in crowd control while another becomes highly skilled in search and rescue. Some public health officials might be trained in communicating information about outbreaks to federal agencies while others know how to rapidly deploy vaccines and other supplies.

Finally, the authorizing statute should specify that the states have no power to resist the use of their personnel by the federal government for emergency purposes. States could not, for example, prohibit their employees from reporting to federal duty or otherwise obstruct

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432 U.S. CONST. art. I, § 8, cl. 16.

433 *See* LESSONS LEARNED, *supra* note 43, at 118–20.

434 *See id.* at 122.

435 For example, FEMA operates an "Emergency Management Institute" that provides resident and nonresident instruction on emergency management: mitigation, preparedness, response, and recovery. *See* Emergency Management Institute Homepage, http://www.training.fema.gov/ (last visited Oct. 29, 2007).

436 *See* Counter-Terrorism Training and Resources for Law Enforcement, http://www.counterterrorismtraining.gov/tta/index.html (last visited Oct. 29, 2007) (collecting programs); Mem'l Inst. for the Prevention of Terrorism, Courses and Training Events, http://www.mipt.org/trainingcourses.asp (last visited Oct. 29, 2007).

437 *See* Fed. Bureau of Investigation, Laboratory Services, http://www.fbi.gov/hq/lab/html/hmru1.htm (last visited Oct. 29, 2007).

the federal government's emergency commandeering powers. Nor could states fire or otherwise punish their employees for periods of federal service.

B. By the Numbers

Today, with the ongoing deployment of troops to Iraq, federal military personnel (including members of the National Guard in federal service) are "stretched thin."[438] State and local emergency response personnel therefore represent an important resource. Adopting the emergency commandeering proposal offered here will make available more than six million state and local police officers for the federal government to deploy to respond to emergencies,[439] along with more than a quarter million career firefighters,[440] and nearly 900,000 emergency medical service personnel.[441] Just as the old militia represented an alternative to maintaining federal troops, today, state and local emergency responders represent an alternative to using professional soldiers in times of emergency.

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438 JAMES A. BAKER III ET AL., THE IRAQ STUDY GROUP REPORT 30 (2006), *available at* http://www.usip.org/isg/iraq_study_group_report/report/1206/iraq_study_group_report.pdf; *see also id.* at 76 ("U.S. military forces . . . have been stretched nearly to the breaking point by the repeated deployments in Iraq. . . ."); Scott Shane & Thom Shanker, *When Storm Hit, National Guard Was Deluged Too*, N.Y. TIMES, Sept. 28, 2005, at A1 (reporting that Louisiana National Guard commanders considered the Guard's response to Katrina "crippled . . . by a severe shortage of troops that they blame in part on the deployment to Iraq of 3,200 Louisiana guardsmen"); Thom Shanker & Michael R. Gordon, *Strained, Army Looks to Guard for More Relief*, N.Y. TIMES, Sept. 22, 2006, at A1 ("So many [active army units] are deployed or only recently returned from combat duty that only two or three combat brigades—perhaps 7,000 to 10,000 troops—are fully ready to respond in cases of unexpected crises, according to a senior Army general.").

439 For data on the number of state and local law enforcement officers, see BUREAU OF JUSTICE STATISTICS, *supra* note 17, at 42 tbl.1.27. For fiscal year 2007, Congress authorized more than 1.3 million active duty members of the regular military. *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 401, 120 Stat. 2083, 2168–69 (2006) (authorizing active duty strengths of 512,400 for the Army, 340,700 for the Navy, 180,000 for the Marine Corps, and 334,200 for the Air Force).

440 In 2002, the most recent year for which data is available, there were 266,100 career firefighters in the United States. NEEDS ASSESSMENT, *supra* note 428, at 15.

441 *See* Brian J. Maguire, *Current Emergency Medical Services Workforce Issues in the United States*, J. EMERGENCY MGMT., Summer 2004, at 17, 20–21; Nat'l Ass'n of Emergency Med. Technicians, EMS Statistics, http://www.naemt.org/aboutEMSAndCareers/ems_statistics.htm (last visited Oct. 29, 2007).

C. *Locating the Militia*

An objection to the proposal offered here is that modern law enforcement and other emergency personnel are not the "militia" within the meaning of the 1789 Constitution—therefore the federal government lacks the authority to call forth these modern state and local personnel. However, there are at least three good reasons why Congress can properly invoke its militia powers to enact a modern emergency commandeering statute.

First, the Constitution does not itself define the militia; nothing in the Constitution specifies who is a member. From the earliest days of the Republic, Congress has made and relied upon its own definition of the militia within the meaning of Article I.[442] Congress did not see a need to defer to state law on who comprised the militia.[443] Following this early tradition, Congress should be free today to define the militia, for purposes of the Federal Constitution, to include all law enforcement, firefighters, public health personnel, and other emergency workers. Second, functionally, the closest modern analogue to the old militia—which, in addition to combat, performed various kinds of public order functions—is probably the police (and not the National Guard).[444] Third, even if Congress were required to follow a historical understanding of the militia as all or some significant part of the entire body of free men,[445] with perhaps a modification, in light of the Nineteenth Amendment, to also include women,[446] Congress can still enact the proposed emergency commandeering statute. However broadly one defines the militia, Congress can provide for calling forth

442 *See supra* notes 289–92, 431 and accompanying text.

443 In 1859, upon the governor's request, the Massachusetts Supreme Judicial Court issued an advisory opinion that the state was bound by Congress' definition of the "militia" under the Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271 (repealed 1903). *See In re* Opinion of the Justices, 80 Mass. (14 Gray) 614, 619 (1859) ("The general government having authority to determine who shall and who may not compose the militia, and having so determined, the state government has no legal authority to prescribe a different enrolment.").

444 *See* Mazzone, *supra* note 251, at 142 n.621 (discussing why law enforcement is the closest modern equivalent to the militia).

445 *See generally* CRESS, *supra* note 35, at 3–33 (discussing the early colonial use of militias as "require[ing] all free white males to provide their own weapons, keep them in good repair, and attend frequent militia drills"); Ansell, *supra* note 35, at 472–78 (illuminating the meaning and existence of the nation's militia via legal and historical analysis).

446 *See generally* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 960–77 (2002) (arguing for a "synthetic" reading of the Nineteenth and Fourteenth Amendments that would "reground[ ] sex discrimination doctrine in constitutional history").

that part that comprises police officers, firefighters, and the like. In other words, Congress can retain its current (broad) statutory definition of the militia,[447] and yet pick and choose among the members of the militia best suited to respond to terrorism, natural disasters, or other emergencies—the federal government is not required to call forth every member of the militia or nobody at all. Instead, the federal government can today deploy that portion of the militia that comprises state and local emergency personnel. In this sense, a very broad definition of the militia for constitutional purposes works to Congress' advantage. A similar conclusion would follow if Congress was required to follow the states' own (very broad) definitions of their militias.[448]

More generally, emergency commandeering is consistent with, indeed good for, federalism. Rather than the federal government bypassing states and localities, emergency commandeering involves the use of preexisting state and local resources. Instead of deployment of professional soldiers (historically, the most dreaded force of all) or of federal personnel from Washington, D.C., emergency commandeering involves the employment of police officers, firefighters, and other civilians.

D. Triggers

In accordance with the constitutional provisions authorizing the use of the militia, there are three circumstances in which the federal government is entitled to commandeer law enforcement and other employees of state and local governments: to repel invasions, suppress insurrections, and to execute federal laws.[449] The role that state emergency response personnel can usefully play in these three circumstances will depend upon the particular nature of the emergency at hand.

If invasions take the classic form of a foreign power launching an attack on the homeland, the federal government is, of course, likely to depend principally on the military—whose job it is to defend the nation. At the same time, even in the context of repelling the invasion, the federal government might find it beneficial to deploy state and local personnel: police departments might be directed to assist in

447 10 U.S.C. § 311(a) (2000) ("The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.").

448 *See supra* Part I.B.2.

449 U.S. CONST. art. I, § 8, cl. 15.

arresting foreign spies, to provide security at high-risk targets, or to enforce a curfew; public health officials might provide medical assistance; firefighters might be deployed to monitor cities for evidence of biological or chemical attacks.

Insurrections will present a variety of circumstances in which the federal government can make good use of state and local emergency response personnel. Police can respond quickly to riots and other disturbances, disperse crowds, and enforce barriers, street blockades, and curfews. Police can also protect vulnerable members of the population and secure government offices and other buildings under attack. Fire departments can respond to arson and other physical dangers. Bomb squads can respond to uses of, or threatened uses of, explosive devices. Health workers can provide medical assistance to injured responders and other victims of violence.

Terrorism might be deemed an invasion, because it involves an attack from outsiders, or deemed an insurrection, because it involves a domestic uprising.[450] In either case, the federal government can usefully deploy police officers to operate checkpoints at bridges and tunnels, patrol harbors, inspect vehicles entering cities, provide security on mass transit, and guard buildings. Firefighters or public health personnel can be deployed to test for noxious agents in subways, bus

450 This characterization might have one important implication. Article I authorizes Congress to provide for calling forth the militia to suppress insurrections and to repel invasions. *Id.* While Article IV requires the federal government to "protect" the states against invasion, it only requires the federal government to protect the states against "domestic violence" when the state makes a request. *Id.* art. IV, § 4. Though the Constitution does not specifically prohibit the federal government from deploying the militia in response to an insurrection, one might read Article IV, if insurrection is equivalent to "domestic violence," to imply as much. On this view, if a terrorist attack is an insurrection/incident of domestic violence, the federal government must wait for a state request before sending forces to help. Perhaps a better understanding is that an insurrection is an effort to overthrow the government, and is therefore more serious than "domestic violence," which is in turn merely opposition to the enforcement of the laws. Therefore, the federal government's power to intervene with militia only arises when domestic violence escalates to insurrection—the state government is in the best position to make this call. Evidence from the Founding era is not entirely clear. In considering the proposal that became Section 4 of Article IV, delegates spoke variously about "domestic . . . violence," "rebellions," and "dangerous commotions, insurrections and rebellions." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 47–48, (Max Farrand ed., rev. ed. 1966) (reporting the statements of James Wilson, James Madison, Luther Martin, and John Rutledge). Without debate, the convention refused a last minute proposal to substitute "insurrections" for "domestic violence" in Article IV, Section 4. *See id.* at 467. It is not clear whether that change (which would make Article IV mirror the Article I language) was rejected because insurrection was considered a synonym for domestic violence or because a difference was intended.

stations, and at public events. Special Weapons and Tactics (SWAT) teams can be sent to seize suspected insurgents; undercover officers can infiltrate terrorist organizations.

The third constitutional basis for commandeering state personnel is to execute federal laws. This basis will allow the federal government to commandeer state emergency response personnel in a wide variety of circumstances where the enforcement of federal law is at risk. The most obvious is where, as in the Whiskey Rebellion and Fries' Rebellion, organized opponents of a law interfere with its enforcement.[451] Organized opposition might take the form of violence against federal officials, the occupation of federal buildings, or the harboring of individuals subject to regulation. The federal government is entitled to deploy state and local personnel to end interference of this nature with federal law enforcement.

Various other kinds of emergencies can produce obstructions to an array of federal laws, and thereby also trigger the government's power to commandeer state and local personnel. Looting, violence, and other kinds of unlawful activity are a frequent accompaniment to all variety of emergencies, including blackouts,[452] earthquakes,[453] hurricanes,[454] and terrorism.[455] Emergencies might result in obstructions of the mail; federal law creates the postal system, provides for the delivery of the mail,[456] and prohibits "knowingly and willfully obstruct[ing] or retard[ing] the passage of the mail, or any carrier or

451 *See supra* Part III.E.1.

452 Most famously, the widespread looting that occurred in New York City in July 1977. *See* JONATHAN MAHLER, LADIES AND GENTLEMEN, THE BRONX IS BURNING 187–95 (2007) (recounting the events). By contrast, a blackout in the City in August 2003 produced relatively little looting. *See* Michael Wilson, *Central Parts of Brooklyn Saw the Worst of Looting*, N.Y. TIMES, Aug. 21, 2003, at B4.

453 *See* SIMON WINCHESTER, A CRACK IN THE EDGE OF THE WORLD 307–08 (2005) (describing looting during the San Francisco earthquake of 1906); Don Davis, *Quake Cripples Bay Area: Toll 250 and Rising; Roads, Bridges Fall*, SAN DIEGO UNION, Oct. 18, 1989, at A1 (describing looting in San Francisco after the earthquake in October 1989).

454 *See, e.g.*, Paul Flemming, *New Charge Sought for Gougers; Attorney General Pushes Harsher Punishments*, NEWS-PRESS (Sw. Fla.), Oct. 2, 2004, at 1B (reporting more than 10,000 allegations of price-gouging during the 2004 Florida hurricane season).

455 *See* Richard Lezin Jones, *Security Cameras Planned for Mall in Trade Center Ruins*, N.Y. TIMES, Sept. 29, 2001, at B10 (describing looting at the World Trade Center site following the attacks of September 11, 2001); William Mauldin, *74 Arrested for Post-9/11 Larceny*, N.Y. SUN, June 19, 2003, at 11 (reporting the theft of $15 million from ATM machines following the interruption of electronic banking service).

456 *See* 39 U.S.C.A. § 401 (West 2007).

conveyance carrying the mail."[457] So too, emergencies might obstruct commerce; federal law also prohibits interference with interstate commerce.[458] Katrina had a substantial impact on interstate commerce, including by undermining energy production.[459] Emergencies can easily interfere with the flow of traffic on federal-aid highways[460] and obstruct navigable waters.[461] Emergencies can interfere with enforcement of federal criminal statutes, for instance, laws regulating firearms;[462] prohibiting the use of minors in crimes of violence;[463] prohibiting possession of biological toxins[464] and chemical weapons;[465] prohibiting access to secured federal property, seaports and airports;[466] prohibiting interstate domestic violence;[467] prohibiting

457 18 U.S.C. § 1701 (2000); *see also In re* Debs, 158 U.S. 564, 586 (1895) (recognizing federal power to remove from the highways things that obstruct the mails or interstate commerce), *abrogated on other grounds by* Bloom v. Illinois, 391 U.S. 194 (1968).

458 18 U.S.C. § 1951(a) (2000) (prohibiting "obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . or commit[ting] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section").

459 *See* Micheline Maynard, *Carriers Are Stricken by Cancellations and Lack of Fuel*, N.Y. TIMES, Aug. 31, 2005, at C4 ("The airline industry felt the brunt of Hurricane Katrina yesterday, with some airports running low on jet fuel and carriers canceling hundreds of flights. Meanwhile, Wall Street feared that the financial problems of the sickest airlines could grow worse."); Eduardo Porter, *Hurricane's Disruption of Key Energy Systems Hits Variety of Industries*, N.Y. TIMES, Aug. 31, 2005, at C1 ("[E]conomists warned that [Katrina] was likely to leave a deeper mark on the national economy than previous hurricanes because of its profound disruption to the Gulf of Mexico's complex energy supply network.").

460 *See* 23 U.S.C. § 103(a) (2000) (defining the "Federal-aid systems" as the "Interstate System and the National Highway System").

461 *See* 33 U.S.C. § 403 (2000) (prohibiting "any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States").

462 *See, e.g.*, 18 U.S.C.A. § 921(a) (West 2000 & Supp. 2007) (prohibiting interstate sales of firearms except between licensed dealers); 18 U.S.C. § 922(g) (2000) (prohibiting any convicted felon from possessing any firearm shipped or transported in interstate or foreign commerce); *id.* § 922(o) (prohibiting the possession of fully automatic firearms manufactured before 1986); 26 U.S.C. §§ 5812, 5841(a), (e) (2000) (imposing registration requirements and transfer restrictions on fully automatic weapons and certain other firearms).

463 18 U.S.C. § 25 (Supp. IV 2004).

464 *Id.* § 175(b).

465 *Id.* § 229 (2000).

466 18 U.S.C.A. § 1036 (West Supp. 2007).

467 *Id.* § 2261 (West 2000 & Supp. 2007).

transportation of minors for use in sexual activity;[468] and prohibiting damage to nuclear facilities.[469]

Emergencies might also put at risk the enforcement of a range of federal civil statutes, including federal tax laws and immigration laws. So too, emergencies might threaten federal property[470] (for example, the post office), put federal employees at risk, or undermine federal electoral processes. Emergencies can interfere with federal judicial processes, such as the operations of federal courts and the enforcement of court judgments and decrees, the safety of witnesses,[471] and the security of federal prisoners. An emergency might risk destruction of records related to a federal investigation.[472] Katrina is again instructive: flooding in police evidence rooms in New Orleans jeopardized some three thousand prosecutions.[473] Some emergencies will themselves trigger a federal investigation: after a terrorist attack, for example, the federal government will likely seek to bring criminal charges against the perpetrators and so will have an interest in securing the crime scene and preserving evidence.

Significantly, federal power to intervene when emergencies occur should not be limited to narrowly defined security functions like patrolling streets, guarding federal property, or arresting individuals who interfere with the execution of federal laws. Rather, federal power should extend to all activities that restore order and facilitate the implementation of federal law.[474] For example, preventing looting in the aftermath of a hurricane might require the use of police officers to guard stores—but also police cadets to distribute food supplies and equipment to stranded residents so that looting becomes unnecessary. If a terrorist attack produces vigilantism, the federal government can deploy police to implement a curfew—it can also dispatch firefighters and search and rescue personnel to help victims escape dangerous parts of town. During the outbreak of a disease, the

468 *Id.* § 2423 (West Supp. 2007).

469 42 U.S.C.A. § 2284 (West Supp. 2007).

470 *See* 18 U.S.C. §§ 1851–1864 (2000) (defining crimes in connection with public lands).

471 *Id.* § 1512 (2000 & Supp. IV 2004) (prohibiting tampering with witnesses, victims, and informants).

472 *Id.* § 1519 (Supp. IV 2004) (criminalizing the destruction or alteration of federal records).

473 Kevin Johnson, *Engulfed Evidence Puts New Orleans Court Cases in Doubt*, USA TODAY, Sept. 22, 2005, at 6A.

474 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

federal government can place guards at public hospitals to prevent panicked citizens from seizing vaccines—it can also send medical personnel to distribute supplies to victims so as to reduce the likelihood that a hospital will come under attack.

In addition, emergencies might require federal intervention to protect civil rights.[475] An emergency could easily produce racial violence, interference with property, attacks on religious minorities, or suppression of opposition viewpoints. Katrina led to violations of prisoners' rights: the U.S. Department of Justice is investigating violence committed against inmates during the chaos of the hurricane.[476] Thousands of people who were arrested before the storm, many on minor charges, were held in detention for unduly long periods[477] and without access to lawyers.[478] The federal government is also entitled to deploy state and local personnel to secure rights protected under federal law.

E. Katrina Replayed

Consider, then, how emergency commandeering would have played out during Katrina. Once it became evident that the hurricane would jeopardize federal interests in the region, the President, in accordance with the relevant statutory scheme, would have called into federal service sufficient state and local emergency personnel to mount an effective response. The President would likely have begun by federalizing police officers, firefighters, search and rescue workers, hazardous waste crews, and other emergency personnel in Louisiana, Mississippi, and Alabama. There would have been no need for the governors of those states (or for local officials) to consent to federalization: the order would have issued directly to the chiefs of police, fire and other departments, and the personnel would have reported to

475 In the modern codification of the Ku Klux Klan Act, federal law prohibits "conspir[ing] or go[ing] in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3) (2000); *see also* Griffin v. Breckenridge, 403 U.S. 88, 102–03 (1971) (setting out elements of a claim under this provision).

476 Bruce Alpert, *Investigation Opens into Possible Inmate Abuse*, TIMES-PICAYUNE (New Orleans), Oct. 4, 2005, at A3; Michael Perlstein, *Prison Became Island of Fear*, TIMES-PICAYUNE (New Orleans), Sept. 23, 2005, at A1.

477 Henry Weinstein, *2500 Arrested Before Katrina Are Still in Limbo*, L.A. TIMES, Nov. 20, 2005, at A38.

478 *See* Leslie Eaton, *Judge Steps in for Poor Inmates Without Justice Since Hurricane*, N.Y. TIMES, May 23, 2006, at A1 (reporting on orders issued by New Orleans Judge Arthur L. Hunter Jr. to release detained defendants held for long periods without being granted counsel because of a shortage of public defenders).

duty. In addition, given the magnitude of the hurricane, the President would likely have also deployed to New Orleans and other towns law enforcement and other personnel from neighboring states. Again, the order would have issued directly to the police department in Little Rock, the leader of the search and rescue team in Austin, the fire chief in Atlanta, and so on. If needed, personnel from farther away would also be called into federal service. These commandeered state and local personnel would be dispatched to the affected region where, drawing upon their prior training in federal programs, they would carry out the response effort under federal authority. They would be paid and outfitted by the federal government. Once their tour of federal duty ended, they would return home and resume their employment with state or local government.

F. Capacities

Law enforcement and other employees of state and local governments are well prepared to respond to a variety of emergencies under federal command. More than four hundred police departments in the United States have specialized bomb dispersal units.[479] Hazardous materials units ("HazMat units") in local police departments are trained to be the first responders in the event of chemical or biological incidents.[480] In Idaho, Regional Response Teams stand ready to respond to incidents anywhere in the state involving hazardous materials.[481] Local law enforcement has training in and experience with responding to riots and controlling crowds[482] and can employ SWAT teams to respond to high-risk incidents.[483] In Massachusetts, personnel of the state Department of Public Health provide and coordinate emergency medical services following natural disasters and terrorist attacks.[484] In Los Angeles, the Terrorism Early Warning Group, a

479 William F. McCarthy, *Bombs and Bomb Squads*, *in* 1 ENCYCLOPEDIA OF LAW ENFORCEMENT 26, 26 (Larry E. Sullivan & Marie Simonetti Rosen eds., 2005) [hereinafter ENCYCLOPEDIA OF LAW ENFORCEMENT].

480 Ellen Sexton, *Chemical and Biological Terrorism, Local Response to*, *in* 1 ENCYCLOPEDIA OF LAW ENFORCEMENT, *supra* note 479, at 47, 47–48.

481 *See* Idaho Bureau of Homeland Sec., Regional Response Teams, http://www.bhs.idaho.gov/agency/ops.htm (last visited Oct. 29, 2007).

482 *See* Anders Walker, *Riots/Demonstrations (Response To)*, *in* 1 ENCYCLOPEDIA OF LAW ENFORCEMENT, *supra* note 479, at 410, 410–11.

483 *See* Jeff Rojek & David A. Klinger, *SWAT Teams*, *in* 1 ENCYCLOPEDIA OF LAW ENFORCEMENT, *supra* note 479, at 447, 447–48.

484 *See* Mass. Dep't of Pub. Health, Fact Sheet: Emergency Management and Public Health, http://www.mass.gov/Eeohhs2/docs/dph/emergency_prep/how_emergencies_are_handled.pdf (last visited Oct. 29, 2007).

joint effort among state, local, and federal agents, constantly collects and evaluates intelligence information.[485] The Los Angeles Department of Health Services has implemented and tested sophisticated programs for detecting and responding rapidly to bioterrorism and other public health incidents.[486] More than one hundred counties in Kansas have participated in a "Prairie Plague" bioterrorism drill.[487] In Boynton Beach, West Palm Beach, and Palm Beach Counties in Florida, fire departments have specialized search and rescue teams to go into collapsed buildings, high-rise towers, and underground tunnels.[488] Montgomery County, Maryland, has special equipment for hospital surge capacity, mass casualty response, patient identification, and patient database management for disease investigation.[489] The Arizona Department of Health Services operates a sophisticated laboratory for analyzing biological agents.[490] In Illinois, Emergency Medical Response Teams respond to and assist with emergency medical treatment of mass casualty incidents when activated by the Director of Public Health; team members assisted victims in Baton Rouge following Hurricane Katrina.[491] The Cities Readiness Initiative (CRI), a partnership with Chicago, St. Louis, and neighboring states, conducts readiness exercises among large metropolitan areas and states to enhance cooperation.[492] State Weapons of Mass Destruction (SWMD) Teams are trained to respond to a biological, chemical, or radiological attack.[493] The Chicago Police Department operates a sophisticated web-based data management system, Community and

485 *See* U.S. Dep't of Homeland Sec., Office of State and Local Gov't, Coordination and Preparedness, Terrorism Early Warning Group, http://www.mofb.org/webquest/terr3.pdf (last visited Oct. 29, 2007).

486 L.A. COUNTY DEP'T OF HEALTH SERVS., BIOTERRORISM READINESS REPORT 2 (2005), http://www.labt.org/pdf/BT_Readiness_Report_2005.pdf.

487 OFFICE OF HOMELAND SEC., STATE AND LOCAL ACTIONS FOR HOMELAND SECURITY 2 (2002), *available at* www.ncs.gov/library/policy_docs/State_and_Local_Actions_for_Homeland_Security.pdf.

488 Leon Fooksman, *Officials Say Region Is More Secure but Push for Extra Resources*, S. FLA. SUN-SENTINEL, Sept. 9, 2006, at 1A.

489 *See* Gordon Aoyagi, *Sept. 11 Reflections and Remembrances; The County's Homeland Security Director Describes Improvements in Regional Emergency Preparedness*, WASH. POST, Sept. 7, 2006 (Montgomery Extra), at 10.

490 *See* OFFICE OF HOMELAND SEC., *supra* note 487, at 11.

491 *See* Press Release, Ill. Office of Governor Rod. R. Blagojevich, Governor Blagojevich Names New Deputy Chief of Staff for Public Safety; Carl Hawkinson Retires from State Service (Dec. 22, 2005), *available at* http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=4548.

492 *Id.*

493 *Id.*

Law Enforcement Analysis and Reporting (CLEAR), that assists in terrorist prevention and response measures.[494]

Since 9/11, the personnel of local government have largely occupied the "front lines"[495] in the domestic war on terrorism. Police, firefighters, city transportation officials, public health officers, and other local employees are the men and women who guard the tunnels and bridges, monitor ports and harbors, protect transportation systems, secure public events, test for radiation and biological agents, and prepare responses in the event of future attacks; they are also the first responders should an attack occur.[496] Local governments have implemented high-tech surveillance, radiation detection systems, and plans for mass quarantine;[497] mayors have sent security delegations to Israel for training;[498] city aircraft patrol the skies and police boats monitor the harbors; elite city commando teams (called "Hercules Teams" in New York) stand at the ready;[499] and agents of city government regularly investigate individuals with possible terrorist ties and infiltrate suspicious groups.[500] Measured by its post-9/11 budget and personnel, the NYPD outranks all but nineteen of the world's standing armies.[501] The Fire Department of New York (FDNY) has over 11,000

494 *See* ROBERT CHAPMAN ET AL., U.S. DEP'T OF JUSTICE, LOCAL LAW ENFORCEMENT RESPONDS TO TERRORISM 5–6 (2002), *available at* www.cops.usdoj.gov/mime/open.pdf?Item=296.

495 HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., A REPORT FROM THE TASK FORCE ON STATE AND LOCAL HOMELAND SECURITY FUNDING 9 (2004), *available at* http://www.dhs.gov/xlibrary/assets/HSAC-FundingTaskForceRpt0604-FINAL.pdf ("The 'front lines' of our nation's domestic 'War on Terrorism' are in neighborhoods and communities across the United States where law enforcement, firefighters, emergency medical technicians, public works and health care workers live and work.").

496 *See* Press Release, U.S. Dep't of Homeland Sec., Law Enforcement Terrorism Prevention Program: Helping our Nation's First Responders (Nov. 3, 2003), *available at* http://www.dhs.gov/xlibrary/assets/First_Responder_Press.doc; *see also* The White House, Facts About First Responders, http://www.whitehouse.gov/homeland/first responders/01.html (last visited Oct. 29, 2007) (describing local law enforcement personnel as the "first preventers" of terrorism).

497 *See* William K. Rashbaum & Judith Miller, *New York Police Take Broad Steps in Facing Terror*, N.Y. TIMES, Feb. 15, 2004, at A1.

498 *See* Al Baker, *Manhattan: Police Receive Antiterrorism Training in Israel*, N.Y. TIMES, May 20, 2002, at B6.

499 *See* Ed Bradley, *Protecting New York*, CBS NEWS, Mar. 23, 2003, http://www.cbsnews.com/stories/2003/03/23/60minutes/main545591.shtml.

500 *See, e.g.*, Press Release, N.Y. City Law Dep't, U.S. District Court Grants City's Request to Modify the *Handschu* Decree Granting NYPD Much-Needed Latitude in the Fight Against Terrorism (Feb. 11, 2003), *available at* http://www.nyc.gov/html/law/downloads/pdf/pr021103.pdf.

501 *See* Rashbaum & Miller, *supra* note 497.

firefighters and nearly 3000 emergency medical technicians and paramedics.[502] Members of the FDNY receive forty hours of combined HazMat and terrorism awareness training; specialized units have additional training in responding to chemical and biological incidents and large-scale attacks involving weapons of mass destruction.[503] The Department has adopted Internet Protocol-based satellite technology as part of its wireless communications system and has Inmarsat Global Area Network terminals and services for video, voice, and data connectivity for response vehicles and the Fire Department Operations Center and other fixed and mobile command centers.[504] The New York City Department of Health, with its sophisticated emergency response capabilities, is among the best public health departments in the world.[505] Many local government officials also have prior experience working closely with federal, state, and other local governments to develop prevention and response measures across regions and the nation as a whole.[506]

Emergency commandeering allows the federal government to tap the vast set of specialized skills and experiences state and local emergency response personnel already possess. Experts warn that military personnel are not presently capable of responding adequately to many kinds of emergencies.[507] Rather than having to train members of the military for domestic searches and rescues, evacuations, crowd

502 *See* FIRE DEP'T CITY OF N.Y., STRATEGIC PLAN 2004–2005, at 3 (2004), *available at* http://www.nist.gov/public_affairs/ncst/11_22_2004/FDNY_Strategic_Plan.pdf.

503 *See id.* at 11–14.

504 Peter J. Brown, *Satellites Stand By High Above the Hot Zone*, VIA SATELLITE, Aug. 2005, at 30, 30–33.

505 *See* Rashbaum & Miller, *supra* note 497.

506 *See, e.g.*, Raymond W. Kelly, Police Comm'r, N.Y. City, Testimony Before the National Commission on Terrorist Attacks Upon the United States 3–6, 8 (May 18, 2004), *available at* http://www.9-11commission.gov/hearings/hearing11/kelly_statement.pdf (describing how New York City has: posted 250 officers full-time to the Joint Terrorism Task Force (JTTF) with the FBI; posted a New York City detective to Washington to serve as the liaison to the Department of Homeland Security; implemented an Incident Command System consistent with federal standards; developed a security alert plan based on the federal Homeland Security Advisory System; and engaged in cooperation with foreign law enforcement).

507 For example, President Bush has suggested calling in the army and federalizing the National Guard to deal with an avian flu pandemic. *See* Brian Knowlton, *Bush Weighs Strategies to Counter Possible Outbreak of Bird Flu*, N.Y. TIMES.COM, Oct. 4, 2005, http://www.nytimes.com/2005/10/04/politics/04cnd-prexy.html (reporting on the President's suggestion that the military might be needed). However, the armed forces "have little or no training in combating a pandemic." Tyler Cowen, Avian Flu: What Should Be Done 28 (Nov. 11, 2005) (unpublished manuscript), *available at* http://www.mercatus.org/repository/docLib/20060726_Avian_Flu.pdf.

control, specialized medical procedures, and so on, the federal government can deploy specialists who already have much of the requisite knowledge base.

V. EMERGENCY AND DEMOCRACY

Emergency commandeering is good for democracy. There are significant democratic benefits to relying upon state and local personnel, rather than professional soldiers, to respond to emergencies. This Part explores those benefits. It also considers some potential risks and downsides to emergency commandeering and how they can be minimized.

A. Democratic Benefits

Properly organized, police and other state and local responders can successfully respond to many kinds of emergencies without presenting many of the risks associated with the deployment of soldiers. Security is an important component of any emergency response. However, where possible, it is preferable to ask police rather than soldiers to perform domestic security work. Fundamental differences between police officers and members of the military make the former a better choice in many emergency situations. Police officers are generalist problem solvers who interact on a daily basis with members of the community.[508] Soldiers train for warfare against enemies and not for dealing with desperate Americans[509]—during Katrina, when soldiers, some fresh from overseas assignments, were sent to New Orleans, their initial approach was to patrol the city with weapons raised.[510] The problem extends beyond combat forces. Police officers have vast experience with crowd control. They know how to direct the flow of people to prevent dangerous congestion, how to keep impatient citizens calm, and how to end friction before it

508 In the well-known formulation of Egon Bittner, the police do not engage in mere law enforcement, but rather use coercive force, or the threat of force, "in accordance with the dictates of an intuitive grasp of situational exigencies." EGON BITTNER, *The Functions of the Police in Modern Society: A Review of Background Factors, Current Practices, and Possible Role Models*, *in* ASPECTS OF POLICE WORK 89, 131 (1990) (emphasis omitted).

509 As the House Committee put it: "We cannot expect the Marines to swoop in with MREs [meals ready to eat] every time a storm hits. We train soldiers to fight wars. You can't kill a storm." FAILURE OF INITIATIVE, *supra* note 8, at 15.

510 *See Anderson Cooper 360 Degrees* (CNN television broadcast Sept. 5, 2005) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0509/05/acd.01.html) (describing a scene where Lieutenant General Russell Honore repeatedly ordered troops to put down their weapons).

gets out of hand. Soldiers by and large do not have experience with these kinds of measures. Hence, during one Katrina incident, "soldiers trained in levee repair, not police work, locked themselves into an exhibit hall at the convention center rather than challenge an angry and desperate crowd of more than 10,000 hurricane victims."[511] While other commentators, also skeptical of regular military forces, have suggested that a greater role for the National Guard would combine an effective response to emergencies with guarding against excessive federal power,[512] the National Guard is more akin to the military than to the police and so it should also be a less preferred choice.[513]

Sociologist Hans Geser's work on the differences between police and military personnel sheds important light on why domestic deployment of police in emergencies is preferable to relying on military forces.[514] Police forces, according to Geser, must "react quickly and adequately to any type of disturbing events occurring at any unpredictable points in space and time."[515] Accordingly, police departments are characterized by "bottom-up organization," with the lowest level individual police officer responsible for many on-the-spot decisions: "scanning the environment, taking notice of relevant events, deciding immediately on the spot whether and in what way intervention shall occur, and whether it is necessary to mobilize higher levels of the organization."[516] As a result, the overall quality of police work depends on the "capabilities of lower level policemen: on their moral integrity, sound judgment and personal authority as well as on various professional skills."[517] In addition, successful police work "relies heavily on cooperative relationships with many civilian citizens and institutions."[518] By contrast, "the major concern of *armies* is to focus huge amounts of resources for decisive violent actions against enemy forces

511 Shane & Shanker, *supra* note 438.

512 *See, e.g.*, Oates, *supra* note 132, at 166 ("Activation of National Guard members . . . reinforces the emergency powers of the governor that are established in the U.S. Constitution and encourages strong state or territorial role in an emergency disaster.").

513 Though the distinctions are not perfectly crisp—some members of the National Guard are police or firefighters in civilian life.

514 *See* Hans Geser, International Policing: A New Evolutionary Stage of Military Organization? Peace-keeping Missions in a Sociological Perspective (May 14, 1996), http://www.geser.net/inpo.htm (comparing and contrasting police and armed forces).

515 *Id.*

516 *Id.*

517 *Id.*

518 *Id.*

or other clearly defined targets."[519] Accordingly, a military force is a "top-down organization": a successful military strike requires "strategic and operational planning, well-coordinated supply systems and highly elaborated systems of centralized leadership and hierarchical controls."[520] These basic differences in organization and operation point to the mismatch that can easily occur when military personnel, rather than police officers, are deployed to respond to domestic emergencies. Emergencies, by definition, produce heterogeneous demands. Emergencies require respondents to perform a variety of tasks depending on the circumstances and their evolution; responders first on the scene must be able to make individualized judgments about what is required of them and how best to proceed. Soldiers are likely less suited to balancing the various demands domestic emergencies produce.[521]

Police and other state and local emergency response personnel are also accountable to civilian government in ways that might not be true, or easily made true, of military forces.[522] Mayors and the city council members who supervise urban police are elected officials, as are sheriffs. Civilian complaint boards allow individuals to file complaints about police misconduct. Police departments operate under close regulation by the courts. In particular, since the Warren Court era, courts have crafted detailed rules based on the Federal Bill of Rights that govern police officers' interactions with citizens. Military personnel are not likely to be naturally predisposed to observe these same standards.[523] Turning domestic emergency response functions

519 *Id.*

520 *Id.*

521 *See id.*

522 *See* Julianne Smith & Derek Chollet, *The Return of U.S. Mission Creep*, DEF. NEWS, Oct. 10, 2005, at 21, *available at* http://www.defensenews.com/story.php?F=1164780 (criticizing proposals to use the military in disaster relief as "dangerous" because they allow the military to "outrank its civilian chain of command in influence, authority and resources").

523 There are numerous examples of domestic deployment of soldiers resulting in excesses. For example, when the army was deployed in response to the 1899 miners' strike in Coeur d'Alene, Idaho, soldiers conducted door-to-door searches and arrested and detained people in large numbers without probable cause. *See* Note, *Riot Control & the Use of Federal Troops*, 81 HARV. L. REV. 638, 642 & nn.33–34 (1968). Military forces, in the guise of restoring law and order, suppressed lawful union activities during World War I. *See, e.g.*, Jerry M. Cooper, *Federal Military Intervention in Domestic Disorders*, *in* THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989, at 120, 136–38 (Richard H. Kohn ed. 1991). Of course, there are also examples of the police using excessive force: for example, the frequently heavy-handed responses to protests in the 1960s, *see, e.g.*, Emmanuel O. Iheukwumere & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-*

over to professional soldiers raises basic issues about whether their activities would be subject to adequate constraints and whether courts would have the inclination or resources to supervise how military personnel conduct searches, seize citizens, question suspects, and otherwise use force. This is not to say that all or any of the present-day checks on police behavior would necessarily apply when police (and other state and local personnel) are called into federal service and dispatched to the site of an emergency. Whether constitutional protections would operate in the same way, whether there would be liability for police misconduct during these periods, whether individual officers or the federal or state government could be sued: all are issues that would require future consideration by Congress and the courts. My point is simply that police officers come from a strong tradition of operating within a framework of clearly defined rights, limitations on permissible conduct, and oversight mechanisms. The same is not likely to be true of military personnel who, though subject to a chain of internal command, do not typically experience control from courts or other outside entities. Soldiers, as a saying goes, are trained to vaporize, not to Mirandize.[524]

In addition to a tradition of formal civilian supervision, police departments tend to be embedded within broader communities that also shape and constrain police behavior. The military distinguishes itself from the general population (soldiers live in barracks) and emphasizes inter-unit cohesiveness. Police forces, by contrast, develop and maintain relationships with members of their communities. Notions of community policing emphasize that police work is most successful when it is conducted in coordination with members of the local community, with officers understanding themselves to be members of the communities they serve rather than outsiders imposing external rules. More generally, as theories of democratic policing stress, law enforcement activities can be made to reflect broader dem-

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Blind Jurisprudence, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 21 n.134 (2001); the beating of Rodney King by members of the LAPD in March 1991; *see* PAUL CHEVIGNY, EDGE OF THE KNIFE 42–45 (1995); and the shooting of Amadou Diallo by NYPD officers in February 1999, *see, e.g.*, Christopher Dunn, *Balancing the Right to Protest in the Aftermath of September 11*, 40 HARV. C.R.-C.L. L. REV. 327, 335 (2005). *See generally* CHEVIGNY, *supra*, at 35, 55–57 (depicting the decline of the admiration and professionalism of the LAPD as a result of the use of excessive force and police brutality). There is also a risk of excess when nonmilitary agents carry out military-style raids, as suggested by the Waco raid by ATF agents in February 1993. *See* David A. Koplow, *Tangled Up in Khaki & Blue: Lethal & Non-Lethal Weapons in Recent Confrontations*, 36 GEO. J. INT'L L. 703, 754–69 (2005).

524 Mathew Miller, *Where's the Beef?*, TIME, Mar. 1996, at 37, 38 (citing the statement of Lawrence Korb, Assistant Secretary of Defense under President Reagan).

ocratic norms.[525] Military personnel do not typically have these same kinds of experiences or motivations.

Beyond external checks on their behavior, there is some reason to think that compared to soldiers, police officers have greater internal motivation and capacity to act in ways that are consistent with democratic norms. Police officers are generally accustomed to making judgment calls. They are therefore more likely to refuse orders to engage in abusive practices than are soldiers who are trained to follow orders—to shoot first and ask questions later. On this score, it is significant that police departments increasingly represent a cross-section of the population. Police forces are increasingly diverse;[526] there is at least some evidence that police officers from minority backgrounds have greater understanding of and credibility within minority communities.[527] The diversification of police departments has also produced organizations of minority police officers, like the National Organization of Black Law Enforcement Officers, that monitor and exert influence on departmental policies and practices.[528] Just as the old militia, comprised of regular citizens, embodied and therefore protected the people's liberties, so too modern police departments can represent the interests of the population as a whole.

B. Risks and Downsides

Though preferable to other options, emergency commandeering is not a perfect solution to the problems federalism presents in times of emergency. Emergency commandeering might not naturally provide the most efficient response to emergencies. Police officers, firefighters, and other personnel from disparate jurisdictions might not be able to work together seamlessly. At the very least, they will need a common core of training so that when brought together they have common skills and practices. Like any other emergency response plan, a key component of the success of emergency commandeering will be adequate advanced planning and training. Emer-

525 *See* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1700–02 (2005) (discussing various conceptions of democratic policing).

526 *See* David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1210 (2006) ("The virtually all-white, virtually all-male [police] departments of the 1950s and 1960s have given way to departments with large numbers of female and minority officers, often led by female or minority chiefs. Openly gay and lesbian officers, too, are increasingly commonplace.").

527 *See id.* at 1224–28 (discussing mixed evidence about how minority officers perform in minority communities).

528 *See id.* at 1230–31.

gency commandeering might burden states and localities from which personnel are drawn. Particularly well-trained and highly skilled response personnel might find themselves frequently called into federal service. This will produce perverse incentives for localities considering how much to invest in preparing their employees for emergencies as well as raise basic problems of fairness. The possibility of being called with any regularity into federal service and deployed to a far-off location for dangerous work might also lead some emergency response workers to find different employment and produce local problems of recruitment.[529] In crafting an emergency commandeering statute, Congress must ensure that burdens are distributed evenly among states and localities.

It would also be wrong to assume that the democratic benefits of emergency commandeering will develop and thrive without any kind of attention or cultivation. Police and other state and local emergency response personnel might not automatically carry with them the same set of democratic values when enlisted into federal service and deployed to an emergency outside of their own communities. It is not hard to imagine, for example, a police officer whose regular job is to patrol a Philadelphia neighborhood, and who knows and depends on members of that local community, having a different disposition when sent under federal command to New Orleans in the aftermath of a hurricane.[530] Training programs and other efforts will likely be required to capture and maximize emergency commandeering's democratic advantages.

CONCLUSION

The emergency commandeering option I have presented in this Article can resolve the widely recognized difficulties federalism presents in times of emergency. In contrast to other proposals for the federal government in times of emergency to bypass state and local governments and send in military forces, my proposal leaves the response in the hands of civilian workers. Rather than centralize entirely the response function, my proposal allows for the necessary federal command, while preserving the roles of state and local govern-

529 However, the attrition rate for police departments is low. *See* Justin McCrary, *The Effect of Court-Ordered Hiring Quotas on the Composition and Quality of Police*, 97 AM. ECON. REV. 318, 323 (2007) (reporting an attrition rate of 3.6%).

530 On the other hand, physical attachment is not everything, as police officers today do not typically live in the same communities they police; even "a police department engaged in community policing remains . . . 'a force of outsiders.'" Sklansky, *supra* note 525, at 1798 (quoting Gerald Frug, *City Services*, 73 N.Y.U. L. REV. 23, 81 (1998)).

ments. Emergency commandeering best reflects the tradition of American federalism and democracy. It is consistent with the provisions in the Constitution for responding to emergencies and with historical practices.

The proposal offered here does not preclude entirely any use of the military to respond to an emergency. Some emergencies will undoubtedly require the deployment of soldiers to maintain order. The detonation of a nuclear device in an American city, for instance, would almost certainly require the use of military forces—to maintain a quarantine zone, deliver supplies to survivors, and control the ensuing panic. However, an emergency for which commandeering of state and local personnel is an inadequate response will be the exception. In most emergencies, deploying state and local responders under federal command will be as good as or better than deploying military forces. Given the choice between local militia units and professional soldiers, our predecessors always chose the militia. We should make an analogous choice and, in times of emergency, opt for federal commandeering of state and local responders over the domestic deployment of military forces.