While the Government Fiddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government's Alibi for the Hurricane Katrina Disaster

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Abstract

This Article analyzes how the government's blame of the Posse Comitatus Act (PCA) for its late response to the Hurricane Katrina disaster was misplaced. In Part One, I discuss the history of the Posse Comitatus Act, including a summary of some of its many judicial and congressional expansions. In Part Two, I apply the PCA to the Hurricane Katrina Disaster to show that, under its proper application, the PCA does, in fact, permit the lawful use of the military for humanitarian purposes. Based on this analysis, I conclude that we should focus our efforts less on the Posse Comitatus Act and more on fixing the real problem behind the delayed rescue of the New Orleanians.

This is a Draft of Mar. 19, 2008

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Introduction

At the beginning of September 2005, the world watched live news coverage of thousands of people stranded without food, water, medicine and sanitation in a flooded New Orleans after Hurricane Katrina made landfall. Many of the local police had abandoned their posts, and there were reports of riots, looting and sniper fire from those first responders who remained. People who did not evacuate before the hurricane hit were herded into the Convention Center and the Superdome; most of these people were poor and minorities with no means to escape the city and with nowhere else to go.

While FEMA and the city, state and federal governments pointed fingers and engaged in a war of words, these citizens remained stranded in conditions that many never thought would occur in one of the largest cities in the richest country in the world. After

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2 James Varney, Four Officers Suspended, Acting Police Chief Says, Sept. 30, 2005, http://www.nola.com/weblogs/print.ssf?/ntlogs/nola_tporleans/archives/print083860.html. Acting New Orleans police chief, Warren Riley, reported that he had suspended four officers and was investigating many more concerning accusations of police looting. Id. He also pointed out that many of the 249 officers that did not show up for work during the Katrina aftermath may have actually been working in other areas or were trapped like other residents. Id. Riley reported that he would be holding tribunals to investigate each case. Id.


several days, the National Guard and active duty troops from the 82nd Airborne arrived. Under the command of General Honore’, a three-star Army general, armed soldiers quickly restored the peace and rapidly evacuated the refugees.

Then, the people of the nation demanded answers. Why did the federal government wait so long to send aid? Why did the federal government ignore the repeated, impassioned pleas for help from local and state officials? Why did the President respond so quickly and compassionately after the 9/11 attacks but failed to do the same during the Katrina Disaster?

The Department of Defense explained that it would have been illegal for the government to send the military into New Orleans. Such action would violate the Posse Comitatus Act of 1878 (PCA), which criminalizes the use of the military in law enforcement. But, does providing humanitarian aid such as food, water, medical assistance and rescue services qualify as a violation of the PCA?


9 Lt. Gen. Honore’, 57 and a Louisiana native, commanded the 1st Army, based at Fort Gilem in Forest Park, Georgia. Lt. Gen. Honore a John Wayne Dude, CNN, Sept. 3, 2005, http://www.cnn.com/2005/US/09/02/honore.profile/index.html. He took charge in New Orleans and quickly gained the respect of Mayor Nagin who later dubbed Honore’ a “John Wayne dude.” Id. Honore’ had a hands-on approach to dealing with the situation in New Orleans – he road around in his “office,” the back of an Army truck, in order to survey and direct based on firsthand observation. He was focused on the humanitarian needs of people and likened his task to “hav[ing] 20,000 people come to supper.” Id.

10 Id. The troops brought order, sustenance and hope, but the plight of the refugees did not end there. Peter Whoriskey and Susan Levine, Guard Troops Descend on New Orleans, Washington Post, Sept. 3, 2005, at A01. The refugees then waited in long lines to be shipped by bus to Houston, where they would be sleeping on a cot in the middle of the field in one of the city’s sports arenas. Id. The Astrodome was expected to house 15,000 citizens with the remaining thousands going to the Reliant Arena and the convention center downtown. Id.


12 Eric Schmitt and Thom Shanker, Military May Propose An Active-Duty Force For Relief Efforts, New York Times, Oct. 11, 2005; United States Air Force AIM Points website: http://aimpoints.hq.af.mil. Interestingly, the first explanation regarding the delay came from former FEMA Director Michael Brown who claimed that there had been a breakdown in communication: the federal government did not know that people were stranded at both the Convention Center and the Superdome. The Big Disconnect on New Orleans, CNN, Sept. 2, 2005, http://www.cnn.com/2005/US/09/02/katrina.response/. This excuse was not very compelling considering CNN had been running 24-hour live news coverage reporting the locations of the stranded individuals.

In this article, I explore how the *Posse Comitatus* Act would apply to the Katrina Disaster. In Part One, I discuss the history of the *Posse Comitatus* Act, including a summary of some of its many judicial and congressional expansions. In Part Two, I apply the PCA to the Hurricane Katrina Disaster to show that, under its proper application, the PCA does, in fact, permit the lawful use of the military for humanitarian purposes. Based on this analysis, I conclude that we should focus our efforts less on the *Posse Comitatus* Act and more on fixing the real problem behind the delayed rescue of the New Orleanians.

I. The History of the *Posse Comitatus* Act

A. The Passage of the *Posse Comitatus* Act

In 1868, Congress passed the *Posse Comitatus* Act, which prohibited the use of the standing military "as a *posse comitatus* or otherwise to execute the laws."\(^{14}\) There was, however, confusion over exactly what the PCA meant.

There was general consensus that the short-term goal of the PCA was to prevent future abuses like those seen during the Reconstruction period\(^ {15}\) by ending the federal troop presence at state elections\(^ {16}\) and by repealing the Cushing Doctrine.\(^ {17}\) Basically, it clarified that civilian marshals could no longer call forth the Army into a *posse comitatus*.

Some supporters also believed that the PCA reinforced the American tradition of limiting military involvement in civilian affairs\(^ {18}\) and barred the use of federal troops to enforce domestic law — except where explicitly enumerated by statute.\(^ {19}\) Others, including President Hayes,\(^ {20}\) subscribed to the view that the PCA merely reaffirmed the existing state

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\(^{15}\) Gary Felicetti and John Luce, *The Posse Comitatus Act: Setting the Record Straight On 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 Mil L Rev 86, 109 (2003).

\(^{16}\) 141 A.L.R. Fed. 271.

\(^{17}\) Gary Felicetti and John Luce, *The Posse Comitatus Act: Setting the Record Straight On 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 Mil L Rev 86, 116 (2003). The Cushing Doctrine allowed marshals (low ranking officials) to summon army troops into the *posse comitatus*. *Id.* at 115.

\(^{18}\) See United States v. Johnson, 410 F.3d 137, 146-147 (4th Cir. 2005) (pointing out that this is not absolute limitation – Congress can authorize military usage in special circumstances that are expressly authorized).

\(^{19}\) See United States v. Wooten, 377 F.3d 1134, 1139 (10th Cir. 2004).

\(^{20}\) Gary Felicetti and John Luce, *The Posse Comitatus Act: Setting the Record Straight On 124 Years of Mischief*
of the law: the use of federal troops required an alternative authorization from the Constitution or Congress and the President had such authorization inherently in the Constitution and by statute in the Militia Acts.\(^{21}\)

In 1882, the Senate Judiciary Committee expressly confirmed the later meaning of the PCA:

> The *posse comitatus* clause referred to arose out of an implied authority to the marshals and their subordinates executing the laws to call upon the Army just as they would upon bystanders who, if the Army responded, would have command of the Army or so much of it as they had, just as they would of the bystanders, and would direct them what to do.\(^ {22}\)

Thus, the domestic use of the military continued in more or less the same capacity as it had before the passage of the PCA, which made the PCA seem unsuccessful. For example, between 1877-1945, the military was involved in domestic affairs 125 times.\(^ {23}\) In fact, the first use occurred only a couple months after Hayes signed the PCA, when he sent troops to quell a civil disorder in Lincoln County, New Mexico.\(^ {24}\) During this deployment, federal troops spent more than a year enforcing local law—a deployment no different from the pre-PCA deployments of Jefferson and Jackson.\(^ {25}\)

In 1956 the PCA was amended to include the Air Force,\(^ {26}\) which returned the PCA to public debate. After another modification in 1959,\(^ {27}\) the PCA started to be used as a defense tactic in criminal trials,\(^ {28}\) which led to both judicial and congressional action to clarify its coverage and proper application.

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\(^{21}\) Paul Jackson Rice, *New Laws and Insights Encircle the PCA*, 104 Mil. L. Rev. 109, 111 (Spring 1984).

\(^{22}\) 13 CONG. REC. 3458 (1882) (remarks of Sen. Edmunds on behalf of the Judiciary Committee).

\(^{23}\) Clayton D. Laurie & Ronald Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* 42 (U.S. Army Center of Military History).

\(^{24}\)

\(^{25}\)

\(^{26}\) The original version of the PCA only included the Army. The impetus for the change was that the Air Force had recently separated from the Army.

\(^{27}\) Removing the sentence “This section does not apply in Alaska.”

\(^{28}\) Gary Felicetti and John Luce, *The Posse Comitatus Act: Setting the Record Straight On 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 Mil. L. Rev. 86, 144 (2003).
In the 1970’s, the federal courts started narrowing PCA protections and set different boundaries for PCA infractions. In the 1980’s, Congress clarified the judicial standards by passing rather expansive exceptions to the PCA in connection with the war on drugs. The Posse Comitatus Act, in its current form, provides that:

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

B. Judicial Interpretation of the Posse Comitatus Act

1. Laird v. Tatum: The "Regulatory, Proscriptive or Compulsory" Standard

In the late 1960’s, the PCA entered the public arena when President Johnson sent federal troops to assist local law enforcement in quelling civil uprisings in Detroit, Michigan and to deal with disturbances that emerged after the assassination of Dr. Martin Luther King. As a result of these operations, the Army instituted a preventative measure to collect information about the activities of people that were thought to have the potential to cause future disorders.

The constitutionality of this surveillance sparked a congressional investigation.

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33 Laird v. Tatum, 408 US 1, 3-4 (1972).

34 Laird v. Tatum, 408 US 1, 3-4 (1972).

35 Laird v. Tatum, 408 US 1, 5-6 (1972).

36 There was a hearing held inform of the Subcommittee on Constitutional rights of the Senate Committee on the Judiciary. Id. at 7. This Congressional investigation sparked an internal Army investigation, which resulted in a culling back of the domestic surveillance activities. Id.
Then in 1972, several groups targeted by these military measures brought a First Amendment claim alleging that the mere presence of this surveillance had a “chilling” effect on their right to free speech and expression.\textsuperscript{37}

In \textit{Laird v. Tatum}, the Supreme Court sided with the government regarding these surveillance tactics and found no “actual present or immediately threatened injury resulting from unlawful governmental action;” therefore, the claimants had no justiciable cause of action.\textsuperscript{38} The court saw the military’s activity as squarely permitted under 10 U.S.C.A. § 331, reasoning that collecting intelligence was a necessary part of acting in a back-up law enforcement capacity.\textsuperscript{39} Without more than a “foreseeable” misuse of the information by the military, the court found that the “chilling effect” standard was not met because the complainants were not at the time subjected to governmental power that was “regulatory, proscriptive or compulsory in nature.”\textsuperscript{40} At the end of his opinion, Justice Burger acknowledged the American tradition of keeping the military out of civilian affairs and expressed confidence that illegal military intrusion, if it were to occur, would not go unchecked.\textsuperscript{41}

Justice Douglas, joined by Justice Marshall, issued a blistering dissent charging that there was no express or implied grant of authority allowing military surveillance over civilians\textsuperscript{42} and that “surveillance of civilians is none of the Army’s constitutional business.”\textsuperscript{43} He also pointed out that the Court severely underestimated the egregiousness

\begin{itemize}
\item \textsuperscript{37} \textit{Laird v. Tatum}, 408 US 1, 2 (1972).
\item \textsuperscript{38} \textit{Laird v. Tatum}, 408 US 1, 15 (1972).
\item \textsuperscript{39} \textit{Laird v. Tatum}, 408 US 1, 5-6 (1972).
\item \textsuperscript{40} \textit{Laird v. Tatum}, 408 US 1, 11 (1972).
\item \textsuperscript{41} \textit{Laird v. Tatum}, 408 US 1, 16 (1972) (“There is nothing in our Nation’s history or in this Court’s decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.”). This quote begs the question of whether Burger had heard of the Revolutionary War and the Reconstruction Era. Earlier in the opinion, Burger quoted the oral argument where the court pointed out that the writ of habeas corpus was the check to keep the Army from “com[ing] in with its list of troublemakers…and[and] rounding up people and putting them in military prisons somewhere.” \textit{Id.} at 8 n.5. Thus far, the courts have not taken the hard-line that Burger seemed to think was appropriate.
\item \textsuperscript{42} \textit{Laird v. Tatum}, 408 US 1, 16 (1972) (“One can search the Constitution in vain for any such authority.”).
\item \textsuperscript{43} \textit{Laird v. Tatum}, 408 US 1, 27 (1972).
\end{itemize}
of the Army’s actions and the seriousness of the issue itself.\(^{44}\)

Douglas asserted that the Army was infiltrating these groups with undercover agents and running an extensive surveillance program with a goal of collecting much more than ordinary public information.\(^{45}\) Douglas found that this behavior was clearly a violation and limitation on the complainants’ freedom of speech rights.\(^{46}\) Nonetheless, the \textit{Laird} interpretation began a trend leading to increased military involvement in domestic law enforcement.\(^{47}\)

2. The Wounded Knee Cases

Not long after \textit{Laird}, the PCA resurfaced in the federal courts, when several defendants pleaded a PCA violation as their defense during prosecutions stemming from a standoff in Wounded Knee, South Dakota. On February 27, 1973, over 100 people looted a trading post and took a number of Wounded Knee residents hostage for several days.

The Bureau of Indian Affairs and the Federal Bureau of Investigation were the primary responders but were aided by officers from the 82\textsuperscript{nd} Airborne and the National Guard.\(^{48}\) Military forces were sent without a presidential mandate under 10 U.S.C.A. §§ 331-334 because the government did not want to conjure up memories of past altercations between the military and Native Indians.\(^{50}\) Nevertheless, the military provided invaluable tactical advice and equipment; an Army colonel even had a vote in final decisions.\(^{51}\)

\(^{44}\) Laird v. Tatum, 408 US 1, 24 (1972) (“The surveillance of the Army over the civilian sector – a part of society hitherto immune from its control – is a serious charge.”).

\(^{45}\) \textit{Id.} at 26-27.

\(^{46}\) Laird, 408 US at 26. “The present controversy is not a remote, imaginary conflict. This case involves a cancer in our body politic. It is a measure of the disease, which afflicts us. Army surveillance, like Army regimentation, is at war with the principles of the First Amendment.” \textit{Id.} at 28.


\(^{48}\) Colonels were sent to advise the Department of Defense and Justice Department of the progress, but he turned out to be a more active participant. \textit{Id.}

\(^{49}\) The Nebraska National Guard provided aerial reconnaissance, and the South Dakota National Guard maintained Army-provided equipment. \textit{Id.}


\(^{51}\) Colonel Warner admitted in his report and testimony that he had a vote in final decisions. \textit{Id.}
After the standoff between law enforcement and looters ended, several people were arrested and prosecuted for violating the Civil Obedience Act of 1968 for smuggling weapons for use against law enforcement personnel. At trial and on appeal, the defendants claimed that the participation of the military violated the PCA. They argued that the officers were not acting under their official duties as law enforcement personnel, which negated one of the elements of the Civil Obedience Act. The three district courts presiding over the cases interpreted the PCA differently and returned three separate standards.

In *United States v. Red Feather*, the District of South Dakota held that the PCA was not violated because there was no “direct active use” of the military at Wounded Knee. For this reason, the evidence of military involvement was not relevant and altogether inadmissible at trial. After examining the legislative history of the PCA, the court determined that it was not Congress’s intent to preclude civilian law enforcement from using military advice and supplies in a passive role and that there was no PCA violation because the military had acted only in an advisory capacity. Ultimately, the defendants were convicted.

In *United States v. Jaramillo*, the District of Nebraska set a “pervading” standard and acquitted the defendants because this threshold was not met. After looking closely at the

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54 Id.

55 Id.


58 United States v. Red Feather, 392 F. Supp. at 921-922, 924-925 (saying that evidence of a soldier in an active role in law enforcement was admissible.)

59 Id. at 921-922 (noting that this issue was not even discussed during the debates.)

60 Id. at 925.

61 Id.

facts of the case, the court found that the extensive involvement of the military officers was problematic and cast a reasonable doubt that they had been lawfully engaged in law enforcement duties. The court was quick to add that it was not finding that the conduct was a violation of the PCA – only that the prosecution failed to meet its burden of proof.

In *United States v. McArthur*, the District of North Dakota – after reviewing the *Red Feather* and *Jaramillo* opinions – applied the *Laird* standard because of the importance of the constitutionally-guaranteed freedoms protected by the PCA. The court dismissed the *Jaramillo* standard as “too vague” and the *Red Feather* standard as “too mechanical.” The reasoning was that a clear standard that could be applied to borderline cases was required, and the “regulatory, proscriptive, or compulsory” standard of *Laird* fit the bill.

After applying the *Laird* standard, the *McArthur* court found that the officers acted lawfully under the PCA. The court disagreed with the *Jaramillo* assessment of the role of the officers because they were “borrowed as a vehicle might be borrowed” and the loaning of equipment between branches of the government was permitted under the PCA. The *McArthur* court also found that the officers acted as advisors because they were not giving orders and police officials still needed to check with their superiors before making major decisions. Even though it did not find a PCA violation, the *McArthur* court still admitted the evidence of the military involvement because it was relevant to the government’s proof.

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63 Id. at 381.

64 Id. (“Lest anyone be misled, let it be emphasized that this court is not finding that the actions of the Federal Bureau of Investigation agents or the United States marshals were unlawful or that anyone violated 18 U.S.C.A. § 1385, the *posse comitatus* statute. The prosecutor’s burden was to prove in court that the actions of those officers were lawful. It failed to carry that burden. My holding means no more than that.”)

65 *United States v. McArthur*, 419 F. Supp. at 194

66 This “rule requires a judgment to be made from a too vague a standard.” Id.

67 Saying that the *Red Feather* standard is too mechanical, and inevitably when the rule is applied to borderline cases, it will crumble at the edges. Id.

68 Id.

69 Id.

70 Id.

71 Id. at 195.

72 Id.
of the elements of the charge. 73

On appeal in United States v. Casper et al, the Eighth Circuit settled the matter by affirming McArthur, which adopted the “regulatory, proscriptive or compulsory” standard and found that the evidence of military activity was relevant. 74 This court had already denied the government’s appeal of the Jaramillo decision more than a year earlier. 75 Thus, Casper meant that the defendants who were acquitted under the lower Jaramillo standard were home free, 76 while the Red Feather and McArthur convictions, which stemmed from the same incident of military activity as in Jaramillo, were affirmed. 77

C. The "Direct, Active Use" Standard

Shortly after the Wounded Knee cases, Congress adopted the “direct active use” 78 standard from Red Feather, which covered a wide variety of military actions. Subsequent DOD directives adopted the McArthur standard for when the Marine Corps or Navy, which were exempt from the PCA, acted in a law enforcement capacity likely to “subject civilians to the use of military power that is regulatory, proscriptive or compulsory.” 79 This congressional activity still left ambiguities in the boundaries of the PCA, and the courts continued to tease out the “direct, active use” standard. 80

The "direct, active use" standard sets a high threshold and requires egregious 81

73 Id. at 194.
74 United States v. Casper et al, 541 F.2d 1275, 1278-1279 (8th Cir. (N.D.) 1976).
76 Id.
77 United States v. Casper et al, 541 F.2d at 1276
79 Dep’t of Def. Directive (DODD) 5525.5, § F4.3.2 (Jan 15 1986).
81 United States v. Al-Talib, 55 F.3d 923 (4th Cir. 1995) (finding no violation of the PCA where an Air Force plane was used in the beginning stages of a sting to transport a car and drugs from one state to another because this act had no direct impact on the defendants. There needed to be some direct, personal connection to the military participation – like searching or confining defendants or searching defendant’s property).
participation of military personnel in law enforcement in order to violate the PCA. The action needs to constitute direct involvement, such as affecting a search of a person or property off base, seizing evidence, arresting people, blocking in civilians, pursuing escaped civilian prisoners or investigating crimes. Enhancing law enforcement, aerial reconnaissance or surveillance, transporting defendants, providing resources and going

82 Even if it does rise to the active standard, it still may be lawful if there is a constitutional or congressional grant of authority.

83 United States v. Johnson, 410 F.3d 137 (4th Cir. (Md.) 2005) (conducting DUI blood tests on the behalf of civilian law enforcement violates the act because it constitutes direct participation in civilian law enforcement.)

84 Taylor v. State, 645 P.2d 522 (Okla. Crim. App. 1982) (CID agent bought drugs undercover, drew gun when defendant arrested, searched defendant’s house, secured/delivered evidence from scene and completed paperwork regarding evidence violated the PCA because these actions “pervaded civilian law enforcement”).

85 Id.

86 Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986) (military roadblocks and patrols during the Wounded Knee incident violated the PCA).


88 State v. Pattioay, 896 P.2d 911 (Haw. 1995) (the PCA was violated when CID agents went undercover and participated in off-base drug buys as part of an investigation because the target was a civilian and there was no verified connection with military personnel).

89 Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990) (military activity was too passive to be a violation of the PCA where NIS shared information with local law enforcement, helped with surveillance and bought drugs undercover).

90 United States v. Hartley, 796 F.2d 112 (5th Cir. 1986) (cooperation between Air Force and Customs – including locating and monitoring an unidentified plane – that led to the arrest of defendants for illegally importing drugs into the United States did not reflect direct military involvement in violation of the PCA).

91 United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (Navy’s activity in caring for, transporting and housing the Defendant while Defendant in FBI custody was sufficiently passive because they were not executing any civilian laws); United States v. Gerena, 869 F.2d 82 (2d Cir. 1989) (transporting defendants in custody of United States Marshals was passive activity that did not violate the PCA).

92 People v. Bautista, 8 Cal.Rptr.3d 862 (Cal. App. 2004) (there was no violation of the PCA where an Army dog (and handler) assisted a DEA agent by signaling the smell of marijuana, which led to the obtainment of a search a warrant, because the use was not pervasive and the handler did not participate in any other way in the investigation).
undercover to purchase drugs are sufficiently passive to be acceptable under this standard. Basically, military personnel need to go above and beyond what a civilian aiding law enforcement would do or need to be an integral part of the process for their behavior to cross the line.

For example in 2005 in United States v. Johnson, the Fourth Circuit found that military participation in DUI blood testing of civilians crossed the line because the actions of the military personnel would have had a direct impact on the defendants. The reasoning was that the blood evidence would determine whether or not the defendants were guilty, and, unless the defendants plead out, military personnel would have needed to testify regarding evidence collection and testing procedures. Congress had not authorized searches by military personnel, and this action was a Fourth Amendment search.

Regardless, the court found no PCA violation. The court noted that, while there was proof that the blood test was conducted at the Armed Forces Institute, there was no evidence that it had actually been performed by military personnel. Without such proof, the court would not find a violation of a criminal statute.

D. Military Branch and Status

Judicial interpretation of the branch component of the PCA is more straightforward than the active use analysis; courts apply a plain language standard. The PCA specifically states that it applies to the Army and Air Force, and those are the two branches covered under the statute.

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95 Id.
96 Id.
97 Id. at 149.
98 Id. This logic sounds reasonable at first glance – we do not want to put an innocent person in prison unless we have substantial proof. However, no one has been prosecuted for a violation of the PCA, so is this really even a threat? Assuredly defense counsel during a PCA prosecution stemming from this case would raise the issue.
99 United States v. Roberts, 779 F.2d 565 (9th Cir. 1986) (plain language, does not include the navy); United States v. Walden, 490 F.2d 372 (4th Cir. 1974) (PCA does not apply to the marines).
100 An amendment to extend the PCA to the Navy failed in 1975. See Omnibus Crime Act, § 1, 94th
Although the PCA does not include the Marine Corps\textsuperscript{101} or Navy,\textsuperscript{102} the Navy has self-imposed a regulation that adopts the PCA policy but does not criminalize its violation.\textsuperscript{103} Additionally, the PCA only applies to soldiers in service under Title 10, which means it does not include the National Guard, unless they are federalized,\textsuperscript{104} or the Coast Guard.\textsuperscript{105}

Interestingly, National Guardsmen can act in law enforcement capacities if they are under state command because of their dual membership\textsuperscript{106} status in both their state and federal National Guard.\textsuperscript{107} In \textit{Gilbert v. United States},\textsuperscript{108} the Sixth Circuit explained that the default status of guardsmen is state until they are called into federal service under a congressional statute.\textsuperscript{109}

The main difference between a guardsmen’s service status is to whom they are reporting, rather than who pays them, their fulltime status or their appearance to

\textit{Cong., tit. II, pt. G (1975); Gary Felicetti and John Luce, The Posse Comitatus Act: Setting the Record Straight On 124 Years of Mischief and Misunderstanding Before Any More Damage is Done, 175 Mil L Rev 86, 144 (2003). The PCA was originally passed as a rider to an Army Appropriations Bill for the purpose of restricting funding for troops summoned unlawfully. United States v. Walden, 490 F.2d at 374-375. Therefore, it was originally applied to the Army. Id. However, PCA was extended to include the Air Force after it split from the Army. Id.}\n
\begin{itemize}
\item \textsuperscript{101} \textit{Id.} at 374.
\item \textsuperscript{102} \textit{Id.} at 374; \textit{United States v. Yunis}, 924 F.2d 1086 (D.C. Cir. 1991) (PCA did not apply to the Navy personnel that arrested the defendant).
\item \textsuperscript{103} \textit{United States v. Walden}, 490 F.2d at 374.
\item \textsuperscript{104} \textit{United States v. Benish}, 5 F.3d 20 (1993 CA3 Pa) (No PCA violation where National Guard assisted in surveillance because they were not in federal service at the time but were assisting state troopers).
\item \textsuperscript{105} The Coast Guard is both a federal law enforcement body and part of the military – 14 U.S.C.A. § 2 (1994) and 14 U.S.C.A. §§ 1, 3 (1997). However, many courts have found that the PCA does not apply to the Coast Guard. \textit{See} \textit{Jackson v. State}, 572 P.2d 87 (Al. 1977) (no PCA where the Coast Guard investigated because Congress did not intend the PCA to apply to the Coast Guard and the Coast Guard is specially qualified to act in this capacity); \textit{United States v. Chaparro-Almeida}, 679 F.2d 423 (La. 1982), \textit{cert. den.} 459 US 1156 (no PCA violation where Coast Guard seized defendant at sea because the PCA does not apply to the Coast Guard and the Coast Guard is specifically permitted to participate in federal law enforcement by statute).
\item \textsuperscript{106} National guardsmen have dual-membership in the National Guard of their state as well as the National Guard of the United States.
\item \textsuperscript{107} \textit{United States v. Gilbert}, 165 F.3d 470 (6th Cir. 1999).
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Id.}\
\end{itemize}
onlookers.\textsuperscript{110} If their commander-in-chief is the governor, they are state guardsmen.\textsuperscript{111} If their commander-in-chief is the President, they are considered federal troops.\textsuperscript{112}

**E. Common LawExceptions**

In addition to congressional exceptions to the PCA, there are two major common law exceptions – private citizen and independent military purpose. Under the private citizen exception, there is no violation of the PCA if military personnel work with law enforcement as private citizens. If the individual’s military status was “merely incidental” to his interaction with authorities, he acted as a civilian.\textsuperscript{113} In many cases involving the private citizen exception, military servicemen aided local law enforcement during off-duty hours by providing information on their own habits in order to secure the dismissal of pending civilian criminal charges.\textsuperscript{114}

The private citizen exception does not, however, apply when the individual is ordered by the military to volunteer or is under the direction of the military – even if the person is a civilian. In *United States v. Chon*,\textsuperscript{115} the Ninth Circuit found that the PCA (through its adoption by the Navy) applies to the Navy Criminal Investigative Service (NCIS), even though many of its agents are civilians and directed by a civilian chain of command.\textsuperscript{116} The court’s reasoning was that NCIS furthers the interests of the Navy and that civilian agents hold the same authority as military NCIS personnel.\textsuperscript{117} Further, the Chief of Naval Operations is the head of the NCIS chain of command and therefore

\begin{itemize}
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} United States v. Hitchcock, 103 F. Supp.2d 1226 (D. Haw. 1999).
\item \textsuperscript{114} See People v. Blend, 121 Cal. App. 3d 215 (1981) (no PCA violation where sailor assisted police, while off-duty, to secure dismissal of pending drug charges as a civilian might do); People v. Taliferro, 520 N.E.2d 1047 (Ill. App. 1988) (finding no PCA violation where airman acted on his own initiative, participate in a drug transaction in the same way as any other private citizen); People v. Burden, 303 N.W.2d 444 (1981) (no PCA violation where airman informant’s assistance was of a person nature and not related to his military position).
\item \textsuperscript{115} United States v. Chon, 210 F.3d 990 (9th Cir 2000), cert. den., 531 US 910.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id.
\end{itemize}
directs the operations of the NCIS.\textsuperscript{118}

Regardless, the \textit{Chon} court did not find a PCA violation because it found that the second common law exception – independent military purpose – applied.\textsuperscript{119} Under the independent military purpose exception, the PCA does not apply when military participation in civil law enforcement facilitates a military purpose or enforces the Uniform Code of Military Justice (UCMJ).\textsuperscript{120} This exception usually occurs in situations where a violation is committed by a civilian on a military base,\textsuperscript{121} an action to recover stolen military property,\textsuperscript{122} an off-base violation that affects the servicemen on-base\textsuperscript{123} and when someone attempts to flee from,\textsuperscript{124} or across\textsuperscript{125} a base or reservation. This exception has even been invoked in drug stings that took place entirely off-base because the military was found to have an independent military purpose in investigating the sale of drugs to active duty personnel.\textsuperscript{126}

\textbf{F. Some Major Congressional Exceptions}

In 1981, Congress enacted the Military Cooperation with Law Enforcement Officials Act\textsuperscript{127} in an effort to achieve a higher military role in the War on Drugs and to

\begin{itemize}
  \item \textsuperscript{118} \textit{Id}.
  \item \textsuperscript{119} \textit{Id}.
  \item \textsuperscript{121} United States v. Santana, 175 F. Supp. 2d 153 (D.P.R. 2001) (PCA does not prohibit military from dealing with on-base violations by civilians).
  \item \textsuperscript{122} United States v. Chon, 210 F.3d 990 (9th Cir. 2000), \textit{cert. den.}, 531 US 910.
  \item \textsuperscript{123} United States v Griley, 814 F.2d 967 (4th Cir.1987); United States v Banks, 539 F.2d 14 (9th Cir. 1976), \textit{cert. den.} 429 US 1024.
  \item \textsuperscript{124} State v Sanders, 281 S.E.2d 7 (1981), \textit{cert. den.}, 454 U.S. 973.
  \item \textsuperscript{125} Commonwealth v Shadron, 370 A.2d 697 (1977) (military base not a sanctuary from state crime).
  \item \textsuperscript{126} McNeil v State, 787 P.2d 1036 (1990) (drunk driving on highway that crossed reservation).
  \item \textsuperscript{127} Moon v. State, 785 P.2d 45 (Al. App. 1990).
\end{itemize}
clarify the Wounded Knee standards.\textsuperscript{129} This act authorized the military to aid in the enforcement of drug, immigration and tariff laws and created sweeping exceptions to the PCA.

The major portions\textsuperscript{130} of the act permitted federal, state and local law enforcement to: 1) share information collected during military operations;\textsuperscript{131} 2) use military equipment and facilities;\textsuperscript{132} 3) receive training and advice;\textsuperscript{133} and 4) receive assistance with the maintenance and operation of equipment.\textsuperscript{134} These provisions specified that actions such as aerial reconnaissance,\textsuperscript{135} interception of vessels\textsuperscript{136} and transportation of civilian officials,\textsuperscript{137} which may appear to be direct actions by the military, were explicitly permitted.

The passage of this act was controversial because it met with resistance from the military.\textsuperscript{138} Military leaders were concerned that an expanded role in civil law enforcement would affect the standing army’s resources and readiness to respond to non-domestic issues – the primary purpose of the military.\textsuperscript{139} Further, military commanders were acutely aware of the difference in enforcement tactics between police and armed services.\textsuperscript{140}

Soldiers are not trained to consider civil liberties or “negotiate” – two primary roles


\textsuperscript{130} Other sections included a Reimbursement provision (10 U.S.C.A. § 377); nonpreemption of law provision (10 U.S.C.A. § 378) and an assignment of Coast Guard personnel to naval vessels for law enforcement purposes (10 U.S.C.A § 379).

\textsuperscript{131} 10 U.S.C.A. § 371.

\textsuperscript{132} 10 U.S.C.A. § 372.

\textsuperscript{133} 10 U.S.C.A. § 373.

\textsuperscript{134} 10 U.S.C.A. § 374.

\textsuperscript{135} 10 U.S.C.A. 374(b)(2)(C).

\textsuperscript{136} 10 U.S.C.A. § 374(b)(2)(D).


\textsuperscript{139} Id.

\textsuperscript{140} Id.
of police officers; they are trained to force the enemy to submit.\(^{141}\) Soldiers are equipped with far more destructive weapons and are permitted to use an initial force that would be considered excessive as a primary response in civilian contexts.\(^{142}\)

Congress appeared to address these concerns by placing two other restrictions on the military action authorized by this Act, specifying that: 1) military support cannot adversely affect military preparedness\(^ {143}\) and 2) these amendments do not authorize “direct participation” by the Army, Navy, Air Force and Marine Corps in search, seizures, arrests or similar acts.\(^ {144}\) It is arguable, however, that Congress’s main concern was with losing voter support for the “War on Drugs” if the military action became too rampant in civilian affairs.\(^ {145}\)

Despite these restrictions, the military’s involvement in the drug war continued to expand over the next three years eventually providing $100 million worth of support and equipment to law enforcement agencies.\(^ {146}\) As if that were not enough, more exceptions to the PCA followed over the next 10 years.\(^ {147}\) The most significant addition provided for military assistance in the event of chemical or biological weapons attacks.\(^ {148}\)

Finally, the Robert T. Stafford Disaster Relief Act of 1984 (amended in 1988) has been interpreted to permit FEMA to send in active duty troops once the President declares a state of emergency in a state (usually requested by the governor).\(^ {149}\) The act does not specifically authorize the use of the military – it simply permits “special measures” to help state and local governments recover from disasters.\(^ {150}\)

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141 Id.
142 Id.
143 10 U.S.C.A. § 376.
144 10 U.S.C.A. § 375.
146 Id.
147 This included the Enhancement of cooperation with civilian law enforcement officials (10 U.S.C.A. § 380); procurement by state and local governments of law enforcement equipment suitable for counter-drug activities through the DOD (10 U.S.C.A. § 381).
G. *Posse Comitatus* Act Enforcement, or Lack Thereof

There is no real penalty for violating the *Posse Comitatus* Act, and no remedy for the injured when a PCA violation occurs.\(^\text{151}\) To date, no one has been prosecuted under the PCA.\(^\text{152}\)

Perhaps more disturbingly, the exclusionary rule, which suppresses evidence collected in violation of the defendant’s Fourth Amendment rights, generally\(^\text{153}\) does not apply to evidence collected when the PCA has been violated.\(^\text{154}\) This means that even though the evidence may have been obtained unlawfully, it can still be used against the defendant at trial.

The courts have deemed the exclusionary rule an “extraordinary remedy”\(^\text{155}\) and unnecessary until there have been “widespread and repeated violations” of the PCA.\(^\text{156}\) For instance in *United States v. Walden*, the federal court analyzed suppression in the context of a PCA violation for the first time when undercover Marines participated in an illegal arms sting.\(^\text{157}\) The Fourth Circuit did not enforce the exclusionary rule even though the military personnel had breached the DOD directive that applied the PCA restrictions to the Marine Corps.\(^\text{158}\)

The court pointed out that one purpose of the exclusionary rule was to deter searches prohibited by the Fourth Amendment in the only way that had worked.\(^\text{159}\) It was impossible to know if more than the court interpretation was needed to enforce this rule, since this was the first known violation of the DOD directive.\(^\text{160}\) The court explained that this directive was not as well known or clear (until after this opinion) as the Fourth

\(^{151}\) United States v. Walden, 490 F.2d 372 (4th Cir. 1974); United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979).


\(^{154}\) *See* United States v. Walden, 490 F.2d 372 (4th Cir. 1974).

\(^{155}\) *Id.*

\(^{156}\) United States v. Wolffs, 594 F.2d 77 (1979).

\(^{157}\) United States v. Walden, 490 F.2d at 376-377.

\(^{158}\) *Id.*

\(^{159}\) *Id.* at 377.

\(^{160}\) *Id.*
Amendment prohibitions, thus it a wait-and-see approach – watching for future violations to determine whether the exclusionary rule was needed for deterrence purposes.

More recently in *State v. Pattioay*, the Supreme Court of Hawaii suppressed evidence collected in violation of the PCA because there was no other penalty for PCA violations – since no one had been prosecuted – and deterring improper police conduct was essential to the operation of the criminal justice system. So far, this is the only court to suppress evidence collected in violation of the PCA. *Pattioay* may, however, start a trend in that direction, as there is still no method to deter violations 30 years after the initial analysis of this question.

Still, there is also no remedy for the defendant for a PCA violation: complaints are not dismissed unless the PCA violation causes an actual element of the crime not to be met. This element-based argument has, however, worked in the government’s favor when it was sued for negligence.

In *Wrynn v. United States*, local police used an Air Force helicopter and personnel to search for an escaped civilian prisoner. The helicopter clipped a tree while landing, and flying debris injured an innocent bystander. When sued under *respondeat superior*, the government claimed that it could not be held liable because the officers were acting outside of the scope of their duties. The court agreed and dismissed the complaint finding that

161 *Id.*

162 *Id.*

163 *State v. Pattioay*, 896 P.2d 911 (Haw. 1995) (the Army CID had participated in a multiple-buy, undercover drug sting that occurred off-base and targeted civilians).

164 *Id.* at 923.

165 *Id.* at 924-925.

166 The *Pattioay* court looked to the *Walden* opinion and pointed out that the Fourth Circuit seemed willing to adopt the rule if it were needed later. *Id.* Maybe future courts will do the same.


169 *Id.* at 461.

170 *Id.* at 464.
the actions could not have been authorized because they were unlawful under the PCA.\textsuperscript{171}

Lastly, there is a high burden for defendants, who must prove that a violation occurred,\textsuperscript{172} whereas the prosecution need only demonstrate compliance after the defense is raised.\textsuperscript{173} A PCA violation defense also must be raised before trial in a motion to dismiss or to suppress, or it will be waived.\textsuperscript{174} This pretrial requirement poses an additional challenge for defendants who may not know about the military’s involvement until after the trial has begun, if they find out at all.

II. The \textit{Posse Comitatus} Act and the Katrina Disaster

A. The Disaster Scene

Four days after Hurricane Katrina hit, troops arrived in New Orleans and began securing the city and attempting to regain order.\textsuperscript{175} These troops consisted of active duty military and National Guard.\textsuperscript{176} It is unclear precisely how many troops were sent when\textsuperscript{177} and who was directing their efforts.\textsuperscript{178}

The state of affairs in the city at that time was also unclear. As many Americans watched repeated clips of General Honore walking down what appeared to be safe streets

\begin{itemize}
\item \textsuperscript{171} \textit{Id.} at 465.
\item \textsuperscript{172} United States v. Ahumdo-Avendano, 872 F.2d 367 (11th Cir. 1989), \textit{cert. den.}, 493 US 830, \textit{cert. den.}, 493 US 863.
\item \textsuperscript{173} \textit{Id}.
\item \textsuperscript{174} United States v. Borrego, 885 F.2d 822 (11th Cir. 1989).
\item \textsuperscript{176} http://www.military.com.
\item \textsuperscript{177} Various news agencies reported different numbers ranging from Reuters report of 300 National Guard arriving on Sept 2, 2005 (\textit{Troops Told ‘Shoot to Kill’ in New Orleans, supra note 8}) to Associated Press reporting 21,000 existing National Guard and 4,000 active duty troops plus 7,000 more on their way as of 9/3/2005(\textit{Bush to Send More Troops to Louisiana, supra note 2}).
\item \textsuperscript{178} Some accounts say that the Governor was commanding them; others infer that Bush was. Various news agencies reported different numbers ranging from Reuters report of 300 National Guard arriving on Sept 2, 2005 (\textit{Troops Told ‘Shoot to Kill’ in New Orleans, supra note 8}) to CNN reporting that 1,000 National Guard arrived under the direction of General Honore on 9/2/2005 (\textit{Commander of Relief Effort in New Orleans Takes Charge}, CNN, September 3, 2005, http://www.cnn.com) to the Associated Press reporting 21,000 existing National Guard and 4,000 active duty troops plus 7,000 more on their way as of 9/3/2005(\textit{Bush to Send More Troops to Louisiana, supra note 2}).
\end{itemize}
and reaching out to citizens, the Army Times was quoting National Guardsmen referring to New Orleans as “Little Somalia.” CNN reported some sniper fire during a hospital evacuation; the Army Times reported repeated fire on Black Hawk and Chinook helicopters by insurgents.

Many news agencies ran reports about absolute anarchy in the Superdome – estimating a body count of 200, multiple rapes of babies and serious gang violence. However, only six bodies were recovered from the Superdome – four died of natural causes, one overdosed and another committed suicide – and there have been no reported rapes. Of the four bodies recovered at the Convention Center, only one was murdered. The Governor reported that National Guard troops were “locked and loaded” and had been told “to shoot and kill ‘hoodlums,’” while General Honore’ reported that his National Guard troops were concerned with the humanitarian needs of the people.

In the wake of the Katrina crisis, Secretary of Defense, Donald Rumsfeld responded, “It didn’t,” when asked why it took troops days to get to New Orleans. A

181 Relief Workers Confront ‘Urban Warfare’, supra note 2.
184 Id.
185 Id.
186 Id.
188 Perhaps Rumsfeld was shoe shopping at Ferragamo with the Secretary of State, Condoleezza Rice, and that is why he missed the delay. George Rush and Joanna Molloy, As South Drowns, Rice soaks in N.Y, NY Daily News, September 1, 2005, http://www.nydailynews.com/front/story/342712p-292600c.html. Rice was apparently on vacation in NYC during the Katrina disaster – shoe shopping and attending Spamalot. Id.
189 Jeff Schogol and Lisa Burgess, Active Duty Troops Won’t Be Used for Forcible Evacuations in New Orleans (Its
month later the Pentagon and military blamed the delay on the *Posse Comitatus Act*,\textsuperscript{190} claiming that the government would have broken the law by sending active duty troops to New Orleans.\textsuperscript{191} Ironically, active duty troops and the National Guard had shown up, arguably late, in New Orleans.

**B. The Legality of Troop Deployment**

Active duty troops most certainly could have been sent to New Orleans to provide food, water, medical attention and other non-law enforcement services because the PCA does not bar the military from providing humanitarian relief.\textsuperscript{192} It only restricts certain branches of the military from “execut[ing] the laws.”\textsuperscript{193} This humanitarian relief authority is spelled out in the Stafford Act, under which the military has been deployed in the wake of many past domestic disasters, including hurricanes.\textsuperscript{194}

Even if authorities expected troop activity to cross the line into a law enforcement role, Congress could have passed an emergency bill that granted specific authority to do so.\textsuperscript{195} In fact, Congress did meet in an emergency session to pass a 10.5 billion dollar bill for relief funds days before the military finally arrived in New Orleans.\textsuperscript{196} Congress could also have passed a military authorization bill at the same time. After all, billions of dollars mean nothing to the people who died waiting for help.

A PCA issue could have arisen if federal troops went to New Orleans for humanitarian purposes but had then taken an active role in law enforcement. There would need to be an alternate grant of authority from the Constitution or Congress for such action, or the troops involved would have to be unfederalized National Guard and Coast Guard.

The following section analyzes the most egregious activity that was reportedly


\textsuperscript{191} *Id*.

\textsuperscript{192} 18 U.S.C.A. § 1385.

\textsuperscript{193} *Id*.


\textsuperscript{195} The PCA has exception for authority granted through an Act of Congress. 18 U.S.C.A. § 1385.

threatened – forced evacuations of civilians carried out by the police and military forces – to examine if even that level of military participation would have violated the PCA. I conclude it likely would not.

1. Military Branch: State or Federal Command?

In order for the National Guard and active duty troops to have assumed a law enforcement role in compliance with the PCA, the Governor of Louisiana ultimately needed to be the one in command of the National Guard forces with active duty personnel providing back up support. Based on the news coverage, it was unclear who was in command. In some statements, the Governor asserted that she had called the National Guard into service and instructed them to enforce the law. In other news reports, General Honore was said to be in charge of the National Guard, which appeared to put the guardsmen under the command of the Army and ultimately the President. According to the National Guard website, the guardsmen were activated under 32 U.S.C.A. § 502(f), which means that they were in “Full-Time National Guard Duty.” This statute allows the Governor, with the permission of the President or Secretary of Defense, to call the National Guard into state service. The command of the guardsmen is squarely under the control of the State, but they are paid through federal funds. Title 32 National Guardsmen are permitted to partake in domestic law enforcement without violating the PCA.


199 Id.

200 Id.


202 Id.

203 Id. at 13

204 Id. at 14
Courts have explained that the guardsmen’s official status – meaning what statute activated them – was how to determine whether or not the guardsmen were under state or federal control. 205 “Look[ing] and act[ing] like soldiers” was specifically found to be irrelevant in Gilbert v. United States in determining whether or not the PCA applied to National Guardsmen. 206 Therefore, it seems as though the National Guard would have been able to execute the laws in New Orleans in compliance with the PCA because the Governor was their acting commander-in-chief.

2. Lawfulness of Forcible Evacuations

Forcible evacuations of civilians would violate the PCA if the military’s role were a “direct, active use” in enforcing the law with no other applicable exception. 207 The common law exceptions – the private citizen and independent military purpose – most likely would not apply.

The troops present in New Orleans, according to the government, 208 were deployed by some governmental – either federal or state – authority to act in their official military capacity and did not volunteer their assistance. 209 There does not appear to be an independent military purpose to justify domestic law enforcement, as the evacuation directive seemingly had nothing to do with military personnel 210 or with retrieving military property. 211 Thus, to comply with the PCA, the role of the active duty military would need to be indirect.

Forcibly removing civilians from New Orleans would most likely have required arrest or forced containment, which would seem to involve a direct law enforcement activity by the military. In fact in 10 U.S.C.A. § 375, Congress clearly states that the

205 Gilbert v. United States, 165 F.3d 470 (6th Cir. (Ky.) 1999).
206 Id.
209 People v. Taliferro, 520 N.E.2d 1047 (Ill.App. 4 Dist. 1988) (finding no violation of the PCA where an airman assisted civilian police on his own initiative as a private citizen.)
210 State v. Partioay, 896 P.2d 911 (Hawai‘i 1995) (finding a PCA violation because there was no showing that the investigation was directed at drug transactions involving military personnel or transactions conducted on-base.)
211 United States v. Chon, 210 F.3d 990 (9th Cir 2000), cert. den., 531 US 910 (finding an independent military purpose and no PCA violation where NCIS trying to recover stolen military equipment.)
military is not authorized to participate in “search, seizures, arrests or the similar.”\textsuperscript{212}

Additionally, in \textit{Bissonette v. Haig}, the Eighth Circuit found that roadblocks with armed patrols that formed a “defense perimeter” used to contain citizens were “regulatory, proscriptive and compulsory.”\textsuperscript{213} The court also pointed out that “regulat[ing], forbid[ding] or compell[ing]” civilians was a PCA violation.\textsuperscript{214}

Further, in \textit{United States v. Al-Talib}, the Fourth Circuit found that the Air Force transport during a drug enforcement operation did not have a direct impact because the DEA “did not use federal troops to invade the appellant’s homes, nor did it employ the military to hunt down or confine the suspects.”\textsuperscript{215} The court hinted that these actions, which are similar to forcible evacuations, would have been a PCA violation had they occurred.\textsuperscript{216}

Under this precedent, compelling citizens to leave by forcibly entering their homes would appear to meet the standard of active participation, especially considering the courts have interpreted the direct participation standard to include much less intrusive activities such as filling out evidence forms or testing blood samples.\textsuperscript{217} But, if active duty personnel were accompanying local law enforcement and acting under their command on the evacuation missions, some military participation might have been lawful.\textsuperscript{218}

In a number of PCA cases, military personnel have accompanied local law enforcement and have been present for searches, seizures and arrests and have not violated the PCA.\textsuperscript{219} In these cases, the key was that the military personnel were acting under the

\textsuperscript{212} 10 U.S.C.A. § 375.

\textsuperscript{213} Bissonette v. Haig, 800 F.2d 812 (8th Cir. (S.D.) 1986).

\textsuperscript{214} Id.

\textsuperscript{215} United States v. Al-Talib, 55 F.3d 923, 930 (4th Cir. (Va.) 1995).

\textsuperscript{216} Id.


\textsuperscript{218} Wrynn v. United States, 200 F. Supp. 457 (E.D.N.Y. 1961) (holding that the use of an Air Force helicopter and personnel in a search for an escaped civilian prisoner was a PCA violation, even though the personnel were under the control of the local law enforcement. This case took place before the congressional amendments in the 1980’s, which now permit the military to aid local law enforcement. It is arguable that this case would now come out differently. As an aside, the government was also claiming a violation in order to disclaim liability in a negligence suit. This may have played a role in the decision.)

\textsuperscript{219} United States v. Stouder, 725 F. Supp. 951 (M.D.Ga. 1989) (accompanying FBI agents serving search warrant was passive and did not violate the PCA); United States v. Yunis, 924 F2d 1086 (D.C. Cir. 1991) (holding that the Navy played passive role in caring for, housing and transporting prisoner in
direction of a non-military authority.

For instance in *United States v. Khan*, the Ninth Circuit found no violation when two Navy ships intercepted a vessel as part of a civil investigation into the trafficking of hashish because the Navy personnel had acted under the Coast Guard’s command. Coast Guard and Navy personnel boarded the ship, after which the Coast Guard searched and seized the vessel and arrested the crew. The Navy’s assistance remained indirect because the Navy personnel did not search the ship or arrest or interrogate suspects. The Navy had only provided “logistical support and backup security” that did not amount to an “exercise of military power.”

Similarly in *United States v. Hitchcock*, the District of Hawaii found no PCA violation when two NCIS agents worked on a drug investigation because the DEA was paying for and directing the operation. NCIS originally started the investigation and collected the initial evidence through undercover work. After handing the investigation over to the DEA, the NCIS agents continued to participate in the surveillance and were present during the search of the defendant’s home, his arrest and subsequent interrogation. However, the DEA agents had read the defendant his rights, received and executed the search warrant and collected and tested all evidence. In the end, the court found that the NCIS involvement was indirect and did not violate the PCA.

According to *Kahn* and *Hitchcock*, the military could probably have assisted New Orleans police in forced evacuations provided that military personnel remained under the command of civilian (or federalized National Guard) authorities. For example, two police officers being transported in an amphibious vehicle by three Army soldiers would most

custody of FBI); *United States v. Hitchcock*, 103 F.Supp.2d 1226 (D.Hawai‘i 1999) (finding no PCA violation where NCIS agents were present during search, arrest and interrogation because they were under the direction of the DEA); *United States v. Mendoza-Cecelia*, 962 F.2d 1467 (11th Cir. (Fla.) 1992) (finding no PCA violation because the Coast Guard assigned to a Navy ship boarded and searched the vessel and detained and arrested the defendant.)

220 United States v. Khan, 35 F.3d 426, 428 (9th Cir. (Hawai‘i) 1994).

221 *Id.* at 432-433.

222 *Id.* at 428.

223 *Id.* at 432.


225 *Id.* at 1226-1227.

226 *Id.* at 1227.

227 *Id.* at 1229.

228 *Id.* at 1230.
likely comply with the PCA so long as the actual detainment was executed by the civilian police officers. In *Kahn*, the court specified that “back up security” was passive, and that role generally requires weapons.

Army personnel could also, independently, transport civilians once they were taken into police custody, since in *United States v. Gerena* the Army’s transportation of a defendant in the custody of US Marshals was lawful under the PCA, and in *United States v. Yunis*, the Navy acted lawfully by caring for, housing and transporting a civilian in FBI custody.

The ratio of police to military personnel might logically seem like a good way to measure involvement; however, the courts have not paid much attention to numbers. For example in *Hitchcock*, there were many DEA agents working with two NCIS agents, while in *Kahn*, there were many more Navy personnel than Coast Guard.

In both of these cases, the courts focused on who was in charge of the operation, but it is unclear what would be needed to demonstrate that local law enforcement was in fact in control. In *Hitchcock*, the court found that the DEA was in charge of the operation because it was funding and directing the mission. In *Kahn*, the court found that the Coast Guard was running the mission because it was directing Navy personnel.

Such distinctions are not as easy to make in the events that occurred in New Orleans. First, the police force was largely out-numbered by the military. It was reported that much of the New Orleans police force, which before the hurricane was about 1,000 strong, abandoned their posts. Depending on whose numbers are accurate, there were as many as 40,000 troops in the area. The courts may not have considered ratios before, but this disparity could be large enough to influence the analysis.

Second, the military would probably need to provide most, if not all, of the equipment used to execute evacuations, as it is likely that the New Orleans equipment was destroyed during the hurricane. That would mean that the military would be funding most of the operation.

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229 United States v. Kahn, 35 F.3d at 432.
234 United States v. Kahn, 25 F.3d at 432.
236 Associated Press reporting 21,000 existing National Guard and 4,000 active duty troops plus 7,000 more on their way as of 9/3/2005. *Bush to Send More Troops to Louisiana*, *supra* note 2.
Third, based on the Wounded Knee cases, military experts are permitted to play an extensive role in advising public officials on how to execute evacuation missions. Under McArthur, the New Orleans civilian authorities would be “borrow[ing the advisor] as a vehicle might be borrowed,” which is permitted under the PCA through a congressional exception allowing the military to share equipment with civilian law enforcement.

This means that for all intents and purposes, the military would largely be in control of the evacuations based on the number of personnel, source of funding and direction of operations. However, it is quite possible that, if litigated, a court, for the reasons discussed above, would not find a PCA violation.

C. Presidential Authority

It is arguable that the President could also have sent the military into New Orleans under 10 U.S.C.A. §§ 331, 333, which permit the President to summon the militia to stop insurrection and to protect the constitutional rights of the American people. While the actions of the Confederate states during the Civil War are generally what is thought of as an insurrection, courts have adopted a broader view by defining insurrection as “a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in [a] city or state.”

Insurrection does not require violence or a probability of success; it needs to “defy for the time being the authority of the government.” Those resisting the power of the civil authorities are known as “insurgents,” and anyone – regardless of their motives – that participates is considered an insurgent.

Under 10 U.S.C.A. § 333, the President can summon the militia when the
“authorities of [a] State are unable, fail or refuse to protect” the rights, privileges and immunities guaranteed by the Constitution. The courts have interpreted this statute to mean that the President can order the militia to protect fundamental rights such as the right to interstate travel. Presidents Grant, Eisenhower and Kennedy used this power to “remove obstructions of justice” that “den[ied] the equal protections of the law” and to “quell domestic violence” in conjunction with civil rights abuses.

The President does not need the permission of a state or Congress to call the militia. The decision to call troops to quell civil disorder is exclusively delegated to the President and is not subject to judicial review.

The situation in New Orleans appeared to meet the requirements for both Sections 331 and 333 on many levels. It is true that many of the horrors described in the days immediately following the hurricane were exaggerated. However, national news stations like CNN ran virtually non-stop live coverage – which broadcasted an undeniable and grim picture. This picture included: houses engulfed up to their roofs in polluted water, people carrying everything from TVs to cartons of diapers out of ransacked local shops, dead bodies lying on the roads and floating in the water and thousands of people sitting in blistering heat without food or water. Virtually all of the refugees were poor, black citizens; virtually all of the local police force was white.

The “insurrection” in New Orleans was documented both in written and video newscasts. Several spokespeople, including former FEMA Director Michael Brown, equated the situation in New Orleans to “urban warfare.”

244 10 U.S.C.A. § 333.
245 Bergman v. United States, 565 F. Supp. 1353, 1401 (1983) (finding that the President could have sent the military in to protect the rights of the black citizens where a white supremacist group was planning on blocking (with force if necessary) the black citizens from disembarking and entering a bus station).
246 Id. at 1401-1402.
247 Id. at 1403.
252 Relief Workers Confront 'Urban Warfare', supra note 2.
discussed being shot at by insurgents. Local police were not able to quell the disorder; in fact some of the officers joined the looters. Local authorities were not able to evacuate critical patients from Charity Hospital due to sniper fire and run-ins with armed looters. Mayor Nagin made multiple passionate pleas for help, as the city was out of control and citizens were dying. Governor Blanco sent in 300 National Guard with permission to use deadly force, but that number pales in comparison to the 20,000 people that were stranded in the Superdome alone.

The denial of the fundamental rights and the equal protection of the laws guaranteed by the Constitution was televised and splashed through the papers. Buses that citizens had rented, by pooling their money, to bring them out of the city were confiscated by authorities. Families were split up and forced to leave their pets behind to slowly starve to death. Citizens were not permitted by law enforcement personnel to leave a city where there was no food, water, medication or sanitation. Police fired warning shots


254 *Relief Workers Confront ‘Urban Warfare’*, supra note 2.

255 Four officers have been suspended without pay and more than a dozen are under investigation in conjunction with participating in or not combating looting. Varney, supra note 2.

256 On two occasions, evacuations of critical patients to Tulane Medical Center (to heliport out) were stopped when a sniper began firing on evacuees. Earlier, boat evacuations were interrupted when armed looters threatened evacuees – even overturning one of their boats. *Sniper Fire Halts Hospital Evacuation*, supra note 4.

257 *The Response and Responsibilities in a Disaster*, supra note 3.

258 *Troops Told ‘Shoot to Kill’ in New Orleans*, supra note 8.

259 A number of European and white tourists staying at a hotel in the French Quarter pooled their money and came up with $25,000. They rented 10 buses and devised a plan to send elderly, sick and minors out first. The National Guard commandeered them when they arrived in New Orleans. Chip Johnson, *Police Made Their Storm Misery Worse*, San Francisco Chronicle, September 9, 2005.


261 Chip Johnson, *Police Made Their Storm Misery Worse*, San Francisco Chronicle, September 9, 2005. This article contains an account of two paramedics who were in New Orleans for a conference and were stranded in the French Quarter for days. *Id.* Both police and National Guard were perpetrating these acts. *Id.* These authorities were apparently not listening to the Mayor who was quoted as telling
in response to those people that managed to walk a few miles in an attempt to cross the Crescent City Connection Bridge out of New Orleans and into Gretna. Police allegedly used helicopters to blow down shelters, fired shots to corral refugees and confiscated citizens’ food and water. When the buses finally did arrive, it was reported that white tourists were bumped to the front of the line and evacuated first.

The government claimed disparate impact – these people were poor and happened to be black; however, this disparate impact combined with Louisiana’s slave state past and New Orleans’s reputation for race-divided neighborhoods makes this explanation suspect. The local response to Katrina recalled images of the civil rights violations perpetrated in the 60’s and 70’s – which often arose from mobility restrictions enforced against black citizens. Surely, the totality of the circumstances met the low threshold of a “mere frustration” and justified presidential deployment of the military under the Insurrection Acts.

citizens to flea to the neighboring Jefferson Parish because the convention center was not safe. Relief Workers Confront ‘Urban Warfare’, supra note 2.

The town of Gretna is few miles away from the Superdome. When the people from the French Quarter were refused entrance to either of the shelters, they decided to walk to the bridge in order to cross the river into the neighboring city. Chip Johnson, Police Made Their Storm Misery Worse, San Francisco Chronicle, September 9, 2005. The Gretna police refused to allow them to enter, explaining they did not want New Orleans to happen in their town. Id. According to the 2000 United States Census Bureau, Gretna is 56% white.


Id.

Barbara Bush commented about the situation for refugees at the Superdome on NPR: “So many of the people here . . . were underprivileged anyway, so this is working very well for them.” Kate Sheehy, Barbara: Houston Shelter is ‘Working Very Well’ for Poor, The New York Post, September 6, 2005, http://www.commondreams.org/headlines05/0906-01.htm.

Washington, supra note 6.


The Lower Ninth Ward, where flooding was the worst, has been reported as 98% black with an average annual income of $27,500 – approximately 25% of those people have an income below $10,000. Alan Shapiro, The Class and Race Divide in New Orleans and in America, http://www.teachablemoment.org/high/raceclass.html.

Bergman v. United States, 565 F. Supp. 1353, 1401 (1983) (Ku Klux Klan planning to block black citizens from leaving a bus station justifies sending in military to protect the fundamental right of mobility.)

Conclusion: The *Posse Comitatus* Act Not To Blame

Soon after troops began arriving in New Orleans, CNN repeatedly showed footage of General Honore’ yelling at a group of soldiers in the back of a pickup truck that were training their M-16’s on haggard-looking civilian men, women and children. The General said: “Point your weapons to the ground, this is not Iraq.”

The soldiers epitomized a *posse comitatus* and appeared to be playing out a scene from a developing country run by aberrant gangs.

Scenes like this were precisely why the PCA was passed: to enforce civilian authority over the military in order to maintain a democratic form of government. Unfortunately, Congress and the courts have created so many exceptions that the PCA has lost its teeth. The modern PCA appears to be nothing more than a legacy law.

While many questions regarding the government’s response to Katrina remain unanswered, one answer is clear: the PCA was not the obstacle delaying the government’s provision of humanitarian aid.

The PCA does not bar the government from rapidly deploying the standing military to bring food, water and medicine to citizens in desperate need after a disaster. If it did, we would not have deployed the military to provide aid in the wake of earlier hurricanes.

If the government had been concerned about violating the PCA, Congress could have passed a bill during its emergency Katrina relief session in order to grant specific military authority in New Orleans. Or, the government could have knowingly violated the PCA — most likely without penalty. To date, no one has been prosecuted under the PCA, and it is doubtful that we would start with the Secretary of Defense or the President.

Most tellingly: how unlawful could the military deployment have been? The government did send active duty troops – it just sent them several days late. The only thing that changed during those four days was Bush’s approval rating.

Since the finger was pointed at the PCA, the Katrina disaster has seemingly become

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272 The text of the PCA specifies that it applies to the execution of the laws, as discussed above.


the poster child for repealing the PCA protections. A proper analysis of the law – and all of its exceptions – shows that this is an unnecessary step.

Rather than blurring the lines between the military and civilian authority by repealing the PCA, the government ought to focus its energies on fixing communication channels and emergency operation plans so we do not have a repeat of the Katrina disaster. Americans depend on their government to protect them from many dangers – domestic and foreign enemies and natural disasters alike.

The government’s response to the Katrina disaster was simply unacceptable and paled in comparison to the response to the terrorist attacks of 9/11. The picture this juxtaposition paints is that we, as a country, can respond quickly when the matter involves a major financial district and largely wealthy citizens, but we squabble over who should provide support when it comes to a cultural center and largely poor citizens.

The government has used the *Posse Comitatus* Act as a smokescreen for its failures to the American people during the Katrina disaster. We must reject the government’s excuse for the misrepresentation that it is. We must hold the government accountable and demand that it fix the breakdown that caused the delay of humanitarian aid.