



# Hurricane Katrina Task Force Subcommittee Report

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ABA Standing Committee on  
Law and National Security

ABA Section of State & Local Government Law

ABA Section of Administrative Law and  
Regulatory Practice

## Hurricane Katrina Task Force Subcommittee Report

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## Foreword

**H**urricane Katrina raised many doubts about our nation's ability to respond quickly and effectively to protect lives, property, and public health and safety during catastrophic events. Following the events of September 11, 2001, national focus turned to response and recovery from a terrorist attack of catastrophic proportions as an essential element of national defense. Hurricane Katrina became a reminder that the safety and security of the public requires an all-hazards approach – that is, an ability to respond effectively during catastrophes of all types. This capability demonstrates resiliency and strengthens public confidence in government, which in turn reduces the terrorizing effect of any catastrophic incident, regardless of cause. Strengthening these attributes in turn strengthens America.

# Introduction

**Albert C. Harvey, Vice Chair**  
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**H**urricane Katrina struck New Orleans and the Gulf Coast on August 29, 2005. Reported evidence and visual television coverage showed that the hurricane devastated the area with widespread loss of lives and property. The news media reported stories of difficulties experienced by officials at all levels to manage the fall-out. There were numerous horror stories of miscommunications, lack of coordination, inability to evacuate those threatened or distribute needed supplies, and failure of communications capacity. The continuous confusion led to a loss of public confidence in government and demonstrated significant vulnerabilities in all facets of national, state, and local emergency preparedness.

In response to these events, the American Bar Association formed the Task Force on Hurricane Katrina in early September of 2005. It called upon the Standing Committee on Law and National Security as well as the Section on State & Local Government Law and the Section of Administrative Law and Regulatory Practice to form a working group responsible for evaluating current legal authorities available to meet this and other national disasters and emergencies.

The Standing Committee on Law & National Security of the American Bar Association is comprised of a small group of lawyers with expertise in matters of the laws and regulations that affect our National Security. Legal response to acts of terror, catastrophic events, and emergencies all fit into the Committee's mission. In May 2005, the Standing Committee on Law & National Security organized a Conference sponsored by the McCormick Tribune Foundation entitled, "Law Amid the Ruins: Doing Business After Disaster." At this Conference, and as part of the publication which followed, experts from the government, business, legal, law enforcement, emergency responder, public health, public works, and non-profit sectors analyzed the potential impact of a catastrophic incident with widespread ramifications on the continuity of operations in both the private and public sectors. In November 2005, panels of experts discussed the state of the law which applies to a catastrophe affecting local, state and federal agencies, as part of the Committee's Annual Review of the Field of National Security Law.

The Section of State and Local Government Law has been similarly active in fostering understanding of the laws applicable to catastrophic events. It has held a number of programs at ABA events over the last three years. In June, 2005 it released a 70 minute Continuing Legal Education Video: "Are You Ready? What Lawyers Need to Know About Emergency Management and Homeland Security;"<sup>1</sup> followed in November, 2005 with publication of "A Legal Guide to Homeland Security and Emergency Management for State and Local Governments."<sup>2</sup> The Section of Administrative Law

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<sup>1</sup> Citation, reference to Public Entity Risk Institute and Jefferson Fordham Society, along with Ordering information

<sup>2</sup> <http://abastore.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5330086>

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and Regulatory Practice has also presented similar programs and recently held its first Homeland Security Law Institute in Washington, D.C.

The mission of the working group was to look at the over-arching question – were laws and regulations applicable to the response by state and federal officials sufficient to deal with this natural disaster? In assessing this, the working group addressed a number of issues and questions: Were decision makers at various levels of government cognizant of and able to use the authorities they had? If the laws were not adequate, how should gaps be filled and where should changes be made? If the authorities were sufficient, where should the emphasis be in the future to avoid the difficulties which occurred? Emergency authorities at both the federal and state level are often deliberately broad, so as to empower government and its officials to take needed actions. Thus, the fact that authorities lack specificity in some instances does not necessarily indicate an inadequacy of such authority; however, this common characteristic of emergency authorities places a higher burden on officials at all levels of government to ensure that these authorities can be implemented in the most effective way possible. Thus, the question becomes whether authorities were clarified in such a way as to be easily understood and implemented, not whether authority did exist.

The working group did not become a fact-finding body. It did its best not to establish fault, to point fingers for failure to respond, or to determine responsibility. That said, it did rely on reports from the media, federal, state, and local government, public and private agencies, businesses, volunteer groups, and individuals to identify the issues and develop observations and recommendations.

This study assesses laws and regulations at federal, state, and local levels to determine authorities under existing laws including if and how these authorities coordinate and cooperate during all stages of emergency management.<sup>3</sup> The Report begins with the U.S. Constitution and examines laws related to catastrophic events and emergencies. Federalism and the challenges it creates are explored first by looking at the response authority of the President and the federal executive departments and agencies. The Report then looks at issues related to State and local government and authority, including that of First Responders.

Under the Constitutional system, states have police power and the consequent security duties to their citizens. The Report analyzes the authority of state and local governments to respond to emergencies to determine if the power and ability of the states and their local jurisdictions to act as First Responders need to be modified. It also offers suggestions as to how to improve and expedite the assistance that the federal government can provide in catastrophic events.

Next, because the military has such an important role, the Report also assesses the laws and regulations which control military support to civilian authorities in catastrophic events. It examines the broad authorities available for use of the Active and Reserve Army, Navy, Air Force, Marine Corps, and Coast Guard in response to catastrophic events – and the ability to effectively use military forces while complying with the

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<sup>3</sup> The focus of the study is specifically on catastrophic incidents, and does not include an assessment of legal authorities that would be applicable specifically in the context of a catastrophic public health emergency, such as an influenza pandemic. A full examination of federal, state, and local authorities to act specifically in a catastrophic public health emergency is thus beyond the scope of this White Paper, although that topic may indeed be the proper subject of subsequent reports.

## Introduction

restrictions against use of the military for domestic law enforcement. The Report also looks at the dual status of the National Guard, the principal military response resource available to state governors,<sup>4</sup> which can also be called up and into federal service by the President under Article 10 of the Constitution.<sup>5</sup>

Finally, the Report examines those legal authorities which control the involvement of groups from the private sector. Non-governmental organizations (NGOs) have a prominent place in recovery operations and often have primary access to funding, supplies, and rescue personnel. Private businesses represent another essential asset for emergency relief but require direction and coordination. The Report examines the laws and regulations which control those areas.

For each major area the Report reaches conclusions and recommendations for the future. The working group hopes that these comments will help guide legislators, regulators, and responders as they prepare for future catastrophes and emergencies.

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<sup>4</sup> When the Guard is called up by a governor, it has full capability to perform law enforcement missions within a state or – if deployed pursuant to the Emergency Management Assistance Compact – within any other state.

<sup>5</sup> When that happens, it becomes a federal asset under the direction of the President as Commander in Chief – although doing so involves restrictions on its use in domestic law enforcement.

# Federalism and Constitutional Challenges

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## Conclusions

The U.S. Constitution constrains the federal response to catastrophic incidents in several significant ways. Most importantly, the Tenth Amendment reserves to the states the police power, the primary power to provide for the health and welfare of the populace, which the states retain as sovereigns. State sovereign immunity is reaffirmed in the Eleventh Amendment, and in other contexts, the Supreme Court has held that the exercise by Congress of Commerce Clause authority is insufficient by itself to abrogate state sovereign immunity. Therefore, federal authority to respond to and compel adequate preparations for catastrophic incidents must be derived either from the Commerce Clause (as limited by the Tenth and Eleventh Amendments), the National Defense power, or the exercise of the power to Tax and Spend to encourage state actions.

Nevertheless, the federal government possesses significant authority to respond to catastrophic incidents. Most limitations – financial, political, and philosophical – have given way over time to an expectation of federal response to catastrophe. Even traditional limitations on the use of the active duty military in the United States outside of times of insurrection have given way to looser interpretations of restrictions such as the *Posse Comitatus* Act (discussed in the following section, below), and broader conceptions of military support to civilian authorities under the Stafford Act.

Ultimately, then, the federal government possesses sufficient authority to respond to catastrophic incidents, with the possible exception of the following issues, which require further study:

1. Under what circumstances, if any, should the federal government have the authority to “federalize” the response to a catastrophic incident without the consent of the state – that is, take actions without request from, or even in contravention of express instructions from, a governor of a state – where the federal government determines that the state is not adequately responding to a catastrophic incident?
2. What threshold of severity concerning a catastrophic incident, measured by its size and scope, its nature (radioactive or other toxic elements), or on its actual destruction of state and local governance infrastructure, beyond which control over the incident should justify the federal government to “federalize” a response to a catastrophic incident?

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3. If the federal government is given new authority to assert and exercise “control” over catastrophic response, what should the extent of that power be, and to what activities should it extend? Would it supplant the state roles or supplement them? If exercised without the cooperation of a state, how will the federal government actually compel the operational cooperation of state and local authorities, as well as that of businesses, non-profit organizations, and the populace generally?

These questions go to whether the model of federal assistance to the states set forth in the Stafford Act is adequate to address all nature of threats facing the nation, regardless of cause, in an age of potential large-scale terrorist acts, the potential for wide-ranging industrial accident, and catastrophic natural disasters. More broadly, however, these questions implicate the constitutional relationship between the federal government and the states, as well as constitutional questions about the ability of the federal government to “commandeer” state resources. Such questions require careful analysis, and unless developed by consensus among the federal government and the states, may well require a Constitutional amendment.

### General Observations

The federal government is one of enumerated powers. Most relevant to the management of disasters and emergencies, the states as sovereigns in their own right granted powers to the federal government in the U.S. Constitution over: Interstate Commerce, to provide for the National Defense; and to Tax and Spend for public welfare. The police power of the states, the basic power to protect the public’s health and safety, was not among the powers granted to the federal government, and thus was reserved to the states under the Tenth Amendment.

Over the last two centuries, the scope of the federal government’s enumerated powers has grown – in emergency management as well as in other areas. Nonetheless, the states still wield the police powers reserved to them in the U.S. Constitution, and state governors have been provided in their state constitutions extraordinary powers, upon declaration of a state of emergency, to commandeer resources, control property, order evacuations, suspend laws and administrative requirements, and take other measures as necessary to respond to the declared emergency.

Moreover, state and local authorities are the “first responders” to every emergency. Every natural catastrophe such as a tornado, ice storm, earthquake, wildfire, and hurricane, as well as every non-natural event such as a chlorine leak from derailed railway tank cars, a bomb at an abortion clinic, or a terrorist release of a contagious biological agent – is experienced first in a local jurisdiction.

When an incident reaches certain proportions, however, and exceeds the capability of local governments to respond, state or federal support may be needed. The larger the incident, the more likely it is that state and federal support will be needed. Inherently, federal assistance will virtually always be needed to respond to catastrophic events. Authorities for federal emergency and disaster relief are largely structured to address this sequence of effect and pattern of resource use. They essentially require the

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federal government to wait for a request for assistance from the governor of an impacted state before taking action to assist in the response to the incident in question.

Once such a request has been made, the President has broad powers to bring the resources of any federal agency to bear in support of the affected locality and state. The President's authority to act, however, in the absence of a request from a governor, or in contravention of a denial by a governor of offered federal assistance, is much more limited, and requires the exercise of authorities typically reserved only for times of dissolution of civil order or insurrection.

In the case of Hurricane Katrina, three basic concerns arose concerning governmental authority to act during the immediate response phase of the disaster. First, state and federal officials seemed at odds over what the federal government had been asked to do, what it could do, and what conditions the federal officials would impose on states before acting. Second, the public seemed confused as to who was "in charge," what the involvement of federal active-duty military meant with respect to civilian control, and what the involvement of a "Principal Federal Official" meant with respect to concepts of state control. Third, the public seemed concerned that confusion over the role of the federal government, and the perceived lack of ability of the federal agencies to act, slowed down the arrival of federal life-saving assistance and security forces, and thus exacerbated the impact of the incident on the affected populace.

Indeed, press reports indicate that federal, state, and local leaders were not communicating, and certainly did not appear to be speaking the same language. On Saturday, August 27, 2005, Louisiana Governor Kathleen Babineaux Blanco requested, and received, an emergency declaration from President George W. Bush.<sup>6</sup> When Governor Blanco says that she asked federal officials for "everything you've got"<sup>7</sup> – and both President Bush and then-DHS Undersecretary and FEMA Director Mike Brown say that she did not ask for federal military units or for some National Guard units – were they speaking the same language? Indeed, when Governor Blanco asked President Bush for "a significant number of federal troops," and the President asked the Governor to place under federal command the Louisiana National Guard and National Guard troops provided by other states under the Emergency Management Assistance Compact (EMAC),<sup>8</sup> were they talking past each other? DHS is mandated to conduct biannual exercises, known as "TOPOFF" or Top Official exercises, in order to build relationships among federal, state, and local leaders, and ensure that these leaders speak the same language during a catastrophic incident response. Katrina events illustrated that these planning and preparedness efforts demonstrably were not adequate.

As a result of these experiences, questions have arisen as to whether the National Response Plan (NRP) should be restructured. More significantly, there have been calls for authorizing the federal government, and the federal military, to be placed in charge of

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<sup>6</sup> Louisiana Office of the Governor, "Response to U.S. Senate Committee on Homeland Security and Governmental Affairs Document and Information Request dated October 7, 2005 and to the U.S. House of Representatives Select Committee to Investigate the Preparation for the Response to Hurricane Katrina," submitted December 2, 2005, *available at* <http://www.gov.state.la.us/assets/docs/PDFs/Gov.response.12.2.05.pdf> [hereinafter "Governor's Response"].

<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Id.* at 14.

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responses to catastrophic incidents. Indeed, the question of whether the entire structure of law under which the federal government responds to disasters should be reexamined has arisen.

### Commentary

#### Federal Disaster and Emergency Authorities

The basic legal authority under which the federal government responds to disasters and emergencies is the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the “Stafford Act”).<sup>9</sup> It is the broadest and most well known of the federal government’s statutory emergency authorities.

The Stafford Act provides that the governor of a state may request “a declaration by the President that a major disaster exists.”<sup>10</sup> The Governor’s request must be “based on a finding that the disaster 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.”<sup>11</sup> The statute also requires that “as a prerequisite to major disaster assistance under [the Stafford Act],” the governor must “take appropriate action under State law and direct execution of the State’s emergency plan” and “furnish information on the nature and amount of State and local resources which have been or will be committed to alleviating the results of the disaster.”<sup>12</sup> In multi-state incidents, such as Hurricanes Isabel in 2003 and Ivan in 2004, each affected state had to request a declaration, and the President is required to issue a separate declaration for each affected state.

Based on such a request, the Stafford Act permits, but does not require, the President to “declare . . . that a major disaster or emergency exists.”<sup>13</sup> Based on the governor’s request, the President decides what federal assistance will be provided. DHS can also make recommendations to the President as to other types of assistance that might be required, based upon the severity of the incident.

The President cannot declare a major disaster without request from a state governor. The President, however, can declare an “emergency” without a request of a State governor if “[p]rimary responsibility rests with the United States because the emergency involves a subject area for which, under the laws of the United States, the United States exercises exclusive or preeminent authority.”<sup>14</sup> Traditional examples of that authority include attacks on federal buildings, disasters involving Indian tribal lands, and incidents involving nuclear materials. In the post-9/11 world, catastrophic terrorist attacks clearly would qualify for such emergency declarations because of their impact on National Defense. An ongoing issue with respect to Stafford Act authorities is drawing

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<sup>9</sup> 42 U.S.C. §§ 5121-5206.

<sup>10</sup> 42 U.S.C. § 5170.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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

<sup>14</sup> 42 U.S.C. § 5191.

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the line between traditional federal interests in supporting state efforts to address disasters and emergencies, and those limited circumstances when primary federal responsibility for providing for the national defense justifies preeminence of federal authority.

A declaration of a major disaster or emergency authorizes use of federal resources “*in support of state and local assistance efforts,*” and includes both direct federal assistance and financial contributions to state or local governments.<sup>15</sup> This provision in the statute is particularly useful since it provides both authority and appropriated funds to act, in the form of the Disaster Relief Fund. Both major disaster and emergency declarations authorize the same emergency powers. Thus, the President may “direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law . . . 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.”<sup>16</sup> After a Presidential declaration, actions under the Stafford Act are delegated to DHS/FEMA and are to be coordinated through the NRP.

Where it is “essential” to meeting “immediate threats to life and property,” the federal government can unilaterally provide the following emergency measures:

- Search and rescue
- Emergency medical care
- Emergency mortuary services
- Emergency mass care
- Emergency shelter
- Temporary facilities for schools and other essential community services
- Provision of food, water, medicine and other essential needs, including movement of supplies or people.<sup>17</sup>

In practice, even in extreme situations the federal government normally acts in cooperation and consultation with state officials, and the Stafford Act provides specifically that federal assistance for these “essential” emergency measures can take the form of direct assistance or of grants reimbursing state costs incurred in carrying out these activities. Moreover, a key element of the NRP is for state and federal officials to be located in the same place to assure proper coordination.

The Stafford Act is not the only source of emergency authority for the federal government. Congress has also bestowed emergency authority on the President with respect to specific situations, or has placed on specified federal officials the authority to take action when faced with emergency conditions involving their agencies’ jurisdiction, e.g., the Secretary of the Department of Health and Human Services may declare a Public Health Emergency; the Secretary of Agriculture can declare a drought emergency. In catastrophic events, multiple declarations are common.

Formal disaster or emergency declarations can allow for the circumvention of regulatory requirements and speed the process of delivering assistance. The federal government, however, often acts to confront issues of national importance in the absence

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<sup>15</sup> 42 U.S.C. §§ 5170a, 5192.

<sup>16</sup> *Id.*

<sup>17</sup> 42 U.S.C. § 5170b.

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of a formal declaration of an emergency. For example, even though both the Severe Acute Respiratory Syndrome (“SARS”) outbreak in 2003 and the anthrax attacks in 2001 were significant health events requiring immediate and strong governmental action, neither incident was ever “declared” either a public health or a general emergency in the United States.

### The Homeland Security Act of 2002

The Homeland Security Act of 2002 (the “Homeland Security Act”)<sup>18</sup> created DHS. It also set forth a number of new federal authorities, and catalogued some but not all existing federal authorities, specifically those relating to informational analysis and infrastructure protection, science and technology in support of homeland security, border and transportation security, and emergency preparedness and response.

Title V of the Homeland Security Act provides the primary structure for emergency preparedness and response authorities. Title V provides the Secretary of Homeland Security with extensive authority to respond to disasters and emergencies, including:

- Helping to ensure the effectiveness of emergency response providers to terrorist attacks, major disasters, and other emergencies;<sup>19</sup>
- Providing the federal government’s response to terrorist attacks and major disasters, including managing that response and coordinating federal response resources;<sup>20</sup>
- Aiding the recovery from terrorist attacks and major disasters;<sup>21</sup>
- Building a comprehensive national incident management system to respond to terrorist attacks and major disasters;<sup>22</sup>
- Consolidating existing federal government emergency response plans into a single, coordinated national response plan;<sup>23</sup>
- Developing comprehensive programs for developing interoperative communications technology, and helping to ensure that emergency response providers acquire such technology;<sup>24</sup> and
- Exercising the functions of FEMA, which were consolidated into DHS, through the Director of FEMA.<sup>25</sup>

In addition to Title V, the Secretary of Homeland Security, through the Director of the Office for Domestic Preparedness (moved from the U.S. Department of Justice and originally placed in the DHS Border and Transportation Security Directorate), is given

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<sup>18</sup> 6 U.S.C. §§ 101-557.

<sup>19</sup> 6 U.S.C. § 312(1).

<sup>20</sup> *Id.*, § 312(3).

<sup>21</sup> *Id.*, § 312(4).

<sup>22</sup> *Id.*, § 312(5).

<sup>23</sup> *Id.*, § 312(6).

<sup>24</sup> *Id.*, § 312(7).

<sup>25</sup> *Id.*, §§ 313(1), 317(a).

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significant preparedness authority under Section 430 of the Homeland Security Act,<sup>26</sup> including:

- Coordinating preparedness efforts at the federal level, and working with all state, local, tribal, parish, and private sector emergency response providers on all matters pertaining to combating terrorism, including training, exercises, and equipment support;<sup>27</sup>
- Coordinating or, as appropriate, consolidating communications and systems of communications relating to homeland security at all levels of government;<sup>28</sup>
- Directing and supervising terrorism preparedness grant programs of the federal government for all emergency response providers (with certain exceptions);<sup>29</sup> and
- Conducting appropriate risk analysis and risk management activities of state, local, and tribal governments.<sup>30</sup>

### Homeland Security Presidential Directive 5 (“HSPD-5”)

Managing complex incidents with multiple levels of governmental involvement requires data to assess the evolving situation, tools to analyze and interpret the data, interoperability to share information and decisions across diverse agencies and information technology systems, and specialized resources.

In order to coordinate the efforts of multiple levels of government and provide for a common operating paradigm and language, and to further implement the authorities set forth in the Homeland Security Act, President Bush issued HSPD-5.<sup>31</sup> It directs the Secretary of Homeland Security to develop and administer the National Incident Management System (“NIMS”)<sup>32</sup> and the National Response Plan (“NRP”).<sup>33</sup> While often discussed together, the NIMS and the NRP are separate but complementary processes for managing complex incidents.

The NRP outlines the overall structure under which a Principal Federal Official is appointed in “Incidents of National Significance” to oversee and coordinate *federal* resources in the response. The NRP serves as foundation for development of detailed supplemental plans and procedures to effectively and efficiently implement federal incident management activities and assistance.

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<sup>26</sup> 6 U.S.C. § 238.

<sup>27</sup> *Id.*, § 238(c)(1).

<sup>28</sup> *Id.*, § 238(c)(2).

<sup>29</sup> *Id.*, § 238(c)(3).

<sup>30</sup> *Id.*, § 238(c)(8).

<sup>31</sup> Homeland Security Presidential Directive 5, 39 WEEKLY COMP. PRES. DOC. 263 (Mar. 7, 2003) [hereinafter “HSPD-5”].

<sup>32</sup> DEPARTMENT OF HOMELAND SECURITY, NATIONAL INCIDENT MANAGEMENT SYSTEM (2004), available at <http://www.dhs.gov/interweb/assetlibrary/NIMS-90-web.pdf> [hereinafter “NIMS”].

<sup>33</sup> DEPARTMENT OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN (2004), available at <http://www.dhs.gov/dhspublic/display?theme=14&content=4264> [hereinafter “NRP”].

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In actuality, the NRP is more of a framework than a plan – it is not a plan in and of itself. Instead, the NRP provides the framework for federal interaction with state, local, and tribal governments, the private sector, and non-governmental organizations. It also provides a framework for domestic incident prevention, preparedness, mitigation, response, and recovery activities. The NRP describes capabilities and resources, and establishes responsibilities, operational processes, and protocols.

The legal status of the NRP is essentially that of an agreement between federal agencies (and the Red Cross); it is not a law. State and local governments are neither signatory parties to it nor are they bound by the NRP – although they were consulted in its creation and have generally designed their own response systems to mirror the structure of the NRP or its primary predecessor, the Federal Response Plan (FRP).

In the immediate response to Hurricane Katrina, there is extensive anecdotal evidence from both the media and from Congressional testimony that the NRP was not followed by the federal government in all aspects. This seemed to have been the result of:

- The recent adoption of the NRP (the final draft only had been completed in December 2004 and represented a departure in several significant aspects from the FRP, which had governed major disaster and emergency response at the federal level for over a decade);
- A general unfamiliarity with the NRP and its underlying structure and concepts on the part of the White House and senior DHS management, virtually all of whom had very little experience with the new DHS component, FEMA, and the workings of the NRP;
- Ambiguity in the roles to be played by the three different systems for coordinating federal responses to the event, each located in different organizational settings: the Emergency Support Team and Emergency Response Team within FEMA (staffed by operations-level representatives from multiple agencies); the Homeland Security Operations Center (DHS's primary operations coordination facility); and the Interagency Incident Management Team (staffed by policy-level representatives from the same agencies staffing the Emergency Support Team); and
- Misunderstandings among senior DHS management as to the applicability of the NRP to various events, including non-terrorism incidents. (The NRP had added a new term "incidents of national significance" as triggering extensive federal involvement. Unlike declaration of a "major disaster" and "emergency" – which triggers broad federal power and authority to assist in catastrophic response – the legal impact of designating an incident to be of 'national significance' is unclear. The term appears to have been intended to allow federal response even when an incident was too small for a traditional declaration, or to signal that some declared major disasters (perhaps a flood or tornado with catastrophic but localized impact) were so routine as to not be "of national significance." In any event, the term appears to have created confusion as to its applicability to non-terrorism situations where the

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federal government's constitutional grounds for assuming control of an incident under the National Defense power are not strong.)

The NIMS is also not a plan for federal management and coordination of complex incidents. Rather, it is a standardized incident management structure that, when adopted by all levels of government, might be involved in an incident. It provides a common management structure and operating vocabulary, enabling multi-jurisdictional incident management and coordination.

The NIMS is a consistent, nationwide approach for incident management, requiring federal, state, tribal, and local governments to work together before, during, and after incidents. It includes common structures and practices to prepare for, prevent, respond to, and recover from domestic incidents of all causes, sizes, and complexities. Further, under NIMS, each jurisdiction should arrange and be prepared to operate in mutual aid systems.

A key element of the NIMS is the Incident Command System (ICS), originally developed as a result of the 1970 California wildfires. The ICS greatly improved coordination between wildland firefighting agencies on these multi-week, campaign-style events that can involve hundreds or thousands of responders from dozens of agencies at all levels of government. Based on the success of the ICS in the wildland firefighting arena, it was adopted by emergency response agencies in many parts of the country for use during incidents of all types and sizes. The ICS coordinates agencies working toward shared goals; stabilizes the incident, and protects life, property and the environment. Adoption of the ICS is a key element of the NIMS.

The NIMS, like the ICS, enshrines the idea that the local Incident Commander is in charge of the incident, regardless of what additional resources – local, regional, state, federal, military or civilian – are brought in to assist. While at first glance this may seem counterintuitive, it is a model that has worked battling wildfires across the Western United States for a generation, and indeed that worked after the attack on the Pentagon on September 11, 2001, where the Arlington County Fire Chief was the Incident Commander despite the fact that the event constituted an attack on a federal military facility. Under the ICS, when resources arrive from outside the jurisdiction, whatever the type, those resources plug into a standardized incident management system and provide support in a centrally coordinated manner.

The federal government through its Tax and Spend power has mandated that all states and local governments adopt the NIMS, including the ICS, by imposing its adoption as a condition to receipt of federal preparedness grants. Its adoption is essential for catastrophic incident response, since larger incidents require increased coordination and information flow across agencies. The effectiveness of federal and state actions is directly related to the degree of coordination and communication between and among the jurisdictions involved.

### Alternatives to Direct Federal Assistance

The concept of mutual aid dates back to the founding of the nation, predating concepts of federal assistance to state and local governments. Informal agreements to provide assistance to neighbors in times of need gave way to more formalized

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arrangements between villages and towns to exchange public safety assistance. In the early 1990's, the Southern Governors' Association created the interstate compact that has become the Emergency Management Assistance Compact (EMAC),<sup>34</sup> a mechanism for providing state-to-state mutual aid, including transfer of National Guard units across state lines while still in state status, upon a governor's declaration of disaster or emergency and request for assistance.

If direct federal assistance, and indeed, increased federal control over catastrophic incident response represent the federal power end of the constitutional spectrum for managing complex incidents, then EMAC represents the opposite end, one which places states as the lead sovereigns for management of incidents affecting the health and safety of their residents. EMAC permits states to access emergency assistance across an enormous range of disciplines through an interstate compact signed by 49 states and the District of Columbia. Virtually any resource that a signatory state maintains can be accessed under EMAC through a request from the affected states. The federal government's role is thus reduced to providing reimbursement to the affected state for the costs of accessing this assistance; the states themselves provide each other with the actual resource support to address the catastrophic incident.

Both direct federal and EMAC assistance were used extensively by the Gulf Coast states in the wake of Hurricane Katrina – sometimes in a complementary manner, sometimes not. Indeed, within days after Katrina's impact on Louisiana, when Governor Blanco accused the federal government of not providing assistance in a timely manner, the Bush Administration replied that the state had been delinquent in not more quickly requesting state-to-state resources under EMAC. Despite the significant amount of work done in developing the NRP, *there remain no standards or consensus as to when an incident warrants direct federal as opposed to EMAC assistance, or indeed, in what order, or in what quantity resources should be requested via one route or the other.*

### Questions Raised

Even a quick glance at news coverage during the first days and weeks after Hurricane Katrina reveals a rising intensity of calls for increased federal authority to “federalize” the response to catastrophic incidents. The Subcommittee takes the view that the federal government has sufficient authority to respond to major disasters and emergencies of the type experienced in the United States on a relatively frequent basis without imposing subordination of state powers.

For this reason, any move to broaden federal authorities should be treated with caution, especially given constitutional restraints on federal power and the continuing debate as to whether the failures of the response to Katrina derived from lack of authority as opposed to failure to effectively implement such authority. Moreover, although it is beyond this Subcommittee's purview to evaluate, any move to broaden federal authority to direct the activities of state and local government responders would carry with it extreme operational difficulties in terms of actually obtaining field-level cooperation from state and local first responders in the face of federal exercise of that authority.

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<sup>34</sup> Pub. L. No. 104-321, 110 Stat. 3877 (1996).

## Federalism and Constitutional Challenges

Thus, before reaching the ultimate questions of expanding federal authority to respond to catastrophic incidents, the following questions should first be addressed:

1. Do current federal plans and procedures built upon existing federal authorities effectively implement these powers?
2. Did the federal government exercise all of the powers available to it under existing authorities in response to Hurricane Katrina? Were federal response authorities exercised in a manner consistent with existing plans and procedures? Did the nature or design of the plans and procedures currently in place hinder the effective implementation of these existing federal authorities?
3. Has HSPD-5 been implemented in a manner most capable of achieving the type of standardized incident management framework across jurisdictions that is required for effective federal, state, and local unity of command and effort in complex incidents? Must the federal government itself take stronger measures to implement HSPD-5 and enforce state and local jurisdictions to do so as well, *i.e.*, by more fully developing the NIMS and the NRP, and by ensuring full NIMS adoption by all governmental entities, including requiring full understanding of the NRP across federal agencies, and ensuring that states and local governments understand what resources are available under the NRP and how those resources are accessed?
4. Is there sufficient understanding of the scope of federal authorities available for catastrophic incident response at the federal, state, and local levels? Further, is there sufficient understanding at all levels of government of the relationship between federal authorities for catastrophic incident response and constitutional and statutory limitations such as the 10th Amendment and the *Posse Comitatus Act*?
5. Are the potential operational causes for the problems experienced in the response to Hurricane Katrina – *e.g.* inadequate sharing of information, inadequate federal-state coordination, failure to co-locate federal and state decision makers, inadequate trust between federal and state partner agencies, insufficient clarity in communications, insufficient coordination among federal agencies, and insufficient understanding of the roles of DHS, FEMA, NORTHCOM, and the White House – sufficiently understood, so that these operational problems – rather than questions of legal authority – can be ruled out as factors behind the failures in response?
6. What is the desired relationship between direct federal assistance and EMAC assistance? From a constitutional point of view, is it more desirable to increase the amount and type of direct federal assistance available, or is it more desirable to create intrastate and interstate mutual aid relationships that would bear most of the burden of providing actual emergency response resources, with the federal government providing only financial support? What is the desired balance between the two approaches?

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### Issues for Further Study

Based on the experience of Hurricane Katrina, once the facts of the incident are more fully understood and the questions presented are answered, then the ultimate issues can be considered in proper context. The following issues require careful study and consideration based on legal, policy, and operational factors, and must be considered in the context of our constitutional system and the realities of disaster response, rather than strictly as a legal analysis.

1. Should the federal government have the authority to override the decisions of the governor of a state if federal officials believe that the governor is not adequately responding to a catastrophic incident? Who should make that decision, and on the basis of what criteria? Can such authority be satisfactorily structured given the limitations of the 10th Amendment, or would a constitutional amendment be necessary?
2. Is there a threshold of severity concerning a catastrophic incident, measured either by its size and scope, its nature and military significance (radioactive or other toxic elements), or based upon its actual destruction of state and local governance infrastructure, beyond which control over the incident should immediately be given to the federal government under the National Defense power of the Constitution? Should such a determination be limited to catastrophic incidents resulting only from terrorist events, or could any event, regardless of cause, reach a size or scope, or wreak such destruction so as to trigger this authority?
3. If the federal government is given new authority to assert and exercise “control” over catastrophic response, what should be the extent of that power and to what activities should it extend? Should it supplant the state roles or supplement them? If exercised without the cooperation of a state, how would the federal government actually compel the operational cooperation of state and local authorities – as well as that of businesses, non-profit organizations, and the populace, generally?

## State, Local, and First Responder Issues

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### Conclusions

**A**s noted in Section A, above, all disasters, regardless of their size and scope, impact first at the state and local government level; thus, any examination of the adequacy of legal authorities for catastrophic incident response must include an examination of such authorities at those governmental levels.

Under the U.S. constitutional system, states possess and retain for themselves the police power, and with it all attendant powers to protect the health and safety of their citizens. Even when their resources are overwhelmed and federal assistance is requested, states continue to possess such powers and responsibilities. Thus, any examination of the adequacy of federal authority to respond to catastrophic incidents requires consideration and respect of such state powers. This is especially true if the examination is whether there should be a stronger federal role in assisting states to make the best use of their existing authorities.

Because the states retain the police power, they inherently possess sufficient legal authority to respond to catastrophic incidents. States vary in the way that they *express or clarify* their authority through statutes or executive orders; how that authority is *made operational* by incorporating it in plans, procedures, and protocols; the manner in which they *execute* that authority during incidents; and how they *delegate* their authority to local units of government. Because of this variation, broad generalization applicable to all states concerning the sufficiency of any of these expressions of authority is impossible. Potential failures involving use of the police power authority, however, can typically be traced to problems in one or more of these four emphasized areas.

In the wake of the attacks of September 11, 2001, many state and local governments revised their disaster and emergency statutes to broaden, strengthen, and clarify legal authorities relating to catastrophic incident response. Experience with Hurricane Katrina provides a warning for state and local government officials and policymakers concerning the difficulty in *implementing* this authority, by translating it into effective plans, procedures, and protocols. The failure to effectively do so is a failure of preparedness.

Effective preparedness for catastrophic incident response requires state and local government officials to design effective plans, procedures, and protocols that facilitate the execution of existing authority, and to design exercises that test the execution of this authority – and potential impediments to implementation – along with traditional operational issues. Given the authorities provided to DHS to ensure national preparedness through conditional preparedness grant funding, effective preparedness also

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requires the government to set benchmarks for implementation of authority, and to design and implement programs to effectively detect shortcomings in emergency plans and procedures, both through annual reviews and regional or national exercises. Finally, effective preparedness requires all levels of government – federal, state, and local – to ensure that elected officials, emergency managers, and government and affected private sector attorneys understand the scope of applicable legal authority *and* how to best translate this authority into effective plans, procedures, and protocols.

As the response to Hurricane Katrina suggests, failure in any of these aspects of preparedness hampers effective emergency response.

### General Observations

The authority of state and local elected officials to act under a state's police powers is at its apex during a disaster. Governors are given broad discretion under state constitutions and statutes to take actions deemed necessary to reduce imminent threats to life, property, and public health and safety. They have extraordinary powers, upon declaration of a state of emergency, to commandeer resources, control property, order evacuations, suspend laws and administrative requirements, and take other measures necessary to respond to the emergency. State and local authorities are of course the "first responders" to every emergency, since in all instances the event occurs initially in one or more local jurisdictions.

States devolve authority to local units of government in various ways. Some cities possess "home rule" authority, either by reason of predating the establishment of the state, or by operation of a state's constitution or law. Local governments in general may also possess authority specifically delegated by the state through charter or operation of state law. Virtually all states have also codified their emergency response powers in some combination of statutes and executive orders, and have developed plans and procedures for responding to catastrophic incidents that derive from these expressions of state authority. Most local governments have taken similar steps.

The federal government has interjected itself into the state and local government emergency planning process by conditioning the receipt of federal preparedness grant funding on review of state and urban area preparedness plans. This represents a federal exercise of its Tax and Spend power in the Constitution in order to encourage state compliance with such federal requirements. The review process is an annual one conducted by the DHS Office for Domestic Preparedness.

### Commentary

Disasters such as Hurricane Katrina raise more questions about specific state and local government authority to act than can be addressed succinctly here. Nevertheless, given the public outcry that has arisen for an examination of the adequacy of federal authority to respond to catastrophic incidents, it is imperative that such an inquiry begin initially with those lessons that can be gleaned concerning the nature and use of state and local government authority in response to Hurricane Katrina.

## State, Local, and First Responder Issues

As noted above, four questions should guide an examination of the adequacy and use of state and local government authority to respond to catastrophic incidents: how did the state *express or clarify* its authority through statutes or executive orders; how was that authority *implemented* through plans, procedures, and protocols; in what manner did the state *execute* that authority during incidents; and how did the state *delegate* its authority to local units of government?

A full, impartial evaluation by this subcommittee of the actions of any of the states impacted by Hurricane Katrina is not possible at this stage, simply because facts relating to federal, state, and local government responses are still being gathered, and compilations have not, for the most part, yet been publicly released.

However, the State of Louisiana has compiled timelines of actions taken by that state in the days leading up to, and following, Hurricane Katrina's landfall, and it has publicly released these timelines in conjunction with ongoing Congressional investigations.<sup>35</sup> These timelines, combined with Congressional testimony of federal, state, and local government officials, and our review of Louisiana emergency management statutes and publicly-available plans, procedures, and protocols, allow certain heavily-reported aspects of the Louisiana response to Hurricane Katrina to be placed in context, and thus can offer some launching points for suggesting how to examine whether that State's, and any state's, authorities are sufficient to respond to a disaster of this magnitude.

One example is the question of evacuation. Could Louisiana Governor Blanco have ordered a mandatory evacuation of Orleans Parish prior to Mayor Ray Nagin's evacuation order on Sunday, August 28, 2005, and was the decision not to do so due to a lack of authority?

The Louisiana Homeland Security and Emergency Assistance and Disaster Act ("Louisiana Disaster Act"),<sup>36</sup> empowers the governor to address emergencies and disasters, including those caused by flood or other natural disasters such as hurricanes. On Friday, August 26, 2005 – three days before landfall of Hurricane Katrina and while there was still considerable uncertainty as to where Katrina would hit – Governor Blanco declared a state of emergency.<sup>37</sup>

The Louisiana Disaster Act specifically empowers the Governor, upon the declaration of an emergency or disaster, to "[d]irect and compel the evacuation of all or part of the population from any stricken or threatened area within the state if he [or she] deems this action necessary for the preservation of life or other disaster mitigation,

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<sup>35</sup> See Louisiana Office of the Governor, "Response to U.S. Senate Committee on Homeland Security and Governmental Affairs Document and Information Request dated October 7, 2005 and to the U.S. House of Representatives Select Committee to Investigate the Preparation for the Response to Hurricane Katrina," submitted December 2, 2005, *available at* <http://www.gov.state.la.us/assets/docs/PDFs/Gov.response.12.2.05.pdf> [hereinafter "Governor's Response"]; Louisiana Office of Homeland Security & Emergency Preparedness, "Response to U.S. Senate Committee on Homeland Security and Governmental Affairs Document and Information Request dated October 7, 2005 and to the U.S. House of Representatives Select Committee to Investigate the Preparation for the Response to Hurricane Katrina," submitted December 2, 2005, *available at* <http://www.gov.state.la.us/assets/docs/PDFs/LOHSEPRresponse122005.pdf>.

<sup>36</sup> LA. REV. STAT. §§ 29:721 *et seq.*

<sup>37</sup> Proclamation No. 48 KBB 2005, "Declaring a State of Emergency" (Aug. 26, 2005), *available at* <http://gov.louisiana.gov/assets/docs/Proclamations/48pro2005-Emergency-HurricaneKatrina.pdf>.

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response, or recovery.”<sup>38</sup> Thus, the Louisiana Disaster Act clearly authorizes the Governor to order a mandatory evacuation of any parish.

However, the Southeast Louisiana Hurricane Evacuation and Sheltering Plan (“Evacuation Plan”) states that each parish, and not the state, will determine whether to issue a voluntary or mandatory evacuation order with respect to that parish.<sup>39</sup> The Evacuation Plan has three phases: Precautionary/Voluntary; Recommended; and Mandatory.<sup>40</sup> During these phases, the “Risk Area Parish” declares a state of emergency, marshals transportation resources, implements public transportation plans, coordinates evacuation orders with the state and other Risk Area Parishes, and instructs people to evacuate. The state plays only a supporting and consulting role, aside from the implementation of the contra-flow plan.<sup>41</sup>

The Louisiana State Police initiated contra-flow on interstate highways running up from coastal Louisiana beginning on Saturday, August 27, 2005.<sup>42</sup> However, the Governor did not order a mandatory evacuation of Orleans Parish at that time. The Evacuation Plan contemplates that the state “prepare proclamations for the State to intervene in local situations if local government fails to act.”<sup>43</sup> There is no indication in the official timelines of the State of Louisiana, however, that the State sought to override any parish’s judgment as to whether or when to order a mandatory evacuation.<sup>44</sup>

It cannot be known whether the Governor’s action to order the *mandatory* evacuation of a parish prior to the parish government ordering such an evacuation would have resulted in a more complete evacuation, given the structure of the Evacuation Plan and the questions that existed until the last minute concerning the ultimate path of the hurricane. It is clear, however, that the Governor possessed the authority to order such an evacuation, although the state apparently chose, in making that authority operational in the form of the Evacuation Plan, to delegate that authority to local units of government (in this case, the parishes) without specifying the degree to which the State retained that authority, and criteria under which the State would exercise that retained authority.

A related example relates to the use of buses for evacuation. Aerial footage of floodwaters covering dozens of inoperative yellow school buses was shown repeatedly on news channels. Could the State or parish governments have forcibly commandeered these and other buses (and drivers) prior to the hurricane’s landfall to help in evacuating residents who lacked other means of transportation to use for evacuation, and was the decision not to do so due to a lack of authority?

The Louisiana Disaster Act gives the Governor authority, under a declaration of emergency or disaster, to “[u]tilize all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster or

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<sup>38</sup> LA. REV. STAT. § 29.724(D)(5).

<sup>39</sup> State of Louisiana Emergency Operations Plan Supplement 1A, Southeast Louisiana Hurricane Evacuation and Sheltering Plan (rev. Jan. 2000), *available at* <http://www.ohsep.louisiana.gov/plans/EOPSupplement1a.pdf> [hereinafter “Evacuation Plan”].

<sup>40</sup> Evacuation Plan, § I(C)(2).

<sup>41</sup> Evacuation Plan, § III(B)(1)-(3).

<sup>42</sup> Governor’s Response, at 2.

<sup>43</sup> Evacuation Plan, § III(B)(1)(c)(11).

<sup>44</sup> Governor’s Response, at 2-6.

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emergency”; to “[t]ransfer the direction, personnel, or functions of state departments and agencies or units thereof for the purpose of performing or facilitating emergency services”; and to “commandeer or utilize any private property if he [or she] finds this necessary to cope with the disaster or emergency.”<sup>45</sup> The Act gives parish presidents the same authority with respect to instruments of parish government and private property.<sup>46</sup> Thus, both the State and parish governments had expressed authority to commandeer buses and drivers.

The Evacuation Plan states, as one of its operative assumptions, that “[s]chool and municipal buses, government-owned vehicles and vehicles provided by volunteer agencies may be used to provide transportation for individuals who lack transportation and require assistance in evacuating.”<sup>47</sup> It also assumes that “[m]anpower and equipment of the political subdivisions will be exhausted and outside support will be needed.”<sup>48</sup>

During the Precautionary/Voluntary Evacuation phase, the Risk Area Parish is responsible for alerting all emergency workers in the jurisdiction, reviewing evacuation procedures, making contact with “special facilities,” and advising them to be ready to evacuate, marshalling local transportation resources, and implementing public transportation plans. The state is responsible for placing its departments and agencies on alert, calling nursing homes to ensure they are prepared to evacuate their residents, alerting DHS/FEMA that the state may need assistance, and preparing any required proclamations to make state resources available to support parish activities.<sup>49</sup>

During the Recommended Evacuation phase, the Risk Area Parish is responsible for mobilizing parish and local transportation and announcing the location of staging areas for persons who need transportation. The state is responsible for mobilizing state transportation resources to support parish activities and mobilizing state evacuation route traffic control personnel and equipment.<sup>50</sup> Finally, during the Mandatory Evacuation phase, the Risk Area Parish is responsible for mobilizing transportation resources and requesting assistance from the state, as needed. The state is responsible for coordination with and support of the parish in these activities.<sup>51</sup> Thus, in making operational the expressed state and parish authority these plans contemplate commandeering buses and drivers, if necessary, in support of evacuation efforts.

The timelines provided by the State of Louisiana make no mention of state authority being exercised to commandeer either school district or private resources, or to reassign or direct state employees holding appropriate driving credentials in the hours and days prior to landfall. It was not until August 31, 2005 that the Governor issued an Executive Order requiring each school district in Louisiana to make its school buses

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<sup>45</sup> LA. REV. STAT. § 29:724(D)(2)-(4).

<sup>46</sup> LA. REV. STAT. § 29:727(F)(2)-(4).

<sup>47</sup> Evacuation Plan, § II(B)(5).

<sup>48</sup> *Id.*, § II(B)(10).

<sup>49</sup> *Id.*, § III(B)(1).

<sup>50</sup> *Id.*, § III(B)(2).

<sup>51</sup> *Id.*, § III(B)(3).

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available to the Louisiana Office of Homeland Security and Emergency Preparedness, and authorized that office to commandeer those buses.<sup>52</sup>

It is beyond the scope of this Subcommittee's work to evaluate the operational effectiveness of the State's actions, or those of the parishes, with respect to evacuation, utilization of transportation resources, or any other such issue. Instead, these examples are raised to demonstrate the differences between the *expression and clarity* of authority – *i.e.* in the Louisiana Disaster Act; the *implementation* of that authority – *e.g.* in the Evacuation Plan; the actual *exercise* of the authority – *e.g.* through Executive Order; and, the appropriateness of *delegation* of that authority – *i.e.* the choice whether to place responsibility for executing authority at the state or local parish level, and whether and to what extent to reserve authority to the state that might otherwise be delegated to local units of government.

In the crucible of a catastrophic incident response, it is very difficult, and indeed often inadvisable, to reverse the ways in which authority was previously implemented and delegated in plans, procedures, and protocols, since such reversal in the midst of crisis response can result in operational chaos. Failure to exercise authority as set forth in plans, procedures, and protocols can result in confusion and paralysis of decision-making. Thus, the time to ensure the adequacy of implementation of authority and its delegation, and the comprehension of such authority and its implementation by state and local government decision-makers, is *prior* to the onset of such an event, during a jurisdiction's efforts to prepare for catastrophic incident response.

To this end, state and local government officials bear the responsibility for understanding the scope and limitations on their authority, and for devising effective plans, procedures, and protocols that make that authority operational and facilitate its exercise during incident response. The federal government has assumed responsibility for reviewing state plans and procedures for the exercise of authority during required annual reviews, as well as during regional and national TOPOFF exercises, as a condition of providing federal preparedness grant funding. As part of these preparedness efforts, all levels of government must ensure an adequate level of education concerning legal authority for elected officials, emergency managers, government, and affected private attorneys.

### Questions Raised

The American Bar Association Section on State and Local Government Law, through its Subcommittee on Homeland Security and Emergency Management, has prepared a *Checklist for State and Local Government Attorneys to Prepare for Possible*

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<sup>52</sup> See Executive Order No. KBB 2005-31, "Emergency Evacuation by Buses" (Aug. 31, 2005), available at <http://gov.louisiana.gov/assets/docs/31execEmergencyEvacuationbyBuses.pdf>. Governor Blanco supplemented this order on September 2, 2005. See Executive Order No. KBB 2005-25, "Emergency Evacuation by Buses" (Sept. 2, 2005), available at <http://gov.louisiana.gov/assets/docs/25EmergencyEvacuationbyBuses-ReplacmentEO.pdf>.

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*Disasters*.<sup>53</sup> The *Checklist* provides a detailed guide for state and local governments to assess, catalogue, and implement their applicable legal authorities in order to prepare for and respond to catastrophic incidents. Some of the questions, set forth in the *Checklist*, relevant to these issues include:

- Who is in charge during a disaster – the elected official of a jurisdiction, the local governing body or board, or a previously-appointed emergency services or emergency management official?
- Must there be a declaration of an emergency before the person(s) with authority can act? Who has the authority to make such a declaration? What else must be done in order for disaster response laws to become effective?
- Who determines what circumstances require evacuation of a civilian population? What grounds for evacuation are required? What legal requirements exist with respect to reentry of the population?
- What is the relationship between the state and its local jurisdictions? Are there regional governance or coordination structures that have authority independent of the state or local jurisdictions? How much authority do local governments possess independent of the state, if any?
- What issues of succession of governmental officials may arise in emergency situations that could have implications for governments taking action, for instance, to declare an emergency?

This Subcommittee suggests that all state and local government entities, their legal counsel, as well as public officials, review the *Checklist* and take the steps recommended therein to prepare for catastrophic incidents that may occur within their jurisdictions. Moreover, this Subcommittee recommends that each of these questions, and indeed each of the many questions regarding legal authority set forth in the *Checklist*, be evaluated in light of the four issues raised herein: adequacy of *expression or clarity* of authority; how that authority has been *implemented* through plans, procedures, and protocols; how the authority is to be *executed*; and the extent that *delegation* of such authority is appropriate. Finally, this Subcommittee recommends that all levels of government ensure the effectiveness of the authority possessed through education, exercises designed to test the execution of that authority, robust reviews of state plans, procedures, and protocols by the federal, state, and local government, and evaluation of the actual execution of that authority during local, state, regional, and national exercises.

### Issues for Further Study

The Subcommittee recommends that further study be conducted concerning the following issues.

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<sup>53</sup> AMERICAN BAR ASSOCIATION, STATE AND LOCAL GOVERNMENT LAW SECTION, CHECKLIST FOR STATE AND LOCAL GOVERNMENT ATTORNEYS TO PREPARE FOR POSSIBLE DISASTERS (Apr. 6, 2005), available at <http://www.abanet.org/statelocal/checklist406.pdf> [hereinafter “*Checklist*”].

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1. Do states and local jurisdictions clearly understand the scope and depth of their legal authority to respond to catastrophic incidents? Has that authority been sufficiently expressed or clarified through statutes, executive orders, and other documentation? How can the federal government play a stronger role in helping to educate states and local governments as to the scope and depth of emergency response authority, and ensure it is adequately clarified?
2. Have states adequately made operational the legal authority they possess, through plans, processes, and protocols for responding to catastrophic events? Have the states adequately evaluated the effectiveness of that authority through exercises designed to test the actual execution of authority during a catastrophic incident? How can the federal government play a stronger role in enforcing this requirement on state and local governments?
3. Have states properly delegated authorities to local units of government to respond to catastrophic incidents? Are such delegations appropriate and sufficient to permit timely action by local units of government? Are such delegations adequately related to potential circumstances that may arise, so as not to impede the state from appropriately exercising its authority, on its own, if necessary?
4. Do state and local government elected officials have the necessary understanding of disaster and emergency authorities, plans, processes, and protocols? Can the federal government play a stronger role in ensuring that education of elected officials concerning emergency and disaster response authorities is a required element of catastrophic incident preparedness?
5. Do state and local government attorneys and affected private attorneys as well (such as those representing private operators of critical infrastructure) have the necessary understanding of disaster and emergency authorities, and the best practices for making operational those authorities through plans, procedures, and protocols? How can the federal government play a stronger role in ensuring that education of state and local government as well as private sector attorneys for critical infrastructure includes training on the use of clearly expressed authorities, and the evaluation of plans, procedures, and protocols for executing authority through exercises and audits?
6. In order to ensure a proper level of understanding of legal authorities concerning catastrophic incident response, and the ability to effectively execute those authorities, should homeland security, emergency management, and emergency services positions at the state and local government level be restricted to professionals who meet certain standards for training and expertise? What frequency and quality of education of these actors occur and how should it be mandated and enforced?
7. Significant attention has been given to federal, state, and local authorities. Many metropolitan areas, either on their own or due to federal encouragement through preparedness grant funding guidance, have created

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regional preparedness and response structures. Is there a need for additional interstate regional preparedness and response authority? How should the boundaries of such regions be determined, and how should the exercise of authority be coordinated among each level of government that is included in such regions? Could a regional preparedness and response structure more effectively ensure adequate implementation, execution, delegation, and comprehension of emergency response authorities by all levels of government?

# **Posse Comitatus and the Military's Role in Disaster Relief**

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## **Conclusions**

**T**here are currently adequate laws and structures in place to facilitate the use of the military in relief efforts in the event of a major catastrophe of whatever kind. *Posse comitatus* plays a key role in delineating exactly under what circumstances the military *may* and *may not* be used for the explicit purpose of enforcing domestic law. Decision makers within the federal, state, and local governments and the federal military (as well as the National Guard) need to understand exactly what is allowed and what is not allowed under various conditions. Steps should be taken to ensure that rules for using the military are clearly understood by all levels of leadership.

## **Observations**

Under the *Posse Comitatus* Act,<sup>54</sup> the Army and Air Force may not be used to enforce domestic law. *Posse comitatus* restrictions have been extended to include the Marines and the Navy.<sup>55</sup> The Act has also been interpreted to apply to the National Guard when federalized (*i.e.* placed into chapter 10 status). However, far from being simply an absolute prohibition, *posse comitatus* additionally delineates under what circumstances the armed forces *may* be used for domestic law enforcement.

Therefore, as a statute, the *Posse Comitatus* Act is just as much empowering as prohibitory. The rather broad conditions under which it empowers the armed forces to enforce domestic law are “*under circumstances expressly authorized by the Constitution or Act of Congress.*”<sup>56</sup> A good example of such authorization is the Coast Guard. Although a member of the U.S. Armed Forces, the Coast Guard does not fall under *posse comitatus* because Congress has, through statute, empowered it to enforce domestic law.<sup>57</sup>

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<sup>54</sup> 18 U.S.C. §1385

<sup>55</sup> 10 U.S.C. §375

<sup>56</sup> 18 U.S.C. §1385

<sup>57</sup> See 14 U.S.C. §89.

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Through the years, Congress has enacted other legislation aimed at allowing the military into domestic law enforcement under certain circumstances. Broadly speaking, these statutes have tended to involve insurrection or threat to the U.S. from external enemies. The prime example is the “Insurrection Act.”<sup>58</sup> Under that Act, in times of civil disturbance or uprising in which “the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings”<sup>59</sup> the military is authorized to enforce domestic law as long as the President has first issued an order to disperse peaceably and return home. Because law enforcement is now authorized, this provides an exception to *posse comitatus*.

Similarly Congress has enacted statutes empowering the military to play a role in interdicting drug flows,<sup>60</sup> illegal immigration information sharing,<sup>61</sup> and the handling of chemical, biological and nuclear weapons/materiel.<sup>62</sup> It must be clearly understood, however, that these latter “exceptions” are not really exceptions to *posse comitatus*. While they create a role for the military in domestic law enforcement operations, that role is still circumscribed and limited to “passive,” as opposed to “active” law enforcement duties. For example, law enforcement authorities may cooperate with military personnel in surveillance operations (thereby making use of the sophisticated training and equipment available to the military), but any actual arrest must be made exclusively by non-military law enforcement personnel.<sup>63</sup> So while the military is brought in to assist domestic law enforcement, it is still remaining passive and therefore technically not enforcing domestic law. *Posse comitatus* in those circumstances still constitutes a restraint.

The Stafford Act envisions use of all resources of the federal government – including military resources – in catastrophic incident response, but it does not override prohibitions on agency activities such as those imposed by *posse comitatus*. Thus, the Stafford Act states that the President can “direct *any* federal agency” – including a military agency – “with or without reimbursement, to utilize *its* authorities and resources” to save lives and protect property and the public health and safety. Since the military does not have authority to enforce domestic law (except where other exceptions apply), it is given no authority to do so by the Stafford Act. While the Stafford Act<sup>64</sup> is occasionally cited as an exception to *posse comitatus*, it is not an exception and does not empower the military to enforce domestic law. Rather, it merely allows the President to use the authorities and resources of the Department of Defense in emergency response efforts. Indeed, Congress viewed the role of the military as so important that it

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<sup>58</sup> 10 U.S.C. §§331-334

<sup>59</sup> 10 U.S.C. §332.

<sup>60</sup> See, e.g. 10 U.S.C. §381.

<sup>61</sup> See, e.g., 10 U.S.C. §371.

<sup>62</sup> 10 U.S.C. §382 and 18 U.S.C. §831, respectively.

<sup>63</sup> See, Trebilcock, Maj. Craig T., USAR, “The Myth of Posse Comitatus,” *Journal of Homeland Security*, (October, 2000).

<sup>64</sup> 42 U.S.C. §5121 *et seq.*

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authorized use of the military for short-term disaster relief (10 days) even before a Stafford Act declaration is issued – although a request from a governor is still required.<sup>65</sup>

In regards to quarantine, generally state health officials have primary quarantine authority, while the federal government has authority over interstate and international quarantine. Although quarantine can affect interstate commerce, courts have ruled that its health component overrules and allocates quarantine to the police power of the state.<sup>66</sup>

The Secretary of Health and Human Services (HHS) has primary responsibility for preventing the introduction, transmission, and spread of communicable diseases from foreign countries into the United States and within the United States and its territories/possessions.<sup>67</sup> HHS then delegates to the Centers for Disease Control and Prevention (CDC) the authority to detain, medically examine, or conditionally release individuals reasonably believed to be carrying a communicable disease which have been delineated by the President through an Executive Order.

If the Director of the CDC determines that steps taken towards quarantine by state and/or local official are inadequate, “he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.”<sup>68</sup>

Enforcement of public health laws such as quarantine orders is so important that there is an express provision allowing use of the military for this purpose:

42 U.S.C. § 97. State health laws observed by United States officers

The quarantines and other restraints established by the health laws of any state, respecting any vessels arriving in, or bound to, any port or district thereof, shall be duly observed . . . by the military officers commanding in any fort or station upon the seacoast; and all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws, according to their respective powers and within their respective precincts, and as they shall be directed, from time to time, by the Secretary of Health and Human Services.

And if this provision did not apply, and a pandemic created a situation in which domestic law cannot be enforced, the Insurrection Act could be used to authorize quarantine enforcement by the military.<sup>69</sup>

The National Guard is sometimes subject to *posse comitatus*, sometimes not. While operating under state jurisdiction (chapter 32 status), it is not subject to *posse comitatus*. However, once federalized (chapter 10 status), *posse comitatus* applies. As long as a state's National Guard remains under state control, it can act to enforce

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<sup>65</sup> 42 USC §5170(c)(1).

<sup>66</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*, 186 U.S. 380 (1902).

<sup>67</sup> 42 USC §264 ( §361 of the Public Health Service Act).

<sup>68</sup> 42 CFR § 70.2.

<sup>69</sup> Elsea, Jennifer and Kathleen Swendiman, CRS Report for Congress, *Federal and State Quarantine and Isolation Authority*, pp. 22-23, December 12, 2005.

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domestic law, and often does so in times of catastrophe. Retaining this power can be part of the motivation behind a governor's refusal to request federalization.

### Commentary

The general thrust of *posse comitatus* and its surrounding statutes is that the military should only be used as domestic law enforcers in the event of some sort of insurrection, uprising or invasion (Insurrection Act). One can argue that this is parallel to the military's chief mission of protecting the country from external threat. Statutes such as the Stafford Act wherein the military is empowered to play a role, but still prohibited from enforcing domestic law, do not affect *posse comitatus* standing. The question is whether or not lawless activity following a catastrophe such as Katrina can be defined as rising to the level of insurrection, even if the activity is aimed not at insurrection *per se*, but rather generalized looting and lawlessness.

It would seem that the federal government did not see the activity surrounding Katrina as rising to the level of insurrection because it did not invoke the Insurrection Act. However upon closer look, it appears that political considerations more than technical legal considerations may have carried the day. In a September 9, 2005 article in the *New York Times*, it was reported that President Bush's advisors had debated whether or not to invoke the Insurrection Act to speed federal intervention and more quickly stop lawless behavior. However the Administration became wary of the reaction to President Bush overriding a southern Democratic governor.

A senior Administration official was quoted in the article as saying, “[c]an you imagine how it would have been perceived if a president of the United States of one party had preemptively taken from the female governor of another party the command and control of her forces, *unless the security situation made it completely clear that she was unable to effectively execute her command authority and that lawlessness was the inevitable result?*”<sup>70</sup> The clear message here is that the necessary legal authority existed through the Insurrection Act (the italicized language very strongly reflects the language of the Act); the concern was the politics of the specific situation.

Had the political situation been perceived differently, the federal government could have intervened under the authority of the Insurrection Act. Such an invocation would have suspended *posse comitatus* and allowed the military to act as law enforcement officers to restrict the looting and general lawlessness. No additional legislation or statutes would have been needed – simply an appropriate usage of the legal authority already in place.

Under the Stafford Act, and appropriate to the federalism construct of the U.S., disaster relief remains under the purview of the state governor. The President may act directly if the event transpires on federally controlled land, such as the Oklahoma City bombing, but otherwise requires a request from the governor in order to send federal support. In the case of Hurricane Katrina, a request was sent by Governor Blanco on August 27 to receive federal assistance. That request did not include a request that the

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<sup>70</sup> Lipton, Eric, Eric Schmitt and Thom Shanker, “Storm and Crisis: Military Response; Political Issues Snarled Plans For Troop Aid,” *New York Times*, September 9, 2005, section A, page 1, column 5, (*Italics added*).

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Louisiana National Guard change to chapter 10 status. Other than by request from the governor, federalization may only occur by Congress if it determines “that more units and organizations are needed for the national security,”<sup>71</sup> or by the President if needed to repel invasion or put down insurrection.<sup>72</sup> Governor Blanco came under a lot of pressure to make the request, but ultimately decided to retain state control, informing the White House minutes before a news conference at which the President had hoped to announce the federalization of the National Guard by its switch to chapter 10 status.

Retaining the state National Guard under state control is important for maintaining critical resources for the governor. By keeping the National Guard under state control, it can continue to play a role in domestic law enforcement. By switching to chapter 10 status, the National Guard can no longer play this role since the *posse comitatus* provisions become applicable, leaving law enforcement solely to state and local police officers. If the state had been previously relying upon National Guard units for this function, federalizing it can create a serious vacuum.

When the National Guard remains in chapter 32 status and federal troops also aid in disaster relief, a shared command structure is created. In the case of Hurricane Katrina, Louisiana's Adjutant General, Maj. Gen. Bennett Landreneau and the commander of Joint Task Force Katrina, Lt. Gen. Russel Honore, shared command. This essentially means that they kept control of their respective forces and coordinated their efforts. The White House had proposed creating a dual-reporting structure. In this unusual scenario, the Louisiana National Guard would have been federalized (thus putting all operations under Lt. Gen. Honore's control), but Lt. Gen. Honore would have reported to both Governor Blanco and the President. The Governor rejected this proposal for fear of losing control of the Guard and undermining the efforts of Maj. Gen. Bennett Landreneau.<sup>73</sup>

In a major disaster, the military can play an important role by bringing to bear equipment, training, and expertise vital to rapid and efficient relief efforts. But these skills are not law enforcement. They include providing shelter, clearing debris, providing rescue operations, and other physical operations requiring sophisticated logistical coordination and execution. Regardless of *posse comitatus*, the military can and should perform this role. *Posse comitatus* is simply not relevant to these functions. Where it does become critical is law enforcement.

The military can not, and should not be asked to function as a domestic law enforcement entity. The Department of Defense (DoD) is amongst the most vocal supporters of this position. To begin with, DoD sees its mission as war fighting. Redirecting resources to domestic operations can serve to weaken the military's war fighting capability. Therefore relief undertakings should be quick and limited to the immediate needs that the equipment and training of the military can fulfill. Furthermore, training appropriate to war zones, *e.g.* rules of engagement, are not going to be appropriate in a disaster situation. Mixed training or training some units in non-war

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<sup>71</sup> 10 U.S.C. 1003, §10103.

<sup>72</sup> 10 U.S.C. 1211 §12406.

<sup>73</sup> Moller, Jan and Robert Travis Scott, *Governor, White House detail response*, “Times-Picayune,” (September 8, 2005).

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fighting scenarios can again take away from the overall preparedness of the military for its primary mission.

In the event of a direct terrorist attack on the United States, the military would most likely be called upon to play a role, particularly if chemical, biological, radiological, or nuclear weapons were used. In regards to *posse comitatus*, this is a situation in which the government would likely waive the statute. Whether it would fall under the Insurrection Act specifically, or perhaps fall under the inherent power of the government to repel attack or invasion, it would constitute a situation in which the government would suspend *posse comitatus*.

In 2002, Congress reiterated its support of *posse comitatus*.<sup>74</sup> This concept is an important part of the civilian-controlled military that is central to the form of government and government-military relations of a functioning democracy. *Posse comitatus* does not impede the military from performing important functions in the assistance of state and local officials in the event of a major catastrophe. The only function prohibited is that of domestic law enforcement. Yet this function can be carried out by state National Guard units if state and local police are overwhelmed. It is therefore important for the governor to retain the National Guard in its chapter 32 status. It is also important for local and state police, as well as first responders, to communicate well with invited military units so that the muscle and might of the military can be efficiently and helpfully applied. This is the best role for the military and one which requires no new legislation. It does require that all relevant leaders understand the roles they are to play, what they may and may not do, and with whom they need to be communicating.

### Questions Raised

The question remaining is whether the current legal authority is believed to be adequate. *Posse comitatus* does not in any way hinder the military from applying the kind of specialized expertise and equipment it can provide for catastrophic events. All it does is prohibit military personnel from enforcing domestic law, a function which can be carried out by local and state police as well as the National Guard as long as it remains under state control. Should the situation further deteriorate into lawlessness, the Insurrection Act is available to empower a vibrant military role in re-establishing order, including through domestic law enforcement.

It would seem that rather than enacting new legal structures or eliminating the concept inherent in *posse comitatus*, it would make more sense to more fully and efficiently make use of the legal authorities that are already in place. Establishing clear lines of communication and confirming that leadership understands the roles and limitations of key players can ensure that resources are best applied in disaster situations.

An important concept in the American democratic system is that of the ultimate control of military power resting in civilian hands. With the Stafford Act, and subject to *posse comitatus*, that structure is retained without sacrificing the capabilities held by the military that can be of great assistance in a catastrophe. It is appropriate for those skills,

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<sup>74</sup> See, 6 USC §466

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funded by U.S. taxpayers, to be used in a time of great need by the citizens of this country.

### **Issues for Further Study**

I. Should the Insurrection Act be revisited? Because it is the most prominent true exception to *posse comitatus*, consideration could be given to broaden its application. Three possibilities regarding such a proposal include:

- a. Rename the Insurrection Act, but leave it unchanged. This possibility assumes that the current language of the Insurrection Act sufficiently empowers the military to enforce domestic law in a fairly broad set of circumstances (whenever “the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings”)<sup>75</sup>, but that the political implications of declaring the loss of civil order an “insurrection” creates an artificial impediment to the exercise of these authorities. Because this word conjures up specific images of attempts to overthrow the government, it may drive leaders to be overly cautious in invoking it, for fear of being accused of overreaching. The reports suggest that this may have been the case with the Administration during Katrina.

This potential problem could be addressed by simply renaming the provision. Perhaps the Insurrection Act could be renamed as the Domestic Disaster Relief Act or Major Disaster Assistance Act, for example. Alternatively, perhaps the proposed title could be combined with its current one. “Insurrection” could remain within the title: *e.g.* the Domestic Disaster Relief and Insurrection Act. The idea is to limit any political stigma from the name and thus empower leadership to look solely to the circumstances of the disaster for guidance as to whether or not to turn to this authority.

- b. Change the language of the statute and rename. Perhaps it is appropriate to more explicitly state the circumstances which entail “unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings.”<sup>76</sup> Instances of looting and other lawless behavior in the aftermath of a major catastrophe perhaps should be explicitly cited as grounds for invoking this Act in order to empower the military to temporarily enforce domestic law until civilian authorities can recover. Perhaps a clause could be added pointing to a situation in which an

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<sup>75</sup> 10 U.S.C. §332

<sup>76</sup> 10 U.S.C. §332.

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extreme disaster may have eliminated local and state authority. Adding language regarding a possible role for the military in enforcing a quarantine might also help to clarify its current authority and make clear its authority in this regard.

There is precedent for this in the Immediate Response Authority, a DoD doctrine which allows commanders to provide resources and assistance to civil authorities without or prior to a declaration under the Stafford Act when a disaster overwhelms the capabilities of local authorities and necessitates immediate action. The immediate response authority may also include law enforcement activities that would ordinarily be prohibited by *posse comitatus*. The controlling directive does not require a request from state or local officials, but rather states that

DoD Components shall not perform any function of civil government unless absolutely necessary on a temporary basis under conditions of Immediate Response. Any commander who is directed, or undertakes, to perform such functions shall facilitate the reestablishment of civil responsibility at the earliest time possible.<sup>77</sup>

The immediate response authority is not provided for in any statute, but is said to have deep historical roots. The 1906 San Francisco earthquake and fire are noted examples. There, the commanding general of the Pacific Division, on his own initiative, deployed all troops at his disposal to assist civil authorities to stop looting, protect federal buildings, and to assist firefighters.<sup>78</sup>

- c. Leave the Insurrection Act as is. There is adequate language in the statute as is and only needs to be better understood and utilized when needed.

II. How can local authorities, first responders, and local/state police best communicate with the military on the ground? That is to say, if the military is to play a supporting role as outlined in the Stafford Act, what kinds of communication structures are needed to assure that the resources are applied as contemplated by existing authorities?

III. This paper has looked to the National Guard to play a key role in disaster relief by remaining in chapter 32 status. In the context of the Total Force Structure of the U.S. military, are National Guard units less able to undertake the kind of disaster relief activities required (such as law enforcement)? The fear is that through integration within the Total Force Structure, National Guard units will be less able to address state-specific needs; or those with specific needs may be located in another state, requiring the governor to reach an agreement with that state's governor to obtain the resources. Should state National Guard units be legally directed to prepare more thoroughly for potential

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<sup>77</sup> U.S. Dep't of Defense, Military Support to Civil Authorities, DoD Dir. 3025.1 § 4.4.10 (1993).

<sup>78</sup> Elsea, Jennifer, CRS Report for Congress, *The Use of Federal Troops for Disaster Assistance: Legal Issues*, pp. 5-6, September 16, 2005).

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state-specific scenarios? Will that undermine the larger U.S. military capability and the Total Force Structure?

IV. How do we balance the needs of the military for international response with respect to the global war on terrorism with the desire to use the military and its resources during national incidents? While the National Guard responded during Hurricane Katrina, many of the troops had either recently returned from Iraq/Afghanistan or were about to leave. There are ever pressing responsibilities placed on the military to respond to all incidents and additional exploration should consider the pressing and sometime conflicting demands placed on the military. Congressional guidance is needed to reexamine, and perhaps reconfigure, the delicate balance struck in law between the military's foreign and domestic roles.

# Private Sector Integration

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## Conclusions

The nation's response to Hurricane Katrina reinforces what many in industry have known since Hurricane Andrew: our legal framework for disaster response does not sufficiently account for private sector contributions or critical infrastructure services.

During and in the immediate aftermath of Hurricane Katrina, the private sector dedicated significant resources to response efforts, including goods, services, and logistics support. This support saved lives, protected property, and served the nation's interests in profound ways. However, the National Response Plan (NRP) – and, more importantly, the legal authorities that support execution of the plan, such as the Stafford Act<sup>79</sup> – neither fully permitted nor effectively encouraged and facilitated private sector involvement prior to, during, or after the storm ravaged the Gulf.

For that reason, Congress should amend the organic statutes that underpin catastrophic incident response. Immediate changes to law are needed for multiple reasons – to facilitate the private sector's own response to catastrophic disasters, to ensure coordination and cooperation between government and the private sector, and to support the government's response and restoration efforts.

Multiple government commissions and industry-led organizations have argued for these changes for over a decade.<sup>80</sup> Congress should expand these authorities to clearly and unmistakably apply outside of a Cold War context. Congress should require the federal government to integrate industry responders into catastrophic incident response, and facilitate immediate critical infrastructure restoration consistent with our legal and market traditions. Amendments should, at a minimum:

1. Update and clarify the scope of emergency response authorities to fully include the private sector, potentially to include consolidating and integrating existing private-sector authorities into a single emergency response framework;
2. Amend portions of the Stafford Act specifically to support critical infrastructure activities;
3. Expand the treatment of private sector emergency responders in the Homeland Security Act of 2002, including broadening the definition of “first responder” in the Homeland Security Act to include appropriate private sector responders;

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<sup>79</sup> The Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. §5121 *et seq.*, (“Stafford Act”)).

<sup>80</sup> See, e.g., *Major Federal Legislation, Legal Foundations Study, Report 6 of 12*, President's Commission on Critical Infrastructure Protection (PCCIP) (October 1997) (Congress would need to amend the disaster legislation, in particular the Stafford Act, to account for critical infrastructure response and restoration).

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4. Require the Department of Homeland Security to complete administrative guidance for authorities relating to the private sector, such as the use of the Defense Production Act; and
5. Authorize, require, and fund the federal government to develop a public trust and confidence program that includes private sector leaders.

### General Observations

#### Industry Is Not Fully Part of Formal Emergency Response Programs

Most citizens and government officials do not treat the private sector as part of the first responder community. Nor do most understand the importance of private sector support to enable the successful management of catastrophic disasters.

During the response to Katrina, professional emergency responders at all levels of government provided traditional emergency services, such as rescuing victims on rooftops and servicing sick and wounded at the Superdome. The private sector similarly delivered a range of essential services in the aftermath of the Katrina storm, both with respect to its own facilities as well as for the public good.

Moreover, certain areas of response require coordination between public and private sector responders. For example, the delivery of essential medical supplies by cargo and freight carriers, reconstitution of Internet services, and the restoration of fuel refining and distribution facilities are activities that are *not formally, explicitly, and clearly* part of the nation's statutory response framework, but which are essential for catastrophic incident response functions.

Governmental reviews and media reports have also revealed that federal departments and agencies, for the most part, did not trigger the extraordinary emergency authorities they already possess in order to facilitate industry restoration activities. Even though essential supplies that are traditionally provided by the private sector, such as power, fuel, and commercial pumps, were in short supply, government attorneys may have hesitated to trigger Congressional authorities fashioned for Cold War-era problems that could have been utilized.

The need for robust coordination of private sector support in response to a catastrophe has increased dramatically since the end of the Cold War. Over 20 years ago, for example, "Ma Bell" was the only telecommunications provider; therefore, treating AT&T as part of the government during response operations raised few problems. Today, there are hundreds of commercial communications providers, including Internet Service Providers that are not, and have never been part of, the government's formal response plans or the Emergency Support Functions (ESFs) that form the core of the NRP.

This is not to say that all of industry is excluded from formal NRP programs. In fact, the ESFs that form the core of the NRP (and most state plans) explicitly draw on industry participation. For example, NRP ESF 1 covers transportation infrastructure – and the government partners closely with the industry to coordinate repair of road, rail, and air infrastructure, as well as to provide transportation resources for supplies and equipment.

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However, a close examination of the ESFs, including those that cover Energy, Transportation, Resource Support, Cyber Response, and Public Affairs, reveal that only a small portion of the private sector is formally incorporated into those parts of the NRP that pertains to their industries.

Finally, private sector leaders were not formally included in public messaging campaigns by their public-sector counterparts or by government emergency managers. Federal, state, and local government officials provided essential information to the public on subjects such as evacuation, availability of supplies, and day-to-day developments. Here, too, the National Response Plan (NRP) and the statutory authorities that inform and direct that plan did not require governmental leaders to include industry Chief Executive Officers and others to communicate with the public and manage the public's trust and confidence.

### Three Areas of Private Sector Support that Merit Attention

A review of after-action reports, lessons learned, and public testimony from Katrina demonstrate that there are at least three distinct areas where treating industry as a co-equal partner in national response operation could have avoided, or at least mitigated, some of the biggest failures of the response. Our legal arsenal must be used to ensure that industry is treated as such a partner.

1. Immediate restoration of critical infrastructure services is essential to effective catastrophic incident response

First responders rely significantly on critical infrastructure services to effectuate emergency response. The lack of communications interoperability among first responders during Katrina was well-publicized.<sup>81</sup> But, there are other equally profound and relevant areas of the communications infrastructure – much of it owned by the private sector – that did not work during Katrina, and could have been more effectively restored to benefit first responders through stronger authorities mandating integration of the private sector into response operations.

For example, the communications industry activated its response plans well in advance of the storm's arrival, as part of NRP ESF 2 (Communications). The Chairman of the Federal Communications Commission (FCC) noted the importance of telecom services in his opening remarks to Congress on the impact of Katrina:

As a result of the communications breakdown, it was extremely difficult for hundreds of thousands of people to receive news and emergency information and to communicate with their loved ones. Emergency workers and public safety officials had difficulty coordinating. It

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<sup>81</sup> This fact has been recognized by the government: the Government Accountability Office found that “insufficient collaboration among federal, state, and local governments had created a challenge for sharing public health information and developing interoperable communications for first responders.” Government Accountability Office, Statement of Norman J. Rabkin, *Hurricane Katrina: Providing Oversight of the Nation's Preparedness, Response, and Recovery Activities*, September 28, 2005, page 8.

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was at times like these that we were reminded of the importance of being able to communicate. While no communications network could be expected to remain fully operational in the face of a direct hit from a category four or five hurricane, that fact was little consolation to the people on the ground.<sup>82</sup>

Communications is not the only area where lack of industry involvement hindered emergency response operations. The lack of electric power, for instance, also hampered first responders across the entire Gulf Region. Entergy, one of the largest electric power companies in Louisiana and Mississippi, announced outages that affected one million customers and immediately sent over 5,000 workers to restore service. Entergy's restoration plan initially focused on service to essential first responders like hospitals, police, fire, communications, water, sanitary, and transportation providers. Restoration, however, was hampered not only by flooding, but also by blocked access. This hindered emergency response operations given shortages of electricity in the weeks following Katrina.<sup>83</sup>

2. The lack of essential infrastructure services for citizens in the affected regions hampered federal, state, and local government plans and priorities.

During and in the immediate aftermath of the Katrina storm, citizens in the Gulf were forced to survive without critical infrastructure services and other private sector support. A lack of infrastructure services is not uncommon after a natural disaster. However, a catastrophe the size and scope of Katrina taxed our entire critical infrastructure at the same time. The following are examples of specific public needs relating to the private sector left unfulfilled during Katrina:

- **Fuels** - The federal government and local governments across the affected region recognized that fuel would need to be strategically positioned across the region for use by citizens until normal retail distribution could resume. However, the lack of formal and widespread industry involvement in response operations pushed the federal government to administer fuel relief plans on an ad-hoc basis.<sup>84</sup>
- **Health Care Services** – Hospital closures were well publicized during and well after Katrina hit the Gulf region. Some hospitals are publicly administered, but most hospitals are owned and operated by non-profit or for-profit entities. While coordination with, and assistance to, non-profit healthcare facilities is contemplated in the Stafford Act and most public

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<sup>82</sup> Federal Communications Website, reprinted at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-261418A1.pdf/](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261418A1.pdf/).

<sup>83</sup> Entergy News Release, [http://www.entergy.com/news\\_room/newsrelease.aspx?NR\\_ID=730](http://www.entergy.com/news_room/newsrelease.aspx?NR_ID=730), August 29, 2005, [http://www.entergy.com/news\\_room/newsrelease.aspx?NR\\_ID=749](http://www.entergy.com/news_room/newsrelease.aspx?NR_ID=749), September 10, 2005 [http://www.entergy-louisiana.com/news\\_room/newsrelease.aspx?NR\\_ID=729](http://www.entergy-louisiana.com/news_room/newsrelease.aspx?NR_ID=729), August 28, 2005.

<sup>84</sup> See, e.g., Office of Electricity Delivery and Energy Reliability, U.S. Department of Energy, *Gulf Coast Hurricanes Situation Report #1*, September 24, 2005.

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emergency plans, for-profit healthcare facilities are typically not included. Destruction of for-profit hospitals, however, prevented ongoing care to those already ill and injured and interfered with delivery of vaccines to those in afflicted areas. Private health care services were stymied by the same lack of communication, blocked physical access, and lack of security in areas of civil disorder as were public healthcare facilities, but were generally left out of governmental response efforts.

- **Supply Chain** – Today’s retail operations, including those in the grocery, hardware, and building supply industries, rely on increasingly advanced supply chain and logistics operations. However, the federal government’s focus on governmental first responder services, and piecemeal aid to transportation carriers and facilities thwarted the delivery of essential goods in the weeks following Hurricane Katrina. For example, the Department of Transportation (DOT) provided \$16 million dollars to damaged airports in Texas and Louisiana, but this initial offering of funds only arrived at the end of September, well over a month after Katrina hit, too late to assist in immediate restoration activities.<sup>85</sup> Several government-related restoration issues impeded rail companies from fixing their routes and running trains with food and water to afflicted areas.<sup>86</sup> Cargo-delivery services reported severe access control problems in affected areas as state and local officials refused to treat such providers as government-sanctioned first responders. The failure to authorize and require a national or regional access-control protocol forced companies to return their goods or to waste valuable time and energy negotiating with local law enforcement and response officials.
  - **Volunteer services** - Databases created by the National Voluntary Organizations Active in Disaster (National VOAD) provided the vehicle by which governments could have accessed donated goods and services for provision to the public, but the databases were often underdeveloped or could not be accessed for lack of Internet and telephone services.<sup>87</sup> Better legal authorities mandating information sharing and collaboration between government and voluntary services would directly benefit public delivery of donated goods and services.
3. Industry disaster recovery and continuity plans could not be effectively executed, undermining other aspects of the response.

Industry resilience, especially in critical infrastructure, is essential for effective response operations. For example, a lack of comprehensive planning with private sector

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<sup>85</sup> U.S. Department of Transportation Office of Public Affairs, *U.S. Department of Transportation Providing Over \$16 Million to Help Repair Hurricane Damaged Airports in Texas and Louisiana*, September 30, 2005. <http://www.dot.gov/affairs/dot14305.htm>.

<sup>86</sup> Union Pacific Railroad Press Release, *Hurricane Katrina Updates*, <http://www.uprr.com/customers/service/hurricanekatrina.shtml>.

<sup>87</sup> Government Accounting Office, *Hurricanes Katrina and Rita: Provision of Charitable Assistance*, December 13, 2005 pg. 8-9. <http://www.gao.gov/new.items/d06297t.pdf>

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fuel suppliers undermined evacuation strategies from New Orleans. While residents were told to evacuate, many of the private sector gas and fuel suppliers were unable to allocate supplies along major evacuation routes.

Hurricane Katrina forced the banking sector to undertake considerable actions to provide essential services during and after the storm. Regulators were forced to trigger statutory and administrative provisions that enabled banks to undertake extraordinary actions – necessary to prevent panic and offer the financial services that customers in Louisiana and Mississippi needed.<sup>88</sup>

Arguably poor integration of private sector contributions adversely affected our economic security at both state, local and federal levels. State and local governments were hardest hit. For example, Standard and Poor’s Rating Services (S&P) placed several state and local government ratings on CreditWatch. After three months of review, S&P took the following actions:

Name of Agency and Type of Debt	S&P Rating Before Katrina	S&P Rating After Katrina
New Orleans general obligation debt	BBB+	B
New Orleans limited-tax debt and pension debt	BBB	B-
New Orleans Sewerage & Water Board water debt and sewer debt	A	B
New Orleans Exhibition Hall Authority debt	A	B
Louisiana Stadium & Exposition District debt	A	B
St. Bernard Parish debt	A	B

Louisiana has worked hard to maintain financial balance following Hurricanes Katrina and Rita. The state reduced revenue expectations, cut spending, and is currently receiving aid from the federal government. In spite of these post-hurricane efforts, the ratings company Fitch placed the following state tax-supported bonds on Rating Negative Watch:

- State of Louisiana
- England District Sub-District No. 1
- Board of Commissioners of the Port of New Orleans
- Louisiana Public Facilities Authority

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<sup>88</sup> Financial Services Sector Coordinating Council for Critical Infrastructure Protection and Homeland Security, *FSSCC Reports Progress in Financial Services Sector Response to Customers Affected by Hurricane Katrina*, Press Release, Sept. 6, 2005.

## Private Sector Integration

### Commentary

Catastrophic incident response authorities that involve essential industry contributions are scattered across the United States Code and therefore suffer from inadequate integration.

Congress has not adopted a civil defense or emergency response framework to replace Cold War-era statutes that further the restoration of private sector infrastructure. Over 50 years ago, starting with adoption of the Defense Production Act of 1950 (DPA) and the Civil Defense Act (CDA),<sup>89</sup> Congress set in motion a statutory foundation for managing catastrophic incidents by involving industry as a responder or leveraging industry goods and services to mitigate the effects of a national emergency. In some cases, such as the DPA, Congress has updated and overhauled the law to account for economic and security developments, such as the growing importance of critical infrastructure to our national defense and emergency preparedness.

In other cases, such as the CDA (now Title VI of the Stafford Act), however, Congress has not updated key terms and legal triggers to account for homeland security or broader concepts of preparedness and response. As a result, the use of these terms and concepts in the NRP, and other federal government strategies, remains unclear. This provides no guidance to the federal government or to industry in understanding whether and to what extent an incident of national significance (such as Katrina) triggers requirements under these authorities.

At a minimum, as the chart below indicates, the federal government may draw on a wide choice of authority, but Congress has not linked these laws to permit an integrated and smooth response:

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<sup>89</sup> The President signed into law the Federal Civil Defense Act of 1950 (FCDA) (ch. 1228, 64 stat 1245 (1951) and it was codified at 50 USC appx. 2151 et seq. A modified portion of the statute remains in Title VI of the Stafford Act, 108 stat. 2599, 3100-11, PI 100-707.

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### *Examples of Federal Emergency Authorities*

Katrina Deficiency	Examples of Authorities
<b>Problems with power outages adversely affecting response</b>	The Federal Power Act permits the Department of Energy to order temporary interconnections of facilities and the generation and transmission of electric energy in an emergency situation. <sup>90</sup>
<b>Shortages of natural gas</b>	The Natural Gas Policy Act authorizes the federal government (Department of Energy) to “purchase of natural gas” and to “allocate supplies of natural gas” in interstate commerce, upon a finding by the President under section 301 of an existing or imminent “severe natural gas shortage, endangering the supply of natural gas for high-priority uses.” <sup>91</sup>
<b>Communications, including Internet Service Providers</b>	Section 606 of the Communications Act of 1934 is the principal authority for authorizing the federal government’s involvement in restoration of critical communication networks. The Communications Act is also the foundation authority for ESF #2. Finally, the authority is also essential for making available a rapid and efficient communications service for national defense, homeland security, and public safety.
<b>Shortages of Fuels, including Diesel and Gasoline; pre-positioning or prioritization of diesel supplies for the private sector</b>	Sections 151-181 authorize the Department of Energy to establish and operate the Strategic Petroleum Reserve (SPR). Section 161(d)(1) authorizes the President to order drawdown and distribution of the SPR upon a finding that drawdown is required by a “severe energy supply interruption.” <sup>92</sup>
<b>Port Reconstitution &amp; Supply Chain</b>	Magnuson Act (50 U.S.C. §191 <i>et seq.</i> ) authorizes the Secretary of Transportation to issue regulations governing the movement of any vessel within the U.S. territorial waters, upon a Presidential declaration of a national emergency by reasons of actual or threatened war, insurrection or invasion, or disturbance or threatened disturbance of the international relations of the United States.
<b>Health Care Services</b>	Public Health Service Act, Section 319 gives the Secretary of the Department of Health and Human Services (DHHS) the broad authority to take appropriate action to respond to public health emergencies, including those that may affect beneficiaries of DHHS programs.

<sup>90</sup> See 16 U.S.C. §791a *et seq.*; Section 202 (c); (16 U.S.C. §824a(c)).

<sup>91</sup> ((15 U.S.C. §3301 *et seq.*; 15 U.S.C. §§3361-3363).

<sup>92</sup> Section 3(8) of the EPCA

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Katrina Deficiency	Examples of Authorities
<p><b>Procurement/Donations from Industry – Statutory authority to accept and manage donations from industry to restore critical infrastructure or to house essential industry workers</b></p>	<p>Under the Property Act, the General Services Administration (GSA) has inherent authority to donate surplus personnel property to states and local governments and to enter into cooperative agreements with state agencies for the transfer of such property. 40 U.S.C. 484 (j), 48(n). This authority is implemented in 41 C.F.R. 101-44.2.<sup>93</sup></p>

The Stafford Act, our Nation’s principal disaster management statute, does not authorize broad industry participation or support.

The Stafford Act is our nation’s principal disaster management statute. As discussed in the sections above, the Stafford Act recognizes constitutional and historical divisions of responsibility between the federal government and the states. The federal government provides support and triggers involvement only where states are unable to manage events or require (and request) federal assistance with a disaster declaration. Specifically, the Stafford Act authorizes federal government assistance to states, to individuals, families, private non-profit organizations, and local governments in federally declared major natural disasters. The Stafford Act also contains authority for emergency assistance to states and local governments when a situation is of such severity and magnitude that effective response is beyond the capabilities of the state and the affected local governments.

The federal government created the NRP to execute the provisions of the Stafford Act and to manage a response to all-hazards catastrophes. The NRP “establishes the coordinating structures, processes, and protocols” to be activated in the instance of a national catastrophe.<sup>94</sup> The primary goal of the NRP is to mobilize and coordinate federal resources to “augment existing Federal, State, local, and tribal capabilities.”<sup>95</sup> This underlying purpose largely reflects the core theme in the Stafford Act,<sup>96</sup> namely –

To authorize programs and processes for the Federal government to provide disaster and emergency assistance to States, local governments, tribal nations, individuals, and qualified private non-profit organizations. The provisions of the Stafford Act cover all hazards, including natural

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<sup>93</sup> Under the Public Buildings Cooperative Use Act, 40 U.S.C. 490(a)(16) – (19), 601a, 612a, the Administrator may make available, on occasion, certain areas of public buildings for cultural, educational or recreational activities. See 41 C.F.R 101-20.4. The administrator may provide such space free of charge. 41 C.F.R 101-20.407. This authority might apply to allow certain private organizations, or possibly state and local governments, the use of Federal property if needed for the reconstitution efforts.

<sup>94</sup> Department of Homeland Security, *National Response Plan*, December 2004 at 5.

<sup>95</sup> Department of Homeland Security, *National Response Plan*, December 2004 at 5.

<sup>96</sup> 93 Pub. L. No. 388, 88 Stat. 143 (1974), codified at 42 USC §§ 5121-5206.

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disasters and terrorist events. Relevant provisions of the Stafford Act include a process for Governors to request Federal disaster and emergency assistance from the President. The President may declare a major disaster or emergency under specifically enumerated statutory conditions.<sup>97</sup>

Both the Stafford Act and the NRP treat the private sector as a voluntary partner, as opposed to an integral stakeholder with specific roles and responsibility, requiring assistance in priority restoration treatment, and providing special liability protections during catastrophic incident response. According to the NRP:

Private-sector organizations support the NRP (voluntarily or to comply with applicable laws and regulations) by sharing information with the government, identifying risks, performing vulnerability assessments, developing emergency response and business continuity plans, enhancing their overall readiness, implementing appropriate prevention and protection programs, and donating or otherwise providing goods and services through contractual arrangement or government purchases to assist in response to and recovery from an incident.<sup>98</sup>

There are legal experts who argue that the Stafford Act does, in fact, account for private sector needs and contributions. The protection of life and property, including the restoration of government assets, they argue, is the primary objective of federal authority, but the Stafford Act enumerates specific areas of support, including each of the following, which the President (via DHS/FEMA) may authorize:

- (A) debris removal;
- (B) search and rescue, emergency medical care, emergency mass care, emergency shelter, and provision of food, water, medicine, and other essential needs, including movement of supplies or persons;
- (C) clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services;
- (D) provision of temporary facilities for schools and other essential community services;
- (E) demolition of unsafe structures which endanger the public;
- (F) warning of further risks and hazards;

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<sup>97</sup> Department of Homeland Security, *National Response Plan*, December 2004 at 79 (citing to the Stafford Act).

<sup>98</sup> Department of Homeland Security, *National Response Plan*, December 2004, page 13. Private sector is defined as “Organizations and entities that are not part of any governmental structure. Includes for-profit and not-for-profit organizations, formal and informal structures, commerce and industry, private emergency response organizations, and private voluntary organizations.” Department of Homeland Security, *National Response Plan* at 71 (December 2004).

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- (G) dissemination of public information and assistance regarding health and safety measures;
- (H) provision of technical advice to State and local governments on disaster management and control; and
- (I) reduction of immediate threats to life, property, and public health and safety.<sup>99</sup>

At a minimum, these activities, while critical, do not include many services that industry responders required during Katrina, such as security support. Moreover, it seems likely that legal specialists will treat these enumerated areas as exclusive and not examples. Finally, even if the list were not exclusive, the Stafford Act is not a useful tool to funnel government support to for-profit entities – even if such support would help in response operations.

Homeland Security Act authorities, while more cognizant of the private sector, are still inadequate to ensure effective public-private coordination and cooperation.

The Homeland Security Act of 2002 created the Department of Homeland Security (DHS). DHS fuses border and transportation security, emergency preparedness and response, chemical, biological, radiological and nuclear countermeasures, and information analysis and infrastructure protection under one secretary to streamline homeland security initiatives. The new Preparedness Directorate is positioned well to manage and coordinate a range of private sector functions – such as development of the National Infrastructure Protection Plan (NIPP), which support execution of the NRP. As the recently issued NIPP Base Plan concludes, the structures and institutions that support successful implementation of the NIPP and incident management under the NRP “are one and the same.”<sup>100</sup>

However, the Homeland Security Act does not harness the power of the private sector for purposes of improving catastrophe response and restoration. For example, neither Section 430 nor Title V of the Homeland Security Act, the primary authorities for emergency preparedness and response, contemplate robust coordination between the public and private sectors for catastrophic incident response.<sup>101</sup> Similarly, the definition of the term “first responder” does not explicitly include the private sector.<sup>102</sup> While “first responder” status would not solve the problems of public-private coordination, it would provide necessary authority and direction to incorporate industry responders in plans, procedures, and protocols for emergency response, including necessary access to affected areas and facilities. Finally, the Homeland Security Act provides no liability protections

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<sup>99</sup> Section 502(a) of the Stafford Act, 42 USC §5170b(a)(3)(A)-(I).

<sup>100</sup> Refer to the DRAFT National Infrastructure Protection Plan (v.2.0) at page 14 (January 2006).

<sup>101</sup> 6 U.S.C. §§ 238. Section 430(c)(1) does contemplate that the Secretary coordinate preparedness efforts with private sector emergency response providers, but virtually all other preparedness authorities in that section speak only of governmental emergency response providers.

<sup>102</sup> Section 2(6) of the Homeland Security Act states “[t]he term ‘emergency response providers’ includes Federal, State, and local emergency public safety, law enforcement, emergency response, emergency medical (including hospital emergency facilities), and related personnel, agencies, and authorities.”

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for industry responders, nor a process to support industry responders with their responsibilities in performing immediate restoration of critical infrastructures.

### Questions Raised

1. To what extent should Congress expand statutory authorities to target and promote broad private sector involvement in emergency response operations; specifically, should Congress integrate authorities into a single civil defense or emergency response framework?

The federal government did not activate its extraordinary powers with respect to the private sector to alleviate suffering during Katrina operations. In many ways this is understandable: our statutory framework for catastrophic incident management lacks clarity, causes confusion, and ultimately left responders without invaluable tools to respond effectively. Therefore, Congress should examine and update these emergency authorities where needed. Amendments should expand legal definitions and triggers to apply to catastrophic disasters like Katrina. Authority to the federal government should be clear and unmistakable.

At a minimum, Congress should examine the following authorities:

- Federal Power Act
- Natural Gas Act
- Public Health Service Act
- Communications Act of 1934, as amended
- Economy Act

Congress should, in addition, consider *integrating* these powerful disaster management authorities into a single, civil defense or emergency response framework. Integration would not supersede the Stafford Act or in any way alter the deep and sophisticated compact between the federal government and the states for managing disasters, as defined by the Stafford Act. Rather, the purpose of integration would be to integrate the restoration of essential industry services and seamless involvement of industry responders after catastrophic incidents on a par with damages suffered from Katrina. Under these circumstances, Congress should de-link private-sector disaster management options from the Stafford Act to provide more flexibility for the federal government to invoke these authorities.

2. To what extent should the Stafford Act be amended to support critical industry activity?

As indicated in this report, the Stafford Act has never been a private sector-based statute – rather, the authorization is premised on legal principles that are not suited to provide broad industry support and involvement. While the Stafford Act may provide some assistance to industry, and it also may facilitate some coordination with industry, the focus of that law – including the flow of funds to the states to mitigate disasters –

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does not adequately assist private sector critical infrastructure in immediate restoration activities. Nor does the statute and a robust administrative framework implementing the law effectively mandate coordination and cooperation between government and industry. At a minimum, Congress should consider amendments to expand the Stafford Act for providing (1) security protection for industry responders and (2) controlled access to facilitate industry responders to work in and outside of a disaster zone.

The amendment on access control is especially relevant, although it is uncertain whether the Stafford Act or some other authority would be best suited for this legal recommendation. For over a decade, industry responders have pointed out impediments relating to access control.<sup>103</sup> During Katrina, multiple industry organizations were prevented from accessing a disaster site or traveling across the Gulf without having to pass through local and state roadblocks. What is needed is a single regional (or, preferably, national) process that recognizes organizations, given the large number of persons that would need access to control rights in each sector. In addition, while Homeland Security Presidential Directive 12 begins the process of standardizing technical aspects of this issue, ultimately what is needed are more strategic changes to law and policy to resolve the issue.

3. To what extent should Congress amend the Homeland Security Act to support critical industry activity during catastrophic incident response?

Congress should consider amending the Homeland Security Act to include much broader authority for coordination and cooperation with the private sector during catastrophic incident response. In particular, Congress should consider amending the Homeland Security Act's narrow definition of "first responder" to include private sector responders, where appropriate, and provide liability protections and appropriate access to impacted areas on a regional or national basis.

But Congress should also provide new authorizations to integrate two disparate communities – critical infrastructure and emergency response. While the NIPP asserts that structures and institutions that support infrastructure restoration and traditional response are "one and the same," Congress is needed to authorize more specific strategies to achieve that important goal. As indicated above, meetings amongst public and private representatives for the ESFs do not generally include their counterparts in the critical infrastructure community. Congress needs to set a vision on how this should be accomplished, authorize and empower officials to undertake appropriate actions, set accountability, and appropriate resources.

4. Should the Department of Homeland Security update guidance on Cold War-era public-private programs that were not activated or failed to provide adequate support during Hurricane Katrina response operations?

These include:

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<sup>103</sup> See, e.g., The President's National Security Telecommunications Advisory Committee, *Vulnerabilities Task Force Report – Trusted Access*, January 2003; (calls on need for a national plan for managing access by organization – not individual responder or restoration professional, reprinted at <http://www.ncs.gov/nstac/reports/2003/Trusted%20Access%20Report.pdf>).

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- National Security & Emergency Preparedness (NS/EP) programs: The federal government has been studying legal authority covering NS/EP telecommunications since the 9/11 attacks. Congress should require the federal government to update Executive Orders and regulations so that NS/EP includes the widest range of communications infrastructure, including Internet services, which were not available during Katrina response.
- Defense Production Act (DPA): Although Congress amended the DPA in 2003 to include “critical infrastructure,” the Department of Homeland Security has never issued any regulatory or administrative guidance on use of the statute after a catastrophe, especially for purposes of prioritizing goods needed for responding to a Katrina-like catastrophe.
- The National Infrastructure Protection Plan (NIPP): The NIPP suggests that greater emphasis on industry is possible. According to the NIPP draft:
- When an incident of National Significance occurs, regardless of the cause, the NRP is implemented for overall coordination of domestic incident management activities. The NIPP provides CI/KR dimension, complementing the NRP incident management coordinating structures. Implementation of the NIPP risk management framework facilitates those actions directly related to the current threat status, incident prevention, response, restoration, and recovery.

The federal government should detail with greater particularity how DHS will integrate emergency authorities to restore industry infrastructure. The NIPP currently cites specifically to the Homeland Security Act and hints that other laws may be implicated. Planning should aggressively include the Sector-Specific Agencies, as DHS drafters intended, and detail how and when these entities would trigger Congressional delegations of authority.

5. To what extent should Congress authorize, require, and fund programs to develop and enhance public trust and confidence?

While Hurricane Katrina illustrated private sector strengths in responding to catastrophe – especially in the areas of logistics management – our nation cannot afford to experience a follow-on disaster that undermines trust in our country’s ability to respond to disaster. Congress should consider mandating that any such program fully include the private sector. Statutory requirements should cover:

- Jointly communicating clearly and consistently with the public;
- Coordinating messages not only across federal, state, and local jurisdictions, but also directly with industry leaders;
- Pre-planning collaborative processes and messages in advance of a catastrophe.

## **Private Sector Integration**

### **Issues for Further Study**

1. What political, operational, or strategic roadblocks exist that prevent Congress and federal departments and agencies from addressing these issues – many of which have been known and widely publicized long before Katrina?
2. How should Congress integrate legal definitions for key terms – such as national defense, emergency preparedness and response, and homeland security – into existing laws providing the federal government authority to act in extraordinary circumstances?
3. How should Congress resolve complex issues associated with donations? Four years ago, the government experienced the exact same problem – namely, a legal and strategic process for accepting donations.

## Report Conclusion

***Albert C. Harvey, Vice Chair  
ABA Standing Committee on Law and National Security***

The purpose of this study was to examine the legal authorities available to guide the preparation and response to a catastrophic incident, whether from terrorism, accident or natural causes. Many hours of study and discussion and numerous drafts demonstrate the complexity of the subject. It is also recognized that human factors such as leadership, coordination, and cooperation control even if the legal authorities are appropriate. The devastation wrought by Hurricane Katrina did not occur because laws were inadequate. Lack of adequate training and readiness, failure of various entities to ensure communications and coordination, delay from inaction, and breakdown of leadership all contributed. See, for example, the recent GAO Report of the Comptroller General issued on February 1, 2006.

Should the statutes and regulations which are supposed to control be examined? Of course. And this paper points out many of the issues which deserve consideration by executives and law makers at every level of government.

At the federal level, the existing constitutional and statutes provide sufficient response authority. The Stafford Act and the Homeland Security Act of 2002 coupled with the National Incident Management System and the National Response Plan are adequate from an overall perspective. The issue for debate is whether the governmental statutory authorities at every level should be broad, with specificity left for plans, procedures and protocols – or whether the statutes and regulations are sufficiently specific to remove ambiguity and force responsibility and accountability. Not every situation can be anticipated by the enabling statutes, but officials must prepare for, and execute, executive authority and must be accountable for failure to do so.

One area of legitimate concern for new authority is where the catastrophic incident is so large, the danger so immediate, and state government so affected, that the federal government should be in charge and able to exercise overall control. Some feel that the authority is already present while others believe additional, clearly articulated rules are necessary.

The military is a valuable asset in any emergency. It has a command structure, personnel and equipment at the ready. There is sufficient statutory authority to act or react. The questions raised by the report concern the name and scope of the Insurrection Act and the benefit of education and training of both civilian leaders and military commanders.

The roles of business and industry in the private sector are not clear or understood. Action is needed to more fully integrate private industry into formal emergency response programs. Industries which provide critical infrastructure services such as communication, fuels, power, healthcare, and essential supplies must become part of

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planning, training and coordination. Enabling statutes and financing at both the federal and state levels must include the private sector.

We appreciate the opportunity to advance these ideas and we are prepared to continue our work.

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