

**AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES**

August 13-14, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association urges Congress to create an independent, bipartisan commission to investigate and recommend these appropriate measures required to rebuild the infrastructure of the Gulf Coast damaged by Hurricane Katrina and Rita, and to provide reasonable hurricane and flooding protection for people living in those areas, and to recommend appropriate measures designed to prevent or mitigate problems in responding to natural disasters in the future.

REPORT

I. Introduction

When Hurricane Katrina struck the Gulf Coast in August 2005, it left devastation in its path that this country had never before seen from a natural disaster. The Hurricane killed more than 1,500 people and left hundreds of thousands injured and displaced. By all accounts, the preparation for and response to Katrina by the local, state and federal government was an abject failure. At every turn—from emergency preparation to communication systems to search and rescue—the government seemed unable to properly do its job.

To its credit, the American Bar Association responded immediately to the crisis and has continued to focus its attention on a wide range of issues arising from it. Mere days after Katrina hit, ABA President Michael Greco established the ABA Task Force on Hurricane Katrina to coordinate the Association's response as well as to identify and recommend necessary policy to address issues raised by Katrina and its devastation. The Task Force immediately went to work to provide immediate assistance to victims. ABA's Katrina website was established with helpful information and links for victims as well as volunteers, and thousands of lawyers volunteered to staff legal assistance hotlines, travel to the affected region, provide office space to displaced lawyers, and more. The website provides a clearinghouse of information on disaster relief and includes resources to help lawyer victims rebuild their practices and their lives, among many other things. In addition, the ABA worked with courts to establish 90-day tolling of all deadlines and advocated suspension of unlicensed practice rules in affected states so that lawyers from other jurisdictions could volunteer to help. Various ABA entities have also looked into legal and policy issues highlighted by Katrina and its aftermath, including disaster response authority and insurance.¹

In February 2006, the ABA House of Delegates adopted a series of recommendations addressing issues highlighted by Hurricanes Katrina and Rita, including one that urged Congress to investigate the response by federal and affected state and local governments to Hurricanes Katrina and Rita.² They also included specific recommendations for federal, state, and/or local governments to 1) establish and appropriately fund flood control and redevelopment plans for the Gulf Coast region; 2) take all steps necessary to ensure that the civil and criminal justice systems in the affected states have the necessary resources to maintain the continuity of the rule of law; 3) explore mitigation efforts for future natural disasters; 4) afford relief from legal deadlines that adversely affect individuals, businesses, and property owners because of effects of hurricane destruction; and 5) reexamine all aspects of the federal flood insurance program. The recommendations further urged appropriate entities to work to develop model emergency orders for state supreme courts to enact to provide lawyers from other jurisdictions to provide pro bono legal services to disaster victims and also supported the principle that emergency preparedness plans should take into account the needs of people with household pets or service animals. Although the recommendations outlined a number of areas of focus for congressional hearings, they did not specify whether Congress should create any kind of special vehicle to undertake an investigation.

¹ *In the Wake of the Storm: The ABA Responds to Hurricane Katrina, A Midyear Activity Report*, American Bar Association, Feb. 2006.

² ABA Recommendation 305, adopted by the House of Delegates Feb. 13, 2006.

The Civil Rights and Equal Opportunity Committee of the Section of Individual Rights and Responsibilities of the American Bar Association sponsored a panel entitled "Hurricane Katrina: A Civil Rights Disaster," almost a year after Katrina on August 5, 2006, to discuss the issues and challenges existing in housing, education and voting after Katrina. One of the recurring ideas during the discussion among panelists and those in the audience was the need to convene an independent, bipartisan Commission much like that formed after 9/11 to investigate what happened in New Orleans that led to the devastation in the wake of Hurricane Katrina. Legislation calling for this type of Commission was not specifically included in the list of recommendations adopted in February 2006 by the ABA House of Delegates.

Now, months later, the need for such a Commission continues, both in terms of studying the immediate and ongoing responses to Katrina and recommending preventative measures for the future. Nearly two years after Katrina, countless persons in the Gulf Coast region and beyond continue to suffer the consequences of failed governmental policies and inaction. Katrina caused a tremendous upheaval in literally every facet of the lives of those left behind to weather the storm. Displaced residents and those who have returned to the Gulf still struggle for basic subsistence. Too many persons are forced to spend their days trying to find or maintain housing, employment, and education for their children. The rebuilding of neighborhoods, towns and cities has raised troubling issues relating to the destruction of low-income housing, exclusionary zoning, and the emphasis on commercial development. The legal systems in the affected areas are still trying to recover from the tremendous jolt caused by Katrina. In every election since Katrina, ensuring political participation for Gulf Coast residents requires special efforts for those who have been displaced, moved or are otherwise not able to participate.

In the immediate aftermath of Katrina, members of Congress introduced and/or supported legislation to create an independent, bipartisan Commission to study the lack of preparedness for a cataclysmic event such as Katrina as well as the failure at all levels of government to respond properly to the myriad consequences of the disaster. However, a Katrina Commission was never created by Congress. As described *infra*, the U.S. House of Representatives, the U.S. Senate and the White House separately prepared reports designed to address the range of failures by governmental policy and to propose recommendations for the future. In the partisan atmosphere of Washington, however, these were not coordinated and were largely viewed as products of partisanship. Additionally, the Congressional reports were criticized for lacking relevant information not made available to investigators. The reports did not bear the hallmarks of credibility and consensus that would accompany the type of review conducted by an independent and wholly bipartisan Commission.

The absence of a Katrina Commission has meant that, to date, there has been no comprehensive analysis by an independent, bipartisan entity regarding the level of preparation for Katrina, the adequacy of the governmental response after the Hurricane, and the preventative steps which must be taken in the future. Although certain local, state and federal entities have addressed issues rising from Katrina on a subject matter or jurisdictional basis,³ there has not been one comprehensive

³ In addition to the national reports referenced herein, various state agencies have issued reports, e.g., The Failure of the New Orleans Levee System During Hurricane Katrina, Team Louisiana, prepared for Louisiana Dept. of Trans. & Dev., Dec. 18, 2006, available at <http://www.dotd.louisiana.gov/administration/teamlouisiana/Team%20Louisiana%20-%20cov,%20toc,%20exec%20summ,%20intro.pdf>

examination of what went wrong and why. It is therefore appropriate for the American Bar Association to call for legislation, requiring President Bush's signature, to establish a Katrina Commission, modeled after the 9/11 Commission. It is only through a thorough, objective review of all the facets of the government's response can we hope to avoid repeating the same mistakes and, for the future, know the steps that must necessarily be taken in order to minimize the impact of another natural disaster like Katrina.

II. Structure and Timing of a Katrina Commission

The model for a Katrina Commission can be based largely on the National Commission on Terrorist Attacks Upon the United States, also known as the "9/11 Commission." In 2002, Congress created legislation establishing an independent, bipartisan commission both to study the government's preparedness for, and response to, the terrorist attacks and to make recommendations for corrective measures to prevent future acts of terrorism.⁴ The 9/11 Commission was composed of non-legislators and represented a balance between Republican and Democrat appointments.⁵ It was widely praised for both the thoroughness of its investigation and its recommendations.

Specifically, that legislation specified that the purposes of the 9/11 Commission were to: (1) examine and report upon the facts and causes relating to the terrorist attacks of September 11, 2001, occurring at the World Trade Center in New York, New York, in Somerset County, Pennsylvania, and at the Pentagon in Virginia; (2) ascertain, evaluate, and report on the evidence developed by all relevant governmental agencies regarding the facts and circumstances surrounding the attacks; (3) build upon the investigations of other entities, and avoid unnecessary duplication, by reviewing the findings, conclusions, and recommendations of [congressional, executive and independent commission investigations]; (4) make a full and complete accounting of the circumstances surrounding the attacks, and the extent of the United States' preparedness for, and immediate response to, the attacks; and (5) investigate and report to the President and Congress on its findings, conclusions, and recommendations for corrective measures that can be taken to prevent acts of terrorism."⁶

Although the specific contours of the Katrina Commission would be left to Congress to formulate, the duties and functions of the Commission could address the following issues: review and evaluate the information available to governmental agencies relating to Katrina prior to its impact; evaluate the decisions made by governmental agencies regarding the planning and preparation for Katrina; ascertain the efforts to provide response and recovery to all communities within the target areas of the Hurricane; build upon the investigations of other entities, and avoid unnecessary duplication, by reviewing the findings, conclusions, and recommendations of investigations by other entities; make a full and complete accounting of the extent of the government's preparedness for, and immediate response to, Katrina; and, investigate and report to the President and Congress on its findings, conclusions and recommendations for corrective measures to mitigate the impact of future natural disasters.

It is still timely for the ABA to call for legislation establishing a Katrina Commission. The devastating effects of the inadequate governmental response to Katrina continue to be felt by

⁴ Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383.

⁵ *Id.* at § 603.

⁶ *Id.* at § 602.

countless residents of New Orleans and those in the Katrina diaspora. In late March 2007, for example, the New York Times published an editorial, “Still Trying to House Katrina’s Victims,” lamenting the government’s mishandling of the Katrina housing crisis and supporting remedial action that has yet to take place.⁷ The passage of time since Katrina actually offers an opportunity for the Commission to synthesize analyses and reports by various governmental agencies about responses to Katrina across issue areas. Studies on the response to Hurricane Rita, which struck the Gulf Coast shortly after Katrina, should be examined as well. The chronology relating to the work of the 9/11 Commission demonstrates the usefulness of a commission’s report and recommendations years after the event at issue took place. The legislation establishing the 9/11 Commission was passed by Congress and signed by President Bush in November 2002, over one year after the attack.⁸⁹ The Commission released its bipartisan, unanimous report on July 22, 2004.¹⁰ Congress only this year took legislative action to implement several of the unfinished recommendations of the 9/11 Commission.¹¹

III. Prior Legislative Action on an Independent, Bipartisan Katrina Commission

The proposal by the American Bar Association for Congress to establish a Katrina Commission has some historical precedent. Immediately after Katrina occurred, several members of Congress called for a Katrina Commission that was essentially modeled after the 9/11 Commission. At the time a Katrina Commission was proposed, a CNN/USA Today Gallup poll indicated that 70 percent of those surveyed favored establishing an independent commission to investigate the government’s response to Katrina.¹²

In September 2005, S. 1622 was introduced in the Senate, calling for an independent, bipartisan Katrina Commission. The proposed Commission would (1) examine the federal, state, and local response to Katrina; (2) evaluate information developed by governmental agencies before and after Katrina struck; (3) build upon concurrent and prior investigations of other entities; (4) account for the circumstances surrounding the approach of Katrina and the extent of the government’s preparedness for and response to it; (5) examine planning necessary for future cataclysmic events; (6) analyze whether decisions differed in response and recovery for different communities and what problems resulted from a lack of a common plan, communication structure and centralized command structure; and (7) investigate and report to the President and Congress on immediate corrective measures to prevent problems with federal response to future cataclysmic events.¹³ A similar bill was introduced in the House, with 190 co-sponsors.¹⁴ These bills were not enacted.¹⁵

⁷ Editorial, *Still Trying to House Katrina’s Victims*, N.Y. TIMES, Mar. 28, 2007.

⁹ Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383; Statement by President George W. Bush, Nov. 27, 2002, available at <http://www.9-11commission.gov/about/president.htm>

¹⁰ The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon the United States, July 22, 2004, available at <http://www.9-11commission.gov/>

¹¹ S. 4, 110th Cong. (2007); H.R. 1, 110th Cong. (2007).

¹² *Senate Kills Bid For Katrina Commission*, USA TODAY, Sept. 14, 2005.

¹³ S. 1622, 109th Cong. (2005) at § 3. The Commission’s investigation would focus on federal emergency planning and execution; military and law enforcement response planning and execution; federal mitigation plans; federal, state and local communication; budgetary provisions for preparedness, mitigation, response and recovery; Federal Emergency Management Agency’s response capabilities; the role of congressional oversight and resource allocation; and the long-term needs for people impacted by Katrina. The Commission would also identify and evaluate the lessons learned from

Other bills to establish an independent, bipartisan Katrina Commission were introduced in Congress but not passed. H.R. 3706 would have established a National Independent Inquiry Commission on Disaster Preparedness and Response.¹⁶ H.R. 3799 would have established an independent, Presidentially-appointed Commission “to assess the circumstances related to the damage caused by Katrina.”¹⁷

Immediately after Katrina, there were also proposals for a bipartisan Katrina Committee composed entirely of members of Congress. For example, House and Senate GOP leaders proposed a “Hurricane Katrina Joint Review Committee.”¹⁸ Although the Committee was to be bipartisan, Republicans would outnumber Democrats to reflect their leadership in Congress at the time.¹⁹ (This was apparently patterned after the 1987 Iran-Contra panel.) The Committee would have subpoena power and would investigate the actions of federal, state and local governments before and after Katrina. But Democratic leaders balked, saying that a Republican-led Congress could not be trusted to thoroughly investigate a Republican Administration. Then-Senate Minority Leader Harry Reid (D-NV) stated, “Democrats strongly prefer that the response to Hurricane Katrina be investigated by a commission of independent experts like the 9/11 commission.”²⁰ Then-House Minority Leader Nancy Pelosi (D-CA) stated that the new Committee “is not truly bipartisan, will not be made up of equal numbers of Democrats and Republicans, cannot write legislation and will not have bipartisan subpoena power.”²¹

In this 110th Congress, there continue to be proposals for independent, bipartisan commissions to investigate the governmental response to Katrina and to make recommendations to ensure that the failures do not happen again. On January 5, 2007, H.R. 265 was introduced to establish an independent, nonpartisan Commission “to assess the circumstances related to the damage caused by Katrina.”²² In addition, the Congressional Black Caucus has called for a Select Congressional

Katrina including coordination, management policies, and procedures of the federal, state and local governments, and nongovernmental entities, relating to detection, planning, mitigation, and responding to cataclysmic natural disasters.

¹⁴ H.R. 3764, 109th Cong. (2005).

¹⁵ Supporters of the legislation could not win the procedural vote to obtain an up-or-down vote on the Senate floor. Apparently, there were only 44 votes to end debate on the bill, and the procedural vote was strictly along party lines. *Senate Kills Bid For Katrina Commission*, USA TODAY, Sept. 14, 2005.

¹⁶ H.R. 3706, 109th Cong. (2005). This legislation would have required the Commission to (1) examine the preparedness of federal, state and local governments to respond to the effects of Katrina; (2) report on available resources to meet the needs of displaced individuals; (3) report on the effectiveness of rescue operations and coordination between the Armed Forces and federal, state and local governments; (4) determine if the federal response was adequate and coordinated; and (5) investigate and report to the President and Congress on the federal government’s failure to prepare adequately for and response to Katrina. *Id.* at § 2.

¹⁷ H.R. 3799, 109th Cong. (2005). The Commission would be required to (1) chronicle the trajectory of Hurricane Katrina and the responses by federal, state and local governments; (2) estimate the loss of life, physical and structural damage, and displacement of residents; (3) recommend corrective actions; and (4) prepare a report to Congress, the President and the public. *Id.* at § 5.

¹⁸ *Parties Scramble for Post-Katrina Leverage*, WASH. POST, Sept. 8, 2005.

¹⁹ *Id.*; *Katrina Gives Fuel to Democrats*, WASH. TIMES, Sept. 12, 2005; *Senate Kills Bid For Katrina Commission*, USA TODAY, Sept. 14, 2005.

²⁰ *Parties Scramble for Post-Katrina Leverage*, WASH. POST, Sept. 8, 2005.

²¹ *Id.*

²² H.R. 265, 110th Cong. (2007).

Committee on Hurricane Katrina to focus on rebuilding the Gulf Coast.²³ In a letter, the Congressional Black Caucus noted the “continuing catastrophic situation in the Gulf Coast.”²⁴

IV. Prior Action to Investigate the Preparedness for and Response to Katrina Short of a Katrina Commission

In the aftermath of Katrina, both the U.S. House of Representatives and the U.S. Senate separately conducted investigations, held hearings, and issued extensive reports on the government’s failures before and after Katrina. The White House also issued its own report. For purposes here, it must be noted that the national investigations were conducted in a highly partisan climate, including but not limited to strong disagreement about the political compositions of the Congressional committees conducting the investigations. Additionally, there was substantial criticism that the Congressional investigations lacked access to necessary Administration witnesses and documents. The House report was criticized for failing to hold officials accountable and, while the White House report raised questions about key failures, it noted specifically it was doing so “not to affix blame.” The reports also focused on different governmental units, *e.g.*, the House and Senate reports focused on the actions of local, state and federal government while the White House report focused almost exclusively on the federal government’s response, touching upon state and local actions only where they had bearing on federal decisions. The reports placed differing emphasis on recommendations for the future. The House was charged with compiling findings rather than recommendations while the Senate report included eighty-eight recommendations in addition to findings. At times, the findings in the reports were almost directly contrary. For example, the House report found that mandatory evacuations in Alabama and Mississippi went well, while the White House report noted that federal response was weak across the Gulf Coast because of poor planning for evacuations.²⁵ Clearly, the reports that were issued remain helpful to any comprehensive investigation by an independent, bipartisan Katrina Commission, but they alone cannot be viewed as providing the exhaustive review that is still necessary to ensure that the many mistakes made in connection with Katrina do not happen again.

A. The House of Representatives Report

In September 2005, the House of Representatives passed legislation, H.R. 437, establishing a House Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina.²⁶ The vote was along party lines, with all Democrats voting no.²⁷ The House Select Committee was charged with conducting an investigation regarding (1) the development, coordination, and execution by federal, state and local authorities of emergency response plans and other activities in preparation for Katrina and (2) the local, state and federal government response to Katrina.²⁸

²³ *Black Caucus Requests Katrina Committee*, WASH. POST, Jan. 30, 2007.

²⁴ Letter from Carolyn Cheeks Kilpatrick, Chairwoman, Congressional Black Caucus to Speaker Nancy Pelosi, Jan. 24, 2007.

²⁵ *White House Proposes Katrina Fixes*, HOUSTON CHRON., Feb. 24, 2006, available at <http://www.chron.com/disp/story.mpl/nation/3681828.html#>

²⁶ H.R. 437, 109th Cong. (2005).

²⁷ 151 Cong. Rec. H8022 (daily ed. Sept. 15, 2005).

²⁸ H.R. 437, 109th Cong. (2005) at § 3.

The House Select Committee was composed of twenty members, all appointed by then-Speaker J. Dennis Hastert (R-IL), with nine members appointed after consultation with the Minority Leader.²⁹ The Committee was chaired by Representative Thomas Davis, III (R-VA). As noted in Additional Views to the House report by Democratic Representatives, subpoena authority was granted only to the Republican Chair, and not to the Democratic minority.³⁰ The House Democrats refused to participate.³¹ Accordingly, an eleven-member House Committee—composed entirely of one political party—investigated the response to Katrina at the federal, state and local levels.³²

The House Select Committee released a 600-page report in February 2006. The Report was entitled “A Failure of Initiative: The Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina.”³³ The report called the government’s response a failure in leadership, and identified “failures at all levels of government that significantly undermined and detracted from the heroic efforts of first responders, private individuals and organizations, faith-based groups, and others.”³⁴ It singled out Homeland Security Secretary Michael Chertoff as “detached” and FEMA Director Michael Brown as “clueless.”³⁵ The report offered 90 findings describing failures at all levels of government.³⁶ However, it was criticized for proposing few specific changes.³⁷

Democratic House members from Louisiana—Charles Melancon and William Jefferson—informally participated in the hearings.³⁸ They wrote a separate 57-page minority report, entitled “Additional Views Presented by the Select Committee on Behalf of Rep. Charlie Melancon and Rep. William J. Jefferson.”³⁹ This report noted that the “single biggest flaw” in the investigation was the failure to obtain documents and testimony from the White House.⁴⁰ It noted that the Select Committee “was allowed to see only what the Administration wanted it to see and could not find out what had been withheld.”⁴¹ It described efforts to identify gaps in documents provided and requests for meetings with officials to explain why documents were withheld.⁴² The minority report believed that no administration officials were held accountable: “[T]he Select Committee adopted an approach that

²⁹ *Id.* at § 2.

³⁰ Additional Views Presented by the Select Committee on Behalf of Rep. Charlie Melancon, Rep. William J. Jefferson, U.S. House of Representatives, Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, Feb. 15, 2006 at 16, available at http://katrina.house.gov/minority_views.doc

³¹ *Katrina Gives Fuel to Democrats*, WASH. TIMES, Sept. 12, 2005.

³² <http://katrina.house.gov/members.html>

³³ A Failure of Initiative, Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, U.S. House of Representatives (109th Cong., 2nd Sess.) (Feb. 15, 2006) [hereinafter HOUSE REPORT], available at http://katrina.house.gov/full_katrina_report.htm

³⁴ *Id.* at 1.

³⁵ *Report: Katrina Response a ‘Failure of Leadership,’* CNN.COM, Feb. 13, 2006, available at <http://www.cnn.com/2006/POLITICS/02/13/katrina.congress/index.html>

³⁶ HOUSE REPORT at 2-6.

³⁷ *Katrina Report Spreads Blame*, WASH. POST, Feb. 12, 2006.

³⁸ *Report: Katrina Response a ‘Failure of Leadership,’* CNN.COM, Feb. 13, 2006, available at <http://www.cnn.com/2006/POLITICS/02/13/katrina.congress/index.html>

³⁹ Additional Views Presented by the Select Committee on Behalf of Rep. Charlie Melancon, Rep. William J. Jefferson, U.S. House of Representatives, Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, Feb. 15, 2006, available at http://katrina.house.gov/minority_views.doc

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 17.

⁴² *Id.*

largely eschews direct accountability. The majority report rarely assesses how these problems occurred, why there not corrected sooner, and who in particular was responsible.”⁴³ The minority report concluded that an independent investigation was still needed: “We therefore renew our call for an independent commission to examine the disastrous response to Hurricane Katrina. ... The work that the Select Committee has started needs to be completed. Accordingly, we call for an independent commission, modeled after the 9/11 Commission, that will put politics aside and follow the facts wherever they lead. Only by finishing this job will the nation obtain the complete accounting that must precede true reform.”⁴⁴

B. The Senate Report

The Senate issued its own report on failures relating to the preparation for and response to Katrina. The Senate did not establish a special committee but conducted the investigation through its standing Homeland Security and Governmental Affairs Committee. Senator Susan Collins (R-ME) was the Chair of the Committee and Senator Joseph Lieberman (D-CT) was the Ranking Member. There was bipartisan participation.

The Committee issued its 732-page report in April 2006, entitled “Hurricane Katrina: A Nation Still Unprepared.”⁴⁵ The report found four overarching factors contributing to the failure of government at all levels: (1) long-term warnings went unheeded combined with neglect of duties by governmental officials; (2) governmental officials took insufficient action or made poor choices immediately before and after Katrina; (3) response systems on which officials relied failed; and (4) governmental officials at all levels failed to provide effective leadership.”⁴⁶ The Senate report was highly critical of the White House, and urged eliminating FEMA and replacing it with a stronger agency.⁴⁷ Unlike the House report, the Senate report produced both findings (186) and recommendations (88).⁴⁸ Although it recommended additional funding for disaster planning and response, it did not specify the amount or the source of the funding.⁴⁹ It focused on the response in New Orleans, although the entire Gulf Coast was affected, and was confined to the period in the week after Katrina struck.⁵⁰

The minority Senators on the Committee issued “Additional Views” on three matters on which the Chair and Ranking Member were unable to agree.⁵¹ First, and similar to the minority views on the House report, the Senators took issue with the lack of cooperation by the Administration with the Congressional investigation: “The Committee’s efforts to understand the role the White House played in events leading up to and following the catastrophe were severely hindered by the White

⁴³ *Id.* at 1 (emphasis in original).

⁴⁴ *Id.* at 1, 3 (emphasis in original).

⁴⁵ Hurricane Katrina: A Nation Still Unprepared, Special Report of the Committee on Homeland Security and Governmental Affairs, United States Senate, S. Rep. No. 109-322 (109th Cong., 2nd Sess.) (May 2006) [hereinafter SENATE REPORT], available at <http://hsgac.senate.gov/files/Katrina/FullReport.pdf>

⁴⁶ *Id.* at 2.

⁴⁷ *Katrina Report Rips the White House Anew*, CHI. TRIB., Apr. 27, 2006.

⁴⁸ SENATE REPORT at 589-605, 607-630.

⁴⁹ *Katrina Report Rips the White House Anew*, CHI. TRIB., Apr. 27, 2006.

⁵⁰ SENATE REPORT at 3.

⁵¹ SENATE REPORT at 667-700 (Additional Views of Senators Lieberman, Levin, Akaka, Carper, Lautenberg and Pryor on White House Katrina Failures, Administration Lack of Cooperation with the Investigation, and Failure to Establish Unified Command).

House's failure to comply with Committee requests for information, documents and interviews. As a result, we learned much too little about what the White House and the Executive Office of the President were doing during the critical days before and after Katrina struck."⁵² The Senators complained they had little insight into how the President and his staff managed the government's preparedness for the disaster and how they coordinated the federal bureaucracy in response to Katrina.⁵³ The Senators traced the often-obstructed efforts by the Committee to obtain information not only from the White House but the Department of Homeland Security, Department of Justice and the Department of Health and Human Services.⁵⁴ These Senators found the "White House less willing to cooperate with a Senate investigation than any we have witnessed in our many years in this body."⁵⁵ The minority Senators concluded that subpoenas should be issued to the White House, but the Chair disagreed. Thus, the Committee did not receive all the information requested.⁵⁶

The second point of disagreement was that the minority Senators concluded that the President failed to exercise critical leadership that contributed to a "grossly ineffective" response by the federal government; the White House failed to address FEMA's shortcomings; the White House failed to ensure the federal government was prepared to respond; the White House was not sufficiently engaged and failed to initiate a proactive response despite warnings that Katrina would be catastrophic; the White House was "surprisingly detached" until two days after landfall; and the White House failed to understand the magnitude of the disaster.⁵⁷ The third point of disagreement concerned the minority's conclusion that Louisiana's failure to establish a unified command was more complex than that characterized by the majority report and that FEMA's failure to provide personnel with sufficient expertise and training was a contributing factor.⁵⁸

C. The White House Report

Immediately after Katrina, President Bush announced that the Administration would investigate the response to Katrina.⁵⁹ The White House released its 228-page report in February 2006, "The Federal Response to Hurricane Katrina: Lessons Learned."⁶⁰ The press release included a statement from President Bush: "On September the 6th, I asked Fran (White House Homeland Security Advisor Fran Townsend) to conduct a thorough review of the federal response to Katrina and to make recommendations about how we can better respond in the future. I wasn't satisfied with the federal response. ... I reminded our Cabinet that hurricane season begins in June and that we will be tracking the implementations of the recommendations in this report. ... In the meantime, our commitment to rebuild and help rebuild Mississippi and Louisiana is ongoing and robust."⁶¹ Townsend led a panel of twenty Bush Administration officials.⁶²

⁵² *Id.* at 667.

⁵³ *Id.* at 676.

⁵⁴ *Id.* at 676-92.

⁵⁵ *Id.* at 676.

⁵⁶ *Id.*

⁵⁷ *Id.* at 667-668.

⁵⁸ *Id.* at 692.

⁵⁹ *Parties Scramble for Post-Katrina Leverage*, WASH. POST, Sept. 8, 2005.

⁶⁰ The Federal Response to Hurricane Katrina: Lessons Learned, February 2006 [hereinafter WHITE HOUSE REPORT], available at <http://www.whitehouse.gov/reports/katrina-lessons-learned/>

⁶¹ Press Release, *White House Releases Katrina Report*, Feb. 24, 2006, available at <http://mmrs.fema.gov/press/2006/pr2006-02-24.aspx>

⁶² *White House Proposes Katrina Fixes*, HOUS. CHRON., Feb. 24, 2006, available at <http://www.chron.com/disp/story.mpl/nation/3681828.html>

The White House report identified deficiencies in the federal government's response in the chapter, "Lessons Learned," which were described as "the seventeen most critical challenges that were problematic before, during and after Hurricane Katrina's landfall."⁶³ Ranging from National Preparedness to Communications to Mass Care and Housing, these were described as key failures that were to be explored "not to affix blame" but to identify systemic gaps and improve preparedness for the next disaster.⁶⁴ The report made 125 recommendations within seventeen areas, and implementation plans were to follow.⁶⁵ It is not known whether they have been implemented. The report proposed eleven activities to be undertaken before the next hurricane season.⁶⁶

Since the White House report was released one week after the House Select Committee report on Katrina, there were inevitable comparisons between the two. Press accounts indicated that the White House report took a "softer approach" where it focused on problems to remedy rather than affixing blame.⁶⁷ Members of Congress also criticized the White House report. Then-Senate Minority Leader Harry Reid called the report "understated and oftentimes self-congratulatory. This is far from the hard-hitting, independent analysis promised by the President and demanded by Senate Democrats."⁶⁸

Senator Joseph Lieberman, the Ranking Member of the Senate Committee which investigated Katrina, called the White House report "thoughtful," but stated it not did assign enough blame for the problems. "Only a full understanding of what went wrong and who was responsible will enable us to correct our path for the future."⁶⁹

V. Conclusion

The devastation caused by Hurricane Katrina was greatly exacerbated by the lack of planning and preparation for Katrina and the inadequate response once Katrina reached ground. The effects of the failure at all levels of government still plague countless victims of Katrina. While several investigations have been conducted in the past two years regarding the government's role, there still has been no investigation by a nationally-chartered independent, bipartisan Katrina Commission modeled after the 9/11 Commission. Such an investigation, complete with specific recommendations for the future, is the only way we as a country can ensure that a thorough and objective review of the facts and circumstances has been conducted and that all steps have been taken to ensure that this type of tragedy will never occur again.

Respectfully Submitted,
Robert E. Stein, Chair
Section of Individual Rights and Responsibilities

August 2007

⁶³ WHITE HOUSE REPORT at 2.

⁶⁴ *Id.* at 51.

⁶⁵ *Id.* at 83-123.

⁶⁶ *Id.* at 83.

⁶⁷ *White House Study Cites Katrina Errors*, CBSNEWS.COM, Feb. 23, 2006, available at <http://www.cbsnews.com/stories/2006/02/23/katrina/main1339976.shtml>

⁶⁸ *White House Proposes Katrina Fixes*, HOUS. CHRON., Feb. 24, 2006, available at <http://www.chron.com/disp/story.mpl/nation/3681828.html>

⁶⁹ *Id.*

GENERAL INFORMATION FORM

Submitting Entities: Section of Individual Rights and Responsibilities

Submitted by: Robert E. Stein, Chair
Section of Individual Rights and Responsibilities

1. Summary of Recommendation

The recommendation urges Congress to create an independent, bipartisan commission to investigate the preparedness for, and the immediate and ongoing responses by, federal, state and local governments to Hurricane Katrina, and to recommend appropriate measures designed to prevent or mitigate problems in responding to natural disasters in the future.

2. Approval by Submitting Entity

The Council of the Section of Individual Rights and Responsibilities approved the filing of this Report with Recommendation in principle on April 16, 2007, during its spring meeting in Washington, D. C. The Executive Committee approved the filing of this Report with Recommendation on May 7, 2007.

3. Has This or a Similar Recommendation Been Submitted to the House of Delegates Board of Governors Previously?

No.

4. What Existing Association Policies Are Relevant to This Recommendation and Would They Be Affected by Its Adoption?

In February 2006, the ABA House of Delegates adopted a series of recommendations addressing issues highlighted by Hurricanes Katrina and Rita, including one that urged Congress to investigate the response by federal and affected state and local governments to Hurricanes Katrina and Rita. They also included specific recommendations for federal, state, and/or local governments to 1) establish and appropriately fund flood control and redevelopment plans for the Gulf Coast region; 2) take all steps necessary to ensure that the civil and criminal justice systems in the affected states have the necessary resources to maintain the continuity of the rule of law; 3) explore mitigation efforts for future natural disasters; 4) afford relief from legal deadlines that adversely affect individuals, businesses, and property owners because of effects of hurricane destruction; and 5) reexamine all aspects of the federal flood insurance program. The recommendations further urged appropriate entities to work to develop model emergency orders for state supreme courts to enact to provide lawyers from other jurisdictions to provide pro bono legal services to disaster victims and also supported the principle that emergency preparedness plans should take into account the needs of people with household pets or service animals. Although the recommendations outlined a number of areas of focus for congressional hearings, they did not specify whether Congress should create any kind of special vehicle to undertake an investigation.

5. What Urgency Exists That Requires Action at This Meeting of the House?

Nearly two years after Katrina, countless persons in the Gulf Coast region and beyond continue to suffer the consequences of failed governmental policies and inaction. In the immediate aftermath of Katrina, members of Congress introduced and/or supported legislation to create an independent, bipartisan Commission to study the lack of preparedness for a cataclysmic event such as Katrina as well as the failure at all levels of government to respond properly to the myriad consequences of the disaster. However, a Katrina Commission was never created by Congress.

The absence of a Katrina Commission has meant that, to date, there has been no comprehensive analysis by an independent, bipartisan entity regarding the level of preparation for Katrina, the adequacy of the governmental response after the Hurricane, and the preventative steps which must be taken in the future. For this reason, it is still timely for the ABA to call for legislation establishing a Katrina Commission. The passage of time since Katrina offers an opportunity for the Commission to synthesize analyses and reports by various governmental agencies about responses to Katrina across issue areas and to address the problems that still exist in the Gulf region.

6. Status of Legislation

In September 2005, S. 1622 was introduced in the Senate, calling for an independent, bipartisan Katrina Commission. A similar bill was introduced in the House, with 190 co-sponsors. These bills were not enacted.

Other bills to establish an independent, bipartisan Katrina Commission were introduced in Congress but not passed. H.R. 3706 would have established a National Independent Inquiry Commission on Disaster Preparedness and Response. H.R. 3799 would have established an independent, Presidentially-appointed Commission "to assess the circumstances related to the damage caused by Katrina."

In this 110th Congress, there continue to be proposals for independent, bipartisan commissions to investigate the governmental response to Katrina and to make recommendations to ensure that the failures do not happen again. On January 5, 2007, H.R. 265 was introduced to establish an independent, nonpartisan Commission "to assess the circumstances related to the damage caused by Katrina." In addition, the Congressional Black Caucus has called for a Select Congressional Committee on Hurricane Katrina to focus on rebuilding the Gulf Coast. In a letter, the Congressional Black Caucus noted the "continuing catastrophic situation in the Gulf Coast."

7. Cost to the Association (both direct and indirect costs)

Adoption of this Recommendation would result only in minor indirect costs associated with Governmental Affairs and Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

8. Disclosure of Interest

There are no known conflicts of interest.

9. Referrals

By copy of this form, the Report with Recommendation will be referred to the following additional entities, including all Sections and Divisions:

Section of Administrative Law and Regulatory Practice
Section of Business Law
Criminal Justice Section
Section of Dispute Resolution
Section of Environment, Energy, and Resources
Section of Family Law
General Practice, Solo and Small Firm Section
Government and Public Sector Lawyers Division
Health Law Section
Section of International Law and Practice
Section of Labor and Employment Law
Section of Litigation
Section of Real Property, Probate and Trust Law
Section of Science and Technology Law
Section of State and Local Government Law
Tort and Insurance Practice Section
Judicial Division
Law Student Division
Senior Lawyers Division
Young Lawyers Division
ABA Task Force on Disaster Preparedness
Commission on Homelessness and Poverty
Commission on Racial and Ethnic Diversity in the Profession
Council on Racial and Ethnic Justice
Commission on Women in the Profession
American Immigration Lawyers Association
Hispanic National Bar Association
National Asian Pacific American Bar Association
National Association of Women Judges
National Association of Women Lawyers
National Bar Association Inc.
National Legal Aid and Defender Association

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11. Contact Person (who will present the report to the House)

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