

# Opening Statement

## Crisis Does Not Suspend the Constitution

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What happens to the rule of law in times of calamity? This past year, the Section of Litigation prepared the Principles for the Rule of Law in Times of Calamity, a set of principles that would guide the justice system, and those of us who work within it, in times of disaster. The Principles take special aim at protecting the criminal justice system from challenges that might overwhelm it; recommend heightened efforts to ensure that victims can secure compensation for their losses through insurance payments and judicial action, where available; and urge respect and support for charitable relief efforts, provision of effective government assistance, and pro bono representation by members of the bar for victims of disaster.

The Principles cannot hope to avert catastrophe, but they can help ready the bar and the nation to respond to its challenges. They have not yet been presented to Section Council or to the ABA House of Delegates. As printed below, the Principles may still be subject to slight revision, but in the main they represent the Section's voice and intent to improve the system and, we hope, the country.

**Principle 1: The rule of law must be preserved when catastrophe occurs.** The Principles are intended to insure that the rule of law is preserved in times of catastrophe. A catastrophic event is defined as any adverse occurrence, officially recognized by national or state authorities pursuant to existing law.

**Principle 2: The preservation of the rule of law requires proactive planning, preparation, and training before catastrophe strikes.** The Principles recognize that the courts, the organized bar, prosecutors, public defenders, providers of legal services to the poor, individual lawyers, police, and prison and jail officials must plan and prepare to insure that the legal system continues in time of catastrophe.

**Principle 3: All those involved in the justice system must work to ensure the ongoing integrity of the system in times of catastrophe.** In preparing for catastrophe, these steps should be fol-

lowed to ensure the operation of the justice system:

- Plans must be in place for presiding judges or their designees to continue the operations of the courts without significant interruption.
- Steps must be taken to maintain and preserve the integrity of legal records and evidentiary materials.
- In time of disaster, courts must (a) plan for and utilize alternative physical facilities to conduct judicial business; (b) plan to share or lend judicial personnel between courts; and (c) plan to share or lend proactive personnel between courts.
- Incarceration authorities and courts must plan to share incarceration space in times of disaster.
- Those involved in the dispensing of justice must plan to take appropriate steps to ensure that an adequate number of public and private attorneys are available to carry out the adjudicatory activities of the justice system. *Pro hac vice* admissions should be considered, along with responses relying on existing resources within the jurisdiction.
- Those involved in the dispensing of justice must make information available regarding the status of pending matters as soon and as often as practicable to clients, families of clients, the press, and the public.

**Principle 4: In times of catastrophe the requirements of the Constitution regarding criminal prosecution must be respected.** The following points are essential to the operation of the justice system in times of catastrophe:

- Catastrophes do not abrogate the Constitution. Even in times of catastrophe, public authorities must provide criminal offenders, accused individuals, and others in custody with humane treatment and adjudicative due process.
- Public authorities charged with the operation of the criminal justice system must plan, prepare, and practice for catastrophes. Effective law enforcement must continue at all times, including the continuous leadership of police, prosecutorial, defender, and judicial personnel.

- Mass arrests and mass prosecutions are unacceptable.
- In the event of catastrophe, public authorities must continue to process those accused or convicted of misdemeanors in a prompt and orderly manner consistent with the requirements of the Constitution. Where such processing is rendered impracticable, commutation should be the preferred system choice.
- In the event of catastrophe, the criminal courts must continue to operate and must respect the due process rights of criminal offenders and accused individuals, with the needs of the most serious criminal charges getting highest priority and lesser charges being withdrawn, if necessary.
- In the event of catastrophe, criminal custodial and detention institutions must continue to ensure the safety of inmates and the security of the public. In such circumstances, custodial institutions should also facilitate communication between inmates and their immediate families.
- Deviation from the requirements of the Constitution should be permitted only when martial law has been properly invoked. In such circumstances deviation from rights guaranteed by the Constitution should be kept to an absolute minimum and continued for only as long as absolutely necessary to insure the restoration of order.

**Principle 5: In all cases where the acts or omissions of individuals or organizations result in a catastrophe, or exacerbate a natural catastrophe, the executive and legislative branches of government should consider establishing an independent commission of inquiry to examine the reasons for and consequences of the catastrophe.** Such appointed commissions should have subpoena power, should hold public hearings, and, within one year from the date of the catastrophe, prepare and publish a public report of their findings, including methods of improving legal and other procedures in the event of future catastrophes.

**Principle 6: To the fullest extent permitted by law, the victims of catastrophe should be compensated for their losses through insurance coverage and judicial action.** Where feasible and authorized by law, compensation for the losses suffered by the victims of catastrophe should be provided pursuant to the mechanisms of insurance coverage

and judicial action.

Public authorities should, to the extent feasible, promote the availability and effectiveness of private insurance to provide compensation for losses suffered pursuant to catastrophe.

Public authorities should, to the extent feasible, promote the availability and effectiveness of judicial remedies that, pursuant to existing law, hold parties accountable who, through their activities or failure to act, are responsible for a catastrophe.

**Principle 7: Government payment of compensation to the victims of catastrophe should be considered when government is either implicated in the catastrophe or public authorities determine that it is in the interest of the nation to provide compensation. Principles of equal treatment, due process, and transparency should govern the distribution of compensation.** In cases where neither insurance coverage nor judicial action is likely to provide compensation to the victims of catastrophe, public authorities should provide reasonable compensation to individual victims of catastrophe for losses when: Public authorities should have prevented the catastrophe or greatly reduced the severity of the harm it caused but failed to do so; public authorities should have perfected a rescue but failed to do so; or public authorities determine that a remedy traditionally available either through judicial action or otherwise should not be made available or should be severely curtailed.

Public authorities should also be free to determine that compensation for catastrophic loss should be provided by the government when it is in the interest of the nation to do so.

In such cases public authorities may provide for alternative methods of determining eligibility and fixing awards, rather than judicial action. They should also be free to offer victims, on a voluntary basis, a fair alternative to having their cases involving loss from catastrophe resolved through judicial action.

In cases where public authorities determine to provide compensation, priority should be given to providing compensation for physical injury or death before mental suffering or property damage. These, in turn, should be given priority over economic loss claims. This prioritization of claims should not be construed as rejecting the desirability

of fuller compensation when practicable. In cases where public authorities determine that public compensation to individual victims of catastrophe should be awarded with respect to death claims, it should be presumed that all victims should be provided equal awards unless they have been deprived of otherwise available judicial remedies by public action or have had access to such remedies severely curtailed by public action, in which case awards should be comparable to those a court would award.

To the extent feasible, the size and basis for awards should be specified in advance. In cases where public authorities determine that public compensation to individual victims of catastrophe should be awarded, claimants seeking such awards should be permitted as expeditious a hearing as circumstances allow. Said hearing should be presided over by a neutral hearing officer. At said hearing the claimant should be allowed to present relevant proofs and statements. The determination made pursuant to said hearing should be set forth in a written decision with appropriate explanation. The claimant should be entitled to have a negative determination reviewed, either in court or through some alternative process. During the course of all proceedings, claimants should be treated with dignity and respect.

**Principle 8: Charitable assistance to the victims of catastrophe should be encouraged.** Public authorities should take steps that allow the effective and unimpeded operation of charitable organizations in dealing with catastrophe.

**Principle 9: Government provision of assistance mandated by law should be made in an expeditious and efficient manner consistent with principles of equal treatment, due process, and transparency.** Public authorities should provide assistance prescribed by law of both regular (e.g., public assistance payments) and emergency (e.g., FEMA assistance) natures to catastrophe victims in the most efficient and expeditious manner. Emergency assistance should be made available to all in need regardless of immigration status.

**Principle 10: Federal, state, and local governments should work with one another and with the private sector to plan, prepare, and train for catastrophe. Such efforts should focus on means to preserve order at the local level, protect vulnerable populations, and ensure adequate communications.**

Distinct from compensation and assistance, there are a range of institutional steps that public authorities should take in response to catastrophe. These include the following:

(i) Federal response to catastrophe should be treated as a separate and distinct task from protecting the security of the United States.

(ii) Federal-state-local coordination is critical. State and local officials are on the scene and have critical local knowledge; the federal government has expertise, resources, and “surge” capacity. States should negotiate with both the federal and local governments in advance of any catastrophe regarding the allocation of responsibility for responding to catastrophic events.

(iii) Disaster risk assessment and planning should be integrated into government and private infrastructure and land-use decisions. Environmental assessments should include consideration of disaster scenarios and discuss mitigation measures.

(iv) A standing procedure should be in place to assess prevention of and response to all catastrophic events, rather than a reliance on ad hoc mechanisms.

(v) Disaster plans should be specific and coupled with emergency exercises and training programs.

(vi) States should have in place a Disaster Recovery Authority to coordinate housing and other reconstruction issues without delay after catastrophic events.

(vii) The maintenance of order is essential. Law enforcement should remain as much as possible in the hands of state and local police, then state national guard; only if those responses are insufficient should federal troops be allowed to engage in law enforcement.

(viii) Special attention should be given to the needs of vulnerable populations in planning disaster responses (including the elderly, children, and disabled.)

(ix) Children should be zealously protected. Actions affecting children should conform to the following principles: Maintaining the integrity of the family is in the best interests of children in almost all cases; children are presumptively entitled to and eligible for benefits and catastrophe-specific relief; and the health, education, and safety of children in state custody is of paramount concern.

(x) Legislation should ensure that deadlines, whether found in state or federal rules or statutes or in private con-

tracts such as insurance, can be modified or tolled in the event of catastrophic events.

(xi) Legislatures, the executive, and the courts should have standing committees on disaster risk or dedicated staff positions to ensure that these risks receive ongoing attention.

(xii) States should review regulatory statutes to ensure that they contain appropriate waiver provisions for catastrophic conditions.

(xiii) Since much infrastructure, including telecommunications, power, transportation, and mass media are in private hands, private providers should, in cases of catastrophe, be given authority and assistance to facilitate restoration and maintenance of essential services.

Highest priority should be given to maintaining or restoring means of communication in the wake of catastrophe.

**Principle 11: Attorneys should provide pro bono representation to catastrophe victims who seek either compensation or assistance.** To the extent feasible, attorneys representing victims claiming compensation or assistance because of catastrophe-related losses should provide representation either without fee or on a reduced-fee basis. Any fees awarded by the courts should be donated to charitable organizations providing assistance to victims of catastrophe.

The Section will continue to develop these Principles. They should give you a guide for your community. If these Principles are adopted as ABA policy, the Section of Litigation plans to present them to courts, local bars, law enforcement agencies, and communities throughout the country. We must always be valiant in enforcing the liberties promised by our Constitution. □

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*I appreciate the capable leadership of Professor Steve Landsman and Professor JoAnne Epps on the development of these principles and their contributions to this article. Although the principles are still subject to approval by our Section's Council and are not ABA policy, the timely issues they raise are worthy of your consideration.*