

PRIMED & PREPARED:

UPDATING THE STAFFORD ACT FOR A COORDINATED NATIONAL RESPONSE

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DISASTERS AND THE LAW: THE LEGAL IMPLICATIONS OF HURRICANE KATRINA
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Spring 2006

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ABSTRACT

Hurricane Katrina revealed fundamental problems with our nation's ability to respond to natural disasters. Not only did Katrina overwhelm governments at all levels in their abilities to respond to the disaster, but it also revealed their inadequate emergency preparation and response plans. There was a failure among local, state and federal levels to effectively optimize assistance and resources coming from other states and the federal government.

This paper advocates an amended Stafford Act to include three solutions that are crucial to strengthening national preparedness for future disasters. First, local jurisdictions and states should be required to develop comprehensive disaster preparedness and response plans, consistent with a national framework, that enable them to effectively manage complex disasters. Second, the federal government needs to harmonize its disaster-relief infrastructure and consolidate natural emergency preparedness and response functions in the Federal Emergency Management Agency within the Department of Homeland Security. Finally, the Stafford Act should include a contingency plan for a catastrophe so large it renders traditional emergency management impracticable.

While these structural changes for national preparedness can be implemented by executive order as governmental reports and studies have suggested, this paper stresses the importance of enacting these recommendations in legislation. The Stafford Act is the touchstone of federal disaster relief. Updating the Stafford Act to include a national framework for disaster response, the federal infrastructure for disaster management under the leadership of DHS, and the framework for the nation's response to catastrophic incidents, will achieve clarity and permanency for all parties involved. Updating the Act as suggested will ensure that the country shall be primed and prepared for future disasters.

THE SITUATION

The experience of Hurricane Katrina showed that every level of government was unable and unprepared to handle a large natural disaster. In the aftermath of the Hurricane, news reports and government analyses became a game of finger-pointing: local governments denounced the ineptitude of federal support and the federal government suggested the ineffectiveness of local response.¹ Because of the multiple variables that potentially contributed to the ineffective disaster response – a new disaster response plan, poorly trained leaders and an overemphasis on manmade disasters – it is difficult to conclusively isolate what went wrong. Nevertheless, several aspects of Hurricane Katrina show that national preparedness requires a re-examination.

First, local levels were insufficiently prepared for multi-jurisdictional cooperation response to a natural disaster. Historically and traditionally, American disaster relief relies upon local jurisdictions to be the first and immediate responder to a situation.² Since 2002, each state has been required to prepare for and develop the National Incident Management System (NIMS), which is built on the Incident Command System, a framework that places local officials as chief commanders in incident management by providing them with the authority and leadership even over resources that come from other state governments or the federal government.³ However, current federal requirements for complying with the NIMS are fairly flexible, but not every jurisdiction has equally or sufficiently developed an NIMS-based emergency management

¹ SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, 109TH CONG., A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA (2006), *available at* <http://www.gpoaccess.gov/congress/index.html> [hereinafter SELECT COMMITTEE REPORT]; THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED (2006), *available at* <http://www.whitehouse.gov/reports/katrina-lessons-learned/> [hereinafter WHITE HOUSE REPORT].

² WHITE HOUSE REPORT at 11.

³ ABA STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, HURRICANE KATRINA TASK FORCE SUBCOMMITTEE REPORT 9 (2006), *available at* http://www.abanet.org/natsecurity/scolns_hurricane_katrina_report_feb_2006_2.pdf [hereinafter ABA REPORT].

system.⁴ For example, although New Orleans developed and operated an Office of Emergency Preparedness to prepare for and respond to disasters, they were not prepared for working with and supervising officials and resources from other jurisdictions under the unified command structure.⁵ On the other hand, jurisdictions in Mississippi, which had been preparing for these types of disasters since the early summer of 2005, were able to handle multi-jurisdictional assistance in August.⁶ Without strong requirements ensuring that states have fully functioning and comprehensive emergency response infrastructure, Hurricane Katrina demonstrated that disaster preparedness at the local and state levels is subject to the moral hazard of knowing that the federal government will be a last-resort supporter.⁷

Second, the recent inception and adoption of a new framework that organizes disaster response among federal agencies, the National Response Plan (NRP), caused significant confusion because it failed to capably replace preceding federal response plans. In its response to Hurricane Katrina, the federal government response was not internally unified nor was it synchronized with local efforts. On August 27, 2005, Louisiana Governor Kathleen Blanco turned to the Stafford Act, which since 1974, allows for federal support in cases of an emergency and when the state government can no longer handle a disaster.⁸ Although Governor Blanco requested President Bush to provide federal support by declaring a “major disaster,” federal agencies did not fully mobilize because they were awaiting the Secretary of Homeland Security’s declaration of an “Incident of National Significance,” which is required to trigger the National

⁴ See Solution 2 of this paper.

⁵ Hurricane Preparedness: Hearing Before the S. Comm. on Homeland Security and Gov’t Affairs, 109th Cong. (2006) (statement of Tim Bayard, New Orleans Police Department Commander).

⁶ FEMA’s Response to Katrina: Hearing Before the S. Comm. on Homeland Security and Gov’t Affairs, 109th Cong. (2005) (statement of William L. Carwile, Federal Coordinating Officer, FEMA Joint Field Office).

⁷ See FEMA’s Response to Katrina: Hearing Before the S. Comm. on Homeland Security and Gov’t Affairs, 109th Cong. (2005) (statement of Philip E. Parr, Federal Coordinating Officer, FEMA Joint Field Office).

⁸ WHITE HOUSE REPORT at 27.

Response Plan.⁹ Secretary Chertoff did not declare an Incident of National Significance until August 30, 2005 and consequently, delayed a significant part of federal government mobilization of support functions for Hurricane Katrina.¹⁰

In addition, the National Response Plan is premised on the recently strengthened role of the Department of Homeland Security and a weakened role of the Federal Emergency Management Agency (FEMA) as the leading agency for government response.¹¹ Because the Stafford Act – which is the only legislation pertaining to disaster response – specifically authorizes FEMA as the lead agency charged with preparedness, coordination, and response in natural disasters, there is an expectation among government officials that FEMA maintains those roles.¹² However, the National Response Plan and Homeland Security Presidential Directive 5 of 2002 fundamentally altered this role by separating FEMA’s preparation and response directorates.¹³ By the time Hurricane Katrina struck in 2005, FEMA did not have the authority, resources, or command over agencies to deploy resources.¹⁴ As a result, federal response to Hurricane Katrina was uncoordinated – leaving, for example, the regional FEMA offices with no authority to command over federal agencies such as the Department of Defense that were directly supporting the needs of people in New Orleans.¹⁵

Third, and finally, Hurricane Katrina’s size and impact was so overwhelming that local and state officials were physically incapable of responding to an emergency. Responders

⁹ WHITE HOUSE REPORT at 14.

¹⁰ *Id.*

¹¹ National Response Plan, http://www.dhs.gov/interweb/assetlibrary/NRP_Brochure.pdf [hereinafter NRP].

¹² 42 U.S.C. § 5197(g); *see generally* 42 U.S.C. §§ 5121-5206 (1988) [hereinafter THE STAFFORD ACT].

¹³ *See* Michael Grunwald & Susan B. Glasser, *Department’s Mission was Undermined From Start*, WASH. POST, Dec. 22 2005, at A1.

¹⁴ *See* Hurricane Preparedness: Hearing Before the S. Comm. on Homeland Security and Gov’t Affairs, 109th Cong. (2006) (statement of Herman B. Leonard, Prof., Harvard University).

¹⁵ Hurricane Preparedness: Hearing Before the S. Comm. on Homeland Security and Gov’t Affairs, 109th Cong. (2006) (statement of Robert B. Stephan, Assistant Secretary, U.S. Department of Homeland Security)

became victims themselves.¹⁶ Warren Riley, Superintendent of the New Orleans Police, testified that even though the Police Department maintained an Emergency Preparedness Plan, circumstances of Hurricane Katrina were so overwhelming that his force was rendered unable to fully effectuate that plan.¹⁷ For instance, within nearly twenty minutes of the breach of the Industrial Canal levee, the police department received 600 “911” calls.¹⁸ Later that day, over 300 officers were stranded by flood water.¹⁹ Mayor Nagin testified that the Stafford Act only provides federal government support for the “overtime” component of relief; there are situations that are so overwhelming that more aid is needed without the hurdles and obstacles of funding requirements and bureaucratic provisions.²⁰

These episodes about government response to Hurricane Katrina brought to the fore three concerns about the current state of national preparedness for a natural disaster. First, local and state jurisdictions, which are relied upon to be the primary first-responders to any emergency, have not developed clear, consistent, and robust response plans that optimize support from the federal government. Thus, it is important to strengthen this process. Second, the National Response Plan, the plan which organizes the federal government’s response to natural and manmade disasters, does not comport with the infrastructure established in the Stafford Act, which is the only legislation that guides federal disaster response. The future of reshaping national preparedness must thus reconcile these conceptual and technical discrepancies. Third, the government does not have a comprehensive plan for disasters that overwhelm the traditional and relied-upon infrastructures of disaster response, the local and state jurisdictions. Thus, the

¹⁶ WHITE HOUSE REPORT at 35.

¹⁷ Hurricane Preparedness: Hearing Before the S. Comm. on Homeland Security and Gov’t Affairs, 109th Cong. (2006) (statement of Warren J. Riley, Superintendent, New Orleans Police Department)

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Hurricane Preparedness: Hearing Before the S. Comm. on Homeland Security and Gov’t Affairs, 109th Cong. (2006) (statement of C. Ray Nagin, Mayor, New Orleans).

possibility of such a situation must be explored within the constraints of local governments as first responders.

This paper explores three essential concerns raised about national preparedness illuminated in the experience of Hurricane Katrina. In the aftermath of Hurricane Katrina, pundits, government officials (including those involved with the response to Hurricane Katrina) and academics offered numerous suggestions about the substantive changes needed in national preparedness.²¹ Many of those suggestions spoke to the core of the concerns raised in this paper: the importance of having comprehensive disaster response mechanisms at every level of government, the need to clarify the role of FEMA and the role of the NRP in Stafford Act situations, and the possibility of federal government leadership as a first responder in extreme catastrophic incidents.

Ultimately, this paper advocates three changes that should be made to address these concerns. This paper is unique among current recommendations for more effective nationwide disaster response than those in the public debate in that it urges the implementation of these solutions directly in the Stafford Act. First, the Stafford Act should require that states meet quantifiable goals that demonstrate continual compliance with the National Incident Management System (NIMS), which is a framework that allows first responders to effectively lead disasters requiring resources from multiple jurisdictions. Second, the Stafford Act should reflect the federal government's framework – the agencies, their roles, and functions – for disaster response, which is currently established in the National Response Plan. Finally, the Stafford Act should also contain a provision for catastrophic incidents that allows the federal government to serve as a first and leading responder in the extreme situations that local governments are absolutely unable to fulfill their duty. This paper advocates for these changes to

²¹ See generally WHITE HOUSE REPORT; SELECT COMMITTEE REPORT; ABA REPORT.

be made in legislation – specifically the Stafford Act – so that government entities at all levels have consistent, stable, and clear roles with the goal of being *primed and prepared* for natural disasters.

SOLUTION ONE: INTEGRATE THE NATIONAL INCIDENT MANAGEMENT SYSTEM INTO THE STAFFORD ACT

The National Incident Management System (NIMS) is an all-hazard, multi-party framework for all levels of government to follow when creating disaster response plans. The NIMS should be incorporated into the Stafford Act to reflect its status as the principal disaster response framework. States are already required to adopt the NIMS in order to receive federal preparedness funding, but federal legislation is necessary to create a clear framework for all levels of government to follow.²² In addition, federal legislation will enforce expectations of state and local governments regarding federal response roles that are consistent with their systems as they prepare and practice their respective emergency response systems.

Current requirements to comply with the NIMS are not sufficient.

President Bush's Homeland Security Presidential Directive 5 (HSDP-5) called upon the Department of Homeland Security to create a National Incident Management System (NIMS).²³ The NIMS is a standardized incident-management structure that allows governments at multiple jurisdictions to cooperate in the prevention, preparedness, recovery and mitigation of natural disasters.²⁴ The principal purpose of the NIMS is for the federal government, private-sector parties, and officials from non-affected jurisdictions to operate on common structures and lines of communication before, during and after responding to an emergency.²⁵ The NIMS is centered upon the Incident Command System (ICS), which is a structure that places a local Incident

²² <http://www.fema.gov/nims>.

²³ National Incident Management System, http://www.fema.gov/pdf/nims/NIMS_basic_introduction_and_overview.pdf [hereinafter NIMS].

²⁴ *Id.*

²⁵ *Id.*

Commander as the leader of incident response.²⁶ Therefore, in any disaster, the local Incident Commander manages the response to a natural disaster or emergency; if additional assistance is required, the Incident Commander remains the lead responder when supplementary resources arrive from other jurisdictions, including from the federal government.²⁷

Even though the NIMS is primarily aimed at ensuring that federal officials, participants from non-affected jurisdictions, and private-sector parties coordinate their resources effectively, the NIMS has an important impact upon local and state planning for emergencies. For example, Louisiana created the Louisiana Emergency Operations Plan according to the NIMS and keyed the state plan to the NRP.²⁸ At the city level, New Orleans established the New Orleans Office of Homeland Security, which is charged with emergency response that is in compliance with the ICS and NIMS.²⁹ A major benefit of keying the state plan to the federal plan is when a state requests assistance from other states or from the federal government, all members have a consistent framework upon which all parties' plans are based, thereby minimizing communication and command confusion.³⁰

Secretary Michael Chertoff of the Department of Homeland Security required all state, territorial, local and tribal governments to comply with NIMS standards in order to receive federal preparedness funding in 2005.³¹ Although states have agreed to this requirement, and will purportedly achieve "full NIMS compliance" by 2007, the possible loopholes through which

²⁶ ABA REPORT at 9.

²⁷ *Id.*

²⁸ State of Louisiana Emergency Operations Plan 2005, <http://www.ohsep.louisiana.gov/plans/eopindex.html>.

²⁹ <http://www.neworleanscert.org/>.

³⁰ ABA REPORT at 10. Emergency Management Assistance Compact (EMAC) is an interstate compact that allows states to access one another's resources in times of emergencies.

³¹ <http://www.fema.gov/nims> (follow "Frequently Asked Questions" hyperlink; then follow "NIMS Compliance: What Does Full NIMS Compliance Mean?" hyperlink); Full compliance is not required, though, in recognition of funding obstacles, etc.

governments may elect not to comply are too great a risk.³² Preparedness includes prevention and protection, as Richard Skinner, Inspector General of the U.S. Department of Homeland Security testified before the House.³³ Effective preparedness, then, means ensuring that all levels of government are taking the steps necessary toward prevention and protection.

From the outset, the lack of NIMS compliance or any comprehensive state emergency operations plan reflected a moral hazard problem with disaster response—the public’s expectation that the federal government will lead disaster recovery regardless of state obligations. The effect of failed disaster response falling on the federal government was clearly evident in the case of Hurricane Katrina which resulted in a campaign of blame against the Bush administration.³⁴ This problem emphasizes the importance of effective, coordinated disaster relief so that blame is not unfairly absorbed by one level of government, and the public has expectations consistent with the Incident Command System in which local responders are lead responders. There are four specific weaknesses that the current NIMS requirements reveal.

First, the standards are not stringent enough to require individual, independent readiness for disasters that depend upon NIMS-based response plans. As a result, local jurisdictions are not independently capable to address disasters and may not be able to handle a situation with a clear line of authority. In Louisiana, the parish of Orleans teams with Jefferson, Plaquemines and St. Bernard parishes to form Urban Area Security Initiative Region One.³⁵ Although this provision is sensitive to the fact that not all areas will have equal access to resources, it also reveals the threat that each local jurisdiction will not do its best to be prepared independently.

³² *Id.*

³³ Hurricane Katrina: Preparedness and Response: Hearing Before the House Government Reform Committee, 109th Cong. (2005) (statement of Richard Skinner, Inspector General, U.S. Department of Homeland Security).

³⁴ See e.g. William Douglas, *Blacks gathered in D.C. focus on Katrina, response by Bush*, THE HOUSTON CHRON., Oct. 16, 2006. While issues of race were a major part of the public backlash, it ultimately pointed toward an expectation that the federal government should be responsible for disaster response.

³⁵ Hurricane Preparedness: Hearing Before the Senate Homeland Security and Governmental Affairs, 109th Cong. (2006) (statement of Terry Ebbert, Director, New Orleans Office of Homeland Security).

The standard for compliance with current NIMS standards is whether or not the government put forth a good faith effort toward compliance.³⁶ When multiple levels are pooled together, it is harder to ensure that each participant's efforts are equal. To promote fairness (so that one jurisdiction is not giving disproportionately more time or resources into creating and implementing a plan), there should be stricter standards for each individual city government. The standard should not be raised so high that it is impractical for a local governments to meet the funding condition, but it should be strengthened enough to underscore the importance of the NIMS so governments will view NIMS compliance as a major priority.

Second, current NIMS requirements are so broad that they allow local politicians and jurisdictions to under-valuate risk. For example, while California and Gulf Coast states are continually aware of earthquakes and hurricanes respectively, a state like Kansas or Washington (i.e. a state not immediately synonymous with disaster) may not consider emergency preparedness a priority. The current funding conditions permit states to ignore NIMS standards if those states do not feel at risk for a major disaster because those states could simply elect not to receive federal preparedness funding.³⁷

Third, even in states that are faced with high risks of emergency, political agendas of state legislators may exploit the current broad NIMS requirements. Politicians may have difficulties pursuing emergency preparedness as a high priority in the face of other short-term and tangible projects such as education reform or public works. The nature of our political system with its short-term tenures is not conducive to elected officials spending money and effort on possible disasters when the problems citizens see around them might be homelessness and inadequate health care. Without explicit metrics that delineate quantitative requirements,

³⁶ See NIMS.

³⁷ *Id.*

politicians are free to take the least costly approaches, which threaten to compromise preparedness at the local and national level.

Fourth, the disaster of Hurricane Katrina showed that achieving NIMS compliance requires assistance and cooperation among all levels of government. Numerous local jurisdictions are unaware of the NIMS and unwilling to change their systems; some officials have expressed confusion about the NIMS and how their systems are supposed to coordinate with federal relief.³⁸ At the same time, the federal government itself did not follow the NIMS.³⁹ Colonel Stephan testified that federal officials on the ground did not implement key aspects of the NIMS – such as establishing a field office in which they could meet incident command.⁴⁰ Part of this problem can be attributed to the novelty of the system.⁴¹ At the same time, the experience of Hurricane Katrina also signified that imposing the NIMS upon states with weak standards also contributed to the disconnect between federal and state officials in responding to a disaster.⁴²

Although the Secretary of Homeland Security required states to implement the NIMS and created a flexible standard so that states would be able to meet its requirement at its own pace, Hurricane Katrina revealed that more robust conditions for NIMS compliance are required so that both federal and state officials have a clearer understanding of how to coordinate disaster relief and are on a more tangible and identifiable path to effective disaster preparation.

³⁸ See FEMA's Response to Katrina: Hearing Before the Senate Homeland Security and Governmental Affairs, 109th Cong. (statement of Scott Wells, Federal Coordinating Officer, FEMA Joint Field Office).

³⁹ See Hurricane Preparedness: Hearing Before the Senate Homeland Security and Governmental Affairs, 109th Cong. (2006) (statement of Robert Stephan, Assistant Secretary, U.S. Department of Homeland Security).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.*

The Stafford Act should include the NIMS and requirements to comply with it.

To address the problems that result from the current relaxed requirements for implementing the NIMS – a reluctance to comply at the federal level, confusion between jurisdictions, and political de-prioritization – the NIMS should be incorporated into the Stafford Act.

Under “Grants to States for development of plans and programs” of the current Stafford Act, states desiring financial assistance from the federal government are required to submit detailed disaster response plans.⁴³ A provision in this section should be added to require that in order to receive funding to develop their plans, states must build their disaster-response plans consistent with the NIMS template. Specifically, the degree to which they must develop their emergency operating plans must correspond to an index of risk that their jurisdiction faces, similar to the Department of Homeland Security’s current index for disaster-preparation funding.⁴⁴ The requirement to match emergency preparedness to a numerical index based on risk will prevent politicians from shying away from this priority and avoid any under-valuation of risk. Secretary Chertoff of DHS also advocates a risk-based approach.⁴⁵ This ensures a more efficient process because while it does not permit governments to wholly ignore NIMS compliance, it also does not require them to invest more resources than necessary to meet standards. A risk-based approach is more realistic for governments with limited budgets, and it more accurately reflects the true cost of disaster preparedness.

The NIMS should be codified specifically in the Stafford Act for two reasons. First, the Stafford Act generally pertains to situations where states need assistance from other jurisdictions

⁴³ 42 U.S.C. § 5131(c).

⁴⁴ See Response to Hurricane Katrina: Hearing Before the House Government Reform Committee, 109th Cong. (2005) (statement of Michael Chertoff, Security Secretary, U.S. Department of Homeland Security).

⁴⁵ *Id.*

(such as other states) and the federal government.⁴⁶ Second, because the Stafford Act is the controlling law for disaster-response planning, requiring the Act to reflect NIMS standards would make guidelines clearer. The federal government imposed funding conditions to ensure NIMS compliance because the NIMS is the framework all parties should follow. It thus follows that reflecting this requirement in the Stafford Act will ensure that all parties will actually follow these guidelines. In addition, placing NIMS standards into the Stafford Act also makes guidelines more accessible to outside parties. The NIMS is a recent creation, so it could not have been incorporated into the Act at the time the Stafford Act was written; but now that the framework exists, it should be noted explicitly in the Stafford Act.

Implementing stricter standards ensures stronger state and local preparedness.

Requiring states to comply with the NIMS through federal law conditioned on funding not only ensures that state and local governments will develop comprehensive and robust emergency operations plans, but it also creates expectations for federal and state officials regarding the procedures relevant for addressing disasters.

Foremost, requiring vigorous and diligent compliance with the NIMS (and consequently the ICS) ensures that states will develop strong and effective plans maintaining their appropriate role as first responders.⁴⁷ The NIMS is not for every incident – so the majority of incidents will still be handled by local and perhaps state authorities. Rather, the NIMS is intended for national incidents that require cooperation among multiple levels of government and between federal agencies and other emergency responders.⁴⁸ The federal government, for traditional,

⁴⁶ 42 U.S.C. § 5121(b).

⁴⁷ See NIMS.

⁴⁸ *Id.*

Constitutional, and budgetary reasons, respect states' powers and serve as a backstop for resources in disaster response, not the lead authority.⁴⁹

Terry Ebbert, Director of New Orleans Office of Homeland Security, testified before the Senate that the state's interoperable communications system was incapable of meeting the needs during the disaster.⁵⁰ Mayor Nagin noted that the breakdown of the communications system led government officials to talk to one another via text messages in an effort to secure the resources requested on a daily basis.⁵¹ Part of NIMS compliance is ensuring that local and state governments have effective communication systems in place in the event of a disaster.⁵² In making certain that state governments have effective communication methods, the federal government must work with them to provide adequate funding to procure the necessary equipment and conduct regular trainings. NIMS compliance forces all levels of government to work closer together to make sure that standards are met; states can expect a certain level of funding and in return, the federal government will expect that certain standards will be satisfied. Thus, in the event of a disaster, all parties will act based on fulfilled expectations, which will result in a more effective response overall.

In addition, because local jurisdictions maintain a sense of political accountability to its citizenry and has local knowledge of the area best enabling it to respond to disasters, the federal government relies on the local levels of government to be prepared and to dictate its needs to the

⁴⁹ WHITE HOUSE REPORT.

⁵⁰ Ebbert, *supra* note 35.

⁵¹ Hurricane Preparedness: Hearing Before the Senate Homeland Security and Governmental Affairs Committee, 109th Cong. (2006) (statement of Ray Nagin, Mayor, City of New Orleans).

⁵² NIMS.

federal government.⁵³ States must make the investment in disaster preparedness and avoid the tendency for short-sighted political objectives that may hinder the long-term planning for safety.

On the federal level, the official recognition and implementation of NIMS into law affects and shapes organization and operation of the federal government for emergency response involves parties outside the federal government. It is essential that outside parties have a clear understanding of the federal government's disaster response plan and what is based upon. Incorporation into federal law is precisely the format that will promote accessibility, not to mention accountability, of information to outside parties.

Having the NIMS and ICS templates codified into statute – and especially part of the Stafford Act – will consequently require the federal government to adhere to the system, unlike what happened during Hurricane Katrina.⁵⁴ The elaborate NIMS structure will also provide sufficient notice to private-sector participants in disaster relief, non-government organizations, and other jurisdictions about the importance of following the Incident Command System and of having an interoperable communications system.

Overall, requiring states to comply with the NIMS by incorporating its standards into the Stafford Act provides the added benefit that states are ready for all types of disasters. The NIMS is a template for an all-hazards disaster plan, and is part of the federal government's National Response Plan.⁵⁵ All-hazards plans deal with natural and manmade disasters and include terrorist threats.⁵⁶ While it may be possible to predict with reasonable certainty which parts of the country are prone to natural disasters, terrorist threats exist all over the country, so every state

⁵³ Response to Hurricane Katrina: Hearing Before the House Government Reform Committee, 109th Cong. (2005) (statement of Michael Brown, Former Director, Federal Emergency Management Agency, U.S. Department of Homeland Security).

⁵⁴ Spencer Hsu, *Brown Ignored Disaster Plan, New Report Says*, WASH. POST, Mar. 16, 2006, at A3.

⁵⁵ NRP.

⁵⁶ *Id.*

must be prepared. Making the NIMS the federally mandated template to follow ensures that states will be prepared for disasters of all types. The investment in disaster preparedness is necessary to save lives and to protect property.

SOLUTION TWO: IMPLEMENT THE NATIONAL RESPONSE PLAN INTO THE STAFFORD ACT

In order to optimize the effectiveness of federal disaster response and its synchronization with local and state infrastructure, the basic framework and organizational structure of the National Response Plan (NRP) should be included in the Stafford Act. The NRP is an all-hazards plan created and administered by the Department of Homeland Security that organizes resources of federal agencies involved with disaster response. Ideally, the National Response Plan addresses natural and manmade disasters, including those covered by the Stafford Act.⁵⁷ The NRP replaced the Federal Response Plan, which was the disaster response plan formerly administered by the Federal Emergency Management Agency (FEMA) required by the Stafford Act.⁵⁸

Although the NRP is supposed to cover Stafford Act disasters, the experience of Hurricane Katrina showed that the infrastructure of the NRP conflicts with that imagined and presupposed by the Stafford Act. Apart from infrastructural inconsistencies between both disaster preparedness and response mechanisms, the experience of Hurricane Katrina showed that the underlying question about the role of FEMA, the Department Homeland Security, and who is to lead response in natural disasters has been unanswered. Clarity is essential for effective disaster response, and synchronizing the federal government's disaster response plans by implementing the NRP directly into the Stafford Act will achieve that clarity.

⁵⁷ NRP.

⁵⁸ 42 U.S.C. § 5196(b).

The National Response Plan (NRP) and the Stafford Act are inconsistent.

The Stafford Act is the legislative authority through which the federal government supports states in times of disasters. When a disaster overwhelms state capabilities, the Governor submits a request for the President to declare a “major disaster” or an “emergency”; the President’s declaration then triggers federal support under Stafford Act provisions.⁵⁹ Federal support is intended as a backstop for state and local resources while states retain control of the incident.⁶⁰ The Stafford Act requires that the federal government follow a disaster response plan administered by FEMA, which used to be the Federal Response Plan.⁶¹ The President then appoints a Federal Coordinating Officer in charge of the federal response; and should the situation warrant it, the President may request that the Governor of the affected state appoint a State Coordinating Officer to work jointly with the Federal Coordinating Officer.⁶²

In 2002, the Bush Administration created the National Response Plan through Homeland Security Presidential Directive-5 (HSPD-5) to address Stafford and non-Stafford Act disasters. Unlike the state request and subsequent Presidential declaration of a “major disaster” or “emergency” that executes the Stafford Act, the NRP is triggered upon declaration of an “Incident of National Significance” by the Secretary of the Department of Homeland Security.⁶³ Incidents of National Significance are defined as “high-impact events that require an extensive and well-coordinated multi-agency response.”⁶⁴ Upon the declaration of an Incident of National Significance, the Secretary also appoints a “Principal Federal Officer” (PFO), who is in charge of leading all federal response under the NRP to any situation in which the federal government is

⁵⁹ 42 U.S.C. § 5196.

⁶⁰ *Id.*

⁶¹ 42 U.S.C. § 5196.

⁶² 42 U.S.C. § 5143.

⁶³ WHITE HOUSE REPORT at 14.

⁶⁴ *Id.*

involved.⁶⁵ In Stafford Act disasters, theoretically, the PFO is supposed to work hand-in-hand with the Federal Coordinating Officer (the individual with the legal authority to execute Stafford Act responsibilities).⁶⁶ The Bush Administration created this extra bureaucratic role in order to separate on-the-ground management of a disaster (the role of FEMA's Federal Coordinating Officer per the Stafford Act) and strategic, global and long-term management linked to the White House (the Department of Homeland Security's PFO).⁶⁷ In addition, the NRP does not provide FEMA with an explicit role.⁶⁸

Although the NRP states that it used the Stafford Act in creating its foundation, and that nothing in the NRP "alters the existing authorities of individual Federal departments and agencies...[nor does] it convey new authorities upon the Secretary of Homeland Security or any other Federal official," Hurricane Katrina demonstrated that these systems are inconsistent and lead to much confusion and inconsistency among federal response, and consequently, affected the federal government's ability to effectively support local government efforts.⁶⁹

Hurricane Katrina illustrated major problems with the federal government's disaster response plans that can largely be placed into two camps: logistical and structural. In the logistical camp, there was confusion over which federal officer was in charge and under what plan. For example, during the immediate response to Hurricane Katrina, the Federal Coordinating Officer (whose authority derives from the Stafford Act and is the only federal official with legal authority to administer resources) conflicted with the Principal Federal Officer (whose position is a creation of an executive order, and is solely and only in charge of executing

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See id.* at 15.

⁶⁸ *See* NRP at 10.

⁶⁹ *See* NRP at 5.

the NRP).⁷⁰ During disaster response, federal government officials were unclear about whom to follow; likewise, local and state government officials were unsure as to who had more authority to command federal resources.⁷¹ Federal government officials themselves are unclear about the relationship between the PFO and the FCO in Stafford Act disasters. The Department of Homeland Security recently published a two-page brochure intended to simplify the NRP; but even there, the PFO is described as one who may be designated by the Secretary of Department of Homeland Security who “works in conjunction with [other federal] officials to coordinate overall Federal incident management efforts.”⁷² The PFO’s role, then, remains a vague one and its relationship with other federal officers, especially the FCO, is unclear.

Another logistical inconsistency between the National Response Plan and the Stafford Act is funding. For instance, the State of Louisiana requested funding from the federal government for re-interring disinterred remains, which under the NRP is an activity the federal government can handle.⁷³ After initially being promised that the federal government could handle this activity, the federal government had to revoke its promise to the State because FEMA was not authorized to fund the activity under the Stafford Act.⁷⁴

Finally, while a declaration of a “major disaster” by the President initiates Stafford Act provisions, the NRP is not triggered until the Secretary of Homeland Security declares an “Incident of National Significance.” During Hurricane Katrina, the President declared a major disaster per the Stafford Act and the Secretary of Homeland Security declared it an Incident of

⁷⁰ Hurricane Preparedness: Hearing Before the S. Comm. on Homeland Security and Gov’t Affairs, 109th Cong. (2006) (statement of Richard L. Skinner, U.S. Department of Homeland Security).

⁷¹ *Id.*

⁷² WHITE HOUSE REPORT at 15.

⁷³ Hurricane Preparedness: Hearing Before the S. Comm. on Homeland Security and Gov’t Affairs, 109th Cong. (2006) (statement of Richard L. Skinner, U.S. Department of Homeland Security).

⁷⁴ *Id.*

National Significance three days later.⁷⁵ This led to confusion about which provisions to follow – those under the Stafford Act or those outlined within the NRP; because as mentioned earlier, the two are not always consistent.

It should be acknowledged that the NRP was a relatively new plan, and part of the confusion may be attributed to the fact that the NRP was unpracticed. Many of the logistical problems addressed above can be addressed by modifications in the executive order of the NRP such as the clarification of the roles of the PFO and the FCO. However, the experience of Hurricane Katrina also highlighted a substantive problem with the duality of the NRP and Stafford Act as templates for federal disaster: an unanswered and unknown role of FEMA within the Department of Homeland Security.

Formerly, FEMA was an independent, cabinet-level agency who under the leadership of James L. Witt focused much of its efforts on disaster prevention and preparedness.⁷⁶ In March 2003, FEMA lost its independence when it was subsumed by the Department of Homeland Security.⁷⁷ FEMA's role has also been redefined as the agency in charge of response and not preparedness.⁷⁸ There has been no amendment to the Stafford Act to reflect that FEMA is no longer the primary agency in charge of preparedness and response, even though the Stafford Act provides and charges FEMA with many disaster-preparation responsibilities, such as preparation exercises with local government officials, preparation of disaster-response plans, and review of local disaster-response infrastructure.⁷⁹

⁷⁵ WHITE HOUSE REPORT at 41.

⁷⁶ See Department of Homeland Security Regional and Field Office Consolidation: Hearing Before the H. Gov't Reform Committee Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, 108th Cong. (2004) (statement of James L. Witt, President, James Lee Witt Associates); FEMA History, <http://www.fema.gov/about/history.shtm>.

⁷⁷ FEMA History, <http://www.fema.gov/about/history.shtm>.

⁷⁸ Hurricane Preparedness: Hearing Before the S. Comm. on Homeland Security and Gov't Affairs, 109th Cong. (2006) (statement of David M. Walker, Comptroller General, U.S. Government Accountability Office).

⁷⁹ See THE STAFFORD ACT.

The subordination of FEMA under the Department of Homeland Security resulted from a desire to consolidate national preparedness for manmade and natural disasters and unfortunate bureaucratic tension.⁸⁰ For instance, Michael Brown, former director of FEMA, did not respond well to authority and instead sought to receive orders directly from the White House.⁸¹ Before its integration into DHS, FEMA could have reported directly to the President, but under the current structure, FEMA should now report to and request assistance from the Secretary of DHS. This could easily be a conflict of personalities and not a problem pertaining to the consolidation of the Department of Homeland Security. However, the subsuming of FEMA within the Department of Homeland Security has resulted in a plummet in national attention toward disaster mitigation, preparedness, and response. The Center for Progressive Reform reported that in 2005, seventy-five percent of grant dollars from Department of Homeland Security to regional responders went to programs exclusively focused on terrorism.⁸² In addition, the integration of FEMA into the Department of Homeland Security has been accompanied by a deregulation of emergency management to natural disasters.⁸³ For instance, the Administration has pushed for delegating disaster management responsibilities such as providing food and shelter to faith-based organizations. These changes are, once again, not reflected in the cornerstone legislation guiding federal disaster management: the Stafford Act.

As a result, the confusion surrounding FEMA has pervaded to President Bush's recent difficulties in filling the Director of FEMA role.⁸⁴ Top reasons prospective candidates gave for

⁸⁰ Michael Grunwald & Susan B. Glasser, *Department's Mission was Undermined From Start*, WASH. POST, Dec. 22 2005, at A1; Hsu, *supra* note 54.

⁸¹ Hsu, *supra* note 54.

⁸² CENTER FOR PROGRESSIVE REFORM, AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA 5 (2005), available at http://www.progressiveregulation.org/articles/Unnatural_Disaster_512.pdf [hereinafter CPR REPORT].

⁸³ *Id.*

⁸⁴ Eric Lipton, *FEMA Calls, but Top Job is Tough Sell*, N.Y. TIMES, Apr. 2, 2006, at A1.

rejecting the position included the lack of clarity of FEMA’s role since its adoption into DHS.⁸⁵ These problems emphasize the need for not only the harmonization of the National Response Plan and the Stafford Act, but the need to clearly designate a lead agency in disaster preparation and response. The strongest way to achieve equivalence throughout the system is by incorporating elements of the National Response Plan with a stronger role for the Department of Homeland Security including a robust FEMA directly into the Stafford Act.

The Stafford Act should be amended to include the framework of the NRP.

To address the logistical, bureaucratic, and functional differences and inconsistencies between the National Response Plan and the Stafford Act, the Stafford Act should be amended to include the main structure and elements of the National Response. Under the Stafford Act, the “Director [of FEMA] may prepare Federal response plans and programs for the emergency preparedness of the United States.”⁸⁶ However, HSPD-5 is indicative of the government’s direction toward consolidating federal groups related to disaster relief into one agency – the Department of Homeland Security and under one plan – the National Response Plan. Consistent with this direction, the Stafford Act should be amended to state explicitly that the National Response Plan is the controlling plan when Stafford Act disasters are triggered. The Stafford Act should also accurately reflect the organizational structure that the executive branch decides to employ upon a natural disaster (and more appropriately, an “Incident of National Significance”).

Incorporating elements of the NRP into the Stafford Act entails making other legislative changes. First, when the Governor requests federal assistance, instead of the President declaring

⁸⁵ *Id.*

⁸⁶ 42 U.S.C. § 5196(b).

a “major disaster” or an “emergency,” the Secretary of Homeland Security should declare an “Incident of National Significance” thereby triggering the NRP under the Stafford Act.

Transferring the formality of the declaration from the President to the Secretary of DHS also supports the idea of consolidating federal efforts in disaster relief. It also creates a seamless connection between the Stafford Act and the federal government’s established mechanism to address such types of disasters.

Second, regarding the confusion between the Principal Federal Officer (PFO) under the NRP and the Federal Coordinating Officer (FCO) under the Stafford Act, it should be made explicit that the PFO is the leading federal official, is appointed by the Secretary of Homeland Security, and is responsible for strategic and long-term decisions, and directly accountable to the White House. It should also include that the PFO oversees the Federal Coordinating Officer, who should be in charge of on-the-scene deployment of resources as currently delineated in the Stafford Act. Although this seems to add a layer of bureaucracy, with clear job responsibilities (the PFO having a strategic, supervisory role, and the FCO having a commanding on-the-scene and tactical responsibility), job specialization is optimized. In addition, this type of structure allows for the PFO to be a sole federal official responsible over multiple FCOs in the situation of multi-state disasters.⁸⁷ To that effect, the FCO should also be assigned by DHS and not by the President as it currently reads in the Stafford Act.⁸⁸ This enforces the notion that DHS is the federal department in charge and the President will stay informed and updated through the Principal Federal Officer.

More substantively, the final important change to the Stafford Act pertains to the role of FEMA and the Department of Homeland Security. In one respect, this debate should be reserved

⁸⁷ WHITE HOUSE REPORT at 90.

⁸⁸ 42 U.S.C. § 5143.

for the executive agency to reconsider some of the recent changes with the consolidation of the Department of Homeland Security, such as the divorce of preparation and response functions of FEMA. However, the Stafford Act still remains the center-point for state and federal cooperation for natural disaster, and it is thus more appropriate to address those roles in the Stafford Act. Therefore, the organizational and functional roles of Department of Homeland Security and FEMA in natural disasters should be directly delineated in the Stafford Act.

Although the NRP entails a minimal responsibility for FEMA, this paper advocates that that FEMA should have both preparedness and response functions for natural disasters – but still within the Department of Homeland Security, and that this role should be explicit in the Stafford Act. The Stafford Act should explicitly state that FEMA, administratively a part of the Department of Homeland Security, has the leadership over natural disaster preparedness and response. As other advocates have argued, FEMA needs to be responsible for preparing with local and state officials and optimizing its regional facilities.⁸⁹ FEMA should have the continued role of reviewing local and state emergency plans, implementing the NIMS as explained in Solution One of this paper, and acting as the face of the federal government as a responder in disaster situations.⁹⁰

It is essential that these changes are made within the Stafford Act. While many of the above suggestions can be clarified internally by executive order or within the Department of Homeland Security, because disaster response entails involvement of other parties, from tribal and state governments to third parties like the Red Cross, the changes must be written in legislation, a source open to the public. In addition to the clarity that this will achieve, amending the Stafford Act to reflect this organizational structure will also ensure permanency. It will not

⁸⁹ See CPR REPORT at 5.

⁹⁰ See THE STAFFORD ACT.

be vulnerable to every new administration or new Secretary of Homeland Security. The newness of the NRP was part of the problem during the Hurricane Katrina response because plans must be practiced, must be prepared, in order to achieve an effective response. Thus, writing the NRP into legislation will make it more difficult to change the plan; and if it should be changed, it will be through the public channels of Congress. More important than making these changes in any legislation, the structure of the NRP, FEMA, and the Department of Homeland Security should be in the Stafford Act because it is more logical to consolidate disaster response systems into one act, also for the purpose of clarity for state governments who rely on it during a disaster.

FEMA should have a stronger role within the Department of Homeland Security.

First, updating the Stafford Act to reflect modern federal disaster response infrastructure (including the scheme of the NRP) speaks to addressing the confusion about roles of officials that was so apparent during and after Hurricane Katrina. Second and more importantly, is this paper's suggestion about the robust role of FEMA within the Department of Homeland Security, and such a role explicit in the Stafford Act.

In one respect, this paper offers a compromise between two polar suggestions in current public discussion about FEMA and the Department of Homeland Security.⁹¹ The government, especially the White House and Secretary Chertoff, is maintaining its position about separating preparation and response and minimizing the role of FEMA.⁹² Secretary Chertoff recently delivered a speech at the National Hurricane Conference emphasizing the importance of FEMA

⁹¹ This paper was written and presented before the release of a recent U.S. Senate Report entitled, "Hurricane Katrina: A Nation Still Unprepared," which, similar to this paper, advocates a compromise about the future of FEMA by recommending the strengthening of FEMA (or similar type of organization that addresses natural disasters) within the Department of Homeland Security. However, this paper takes such recommendation one step further in advocating that such changes be made in the Stafford Act. Spencer S. Hsu & Bill Brubaker, *Senate Report Urges Dismantling of FEMA*, WASH. POST, Apr. 27, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/27/AR2006042701229.html>.

⁹² WHITE HOUSE REPORT at 88-93.

as a disaster response unit.⁹³ Secretary Chertoff submitted a request to the President for a ten percent increase in FEMA's budget for 2007, with special focus on strengthening three areas within FEMA: logistics, debris removal and contracting.⁹⁴ Secretary Chertoff also mentioned that work was being done to integrate the Preparedness Directorate.⁹⁵ On the other hand, former FEMA Director James L. Witt have argued to re-instate FEMA as a cabinet-level position and separate natural disasters from Homeland Security.⁹⁶

The recommendation in this paper acknowledges the importance of having FEMA, as James L. Witt encouraged before the U.S. Congress during the consolidation of Homeland Security, as a clear, supervisory authority in preparation and response to natural disasters. In natural-disaster response, "the close links between preparedness, prevention, response and recovery for all hazards" are strengthened when they occur within a single organization.⁹⁷ This requires a strengthened and intimate consolidation of natural-disaster preparedness and response functions forged within FEMA. FEMA already has extensive regional relationships, a history embedded in local and state response infrastructures, and a long-standing reputation for carrying out this role. To undo and unravel such a foundation could lead to even further complication.

Therefore, this paper's recommendation of maintaining FEMA within the Department of Homeland Security also reckons with the political reality of the current Administration's priority in strengthening the Department of Homeland Security. It would be unwise to attempt to reorganize FEMA so that it is no longer a part of DHS because, in addition to the reasons mentioned earlier advocating disaster response remain within one department, it will only add to

⁹³ http://www.dhs.gov/dhspublic/interapp/speech/speech_0279.xml.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See Department of Homeland Security Regional and Field Office Consolidation: Hearing Before the H. Gov't Reform Committee Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, 108th Cong. (2004) (statement of James L. Witt, President, James Lee Witt Associates).

⁹⁷ Hurricane Preparedness: Hearing Before the S. Comm. on Homeland Security and Gov't Affairs, 109th Cong. (2006) (statement of David M. Walker, Comptroller General, U.S. Government Accountability Office).

and generate further bureaucratic fighting. Instead of negotiating more power conflicts, it is more efficient to keep all disaster response agencies together and with enough time, FEMA should adjust to its new, albeit specialized to only address natural disasters, role within the Department of Homeland Security.

For this reason, legislation is a more effective way of reminding bureaucrats that the overarching goal of disaster relief is saving lives and protecting property. The explicit acknowledgement of such a role will also facilitate funding from Congress when disaster response is under an umbrella unit. There will only be one department requesting money rather than Congress receiving monetary requests from various agencies, especially if multiple requests deal with disaster relief. With a specific agency that has consolidated natural-disasters preparedness and response directorates, FEMA, within the Department of Homeland Security, will be able to receive the funding it needs to strengthen its regional offices and headquarters.

Another advantage of formalizing the framework of the NRP in the Stafford Act and hence affording it legislative weight is the avoidance of bureaucratic infighting. If the mechanism of federal disaster relief is made federal law, disagreeable bureaucrats will have little choice but to follow the Plan, and will also be held accountable to it. The power struggles endemic to politics are somewhat muffled if the process to change the NRP and who is in charge is placed in the public realm. Legislation reflects people's expectations better than an executive order, so the moral hazard problem mentioned earlier is also mitigated if people are made accountable to themselves (through their representatives). If the NRP and the role of FEMA within the Department of Homeland Security is federal law, people are more likely to support its execution because if it is what their representatives voted for, then it is more likely to reflect their needs than an executive order.

SOLUTION THREE: IMPLEMENT A MORE ROBUST CATASTROPHIC INCIDENT ANNEX OF THE NRP IN THE STAFFORD ACT

The third and final major step in amending the Stafford Act and improving national disaster relief specifically addresses those incidents that overwhelm local and state first responders. There is no explicit federal authority or guidance for federal assumption of disaster relief in catastrophic incidents, so the Stafford Act must be modified to include such a possibility.⁹⁸ At present, the NRP contains a provision for high-impact incidents that warrants a more proactive federal role in disaster response called the Catastrophic Incident Annex (CIA), but it is insufficient. The White House recommended bolstering the CIA, but the White House's suggestion does not go far enough.⁹⁹ The CIA must be strengthened and a proactive, leading federal government role in the case of a catastrophe must be added to the Stafford Act for optimal effectiveness.

There is no comprehensive framework for proactive federal response.

The experience of Hurricane Katrina brought to the fore two concerns about the Catastrophic Incident Annex (CIA). First, because it runs independently of the NRP, the Stafford Act, and all other current disaster-relief programs: Hurricane Katrina was the first situation to test its necessity and the CIA's role proved to be ambiguous and not understood.¹⁰⁰ The CIA is a framework for federal-government response in "little" or "no notice" situations (terms which are undefined).¹⁰¹ The CIA requires that the Secretary of Homeland Security declare a "catastrophic incident," so that executive agencies follow protocols to pre-identify and

⁹⁸ See generally THE STAFFORD ACT.

⁹⁹ WHITE HOUSE REPORT at 88.

¹⁰⁰ Hurricane Preparedness: Hearing Before Senate Homeland Security and Governmental Affairs, 109th Cong. (2006) (statement of David Walker, Comptroller General, Government Accountability Office).

¹⁰¹ NRP at CAT-1.

rapidly deploy essential resources.¹⁰² This mobilization is the same as what the federal government would have done upon a request from a Governor, except on an expedited schedule and without specific requested needs from the state.¹⁰³ However, federal officials expressed that the government advanced resources before the landfall of Hurricane Katrina, and in essence, executed the CIA without officially doing so.¹⁰⁴ On the other hand, Jeff Smith, Acting Deputy Director of the Louisiana Office of Homeland Security and Emergency Preparedness, testified that “[t]he biggest single failure of the Federal response was the . . . failure to . . . implement the catastrophic incident annex.”¹⁰⁵

This is related to the second prominent problem with the CIA and its effectiveness, which is that even if it was implemented, the federal resources may not have been *of the appropriate nature* to address the problems that arose during Hurricane Katrina. Melvin Holden, Mayor-President of Baton Rouge, reported that the NIMS – which is the fundamental structure to the NRP and current disaster relief – could not operate effectively not only because of a lack of system awareness, but also because of the logistical incapacity to do so.¹⁰⁶ Regardless of supplies arriving earlier or before levees broke in New Orleans, the entire disaster-relief structure may not have been working because of the incapacity of the system at local levels. Because the CIA limits any pre-positioned, federal resources deployed proactively to “remain there until requested by State/local incident command authorities, when they are integrated into the incident

¹⁰² *Id.*

¹⁰³ The exact operationally specific component of the Catastrophic Incident Annex is the Catastrophic Incident Supplement (CIS), and is classified from public viewing. The CIA indicates that it will “be approved and published independently of the NRP Base Plan and Annexes” and is “For Official Use Only.” NRP at CAT-1.

¹⁰⁴ Brown, *supra* note 53.

¹⁰⁵ Hurricane Katrina Response in Louisiana: Hearing Before the House Select Committee; 109th Cong. (2005) (statement of Jeff Smith, Acting Deputy Director).

¹⁰⁶ Response to Katrina: Hearing Before the Senate Homeland Security and Governmental Affairs, 109th Cong. (2005) (statement of Melvin Holden, Mayor-President of Baton Rouge).

response effort,” those resources are of little optimal use when the incident command system has collapsed.¹⁰⁷

Currently, proactive authority for the federal government – beyond the pre-positioning of assets enumerated in the CIA – to lead disaster response is unclear. Congress has granted specific emergency authorities to federal officials for their specific jurisdictions. For example, the Secretary of Homeland and Health Services may declare a Public Health Emergency and thus have broad powers to order evacuations and quarantines.¹⁰⁸ In addition, the Department of Defense also acts as an immediate responder for certain national emergencies. The Department engages in activities under the Stafford Act such as debris removal, restoration of public services, rescue, evacuation, and emergency-medical treatment, and even law enforcement absent a request from state or local officials, as long as the President and Secretary of Defense determine that these activities are “absolutely necessary.”¹⁰⁹

This authority is not codified in statute (and its constitutionality has not yet been questioned), but rather has developed historically as far back as the 1906 earthquake.¹¹⁰ In a catastrophic situation stemming from a natural or manmade disaster, there could be conflicting emergencies calling upon the powers of different executive agencies, such as a public health and law-enforcement problem. The involvement of various federal agencies in catastrophic incidents necessitates a plan to coordinate these agencies.

¹⁰⁷ NRP at CAT-1.

¹⁰⁸ ABA REPORT at 5.

¹⁰⁹ JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICES REPORT FOR CONGRESS: THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES 6 (2005).

¹¹⁰ *Id.* at 6.

A framework for catastrophic response must be complete.

Because current authority allowing the federal government to address natural or manmade disasters as an immediate responder is unclear and underdeveloped, the CIA needs to be more robust and enacted into legislation. DHS has legal authority from Congress to coordinate disaster response and acknowledges the need for state consent for such a federal role.

Although the White House recommended that the NRP-CIA include a provision for the federal government to act as a primary responder when the state and local governments are incapacitated, this authority should be directly implemented into legislation.¹¹¹ From a substantive perspective, this authority will allow the federal government to temporarily act as incident commanders until local authorities are able to recover from the initial impact and/ or subsequent catastrophes that may occur.¹¹² There are several considerations that must be addressed when crafting this role of the federal government.

First, any strengthening of the CIA and the role of the federal government responding to a disaster requires a clear threshold. A clear threshold will avoid confusion at all levels, and offer assurance to local and state governments that in truly high-impact catastrophes, like Hurricane Katrina, the federal government will play a more proactive role. Current disaster relief defers to and is centered upon local and state governments as first responders (under the Incident Command System) to respect local home rule and because not every disaster requires federal support.¹¹³ Therefore, to avoid the possibility of federal authorities over-stepping their involvement as immediate responders, the CIA in the Stafford Act should include a specific process by which it is triggered (a process that must be communicated at every level).

¹¹¹ WHITE HOUSE REPORT at 88.

¹¹² *Id.*

¹¹³ WHITE HOUSE REPORT at 13. The Incident Command System is the operating structure for all hazards which places local authorities as lead authorities.

Perhaps the threshold should be cleared by an explicit request for federal control by local and state incident commanders. When incident commanders realize that they need federal assistance under the Stafford Act, they should have the option to request the federal government to assume total leadership and charge of incident command (as opposed to federal agents serving a supplementary and secondary role).

Second, the scope of federal involvement should also be limited by duration. This requires a set of standards that help the federal government determine when local and state officials can re-assume control. The White House indicates that a “temporary” federal assumption of disaster responses should exist, but it is important to ensure that “temporary” is clearly defined so that federal resources are not unnecessarily expended and that states can better restructure their own contingency plans. One possibility is requiring the State Coordinating Officer (who may be designated upon the triggering of the Stafford Act) be allowed to determine when federal leadership to return to a supporting role, rather than a leading role.¹¹⁴

Third, funding and cost sharing must also be explicitly addressed in the modified CIA. Currently, the CIA does not contain a federal-state cost share agreement.¹¹⁵ However, states and federal governments share costs in Stafford Act emergencies.¹¹⁶ This discrepancy is raised in the current CIA but is not resolved.¹¹⁷ The nature of these catastrophic incidents is overwhelming, unpredictable, and almost unfathomable (but not beyond preparation), so one recommendation would be an after-the-fact adjudication of cost-sharing. In catastrophic incidents of this magnitude, the federal government would use whatever local and state resources are at its

¹¹⁴ See 42 U.S.C. § 5143(b)(5).

¹¹⁵ NRP at CAT-2.

¹¹⁶ 42 U.S.C. § 5178(b).

¹¹⁷ NRP at CAT-2 (“Federal assets unilaterally deployed in accordance with the NRP-CIS do not require a State cost-share. However, in accordance with the Stafford Act, State requests for use of deployed Federal assets may require costsharing.”)

disposal. In addition, the urgency of the situation should not be hampered by limited funding caps. Therefore, in these types of catastrophic incidents, cost-sharing should be determined on an after-the-fact, case-by-case basis.

Fourth, integral to the concerns established above regarding the strengthening of the CIA are training and preparation programs. This requires the federal government to be aware of the resources and procedures of local and states jurisdictions so that the federal government leads disaster response efficiently. This concern is consistent with, if not supports, current strengthening and calibration of the Department of Homeland Security and the HSPD-08, President Bush's call for National Preparedness Goals.¹¹⁸

The federal government's role in a catastrophe should be included in the Stafford Act.

The CIA provisions must be explicit in the Stafford Act, so the federal role in catastrophes is consistent with the entire schema of disaster relief as delineated in the first two recommendations of this paper.

Currently, Section 5170 of the Stafford Act permits a governor to make a broad request for a declaration of a "major disaster," and receive federal aid without specifying which state resources will be used (contrary to the requirements for the declaration of an "emergency" under section 5193). In this context, it would be appropriate to insert a clause allowing the request for a declaration of a "catastrophic incident" that would signify execution of the CIA. However it is incorporated (whether a part of Section 5170 or an entirely new component of the Stafford Act), there are numerous concerns with legislating a clause allowing federal leadership as immediate and leading responders to disasters. One principal set of concerns is logistical, regarding cost-

¹¹⁸ Homeland Security Presidential Directive 8, <http://www.whitehouse.gov/news/releases/2003/12/20031217-6.html>.

sharing and the proper administrative procedure. These concerns can be solved by spelling out appropriate procedures within the Act. Then, there are two specific concerns.

First, the inclusion of the CIA in the Stafford Act should be consistent with the proposed changes to the Stafford Act detailed in this paper. For instance, the PFO should have a similar role in catastrophic incidents as in typical federal responses to a major disaster or emergency, which is leading and coordinating the contribution of other executive agencies. Consequently, this bestows upon the Department of Homeland Security and specifically FEMA a clear leadership role (as opposed to other agencies such as the Department of Defense) to build and cultivate relationships that it already has with local and state officials for usual disaster-response training and development.

Second, the legislation of the CIA in the Stafford Act should also address and clarify other emergency authorities that could potentially muddle federal response to a catastrophic incident. For example, the Insurrection Act is specifically geared toward the absence of law enforcement; the threshold allows federal forces to suppress “any insurrection, domestic violence, unlawful combination or conspiracy” if law enforcement is hindered within a state.¹¹⁹ The Department of Defense has inherent emergency power in these situations to “prevent loss of life or wanton destruction of property and to restore governmental functioning and public order”; while this is a broad threshold, it applies only to federal military and not the entire cadre of federal agencies involved in disaster relief.¹²⁰ Thus, the acknowledgement of the possibility of catastrophic incidents should be exclusively in the Stafford Act and different from declarations of insurrection.

¹¹⁹ 10 U.S.C. §§ 331-35.

¹²⁰ *See id.*

Developing a proactive federal role is necessary and should respect state sovereignty.

From the outset, strengthening the NRP-CIA and incorporating the possibility of allowing the federal government to be the leading response to a catastrophic incident would address many of the problems that result from disabled local and state infrastructure. For example, the federal government would be able to manage the situation with a functioning communications system to perform response functions in immediate disaster relief (evacuation, law enforcement) and even possible disasters within catastrophes (such as breaching of levees). The federal government, with permission and acknowledgement by local and state officials, would be able to handle these immediate emergencies without having to wait for an enumerated request (i.e. list of needed resources) from the state governor or approve of cost-sharing mechanisms under current Stafford Act provisions.¹²¹

In addition, the explicit possibility of the federal government to address catastrophic incidents would also be beneficial in situations where natural or manmade disasters affect multiple jurisdictions. For example, during Hurricanes Isabel in 2003 and Ivan in 2004, each affected state had to declare a disaster under the Stafford Act.¹²² In situations where multiple hurricanes or one disaster does not afford the time for those requests and confirmations by the President, coupled with compromised local and state infrastructure unable to address immediate response needs, a proactive federal response is necessary. Not only would a federal response be effective as a first responder when local infrastructure is compromised, but there would be a consistent response led by federal authorities among multiple jurisdictions. In these types of situations, neighboring state cooperation through the Emergency Management Assistance

¹²¹ 42 U.S.C. § 5170; 42 U.S.C. § 5178(b).

¹²² ABA REPORT at 4.

Compact may be difficult to manage.¹²³ For the same reason that a local or state jurisdiction cannot effectively operate an incident command during an overwhelming catastrophic incident, incapacitated jurisdictions cannot manage and administer requests for relief from other states. Therefore, the federal government should take charge in this situation. By having a prominent role, the federal government would not have to work with uncertainty of local and state resources meeting disaster response needs. Such a role would also be important in other large catastrophic incidents such as pandemics or biological terrorism.

The acknowledgement of a possible proactive federal role in the Stafford Act also reflects a fine balance between the need for a significant federal government role in disaster response and respect for state sovereignty. Giving the federal government power to assume immediate leadership premised only upon the explicit request from local and state authorities avoids placing too much power and decision-making out of the hands of traditional first responders. Local and state officials are the best judges to determine whether their systems are incapable of disaster relief, and only upon their determination should federal assumption of their duties be allowed.¹²⁴ In addition, granting the State Coordinating Officer the authority to determine when local and state responders are able to re-assume their roles would also prevent the federal government from expending unnecessary resources and imposing superfluous authority.

Consequently, these changes must be done through legislation. From a legal perspective, the express permission of Congress avoids traditional Constitutional hostility against the executive agency performing law enforcement in states and making wholly unilateral

¹²³ See ABA REPORT at 10.

¹²⁴ *Id.*

decisions.¹²⁵ Furthermore, making these changes in the Stafford Act (as opposed to creating a new act) consolidates the federal role in emergency management into one law and maintains consistency with the current federal-state agreement on addressing natural and manmade disasters.

Finally, the process of amending the Stafford Act encourages deliberation and consideration about the provisions of the NRP and the NRP-CIA by welcoming input by the U.S. Congress, and also by preventing the possibility of changing a system only through executive order as each presidential administration changes. The long-term nature of legislation also provides assurance to states that their investment in disaster response will not be wasted should a new administration create an alternate disaster response system.

¹²⁵ See *Posse Comitatus Act*, 18 U.S.C. § 1385 (1959) (limiting military involvement for domestic law enforcement purposes); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) (holding President did not have constitutional authority via an executive order to seize and possess steel mills).

CONCLUSION

Effective disaster preparedness and response is a national priority that demands cooperation among all levels of government and private parties. Involvement of parties outside of the federal government necessitates sharp clarity on the federal government's part since outside parties must incorporate the federal government's plans into their own. Effective disaster response plans must also be thoroughly practiced, so it is important that federal plans maintain a substantial degree of permanency.

Incorporating the NIMS, the NRP and the CIA into the Stafford Act achieves both clarity and permanency. As this paper spells out, there are structural changes within each that must occur. The NIMS needs to be more robust to include quantifiable standards for compliance by state, territorial, local and tribal governments; the NRP needs to explicitly state that FEMA's role within DHS involves both preparedness and response; and the CIA should empower the federal government to assume control of the Incident Command System in the event of a catastrophic incident.

The Stafford Act should be amended to reflect the NIMS, NRP and CIA as suggested. The benefits of these provisions within federal legislation are many. If the federal government is bound by law to follow its plans, then outside parties will be more confident about the enforcement of federal plans when including federal plans in their response strategies. Changes made through executive orders are risky in the sense that with each new administration, federal response plans are vulnerable to change. Such a risk could serve as a substantial disincentive to outside parties to include federal plans in their own; or outside parties may refrain from investing the necessary efforts and resources in full development of their plans if they suspect their plans will also be susceptible to change with each new administration.

Another benefit to change through legislation is that it invites public input and subjects the federal government to public accountability. Disasters are public events, so those potentially impacted should be able to access and contribute to the very plans intended to help them.

Hurricane Katrina brought to light several flaws with federal disaster response, and many proposals have been proffered about how to rectify those problems, including an extensive list of suggestions from the White House. What remains missing, though, is a fundamental acknowledgment that the federal government must collaborate with outside parties from the outset, which means consistently informing outside parties of its actions and intentions. A legislative act will hold the federal government to that higher standard, and the result will be a more effective disaster response that will save more lives and protect more property.