

## **“Where’s the Cavalry?” Federal Response to 21<sup>st</sup> Century Disasters**

*Day Five, Senator Susan Collins:*

*It is difficult to understand the lack of preparedness and the ineffective initial response to a disaster that had been predicted for years and for which specific dire warnings had been given for days. Katrina was a disaster that scientists, emergency management officials and political leaders had anticipated for years. Yet the initial response was woefully inadequate.<sup>1</sup>*

*Day Six, Department of Homeland Security, Secretary Michael Chertoff:*

*The unusual set of challenges of conducting a massive evacuation in the context of a still dangerous flood requires us to basically break the traditional model and create a new model, one for what you might call kind of an ultra-catastrophe.<sup>2</sup>*

### I. INTRODUCTION

On any given evening, new reports warn Americans and the World of a spectrum of potential natural and man-made disasters which, if realized, could result in widespread devastation.<sup>3</sup> These threats include a bioterrorist attack, an outbreak of an avian flu pandemic, or an onset of intense and more frequent tropical storms resulting from global warming.<sup>4</sup> In 2003, President Bush

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1. Press Conference, Senate Homeland Sec. and Governmental Affairs Comm., Oversight Hearings into U.S. Gov’t Response to Hurricane Katrina (Sept. 6, 2005) (statement of Sen. Susan Collins, Comm. Chair) (remarking on poor federal response to predicted disaster).

2. Press Briefing, Dep’t of Homeland Sec., Hurricane Katrina Response (Sept. 3, 2005) (statement of Michael Chertoff, Sec’y for Dep’t of Homeland Sec.) (observing extreme situation caused by Katrina and need for new response model).

3. See ARNOLD M. HOWITT & HERMAN B. LEONARD, TAUBMAN CTR. FOR STATE AND LOCAL GOV’T, ANNUAL REPORT ON DISASTER MANAGEMENT 24 (2005); Ellen P. Hawes, *Coastal Natural Hazards Mitigation: The Erosion of Regulatory Retreat in South Carolina*, 7 S.C. ENVTL. L.J. 55, 85 (1998); David G. Tucker & Alfred O. Bragg, *Florida’s Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 837 (2001); Roger A. Pielke et al., *Thirty Years After Hurricane Camille: Lessons Learned, Lessons Lost*, (July 12, 1999) [http://sciencepolicy.colorado.edu/about\\_us/meet\\_us/roger\\_pielke/camille/report.html](http://sciencepolicy.colorado.edu/about_us/meet_us/roger_pielke/camille/report.html) (predicting man-made and natural disasters likely to occur with increasing severity and frequency).

4. See HOWITT & LEONARD, *supra* note 3, at 24; Tucker & Bragg, *supra* note 3, at 837; Pielke et al.,

moved twenty-two agencies into the Department of Homeland Security (DHS), including the Federal Emergency Management Agency (FEMA) which was previously an independent agency whose director held a cabinet-level post.<sup>5</sup> DHS was designed to serve as a new central location for the federal government's crisis-incident response systems.<sup>6</sup> Critics argue, however, that DHS is too focused on counter-terrorism and that disaster management is losing out.<sup>7</sup>

August 29, 2005 began the first significant test of DHS's emergency response.<sup>8</sup> Hurricane Katrina, one of the most destructive hurricanes in U.S. history, struck the Gulf Coast region.<sup>9</sup> Katrina was also the most costly natural disaster in U.S. history, causing injury and damage to a region the size of Great Britain.<sup>10</sup> Damage from the storm surpassed the devastation of both Hurricane Camille in 1969 and Hurricane Andrew, which struck Florida in 1992.<sup>11</sup> While there were isolated acts of sheer heroism and courageous rescue, by nearly all accounts, the government's response mechanisms for evacuation, shelter, provision of basic necessities, and maintenance of civil order failed miserably in the first week after the storm's landfall.<sup>12</sup>

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*supra* note 3 (naming natural and man-made threats potentially wreaking havoc in future); *see also* Bruce Nussbaum et al., *The Next Big One*, BUS. WK., Sept. 19, 2005, at 34 (identifying future threats).

5. *See* Richard Sylves & William R. Cumming, *FEMA's Path to Homeland Security: 1979-2003*, J. HOMELAND SEC. AND EMER. MGMT., vol. 1 iss. 2, at 15-17 (2004) (charting major changes in FEMA organization resulting in encapsulation within DHS); *see also* Susan B. Glasser & Michael Grunwald, *Department's Mission was Undermined from Start*, WASH. POST, Dec. 22, 2005, at A01 (highlighting difficulties inherent in plan to re-organize DHS); Michael Grunwald & Susan B. Glasser, *Brown's Turf Wars Sapped FEMA's Strength; Director Who Came to Symbolize Incompetence in Katrina Predicted Agency Would Fail*, WASH. POST, Dec. 23, 2005, at A01 (discussing problematic DHS construction and resulting difficulties for FEMA).

6. *See* Sylves & Cumming, *supra* note 5, at 16 (explaining rationale behind FEMA's transition to DHS).

7. *See* Sylves & Cumming, *supra* note 5, at 16; Jon Elliston, *Disaster in the Making: As FEMA Weathers a Storm of Bush Administration Policy and Budget Changes, Protection from Natural Hazards May Be Trumped by "Homeland Security"* INDEP. WKLY., Sept. 22, 2004, available at <http://www.indyweek.com/durham/2004-09-22/cover.html> (raising concern reorganization enhances focus on counter-terrorism at disaster management expense).

8. *See infra* Part II.D. (describing aftermath of storm and response efforts).

9. RICHARD D. KNABB ET AL., TROPICAL CYCLONE REPORT: HURRICANE KATRINA, NAT'L HURRICANE CTR. 1 (2005) (describing Hurricane Katrina as one of the most devastating storms in U.S. history).

10. *See id.* at 11-12 (rating Katrina as third deadliest since 1900 and most costly hurricane in U.S. history); *see also* *Military and National Guard Roles in Disaster Response: J. Hearing of the H. Subcomm. on Emergency Preparedness, Sci. and Tech. of the Comm. of Homeland Sec. and the Subcomm. on Terrorism, Unconventional Threats and Capabilities of the Armed Serv. Comm.*, 109th Cong. 12 (2005) [hereinafter *Hearings on Disaster Response Role of Military and National Guard*] (statement of Lt. Gen. Steven Blum, Chief, Nat'l Guard Bureau, U.S. Dep't of Def.) (comparing Katrina damaged area to square mileage of Great Britain).

11. *See* KNABB ET AL., *supra* note 9, at 12 (calculating Katrina costs double those of Hurricane Andrew after inflation adjustment); Pielke et al., *supra* note 3, (comparing cost of Camille and Andrew and predicting future, more severe hurricanes).

12. *See* THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 1 (2006) (observing state, local, and federal government failed to adequately respond). *See generally* Keith O'Brien & Bryan Bender, *Chronology of Errors: How a Disaster Spread*, BOSTON GLOBE, Sept. 11, 2005, at

After the immediate emergency of a national disaster passes, lawmakers, practitioners, and the public assess the effectiveness of the disaster management, especially mitigation, preparation, and response.<sup>13</sup> Traditionally, after a major disaster, FEMA, Congress, and the Executive strive to identify the lessons learned and by incorporating these lessons into future management, to improve the country's disaster response approach.<sup>14</sup> The success of these improvements varies.<sup>15</sup> The United States, mainly through FEMA, has developed successful strategies for dealing with moderate disasters.<sup>16</sup> These strategies depend first on local agencies and then on state agencies for initial response.<sup>17</sup> The failed response to Hurricane Katrina, however, shows that with catastrophic incidents, the United States lacks a defined command structure, adequate pre-disaster planning with state and local emergency management, and reliable interoperable post-disaster communications systems.<sup>18</sup>

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A1 (linking failure to mobilize soon enough to inadequate response); *How Bush Blew It*, NEWSWEEK, Sept. 19, 2005, at 26 (detailing the poorly executed and delayed Federal Response to Katrina); *When Government Fails*, ECONOMIST, Sept. 10, 2005, at 26 (highlighting racial and economic tensions resulting from uneven response). *But see* THE WHITE HOUSE, *supra*, at 125 (noting acts of heroism as "what went right" in response).

13. *See* THE WHITE HOUSE, *supra* note 12, at 1-2 (documenting President's call for review of federal response and recognizing need for state and local review); Mortimer B. Zuckerman, *Fixing What's Broken*, U.S. NEWS & WORLD REP., Sept. 19, 2005, at 68; *Top 10 Lessons We've Learned from Hurricane Katrina*, HOUSTON CHRON., Sept. 18, 2005, at 2; Pielke et al., *supra* note 3 (urging importance of learning lessons for better responses after natural disasters). *See generally* Thomas E. Drabek, *Managing the Emergency Response*, 45 PUB. ADMIN. REV. 85, 85-91 (1985); Mark Steyn, Op-Ed., *Depraved Swamp of New Orleans Shows How Little U.S. Learned from 9/11*, IRISH TIMES (Dublin), Sept. 5, 2005, at 10 (highlighting need to define and incorporate lessons into future aid efforts).

14. *See Preparing for a Catastrophe: The Hurricane Pam Exercise: Hearing Before the S. Homeland Sec. and Governmental Affairs Comm.*, 109th Cong. 3 (2006) [hereinafter *Preparing for a Catastrophe*] (statement of Sen. Joseph Lieberman) (declaring post-disaster hearings process an opportunity to learn and improve); *Review Hurricane Relief Response: Hearing Before the H. Select Hurricane Katrina Comm.*, 109th Cong. 1 (2005) [hereinafter *Review Hurricane Relief Response Hearing*] (statement of Rep. Tom Davis) (explaining American public's expectations of Congress to assess disaster response); Press Briefing, The White House, Aid Package for Hurricane Katrina Relief (Sept. 15, 2005) [hereinafter *Aid Package for Katrina*] (statement of Pres. George W. Bush) (calling for review of federal response to Katrina). *See generally* Sylves & Cumming, *supra* note 5 (describing FEMA's development influenced by learning process and improvements after disasters).

15. *See Review Hurricane Relief Response Hearing*, *supra* note 14, at 2 (using Hurricane Isabel as example of need for FEMA to learn from past disasters). *See generally* Pielke et al., *supra* note 3 (describing waning interest in making improvements once disaster immediacy fades).

16. *See Hearings on Disaster Response Role of Military and National Guard*, *supra* note 10, at 13-14 (statement of Paul McHale, Asst. Sec'y Homeland Defense) (asserting effective response management of major disasters affecting counties not multiple states simultaneously); THE WHITE HOUSE, *supra* note 12, at 66 (recognizing current approach works well in most emergencies and disasters).

17. *See* Drabek, *supra* note 13, at 87 (outlining roles of various levels of government in disaster response); Sandra Schneider, *Governmental Response to Disasters: The Conflict Between Bureaucratic Procedures and Emergent Norms*, 52 PUB. ADMIN. REV. 135, 136 (1992).

18. *See* HOWITT & LEONARD, *supra* note 3 at 24-26; Schneider, *supra* note 17, at 137-43 (exploring instances of governmental response, its failures and successes); U.S. SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, HURRICANE KATRINA: A NATION STILL UNPREPARED, 2-21 (2006) [hereinafter *SENATE REPORT*] (summarizing failure of federal response and exploring causes); *see also* Jim

This Note examines the authority of the federal government under the Constitution, the Robert T. Stafford Disaster Relief Act, and the National Response Plan to engage in disaster response and management.<sup>19</sup> This analysis confronts the inherent tension in a system of federalism between federal and state government authority over and responsibility for citizens' welfare and safety.<sup>20</sup> It focuses primarily on the federal government's role in preparing for and *immediately* responding to a disaster.<sup>21</sup> While the federal government also plays a substantial role in funding and directing *long-term* recovery and rebuilding disaster stricken areas, this Note will identify these efforts without exploring them in depth.<sup>22</sup>

This Note discusses the apparent need, in the wake of Hurricane Katrina, for a new model in emergency management, one that requires the federal government to exercise greater authority and to seize control early-on in extreme disasters.<sup>23</sup> This Note further explores FEMA's history and the major changes to its organization and authorizing legislation, as well as the historical precedent for the role of the military in disaster management.<sup>24</sup> Part III proposes that Congress amend existing authority to grant the federal government greater power to act in catastrophic disasters.<sup>25</sup> Congress should also consider providing the federal government with a limited power to intervene prior to receiving permission from state governors.<sup>26</sup> Part III continues by discussing the potential benefits of expanding the military's role in response to these devastating events, while noting potential problems.<sup>27</sup> Finally, this Note suggests criteria to identify these ultra-catastrophes where the most effective protection of life and preservation of property require greater proactive management by the federal government.<sup>28</sup>

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VandeHei & Peter Baker, *Bush Pledges Historic Effort to Help Gulf Coast Recover; President Says U.S. Will Learn From Mistakes*, WASH. POST, Sept. 16, 2005, at A1 (identifying extreme emergencies demand different government response models than less severe ones).

19. See *infra* Part II (charting federal disaster response history leading up to Hurricane Katrina).

20. See *infra* Part II.A (describing origination of federal, state and local disaster relief efforts).

21. See *infra* Parts II & III (discussing historical federal role in disaster response and recommending future role in immediate aftermath).

22. See VandeHei & Baker, *supra* note 18, at A1 (documenting President's pledge for federal rebuilding effort and commitment to provide long-lasting assistance). See generally Peter J. May, *FEMA's Role in Emergency Management: Examining Recent Experience*, 45 PUB. ADMIN. REV. 40 (1985); Alvin Mushkatel & Louis Weschler, *Emergency Management and the Intergovernmental System*, 45 PUB. ADMIN. REV. 49 (1985) (describing intergovernmental emergency response and explaining federal government provides majority of funding for response and rebuilding).

23. See *infra* Part III (arguing for new model of federal authority in extreme disaster events). The devastation brought on by Hurricane Katrina and the far from perfect federal response occurred despite six days advance notice of the storm's arrival. *Id.* Given a bioterrorist attack is unlikely to come with such a warning, the need for adept, coordinated federal emergency management is paramount. *Id.*

24. See *infra* Parts II.A. & D.

25. See *infra* Part III.B.

26. See *infra* Part III.A.

27. See *infra* Part III.A.

28. See *infra* Part III.B.

## II. HISTORICAL BACKGROUND

### A. Federalism and State Police Power

The U.S. approach to disaster relief is rooted in the concept of federalism, which balances state and federal powers.<sup>29</sup> America's approach to disaster relief places primary responsibility on state and local governments when natural disasters strike their regions.<sup>30</sup> State and local responsibility is rooted in the police power reserved for the states under the Tenth Amendment.<sup>31</sup> The Supreme Court has repeatedly recognized that government actions taken to protect citizens' lives and safety are traditional exercises of this power.<sup>32</sup>

State police power includes the authority to constrain citizens' behavior to preserve public health and safety and put down civil disorder.<sup>33</sup> The threat of a natural disaster or its aftermath may require the government to order and enforce such constraints.<sup>34</sup> When disasters are of such magnitude as to overwhelm local and state governments, the federal government may intervene at the request of a state governor.<sup>35</sup> Federal intervention includes supplying

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29. See Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority*, ARMY LAW., July 1997, at 3, 8-9 (defining states' reserved powers under federalism).

30. *Id.* (identifying state and local governments as primary holders of response obligations); see also Drabek, *supra* note 13, at 85 (placing first line of responsibility on localities).

31. See U.S. CONST. amend. X (reserving powers not delegated to federal government to states or people); see also *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895) (acknowledging power of states to protect citizens lives, health, and property); *Gibbons v. Ogden*, 22 U.S. 1, 205 (1824) (characterizing state police power inclusive of actions to protect citizens' health); Tucker & Bragg, *supra* note 3, at 840 (recognizing states' inherent police power reserved by Tenth Amendment); Winthrop, *supra* note 29, at 8 (including disaster response in functions of police power).

32. *E.C. Knight*, 156 U.S. at 11-12 (identifying police power includes protection of health and safety and citing cases recognizing states' reserved powers).

It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution. . . .

*Id.* at 11.

33. See *Gibbons*, 22 U.S. at 205 (including quarantines and health laws within exercise of police power); Tucker & Bragg, *supra* note 3, at 839, 844 (listing power to order evacuation and establish curfews of citizens as police powers); see also Ceci Connolly, *Laws Not Up to SARS Epidemic: Quarantining the Infected and the Exposed May Trample Civil Liberties*, WASH. POST, Apr. 26, 2003, at A1 (noting state government's power to impose quarantine constraint in public health emergency); Melissa Healy, *Are Quarantines Back?*, L.A. TIMES, Apr. 14, 2003, Part 6 (Health), at 1 (citing possible quarantines in response to SARS threat).

34. See Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5170b (omitting evacuation support from defined list of essential federal assistance to state and local governments); Tucker & Bragg, *supra* note 3, at 839-40 (asserting state police power includes power to evacuate).

35. See Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5170 (requiring state governor's request for assistance prior to federal disaster declaration or involvement); see also Tucker & Bragg, *supra* note 3, at 862 (stating Stafford Act provisions triggered only after governor's request); Winthrop,

resources such as food, water, medical attention, and temporary housing.<sup>36</sup>

Unlike the states, the federal government has no inherent police power.<sup>37</sup> Disaster-related action by the federal government, either to compel state or local disaster preparation or to respond in the wake of disasters, is instead supported by the power granted in Article I, section 8 of the Constitution.<sup>38</sup> The power to regulate interstate commerce, to tax and spend, and to provide for the common defense define the scope and nature of federal involvement in disaster relief.<sup>39</sup> The Stafford Act is exercised pursuant to all three.<sup>40</sup>

Under the Stafford Act, the federal government's involvement in disaster relief depends upon both Congress's authorization to act and a state governor's request for a Presidential disaster declaration and assistance in the affected region.<sup>41</sup> Upon declaration, FEMA assists the state government in coordinating the response, providing financial support, and mission assigning, if needed.<sup>42</sup>

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*supra* note 29, at 8-9 (citing Stafford Act requirement of state governor's request for assistance); *infra* Part II.C.

36. 42 U.S.C. §§ 5121, 5170b (authorizing federal agencies to provide assistance to states in response to major disasters); *see also* Tucker & Bragg, *supra* note 3, at 864. (describing various forms of federal assistance President may authorize under Stafford Act). Tucker and Bragg describe one of the federal regulations which provides for "search and rescue, emergency medical care, emergency mass care, emergency shelter, and provision of food, water, medicine and other essential needs . . ." Tucker & Bragg, *supra* note 3, at 864; *see also* David W. Sar, *Helping Hands: Aid for Natural Disaster Homeless vs. Aid for "Ordinary Homeless"*, 7 STAN. L. & POL'Y REV. 129, 131-32 (1995) (listing dominant forms of FEMA assistance).

37. *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (declaring police power within dominion of states and not surrendered to federal government under Constitution); *see also* Tucker & Bragg, *supra* note 3, at 861 (indicating no federal police power).

38. *See* U.S. CONST. art. I, § 8 (articulating enumerated powers of legislative branch).

39. *See* Ernest B. Abbott et al., *Federalism and Constitutional Challenges*, in AMERICAN BAR ASSOCIATION HURRICANE KATRINA TASK FORCE SUBCOMMITTEE REPORT 1, 1 (2006) (outlining federal government's legal authority in disaster response).

40. *See generally id.* (describing federal disaster relief within traditional framework of federalism).

41. *See* 42 U.S.C. §§ 5121, 5170 (requiring governor's request prior to federal assistance). The Stafford Act determines the funding and mechanisms necessary to provide federal disaster relief programs. *See id.* at § 5121 (stating Act's findings and declarations). Under the Stafford Act, a state governor's request must assert that the state has done all it can to meet the disaster but the needs exceed the state's resource capacity. *Id.* at § 5170; *see also* DEP'T OF HOMELAND SEC., THE NATIONAL RESPONSE PLAN 4 (2004) [hereinafter NATIONAL RESPONSE PLAN] (requiring disaster exceed capabilities of state). The Stafford Act also provides for two separate levels of federal assistance defined in the National Response Plan. *See* NATIONAL RESPONSE PLAN, *supra*, at 64, 68 (defining emergency and major disaster). *Compare* 42 U.S.C. §§ 5170-5189 (outlining available federal assistance in response to major disasters), *with* 42 U.S.C. §§ 5191-5193 (distinguishing lesser available assistance in wake of emergencies than in major disasters). A presidentially declared disaster is defined as a natural catastrophe or other major event "caus[ing] damage of sufficient severity and magnitude to warrant major disaster assistance . . . to supplement efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby." NATIONAL RESPONSE PLAN, *supra*, at 68. An emergency is a lesser event under the Stafford Act which requires federal assistance to supplement what states can provide "to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe . . ." NATIONAL RESPONSE PLAN, *supra*, at 64. The Stafford Act also authorizes the President to declare a state of emergency absent a governor's request, if the impacted area is under exclusive control of the U.S. government. 42 U.S.C. § 5191(b). The scope of federal assistance provisions is both wider and more detailed for major disasters than for emergency situations.

42. *See* 42 U.S.C. § 5170 (listing components of federal disaster assistance triggered by presidential

The intention is not, however, for FEMA to be “a national fire and rescue team . . . [it] is not a first responder agency with the resources to assume principal responsibility for overwhelmed state and local governments during a disaster.”<sup>43</sup> Historically, in the wake of a major disaster, citizens, as well as state and local government officials often look to FEMA to sweep in and save them.<sup>44</sup> Opponents to these expanded expectations are quick to point out that local and state officials are best-equipped with the knowledge of local citizens, geography, and special circumstances or difficulties.<sup>45</sup> Reserving the police power to the states recognizes the long tradition of vesting decision-making power over such personal issues as health and safety in those governmental bodies closest to the affected citizens.<sup>46</sup> The chaotic and delayed immediate response to Hurricane Katrina’s destruction (and the citizen suffering that resulted) led to a re-examination of the federal government’s role in major catastrophes.<sup>47</sup>

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declaration); *see also Review Hurricane Relief Response Hearing, supra* note 14, at 22 (statement of Michael Brown, Former Undersecretary of Emergency Preparedness and Response and Director of FEMA) (explaining Stafford Act gives FEMA authority to mission assign after disaster declaration); David McLoughlin, *A Framework for Integrated Emergency Management*, 45 PUB. ADMIN. REV. 165, 166 (1985) (discussing FEMA’s responsibility to coordinate response of other federal agencies with relief programs). Congressman Davis, Chair of the House Select Hurricane Katrina Committee, describes FEMA’s authority to mission assign to federal agencies as having the ability to “garner all the resources of the federal government . . . .” *Review Hurricane Relief Response, supra* note 14, at 22.

43. *Review Hurricane Relief Response, supra* note 14, at 2 (stating disaster response not primarily FEMA’s responsibility); *see also id.* at 4 (explaining FEMA’s role as supporter and coordinator, not first responder).

44. *See Review Hurricane Relief Response Hearing, supra* note 14, at 2 (statement of Rep. Tom Davis) (observing American public’s common false understanding that FEMA is primarily responsible for disaster response); Abbott et al., *supra* note 39, at 1 (observing most limitations to federal authority in disasters gone due to expectation of federal response); *see also* Winthrop, *supra* note 29, at 8 (arguing disaster-stricken Americans overlook federalism and look for “the cavalry” to rescue them). In 2001, Joe Allbaugh, former Director of FEMA, stated that “expectations of federal involvement may have ballooned . . . .” Elliston, *supra* note 7 (quoting former FEMA Director).

45. *See Hearings on Disaster Response Role of Military and National Guard, supra* note 10, at 2 (statement of Rep. Bill Pascrell) (emphasizing local responders’ vital familiarity with community important to successful response); *Hurricane Katrina: How is FEMA Performing its Mission at This Stage of Recovery, Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 109th Cong. 18 (2005) [hereinafter *Hearing on FEMA Mission at This Stage of Recovery*] (statement of David Paulison, Acting Undersec’y FEMA) (emphasizing need to place decisions to local level); *Review Hurricane Relief Response Hearing, supra* note 14, at 4 (statement of Michael Brown) (highlighting need for local response responsibility); *see also* Tucker & Bragg, *supra* note 3, at 838 (describing local officials as most knowledgeable about affected public and region).

46. *See* THE WHITE HOUSE, *supra* note 12, at 11 (linking police power limitations on federal response to state and local knowledge of citizens’ needs).

47. *See, e.g.,* SENATE REPORT, *supra* note 18, at 2 (observing suffering after landfall continued longer than it should have); Press Conference, The White House, Bush Pledges Federal Role in Rebuilding Gulf Coast (Sept. 16, 2005) (statement of Pres. George W. Bush); Aid Package for Katrina, *supra* note 14 (statement of Pres. George W. Bush); Press Conference, United States Congress, The Congressional Response to Hurricane Katrina (Sept. 7, 2005) (statement of S. Bill Frist, Senate Majority Leader) (calling for government review of Katrina response and assessment of proper federal role); *see also* Press Conference, FEMA, Emergency Preparations for Hurricane Rita (Sept. 20, 2005) (statement of David Paulison, Acting Dir. of FEMA)

*B. Military Response to Disasters: Department of Defense and the National Guard*

In 1979, President Carter moved to centralize varied federal disaster programs into FEMA.<sup>48</sup> Prior to this reorganization, the government's disaster response consisted of *ad hoc* legislation passed per event and uncoordinated responses by separate federal agencies.<sup>49</sup> The Department of Housing and Urban Development's Disaster Assistance Program, the National Fire Prevention and Control Administration, the National Weather Service Community Preparedness Program, and the Department of Defense's Civil Preparedness Program were among the federal programs incorporated into FEMA.<sup>50</sup> Long before this transition and also currently, the military, including the National Guard and federal armed forces, played and play vital, but varied, roles in U.S. disaster response.<sup>51</sup>

*1. National Guard*

The National Guard is the modern version of state militias.<sup>52</sup> The Constitution provides for this branch of the military, and its creation reflects the founders' fear that a standing army could infringe on individual liberty.<sup>53</sup> Presently, the federal government provides the majority of National Guard funding, even though the Guard's command remains under each state governor.<sup>54</sup> Given the states' primary responsibility to manage disasters and the state chief executive's command of state guard units, the National Guard is often used in disaster response and relief.<sup>55</sup>

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(contrasting increased federal involvement post-Katrina in preparation for Hurricane Rita).

48. See Federal Emergency Management Agency, FEMA History, <http://www.fema.gov/about/history.shtm> (last modified Mar. 21, 2006) [hereinafter FEMA History] (charting FEMA timeline).

49. See *id.*; THE WHITE HOUSE, *supra* note 12, at 11; McLoughlin, *supra* note 42, at 166 (documenting lack of comprehensive, integrated emergency management across patchwork of agencies led to FEMA).

50. See FEMA History, *supra* note 49 (listing disaster related programs rolled into FEMA).

51. See James F. Miskel, *Observations on the Role of the Military in Disaster Relief*, 49 NAVAL WAR C. REV. 105, 105 (1996) (observing military participation in disaster relief throughout history). The use of "federal armed forces" in this Note refers to the United States Military under Title 10 contrasted with the National Guard, provided for in Title 32 (when in state service), unless called into federal service under Title 10. L. Dow Davis, *Reserve Callup Authorities: Time for Recall?*, ARMY LAW., Apr. 1990, at 4, 6 (1990) (discussing authority by which callup provisions employed).

52. See Davis, *supra* note 51, at 14-15 (comparing present-day guard with state militia tradition).

53. Davis, *supra* note 51, at 14-15 (summarizing historical conflict between distrust of standing armies and dependence on militia). Following the American Revolution, the Founding Fathers were concerned with potential military oppression due to their own experiences with the British. *Id.*

54. See Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 415-16 (2003) (naming federal government responsible for funding and training of state-run Guards); see also Davis, *supra* note 51, at 15 (referencing federal government's National Guard funding).

55. See, e.g., Press Briefing, Dep't of Defense, Ongoing National Guard Response to Hurricane Katrina (Sept. 3, 2005) (statement of Lt. Gen. Steven Blum, Chief, Nat'l Guard Bureau) (explaining National Guard

When the National Guard is under the command of a state's governor, it can be used in almost any capacity within that state, including defense, security, rescue, and support of civil law enforcement.<sup>56</sup> The federal government may, however, call upon National Guardsmen for federal service.<sup>57</sup> The President has the authority to use National Guardsmen for foreign missions, training, and resolution of civil disturbances.<sup>58</sup> Unlike the active duty military, the National Guard is not subject to the limitations of the Posse Comitatus Act<sup>59</sup> and as a result, may be a particularly good resource for assisting local officials with disaster relief.<sup>60</sup>

A state National Guard's ability to respond effectively to an emergency may play a role in whether the President declares the event a disaster.<sup>61</sup> An insufficient number of guardsmen may lead to a quicker need for federal assistance.<sup>62</sup> Critics of the federal response to Hurricane Katrina argued that the depleted number of local Guardsmen, as a result of federalized units deployed to Afghanistan and Iraq, left the states in a weakened position to handle the devastation.<sup>63</sup>

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response to Katrina and state governor's command); Kealy, *supra* note 54, at 415 (identifying guard as predecessor to state militia and under command of state governor); Tom Bowman & Siobhan Gorman, *Debate Flares on Role of Troops in Disasters; Bush Wants Expanded Use – Complex Legal Issue*, SEATTLE TIMES, Sept. 20, 2005, at A13 (illustrating Louisiana's National Guard response to Katrina under state command).

56. See Kealy, *supra* note 54, at 415-16 (documenting state governor's ability to use National Guard for law enforcement); see also NATIONAL RESPONSE PLAN, *supra* note 41, at 8 (outlining state disaster responsibilities and state governor's command of National Guard); Tucker & Bragg, *supra* note 3, at 854 (citing state governor's constitutional power to use militia to preserve public peace).

57. See 10 U.S.C. § 12301 (2000) (granting powers to federalize National Guard).

58. See *id.* (providing Executive may federalize Guard during war, national emergency, or as Congress authorizes); Davis, *supra* note 51, at 7-16 (explaining call-up authority of President).

59. Posse Comitatus Act, 18 U.S.C. § 1385 (2000) (preventing use of Army or Air Forces as posse comitatus and providing penalty).

60. *Id.* (limiting domestic military actions). The statute provides:

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

*Id.*

61. See NATIONAL RESPONSE PLAN, *supra* note 41, at 8 (explaining state governors required to exhaust available resources prior to request for federal aid).

62. See *infra* note 63 and accompanying text (suggesting National Guard's overseas duties deplete domestic resources for disaster response). When Hurricane Katrina struck the Gulf Coast, only 5,000 of the 11,000 Louisiana National Guardsmen were available to respond because of the number of troops deployed to Iraq or Afghanistan. *Hurricane Katrina: The Role of the Governors in Managing the Catastrophe*, Hearing Before the S. Homeland Sec. and Governmental Affairs Comm., 109th Cong. 17 (2006) [hereinafter *Hearing on the Role of the Governors*] (statement of Kathleen Blanco, Governor, State of Louisiana) (noting unavailability of state's Guard). But see STEVE BOWMAN ET AL., CONGRESSIONAL RESEARCH SERVICE, HURRICANE KATRINA: DOD DISASTER RESPONSE, 14-15 (2005) (citing DOD denials that overseas commitment caused delayed Katrina response).

63. See *Review Hurricane Relief Response Hearing*, *supra* note 14, at 21 (statement of Rep. Taylor) (citing commitment of Louisiana and Mississippi National Guard in Middle East during Katrina); see also

Mutual aid agreements are one means by which states can address capacity issues.<sup>64</sup> Under these compacts, neighboring states agree to dispatch, upon request, guardsmen to one another to aid in disaster response.<sup>65</sup> The Stafford Act and National Response Plan both assert the federal government's commitment to these mutual aid agreements as an important resource in emergency management.<sup>66</sup> When the guardsmen of one state are dispatched to a neighboring state under a mutual aid agreement, the affected state's governor assumes command of these troops to ensure consistency of communication and unified command.<sup>67</sup>

## 2. Department of Defense and Active Duty Military

Federal involvement in emergency relief began soon after the country's founding.<sup>68</sup> Prior to the growth of the federal administrative state in the twentieth century, the military was the federal resource for supporting disaster stricken areas.<sup>69</sup> In 1917, the War Department formalized the Defense Department's role in disaster relief through Special Regulation No. 67.<sup>70</sup> The Regulation established guidelines for disaster relief, many of which remain in today's Stafford Act policies.<sup>71</sup> The War Department's disaster declaration

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Bowman & Gorman, *supra* note 55, at A13 (comparing total availability of state guardsmen after Hurricane Andrew to those available post-Katrina).

64. See NATIONAL RESPONSE PLAN, *supra* note 41, at 8 (including mutual aid agreements in state response responsibilities); Press Briefing, Dep't of Defense, Ongoing National Guard Response to Hurricane Katrina (Sept. 3, 2005) (statement of Lt. Gen. Steven Blum, Chief, Nat'l Guard Bureau) (describing use of multi-state mutual aid agreements in Katrina response).

65. See NATIONAL RESPONSE PLAN, *supra* note 41, at 69 (defining mutual aid agreement). A mutual aid agreement is a "written agreement between agencies, organizations, and/or jurisdictions that they will assist one another on request by furnishing personnel, equipment, and/or expertise in a specified manner." *Id.*

66. See 42 U.S.C. § 5196a (stating federal encouragement of state mutual aid agreements); NATIONAL RESPONSE PLAN, *supra* note 41, at 8 (suggesting use of mutual aid agreements prior to requesting federal assistance).

67. See *Hearings on Disaster Response Role of Military and National Guard*, *supra* note 10, at 12 (statement of Lt. Gen. Steven Blum, Chief, Nat'l Guard Bureau) (outlining command structure under state mutual aid agreements).

68. See Winthrop, *supra* note 29, at 9-10 (documenting first emergency relief appropriations of new Union). In 1793, Congress approved a special appropriations bill to send financial aid to east coast cities burdened by an influx of thousands of refugees from Santo Domingo. *Id.* at 9.

69. See Miskel, *supra* note 51, at 109 (describing historical role of military as primary responder in federal disaster relief campaigns). For example, the military provided federal disaster relief during the Chicago fire in 1871, a time when the only federal civilian agency was the post office. *Id.*

70. Miskel, *supra* note 51, at 109 (documenting War Department's "Regulations Governing Flood Relief Work" covered floods but also "other great catastrophes").

71. Miskel, *supra* note 51, at 109 (comparing War Department regulation policies to those in current legislation).

Among the principles that have been carried forward from this regulation into current practice are state precedence, federal certification of the need for assistance, cooperation with local authorities, appointment of federal on-scene coordinators, accountability, an emphasis on avoiding fraud or abuse, competition in contracting, and equal treatment for minority Americans who are victims of

worked similarly to presidential disaster declarations under FEMA; however, it was not until Congress passed the Disaster Relief Act in 1950 that disaster funding received standing approval.<sup>72</sup> This standing approval provided an annual fund for disaster relief, eliminating Congress's case-by-case legislation.<sup>73</sup>

Today, federal armed forces intervene in disaster relief in two ways: first, by FEMA request under the Stafford Act; and second, under a military commander's Immediate Response Authority.<sup>74</sup> Immediate Response Authority permits a local commander to provide assistance absent approval from a higher authority in emergency situations.<sup>75</sup> The Supreme Court justified this long-recognized authority under the principle of necessity in *Mitchell v. Harmony*.<sup>76</sup> While technically this authority is recognized and available if needed, the Stafford Act and military assistance reimbursement procedures strictly limit its application.<sup>77</sup> In fact, the Stafford Act makes no mention of

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disaster.

*Id.*

72. Miskel, *supra* note 51, at 110 (describing similarities between operations under War Department between 1917 and the 1950s and those under FEMA today). Prior to the Disaster Relief Act's passage, a local military officer in charge of the affected region determined whether the situation exceeded the capacity of state and local government and requested approval from the Secretary of War to provide assistance. *Id.* A similar process exists today, where the governor's request, including an assertion that the situation is beyond local capacity, triggers the President's disaster declaration and FEMA assistance under the Stafford Act. *Id.*; see also 42 U.S.C. § 5170 (outlining procedure for presidential disaster declaration).

73. See 42 U.S.C. § 5170 (describing states' initiation of federal relief process).

74. See 42 U.S.C. § 5170b (listing terms for utilization of DOD resources in disaster assistance); Winthrop, *supra* note 29, at 9-12 (describing DOD actions under Stafford Act); Winthrop, *supra* note 29, at 4-8 (defining Immediate Response authority).

75. See John McCarthy et al., *Posse Comitatus and the Military's Role in Disaster Relief* in AMERICAN BAR ASSOCIATION HURRICANE KATRINA TASK FORCE SUBCOMMITTEE REPORT 23, 24 (2006) (recognizing DOD's assistance available without Stafford Act declaration); Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina, *A Failure of Initiative*, H.R. Rep. No. 000-000, at 39 (2nd sess. 2006) [hereinafter *Failure of Initiative*] (explaining Immediate Response Authority for use in "imminently serious conditions . . . requiring immediate action").

76. See *Mitchell v. Harmony*, 54 U.S. 115, 134 (1851) (upholding officers' authority to act under principles of necessity); Winthrop, *supra* note 29, at 4 (defining local response authority and court's recognition of it).

There are, without doubt, occasions in which . . . a military officer, charged with a particular duty, may impress private property into the public service or take it for public use . . . in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for . . . [i]t is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

*Mitchell*, 54 U.S. at 134.

77. See Winthrop, *supra* note 29, at 7-8 (illustrating legislative and fiscal limits on exercise of Immediate Response Authority). Winthrop explains the Stafford Act provides for FEMA reimbursement to the DOD, "as long as the DOD follows the established procedures" of the act. Winthrop, *supra* note 29, at 8.

Immediate Response Authority.<sup>78</sup>

The Stafford Act is the source of most federal military disaster assistance.<sup>79</sup> Under the Stafford Act, once the President grants a governor's request for assistance, all possible disaster assistance is available and FEMA coordinates all response and support.<sup>80</sup> FEMA's relationship with the Department of Defense (DOD) is unique.<sup>81</sup> Unlike other agencies that receive mission assignments from FEMA and whose resources then come under the control of the Federal Coordinating Officer (FCO), FEMA requests assistance from the DOD and the Secretary of Defense determines whether it will be granted.<sup>82</sup> If assistance is provided, DOD appoints a Defense Coordinating Officer (DCO) to work with the FCO under FEMA, but DOD resources remain in the military chain of command and do not come within FEMA's control.<sup>83</sup>

There are several limitations on the potential use of federal armed forces for domestic disaster assistance. First, the Secretary of Defense must consider current troop deployments and other domestic security commitments prior to deciding whether to approve each FEMA request.<sup>84</sup> Next, the Stafford Act authorizes reimbursement for Defense Department funds expended in approved disaster assistance.<sup>85</sup> The potential for denial of reimbursement requests limits the situations in which a local military commander may act under his

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78. See McCarthy et al., *supra* note 75, at 30 (stating Immediate Response Authority not provided in any statute). See generally 42 U.S.C. §§ 5120-5171 (failing to include or mention Immediate Response Authority).

79. See McCarthy et al., *supra* note 75, at 24 (asserting Stafford Act source of authority for nearly all federal military disaster assistance).

80. 42 U.S.C. § 5143 (defining Federal coordinating officers' role); see also NATIONAL RESPONSE PLAN, *supra* note 41, at ix-x (outlining federal agency responsibilities in disaster situations); *Review Hurricane Relief Response Hearing*, *supra* note 14, at 4 (statement of Michael Brown, Former Undersec'y of Emer. Preparedness and Response and Dir. of FEMA) (identifying federal responsibilities in emergency management as coordinator and supporter).

81. See *supra* note 77 and accompanying text (explaining differing relationship).

82. See *Hurricane Katrina and the Defense Dep't Response, Panel I of a Hearing Before S. Comm. on Homeland Sec. and Governmental Affairs*, 109th Cong. 24-25 (2006) [hereinafter *Hearing on Katrina and the Defense Dep't Response*] (statement of Sen. Susan Collins) (noting unique relationship between FEMA and DOD). "DOD is alone among federal agencies and departments in requiring an often lengthy period of negotiations before it will accept a mission assignment . . . other agencies just take the mission assignment from FEMA and go forth and do it." *Id.* Compare NATIONAL RESPONSE PLAN, *supra* note 41, at 15 (describing federal civilian agencies assisting in response work under FEMA coordination and upon assignment), with NATIONAL RESPONSE PLAN, *supra* note 41, at 41-42 (describing DOD assistance requires Secretary approval and DOD works beside, not under FEMA).

83. See NATIONAL RESPONSE PLAN, *supra* note 41, at 41-42 (outlining DCO appointments work alongside FCOs). One can trace this line of command to the passage of the Goldwater-Nichols Act in 1986, which provided for a streamlined military command structure running directly from the President, as Commander-in-Chief, to the Secretary of Defense and Combatant Commanders. Goldwater-Nichols Department of Defense Reorganization Act of 1986, 10 U.S.C. §§ 151-155 (2000) (outlining structured level of command in response efforts).

84. See Bowman & Gorman, *supra* note 55, at A13 (demonstrating military concern that expanded use in disaster hinders "total force").

85. See 42 U.S.C. §§ 5147, 5170b (authorizing reimbursement to federal agencies for expenditures appropriated under Stafford Act).

Immediate Response Authority.<sup>86</sup> Finally, the Posse Comitatus Act<sup>87</sup> restricts the domestic actions of federal military officers.<sup>88</sup>

The Posse Comitatus Act of 1878 re-established the constitutional era principle that the military's only expressly domestic role was to quell insurrections.<sup>89</sup> The Act prohibits the Army from participating in domestic law enforcement.<sup>90</sup> The legislature intended to limit the military's power because proponents believed that too much reliance on the military would threaten individual freedoms and democratic elections.<sup>91</sup> The Act expressly names the Army and Air Force, and military regulations extend the Act's coverage to the Navy.<sup>92</sup> Neither the Act nor regulations restrict the Coast Guard or National Guard, unless those units are called into federal service.<sup>93</sup>

The Posse Comitatus Act restricts the support that federal armed forces can provide in disaster relief. For example, during or immediately following an emergency situation, the affected areas must be secured.<sup>94</sup> Securing the scene constitutes a traditional law enforcement action and thus, is not a permissible military operation under the Posse Comitatus Act.<sup>95</sup>

The DOD is the federal government's greatest resource for planning, logistics, and operational support.<sup>96</sup> The DOD has developed proven training exercises, a strong unified command structure, state of the art communications systems, and a body of individuals trained to act and lead under high-stress,

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86. Winthrop, *supra* note 29, at 7-8 (indicating reimbursement for funding may be limitation).

87. See *supra* note 60 (explaining terms of Posse Comitatus Act).

88. See Kealy, *supra* note 54, at 415-16 (explaining limitations on domestic military use); Tucker & Bragg, *supra* note 3, at 854 (outlining state governor's power over military).

89. See Kealy, *supra* note 54, at 390-97 (detailing historical justification for Posse Comitatus Act).

90. See Kealy, *supra* note 54, at 390-97 (explaining Act's intent and effect).

91. See Kealy, *supra* note 54, at 390-97 (providing historical justification for Posse Comitatus Act).

92. See Kealy, *supra* note 54, at 397 (highlighting inclusion of Army and Air Force only); *supra* note 60 (recalling text of Posse Comitatus Act).

93. Kealy, *supra* note 54, at 397 (noting exclusion of National Guard and Coast Guard from Posse Comitatus Act's limitations).

94. See Kealy, *supra* note 54, at 424-26 (noting importance of securing the scene after disaster); McCarthy et al., *supra* note 75, at 26-27 (observing Posse Comitatus limits apply once National Guard federalized and law enforcement support not available). Hesitation to federalize military support may arise if the conditions to waive Posse Comitatus under the Insurrection Act have not been met, for a State Governor needs Guard support to assist debilitated local law enforcement. McCarthy et al., *supra* note 75, at 26-27.

95. See Kealy, *supra* note 54, at 425 (identifying President Bush's reluctance to federalize National Guard). After the terrorist attack on the World Trade Center and the Pentagon on September 11, 2001, President Bush decided against federalizing the National Guard, observing that once the Guard is federalized, the Posse Comitatus Act applies. *Id.* New York and Washington required aid in securing airports, terminals, and other ports. *Id.* These local security activities are defined as law enforcement activities, and thus, forbidden under the Posse Comitatus Act. *Id.* at 384.

96. See Miskel, *supra* note 51, at 108 (categorizing military as federal government's "preeminent trainer and contingency planner"); see also Bowman & Gorman, *supra* note 55, at A13 (quoting President's assessment of armed forces' capabilities). President Bush called for a broader role for the armed forces in disaster response, dubbing them "the institution of our government most capable of massive logistical operations on a moment's notice." Bowman & Gorman, *supra* note 55, at A13.

crisis-laden, dangerous conditions.<sup>97</sup> After major disasters, key stakeholders in a particular response have argued for an expansion of the military's control over disaster relief operations.<sup>98</sup> The strategic attributes noted above are the strongest criteria cited in favor of this proposition.<sup>99</sup> Critics argue, however, that giving the military such a significant domestic role infringes on the states' police power and conflicts with the principles of the Constitution and federalism.<sup>100</sup> After the September Eleventh attacks and the criticized response to Hurricane Katrina, Congress, Emergency Managers, and the American public questioned the proper role for the military in disasters and whether disaster relief should be managed by a military rather than a civilian agency.<sup>101</sup>

### C. *The Rise of FEMA: Its Creation and Evolution*

History demonstrates that natural disasters and many other types of emergencies inevitably will occur.<sup>102</sup> Emergency Management evolved into a four-stage system—mitigation, preparedness, response, and recovery—to deal with and diminish the effects of these disruptive and costly events.<sup>103</sup> FEMA's

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97. See Miskel, *supra* note 51, at 108 (commending DOD for handling capacity and coordinating international humanitarian relief efforts in Iraq, Bangladesh, and Somalia); Bowman & Gorman, *supra* note 55, at A13 (quoting David Segal, University of Maryland Military Sociologist). Segal commented that the Guard's response to Katrina was "more than sufficient" and most effective relative to other federal responders. Bowman & Gorman, *supra* note 55, at A13; see also *Hearing on Katrina and the Defense Dep't Response*, *supra* note 82, at 3 (statement of Sen. Joseph Lieberman) (maintaining DOD "has the best communications equipment, logistical ability, equipment generally"); *Recovering from Hurricane Katrina: Responding to the Immediate Needs of its Victims*, *Hearing Before the S. Homeland Sec. and Governmental Affairs Comm.*, 109th Cong. 26 (2005) (testimony of witness Robert Eckels, County Judge, Harris County, TX) (observing Army's tremendous capacity for support, troops, logistics).

98. See *Preparedness and Response by the Dep't of Defense, the Coast Guard and the Nat'l Guard of Louisiana, Mississippi and Alabama*, *Hearing Before the H. Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. 1-2 (2005) (statement of Rep. Tom Davis, Comm. Chair) (citing post-Katrina debate about expanding role of military in future disasters); *Hearings on Disaster Response Role of Military and National Guard*, *supra* note 10, at 1 (statement of Rep. Dave Reichert, Comm. Chair) (noting "fresh debate" about whether DOD not DHS should lead federal response effort).

99. See *supra* notes 97 (commending military's strengths of coordination and operational capabilities).

100. See *Hearings on Disaster Response Role of Military and National Guard*, *supra* note 10, at 1-2 (recording debate surrounding proposal to increase role of military, and criticisms rooted in federalism concerns).

101. See *Hurricane Katrina: Managing the Crisis and Evacuating New Orleans, Panel I of a Hearing Before the Senate Homeland Security and Governmental Affairs Committee*, 109th Cong. 9 (2006) [hereinafter *Hearing on Managing the Crisis*] (questioning DOD role in federal disaster response post-Katrina); Miskel, *supra* note 51, at 105 (questioning whether history supports military-run federal disaster relief); see also Kealy, *supra* note 54, at 388 (considering debate whether to expand role of military in wake of growing terrorist threat).

102. See McLoughlin, *supra* note 42, at 165 (predicting occurrence and damage caused by floods, tornadoes, fires, and other emergencies).

103. See McLoughlin, *supra* note 42, at 166 (defining four components of emergency management). McLoughlin defines each of the four stages: mitigation includes "[a]ctivities that reduce the degree of long-term risk to human life and property from natural and man-made hazards"; preparedness includes "activities that develop operational capabilities for responding to an emergency"; response includes "activities taken immediately before, during, or directly after an emergency that save lives, minimize property damage, or

creation gave rise to national cohesion around these phases of disaster management, as well as an “all-hazards” approach.<sup>104</sup> This Note focuses on preparation and response: the phases of emergency management most criticized in Katrina’s wake and the focus of debate surrounding the federal government’s role.<sup>105</sup>

Prior to FEMA, federal involvement in disaster relief consisted of trial and error approaches via event-specific response.<sup>106</sup> “The creation of FEMA was intended to strengthen federal leadership in emergency management, particularly in efforts to avert disaster losses.”<sup>107</sup> This endeavor required integrating more than one hundred federal programs involved with disaster response management.<sup>108</sup> The National Governor’s Association influenced President Carter’s re-organization through its request to reduce the large number of disaster related programs.<sup>109</sup>

In its early years, FEMA faced challenges developing internal organizational procedures and an external Integrated Emergency Management System (IEMS) to assist disaster management at all levels of government.<sup>110</sup> FEMA initially struggled in the face of these challenges, while attempting to create comprehensive and effective procedures.<sup>111</sup> By 1992, national opinion of FEMA was extremely low, and after a disastrous response to Hurricane Andrew, Congress moved to dismantle the agency entirely.<sup>112</sup>

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improve recovery”; and recovery includes “[s]hort-term activities that restore vital life-support systems to minimum operating standards and long-term activities that return life to normal.” *Id.*

104. See McLoughlin, *supra* note 42, at 165-66 (observing FEMA introduced to coordinate unified “all-hazards” approach to disaster management). The “all-hazards” approach is premised on the notion that different types of disasters cause similar damage and require similar response capacities. *Id.*; see also SENATE REPORT, *supra* note 18, at 18 (arguing “all-hazards” approach needed as terrorist attacks and natural disasters call for common capabilities).

105. See *supra* Part I (introducing focus on pre-disaster planning and immediate response).

106. See May, *supra* note 22, at 40 (giving brief history of FEMA’s goals); Mushkatel & Weschler, *supra* note 22, at 49-50 (describing background of U.S. emergency management divided among numerous federal departments).

107. May, *supra* note 22, at 140.

108. Exec. Order No. 12,148, 3 C.F.R. 412 (1979) (creating FEMA); see also FEMA History, *supra* note 49 (providing factual history pre-FEMA).

109. See FEMA History, *supra* note 49 (noting influence of National Governor’s Association).

110. See McLoughlin, *supra* note 42, at 166 (defining Integrated Emergency Management System as all-hazards system with warning procedures). “IEMS [is] a system comprised of many components to serve all levels of government in developing, maintaining, and managing an efficient and cost-effective emergency management capability . . . IEMS emphasizes and capitalizes on the commonalities of emergency functions that exist across all hazards . . .” *Id.*

111. See FEMA History, *supra* note 49 (citing disasters faced by new agency in its formative years); Interview by FRONTLINE with James Lee Witt, Director of FEMA 1993-2000, PUB. BROAD. CORP. (Sept. 16, 2005) [hereinafter Witt Interview] available at <http://www.pbs.org/wgbh/pages/frontline/storm/interviews/witt.html> (explaining reason for low morale upon his arrival as director).

112. See FEMA History, *supra* note 49; Witt Interview, *supra* note 111 (naming disasters FEMA faced as a young agency and resulting criticism). FEMA faced several challenges early on: including the contamination of Love Canal, the nuclear incident at Three Mile Island, the Cuban refugee crisis, Hurricane Hugo in 1989,

Instead, James Witt, President Clinton's appointment and the first agency director with emergency management experience, convinced Congress to give him one year to turn around the troubled agency.<sup>113</sup> Under James Witt's leadership, the agency "streamlined disaster relief and recovery operations," increased focus on mitigation, and turned attention to customer service.<sup>114</sup> Witt's leadership in the then cabinet-level position coupled with increased post-Cold War funding moved the agency into a renaissance.<sup>115</sup>

FEMA underwent another round of major changes after the September Eleventh terrorist attacks, culminating in its movement into the DHS in 2003.<sup>116</sup> The emergency management community highly criticized many of these changes which largely have been offered as an explanation for the government's disorganized response to Katrina.<sup>117</sup> The Bush administration's decreased funding and shift away from Witt's mitigation program in favor of a competitive grant process placed a greater burden on states and local communities while injuring FEMA employee morale.<sup>118</sup> Critics of DHS centralization argued that the recent focus on counter-terrorism, in the wake of

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and Hurricane Andrew in 1992. See FEMA History, *supra* note 49; Witt Interview, *supra* note 111 (recalling fight to convince Congress to delay dismantling of FEMA for one year). A four day delay in response to Hurricane Andrew and plummeting national opinion caused Congress to introduce legislation to move emergency management control to DOD. See FEMA History, *supra* note 49; Witt Interview, *supra* note 111.

113. See FEMA History, *supra* note 49 (stating Clinton's appointment of James Witt marked important growth for FEMA); Witt Interview, *supra* note 111 (sharing recollection of his arrival and threatened dismantling of FEMA, if progress not made).

114. See FEMA History, *supra* note 49 (emphasizing approach to improvements including focus on prevention and mitigation); Witt Interview, *supra* note 111 (recalling reorganization of FEMA including addition of "mitigation/prevention division").

115. See, e.g., Sylves & Cumming, *supra* note 5, at 6 (noting high value Clinton placed on FEMA under Witt); Elliston, *supra* note 7 (referencing FEMA under Witt as focused, effective, and praiseworthy); FEMA History, *supra* note 49 (describing Witt's sweeping and positive reforms). Beginning in 1993, FEMA shifted focus to preparedness and mitigation, building relationships with intergovernmental agencies, and introduced Project Impact. See Elliston, *supra* note 7; Witt Interview, *supra* note 111; FEMA History, *supra* note 49 (noting substantial focus on preparation and mitigation under Witt). Project Impact was a partnership initiative aimed at disaster mitigation that encouraged localities that suffered a disaster to invest, with the federal government's assistance, in mitigation for future events. Elliston, *supra* note 7; Witt Interview, *supra* note 111 (noting efforts to rebuild and protect vulnerable regions). As an independent agency directed by a cabinet-level official, FEMA reported directly to the White House rather than through multiple tiers of authority. FEMA History, *supra* note 49; Witt Interview, *supra* note 111; Elliston, *supra* note 7 (recognizing less bureaucratic chain of command).

116. See generally Homeland Security Act of 2002, 6 U.S.C. §§ 101-557 (2003) (establishing Dep't of Homeland Sec. and FEMA's place within it); see also Elliston, *supra* note 7 (listing budget cuts and lessened commitment to mitigation).

117. See Witt Interview, *supra* note 111 (acknowledging change in focus post-September Eleventh); see also Glasser & Grunwald, *supra* note 5, at A01 (linking politicized and rash creation of DHS to ineffective operations); Grunwald & Glasser, *supra* note 5, at A01 (documenting complaints by FEMA director within DHS and prediction of lack of readiness).

118. See Elliston, *supra* note 7; Grunwald & Glasser, *supra* note 5 at A01 (illustrating budget cuts, reduction in FEMA authority, and management conflicts following FEMA's move to DHS). The 2004 American Federation of Government Employees survey found poor employee opinion of FEMA. Elliston, *supra* note 7.

September Eleventh, distracted the agency from its expertise with natural hazards.<sup>119</sup>

The move to DHS aimed to centralize incident response.<sup>120</sup> Political turf wars, however, resulted in a poorly designed agency with little hope of true success.<sup>121</sup> The Homeland Security Act of 2002 included a directive for the creation of a National Response Plan which addressed varied levels and types of incidents and created a unified response approach.<sup>122</sup> Introduced in 2004, the National Response Plan outlined the roles and responsibilities of each level of government, volunteers and the private sector during an emergency.<sup>123</sup> Hurricane Katrina was the National Response Plan's first true test.<sup>124</sup>

Any federal disaster effort must confront a number of challenges.<sup>125</sup> Coordination and communication among various actors, especially between local, state, and federal emergency coordinating officers, is vital to success and easily disrupted.<sup>126</sup> Without proper training, advance preparation, and reliable communications systems, emergency management is vulnerable to disorganization, confusion, and failure.<sup>127</sup>

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119. See Sylves & Cumming, *supra* note 5, at 15-17; Elliston, *supra* note 7 (raising concern DHS too focused on anti-terrorism while FEMA disaster response neglected).

120. See 6 U.S.C. §§ 101-557 (2003) (outlining centralized organization of DHS).

121. See generally Glasser & Grunwald, *supra* note 5; (noting that understaffing and unclear boundaries contributed to DHS Chaos).

122. See NATIONAL RESPONSE PLAN, *supra* note 41, at 78-88 (citing authorities under which National Response Plan established).

123. See NATIONAL RESPONSE PLAN, *supra* note 41, at 78-87 (explaining authority, background, and implementation of National Response Plan). The intent of National Response Plan is to "align Federal coordination structures, capabilities, and resources into a unified, all-discipline, and all-hazards approach to domestic incident management." *Id.* at i.

124. See *The Role of the Department of Homeland Security in Hurricane Katrina Relief Response, Hearing Before the H. Select Hurricane Katrina Comm.*, 109th Cong. 4 (2005) [hereinafter *Hearing on Role of Dep't of Homeland Security*] (statement of Michael Chertoff, Sec'y, Dep't of Homeland Sec.); Steyn, *supra* note 13, at 10 (declaring Katrina first large-scale test of new federal response plan).

125. See *infra* notes 126 and accompanying text (describing challenges faced specifically by Katrina responders); see also Drabek, *supra* note 13, at 85-88 (explaining complex demands facing emergency managers, generally).

126. See *Hurricane Katrina: Urban Search and Rescue in a Catastrophe, Hearing Before the Senate Homeland Security and Governmental Affairs Committee*, 109th Cong. 8 (2006) [hereinafter *Hearing on Urban Search and Rescue*] (statement of Lt. Col. Keith Lacaze, Asst. Law Enforcement Div. Admin., Louisiana Dep't of Wildlife and Fisheries) (detailing complete devastation of communication system and hindered relief effort after Katrina); Drabek, *supra* note 13, at 88-90 (discussing importance of communication and coordination for successful response). See generally Megan M. Grew, Note, *The Joint UNEP/OCHA Environmental Unit: A Global Environmental Response Team*, 25 SUFFOLK TRANSNAT'L L. REV. 687 (2002) (observing importance of coordination and planning to successful multi-agency efforts).

127. See O'Brien & Bender, *supra* note 12 at A1 (discussing communication breakdown between first responders and outside world during Katrina); see also *Hearing on Role of Department of Homeland Security*, *supra* note 124, at 4 (statement of Michael Chertoff, Sec'y, Dep't of Homeland Sec.) (contrasting Katrina communication failure with improved communication and coordination in Rita); *Hurricane Katrina: Perspectives of FEMA's Operations Professionals, Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 109th Cong. 1 (2005) [hereinafter *Hearing on Perspectives of FEMA Operations Professionals*] (statement of Sen. Susan Collins, Comm. Chair) (emphasizing good communications as

In times of economic difficulty, intergovernmental tension rises. As first responders, state and local governments are integral to effective response, although their capacities and resources for disaster preparedness vary greatly and are rarely sufficient to meet federal guidelines.<sup>128</sup> The Stafford Act conditions federal funding for mitigation and preparedness on states' contributions to, and development of, emergency response plans.<sup>129</sup> Regardless of state and local efforts, Congress is unlikely to deny funds to needy areas for both practical and political reasons.<sup>130</sup> Critics of recent disaster policies argue that cuts in funding for mitigation and preparedness, concurrent with a shift toward greater responsibility on state and local governments, has left them in an impossible position.<sup>131</sup> The failure of all levels of government to respond adequately to Katrina highlighted not only the need to develop state and local emergency plans but also the need for emergency officials with the proper qualifications and training to effectively execute those plans.<sup>132</sup>

*D. FEMA in Action: First Test of the National Response Plan – Hurricane Katrina*

Hurricane Katrina made landfall on August 29, 2005, and although it weakened as it passed over land, hurricane force winds and rain caused severe destruction, death, and massive flooding.<sup>133</sup> The area that suffered the greatest loss of life and property was New Orleans, due in great part to the breached levee system protecting the below-sea-level city from neighboring Lake Pontchartrain.<sup>134</sup> In addition to the harmful flood, the disorganized and hindered relief response especially in the New Orleans area, ultimately caused additional human suffering and incidents of violence.<sup>135</sup>

Almost immediately following the storm, political battles erupted over

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“lifeblood of emergency operations”); THE WHITE HOUSE, *supra* note 12, at 117-18 (observing need for training of emergency managers).

128. See Mushkatel & Weschler, *supra* note 22, at 51-53 (analyzing local and state roles and capacity under FEMA); see also Elliston, *supra* note 7 (citing state and local emergency managers feel crunched by Bush policy and funding changes).

129. 42 U.S.C. § 5131 (outlining state responsibilities if seeking disaster preparedness assistance).

130. See HOWITT & LEONARD, *supra* note 3, at 25-26 (suggesting congressional pressure limits President's attempt to swing 'stick' of conditional funding).

131. See Elliston, *supra* note 7 (listing elimination of Project Impact and denial of specific mitigation requests). In the summer of 2004, FEMA denied the State of Louisiana's application for a competitive mitigation grant for flood control. *Id.*

132. See SENATE REPORT, *supra* note 18, at 18-19 (recommending federal leadership for improved training and certification standards for emergency officials at all levels).

133. See KNABB ET AL., *supra* note 9, at 1 (summarizing impact of Katrina on Gulf Coast).

134. KNABB ET AL., *supra* note 9, at 10-11 (singling out Louisiana's flooding as destructive secondary effect of Katrina).

135. See generally *Hearing on Role of Dep't of Homeland Security*, *supra* note 124; *Review Hurricane Relief Response Hearing*, *supra* note 14 (distinguishing response difficulties in Louisiana from comparatively smoother responses in Alabama and Mississippi).

assigning responsibility for the slow relief response and addressing ongoing issues of administering aid and improving disaster planning.<sup>136</sup> In the days and months that followed, journalists, lawmakers, and the American public investigated what went wrong and what led to New Orleans's denigration into a dangerous swamp.<sup>137</sup>

Former FEMA Director Michael Brown argued state and local officials failed to evacuate in a timely fashion or to adeptly execute an emergency plan.<sup>138</sup> Brown further asserted that FEMA attempted to fulfill its function as coordinator and supporter, but that the sheer magnitude of the storm and flood overwhelmed the agency.<sup>139</sup> Louisiana Governor Kathleen Blanco proclaimed the federal government failed to provide adequate intervention and aid in the face of a storm that completely overwhelmed local and state first responders and dismantled the city's infrastructure.<sup>140</sup>

As the nation responded, troubling reports reached lawmakers and gave rise to concerns about FEMA's leadership capacity and the efficacy of the nation's new response plan. Firemen reported to FEMA's regional office and were sent to Georgia for sensitivity training rather than into New Orleans for search and rescue; a shipment of ice was routed to Maine rather than to the hurricane victims; buses that should have been used to evacuate disaster victims were left in a parking lot, which later flooded; and police officers used cell phones that were not compatible with the National Guard's SINGARS system thereby worsening the black hole of communications capability in the troubled city.<sup>141</sup> Within a week, the military response, including the National Guard under Governor Blanco's command and active duty troops from Northern Command, reached approximately 54,000 and restoration of order began.<sup>142</sup> While the

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136. See Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1; Eric Lipton et al., *A View of the Political Storm After Katrina*, N.Y. TIMES, Dec. 4, 2005, at 39 (assessing political issues at play in Katrina response).

137. See *infra* note 138 and accompanying text.

138. See *Review Hurricane Relief Response Hearing*, *supra* note 14, at 6-7 (statement of Michael Brown, former FEMA Director) (defending FEMA's actions in responding to Hurricane Katrina).

139. See *Review Hurricane Relief Response Hearing*, *supra* note 14 at 5-7; THE WHITE HOUSE, *supra* note 12, at 37 (describing "total destruction" of many state and local public safety agencies).

140. See SENATE REPORT, *supra* note 18, at 2 (noting intent of DHS to strengthen nation's response capacity and apparent failure of that goal); see also Peter Grier, *What We Know So Far and What We Don't*, CHRISTIAN SCIENCE MONITOR, Sept. 21, 2005, at 3 (reporting Governor Blanco's concern Feds would blame her for their mistakes); Thomas et al., *supra* note 12, at 26 (detailing actions by different levels of government); *When Government Fails*, THE ECONOMIST, Sept. 10, 2005, at 26 (outlining political battles and ensuing accusations).

141. See *Hearing on FEMA Mission at This Stage of Recovery*, *supra* note 45, at 2 (statement of Sen. Susan Collins, Comm. Chair) (listing reports of extreme misuse and inefficiency); *Hearings on Disaster Response Role of Military and National Guard*, *supra* note 10, at 12 (statement of Lt. Gen. Steven Blum, Chief, National Guard Bureau) (discussing communications difficulty due to different systems used); *Hearing on Role of Dep't of Homeland Security*, *supra* note 124, at 22 (statement by Sec'y Chertoff, Dep't of Homeland Sec.) (discussing buses under water and unavailable for rescue).

142. See Press Briefing, Dep't of Defense, Ongoing National Guard Response to Hurricane Katrina (Sept. 3, 2005) (statement of Lt. Gen. Steven Blum, Chief, Nat'l Guard Bureau) (providing details of military

Coast Guard and National Guard response began almost immediately after landfall, federal troops did not arrive in significant numbers until three to four days after landfall.<sup>143</sup>

In contrast to these troubling examples of mismanagement and inefficiency, the American people responded compassionately with heart, muscle, and money.<sup>144</sup> Private sector companies like Wal-Mart and Home Depot donated manpower and products to the relief effort, cities and towns across the country offered shelter in their homes and schools to displaced victims, and the U.S. Armed Forces, especially the Coast Guard, performed heroic rescues and repaired the levees.<sup>145</sup> In the week following landfall, President Bush encouraged an examination into the immediate federal response and pledged full White House cooperation.<sup>146</sup> Congress and the Senate formed committees to investigate and report on the problems with the initial response effort.<sup>147</sup> These committees closely scrutinized government actions, with the aid of hearing testimony and document review, considered FEMA's inclusion within the Department of Homeland Security and explored the proper role for the Armed Forces in disaster response.<sup>148</sup>

As the investigation into the days leading up to and immediately following

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response); *see also* Kealy, *supra* note 54, at 424-25 (defining creation of Northern Command after September 11th attacks).

Since the attacks on Washington and New York, the military has established a North American Command. As of October 1, 2002, this Command has operated air patrols over American cities, engaged in searches up to 500 miles off of the nation's coastline, and prepared itself to respond to major terrorist attacks. There seems to be an expectation, both in Washington and within the Command, that the Command will direct a large part of the federal government's response to any future terrorist attack. In the case of a large-scale terrorist attack that includes weapons of mass destruction, the Command anticipates taking charge of the scene.

Kealy, *supra* note 54, at 424-25.

143. *See Failure of Initiative, supra* note 75, at 202 (charting military deployment and showing largest number of troops not in Gulf region until September 9th); Bowman et al., *supra* note 62, at 1 (discussing delayed arrival of Northern Command armed forces).

144. *See SENATE REPORT, supra* note 18, at 3 (chronicling generosity of American people with both time and money); Aid Package for Katrina, *supra* note 14 (statement of Pres. George W. Bush) (crediting outstanding performance of certain private sector actors providing relief to hurricane victims).

145. *See Aid Package for Katrina, supra* note 14 (statement of Pres. George W. Bush) (praising Coast Guard and military for heroic efforts in contrast to overall government response); Press Briefing, Dep't of Defense, Ongoing National Guard Response to Hurricane Katrina (Sept. 3, 2005) (statement of Lt. Gen. Steven Blum, Chief, Nat'l Guard Bureau) (reporting on missions to block levee leaks).

146. *See Aid Package for Katrina, supra* note 14 (statement of Pres. George W. Bush) (announcing government review of response to Katrina including Congressional investigation).

147. *See* Press Conference, Senate Homeland Security and Governmental Affairs Committee, Oversight Hearings Into U.S. Government Response to Hurricane Katrina (Sept. 6, 2005) (statements of Sen. Susan Collins and Sen. Joseph Lieberman) (presenting to press Homeland Security and Governmental Affairs Committee plan for review of Katrina response); *Review Hurricane Relief Response Hearing, supra* note 15, at 1-2 (statement by Rep. Davis) (explaining House Committee review).

148. *See infra* Part III (analyzing overall response to Katrina and suggesting revamped relief effort).

Katrina pressed on, FEMA faced another round of criticism pertaining to management of long-term assistance.<sup>149</sup> Local officials in Mississippi reported FEMA's failure to reach victims quickly and accurately with information about financial assistance and rebuilding plans.<sup>150</sup> Citizens in the Gulf Coast region filed a class action suit against FEMA seeking declaratory and injunctive relief to prevent the agency from setting a termination date for temporary housing support; to require the agency to communicate more effectively with the public regarding housing assistance; to employ temporary housing measures for displaced individuals; and to insist that the agency process nearly 60,000 applications for assistance which were still pending more than three months after landfall.<sup>151</sup> A federal judge held that the agency could not evict victims from hotels until assistance was provided and demanded the agency communicate with the public about assistance programs.<sup>152</sup> While refusing to order a deadline for processing the applications, the court recognized such an order could be forthcoming, if the agency did not act quickly.<sup>153</sup> Furthermore, the court ordered FEMA to take immediate action to correct past-miscommunication with applicants for housing loans and noted that some of FEMA's mismanagement could, if not corrected, give rise to due process claims.<sup>154</sup>

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149. See Shaila Dewan, *Hotel Aid Ends, Sending Evacuees in Search of Shelter*, N.Y. TIMES, Feb. 14, 2006, at A18 (noting criticism of FEMA and difficulty evacuees had months after Katrina landfall).

150. See Jennifer Steinhauer & Eric Lipton, *FEMA, Slow to the Rescue, Now Stumbles in Aid Effort*, N.Y. TIMES, Sept. 17, 2005, at A1 (cataloging complaints about delays in housing and other aid).

151. *McWaters v. FEMA*, 408 F. Supp. 2d 221, 225-26 (E.D. La. 2005) (hearing plaintiff's complaints regarding FEMA management of housing assistance programs and delays). The government argued the doctrine of sovereign immunity precluded judicial review of FEMA's actions. The court, however, found the Stafford Act did not intend to preclude judicial review of all agency actions, only those that involved discretion. The Court articulated its authority in the case, saying "the issue before this Court is whether the acts or omission complained of by the plaintiffs are discretionary in nature or in fact mandated by law or regulation." *Id.* at 230.

152. *Id.* at 232-37 (discussing and analyzing plaintiff's five requests for non-monetary relief).

153. *Id.* at 232 (refusing to recognize, assuming property interest at stake, sufficient infringement to warrant due process claim). The court notes, however,

[T]his catastrophe has stretched everyone's resources and both Congress and FEMA have made substantial efforts to increase FEMA's resources, in particular . . . if requested by plaintiffs, the court will reexamine the necessity of establishing such a timetable at a later date should FEMA not make extremely substantial progress in processing these pending applications.

*Id.* 408 F. Supp. 2d at 232.

The court notes that the constitutional question of whether an undue delay poses a constitutional violation will remain open, as well. *Id.*

154. *Id.* at 236-37. In June 2006, Judge Duval announced his decision on the government's motion to dismiss and plaintiff's renewed request for injunction to prohibit FEMA from terminating housing assistance without adequate notice. The court reaffirmed its finding that FEMA was not acting expediently to provide victims with needed assistance, enjoined FEMA from ending payment for temporary lodging until two weeks from the date the affected victim a determination as to their request for more permanent housing assistance, and enjoined FEMA from requiring victims seeking additional housing assistance to prove they had first applied for

While striving to recover from national disappointment and repeated accusations of governmental failure, final reports of the White House, Congressional, and Senate investigations were released.<sup>155</sup> Common to all were observations of a lack of the training and preparation needed to implement emergency plans, total failure to ensure an adequate disaster communications network, poorly defined roles for emergency officials, and a confused command structure.<sup>156</sup> Investigators concluded that these weaknesses and failures, while not crippling in an average disaster, caused duplicative efforts, undue delays, and ultimately greater suffering and cost than necessary.<sup>157</sup> These reports also identified the need for a larger federal role in response to catastrophes, an improved federal leadership in building interagency, intergovernmental coalitions, and more efficient utilization of all available governmental resources.<sup>158</sup>

### III. ANALYSIS

Hurricane Katrina was not a surprise; it was anticipated, by many, for years.<sup>159</sup> In 2004, FEMA sponsored a massive emergency response exercise aimed at predicting the fallout from such an event.<sup>160</sup> Despite the days of warning prior to Katrina's landfall and the National Weather Service's forecast that the storm would be the most severe to hit the Gulf Coast region in generations, the response at all levels of government revealed surprisingly inadequate preparation.<sup>161</sup>

After a surprise attack, like the September 11<sup>th</sup> bombing of the World Trade

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a small business loan. *See generally* *McWaters v. FEMA*, 436 F. Supp. 2d 802 (E.D. La. 2006).

155. *See generally* *Failure of Initiative*, *supra* note 75; SENATE REPORT, *supra* note 18; THE WHITE HOUSE *supra* note 12.

156. *See Failure of Initiative*, *supra* note 75 at 2-5; SENATE REPORT, *supra* note 18, at 2-21; THE WHITE HOUSE, *supra* note 12, at 33-40 (attributing failures to poor communication, lack of unified command, and inadequate pre-disaster preparation).

157. *See Failure of Initiative*, *supra* note 75, at 2-5; SENATE REPORT, *supra* note 18, at 2-21; THE WHITE HOUSE, *supra* note 12, at 33-50 (linking governmental failures to worsening conditions and devastation).

158. *See Failure of Initiative*, *supra* note 75, at 2-5, 359-61; SENATE REPORT, *supra* note 18, at Recommendations-1-29; THE WHITE HOUSE, *supra* note 12, at 94-8, 117-19 (observing deficiencies of federal response to Katrina).

159. *See Preparing for a Catastrophe*, *supra* note 14, at 2 (statement of Sen. Susan Collins, Committee Chair) (noting predictions of major storm); Eric Lipton, *Republicans' Report on Katrina Assails Administration Response*, N.Y. TIMES, Feb. 12, 2006 at A1 (criticizing response given anticipation of storm like Katrina).

160. *See Preparing for a Catastrophe*, *supra* note 14, at 1-2 (statement of Sen. Susan Collins, Comm. Chair) (introducing "Hurricane Pam" exercise to simulate affect of major storm on New Orleans area). In 2004, FEMA sponsored a major training exercise for federal, state and local emergency management personnel aimed at simulating the impact of a Category three hurricane on the New Orleans area. *Id.* at 2. The exercise predicted massive flooding, destruction of entire neighborhoods, thousands of fatalities, and complete evisceration of communication systems and the ability of local first responders to deal with the disaster. *Id.* at 2-3. In the wake of Katrina, the accuracy of this simulation led legislators to question how the failures in Katrina were possible given FEMA's predictions of what to expect. *Id.* at 1-3.

161. *See Hearing on the Role of the Governors*, *supra* note 62, at 11 (statement of Sen. Joseph Lieberman); Lipton, *supra* note 159 (calling attention to weather forecast and lack of appropriate planning).

Center, society forgives a lack of coordination and efficiency in rescue and relief efforts and encourages a renewed commitment to be better prepared for the next catastrophe.<sup>162</sup> When coordination and preparation fail in the face of an anticipated event, however, the citizenry demands those responsible take a closer look at what remains to be done to ensure the nation's security and safety.<sup>163</sup> After all, "[i]f our nation cannot give a good account of our ability to manage such a predicted, known and track-able event as a hurricane, we must surely question our preparedness for dealing with a stealthier, more sinister terrorist attack."<sup>164</sup>

#### A. *The Need for Expanded Communications Capability*

Over and over, reports from all involved in the initial Katrina response and rescue cited inoperable and unreliable communication systems as a major obstacle to acting quickly, effectively, and confidently.<sup>165</sup> While traditional disaster response in the United States has respected the states' police power and relied on local first responders for initial disaster management, Katrina totally overwhelmed local police, fire, and emergency officials.<sup>166</sup> The President, Governor Blanco of Louisiana, and high-level National Guard officials acknowledged the need for enhanced communications systems to aid in catastrophic disaster situations.<sup>167</sup>

The Stafford Act should be amended to incorporate these goals and to provide for the use of standardized communications systems by all levels of government in crisis situations.<sup>168</sup> Reliable communication is essential to successful search and recovery efforts, efficient delivery of supplies to those in

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162. See Steyn, *supra* note 13, at 10 (distinguishing unexpected terrorist attack from foreseen natural disasters).

163. See *Preparing for a Catastrophe*, *supra* note 14, at 1 (statement of Sen. Susan Collins) (raising concern about response capabilities in face of unexpected attack or disaster).

164. See *Preparing for a Catastrophe*, *supra* note 14, at 1.

165. See *supra* notes 126, 127, 141 and accompanying text (explaining fragility of communications and failure during Katrina); see also *Preparing for a Catastrophe*, *supra* note 14, at 10 (statement of Jesse St. Amant, Dir., Homeland Sec. and Office of Emer. Preparedness, Plaquemines Parish, LA) (observing one hundred percent breakdown in communications). "[I]f you can't communicate what your problems are, if you can't reach out, then your response is hindered." *Preparing for a Catastrophe*, *supra* note 14, at 10 (statement of Jesse St. Amant, Dir., Homeland Sec. and Office of Emer. Preparedness, Plaquemines Parish, LA).

166. See *Hearing on Managing the Crisis*, *supra* note 101, at 5 (statement of Ray Nagin, Mayor of New Orleans) (describing desperation facing local citizens and responders in days following landfall). "Every day requests were made to state and federal authorities for emergency assistance needed to save lives and restore order. . . . We were in most desperate need of assistance." *Id.*; see also *supra* note 140 and accompanying text.

167. See *Preparing for a Catastrophe*, *supra* note 14, at 10 (statement of Jesse St. Amant, Dir., Homeland Sec. and Office of Emer. Preparedness, Plaquemines Parish, LA) (noting President's acknowledgment of need for interoperable communications); *Hearing on the Role of the Governors*, *supra* note 62, at 5 (statement of Kathleen Blanco, Governor, State of Louisiana) (observing need for reliable communications for effective disaster response).

168. See SENATE REPORT, *supra* note 18, at Recommendations-17-18 (detailing need for federally directed effort to standardize disaster communications systems).

need, and maintenance of civil order.<sup>169</sup> To effectuate an orderly response in a catastrophe the size of Katrina, the National Guard units from different states, federal armed forces, local police, and volunteers must all be able to communicate with each other.<sup>170</sup> Implementing standards for communication would prevent the duplication of efforts that occurred in Katrina's wake, as well as prevent the delayed delivery of needed provisions, which can occur when information about the location of victims is unavailable.<sup>171</sup>

Ensuring reliable communications systems across all levels of government requires the identification of appropriate technology, funding from state and federal governments, and training of local law enforcement and emergency personnel.<sup>172</sup> The military already possesses the most reliable communications systems and mobile communication command units.<sup>173</sup> FEMA must work with the military to identify appropriate communication technology and incorporate its use into the National Response Plan.<sup>174</sup> The communications systems must be interoperable between local officials and military units deployed to aid in disaster response.<sup>175</sup>

Once appropriate communications systems are selected, the Stafford Act should mandate that state governments receiving federal disaster aid incorporate the selected communications system into their disaster management

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169. See *supra* notes 140, 167 and accompanying text.

170. See *supra* notes 141, 167 and accompanying text.

171. See *Hearing on Katrina and the Defense Dep't Response*, *supra* note 82, at 8 (statement of Sen. Susan Collins) (quoting National Guard's after-action report from evaluating Katrina response); *supra* note 141 and accompanying text (listing response problems arising in part from lack of reliable communications).

[T]he disconnect between the Guard and the active duty command and control structures resulted in some duplication of efforts . . . the 82nd Airborne moved into a sector that was already being patrolled by two National Guard units. In addition . . . there was duplication in helicopter missions, with two helicopters sent on the same rescue missions, which arguably delays the rescue of other victims.

*Id.*

172. See THE WHITE HOUSE, *supra* note 12, at 55-56, 96-98 (calling for DHS to review current communications practices and work with agencies to develop improvements). The specific recommendations highlight the need to identify systems that will work and make them compatible across agencies. *Id.* at 97. The report also notes the potential to condition federal funding on state compliance with communications systems. *Id.*

173. See *Hearing on Urban Search and Rescue*, *supra* note 126, at 25-26 (statements of Sen. Joseph Lieberman and Gen. Brod Veillon, Asst. Adjutant Gen., La. Nat'l Guard) (discussing military communications capabilities and disaster response situations).

174. See generally *Hearing on Urban Search and Rescue*, *supra* note 126 (exploring possibility of acquiring military-like communications systems for FEMA); SENATE REPORT, *supra* note 18, at Recommendations-14 (recommending DHS with DOD to inventory assets and tools available in disasters including communications equipment).

175. See *supra* note 141 and accompanying text (explaining difficulties resulting from interoperable communications in Katrina); see also *Hearing on Managing the Crisis*, *supra* note 101, at 12 (statement of Ray Nagin, Mayor of New Orleans) (noting failure of satellite cell phones intended for disaster communications).

plans.<sup>176</sup> Congress should also consider the training of local officials and first responders.<sup>177</sup> In doing so, Congress could condition federal financial assistance on states' compliance with disaster preparation requirements and response training.<sup>178</sup> In the past, the Supreme Court has upheld conditional federal funding to state governments as a legitimate use of the federal government's spending power, as long as the condition is directly related to the program receiving funds.<sup>179</sup> Therefore, federal assistance for disaster planning and response would be conditioned on states' contributions and commitments to incorporating the necessary communications systems.<sup>180</sup>

*B. What is the Proper Role of the "Cavalry?"*

*[W]e must likewise accept that events such as Hurricane Katrina and the terrorist attacks of September 11, 2001, require us to tailor the application . . . to the threats we confront in the 21st century . . . [t]he need for a flexible Federal response and a larger Federal role in catastrophic contingency planning becomes clear.*<sup>181</sup>

As noted above, in roughly fifty annual U.S. disasters, state and federal governments effectively handle the response.<sup>182</sup> Events like Hurricane Katrina, however, require more leadership, command, and preparation to prevent a large loss of life and devastating economic damage.<sup>183</sup> The National Response Plan anticipates an eventuality that would demand faster, more aggressive federal leadership; but in responding to Katrina, FEMA and DHS failed to follow the guidelines set forth in the Catastrophic Incident Annex.<sup>184</sup> With proper

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176. See SENATE REPORT, *supra* note 18, at Recommendations-17 (encouraging conditional grant funding on purchase of interoperable communications systems); see also *supra* note 129 and accompanying text (noting requirement for states to develop disaster management plan).

177. See 42 U.S.C. § 5131 (conditioning states' receiving mitigation assistance on development of state agency to administer disaster preparedness program); THE WHITE HOUSE, *supra* note 12, at 117-19 (describing training needed for federal officials and state and local responders); see also Abbott et al., *supra* note 39, at 9 (observing federal conditions to state preparedness funding).

178. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (upholding Congress's spending power to condition receipt of federal funds on state regulation); Abbott et al., *supra* note 39, at 1 (arguing federal authority to encourage state response action possibly justified under spending power).

179. See *supra* note 178 and accompanying text (citing to authority for conditional federal funding to state).

180. See generally *Dole*, 483 U.S. 203 (upholding federal authority to condition state receipt of federal funds on specific state actions); *supra* note 172 and accompanying text (discussing recommendations for improved communications systems and installation).

181. THE WHITE HOUSE, *supra* note 12, at 11.

182. See *supra* note 16 and accompanying text (stating FEMA and state governments' abilities to handle moderate disasters occurring annually).

183. See *supra* notes 2, 18, 47, 98, 100-101, and accompanying text (documenting calls for different emergency management response to events like Katrina).

184. See NATIONAL RESPONSE PLAN, *supra* note 41, at CAT-1 (creating catastrophic incident annex). This appendix to the National Response Plan anticipates extreme disasters affecting large regions and overwhelming

planning and better coordination and execution, the suffering and damage in the Gulf Coast could have been mitigated.<sup>185</sup>

Investigators found that earlier designation of FEMA officials and a larger FEMA representation in the Gulf Coast would have aided Katrina relief.<sup>186</sup> Further, investigators questioned whether FEMA's movement into DHS created a lack of focus on FEMA, weakened lines of communication within the agency, and led to neglect of emergency management.<sup>187</sup> Ensuring the nation is better prepared to handle catastrophic incidents requires amendments to the Stafford Act and Posse Comitatus Act, as well as increased investment in both federal and state emergency management.<sup>188</sup>

### 1. FEMA and Armed Forces

By the sixth day after Katrina, the National Guard and U.S. Armed Forces Gulf Coast deployment totaled approximately 54,000.<sup>189</sup> More than two-thirds of these troops were National Guard units from all over the country responding to mutual aid agreements.<sup>190</sup> Critics of the federal response argued that the troops arrived too late.<sup>191</sup> The bulk of the federal armed forces units aiding in the effort, with the exception of the Coast Guard, did not arrive until three to five days after landfall.<sup>192</sup> With dismantled communications systems and an overwhelming task facing local and state officials, victims and citizens across the country looked at New Orleans and wondered when the cavalry would finally arrive.<sup>193</sup> The military's proven accomplishments shortly after arrival and the vast resources at the armed forces' disposal support a narrow expansion in the Stafford Act to provide for more federal authority and military

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first responders. *Id.* In such situations, the annex encourages federal involvement sooner than in other major disasters and anticipates a greater need for federal leadership. *Id.*

185. See *supra* notes 135-136, 146-147, and accompanying text (noting better pre-landfall planning would have lessened suffering and damage).

186. See *Preparing for a Catastrophe*, *supra* note 14, at 16 (statement of Sen. Joseph Lieberman) (questioning reason for slow federal response after Hurricane Pam exercise predicted overwhelmed local officials).

187. See *supra* notes 7, 119, and accompanying text (noting concerns move to DHS interfered with ability to manage Katrina response).

188. See *supra* note 97, and accompanying text (noting expertise and capabilities of federal armed forces).

189. See *supra* note 142 and accompanying text (providing estimate on number of troops deployed for Katrina).

190. See Bowman et al., *supra* note 62, at 11 (charting National Guard response by in-state and out-of-state troops).

191. See Bowman et al., *supra* note 62, at 1, 13-16 (summarizing criticisms concerning timing of DOD response).

192. See Bowman et al., *supra* note 62, at 13 (outlining response by DOD during initial days of disaster).

193. See William Matthews, *Disaster Response: Weak Reception for Bush's Proposal to Broaden Military's Role in Domestic Emergencies*, ARMED FORCES J., Nov. 2005, at 8, available at <http://www.armedforcesjournal.com/2005/11/1160886> (observing military's presence caused relief despite delay of "cavalry's" arrival); see also VandeHei & Baker, *supra* note 18, at A1 (including descriptions of concerned outcries about federal response given terrible impact of storm).

involvement in times of extreme disasters.<sup>194</sup> In fact, the growth of Northern Command anticipated this level of involvement and military leadership in the event of a terrorist attack.<sup>195</sup> There are natural catastrophes of such a scale, like Hurricane Katrina, where the impact on citizens and regions is akin to that of a terrorist attack.<sup>196</sup>

Under the increasing threat of disasters like these, the nation needs a more unified plan for dealing with catastrophe.<sup>197</sup> The Stafford Act, and accordingly the National Response Plan, should be amended to provide for greater federal authority to utilize the resources of state National Guards and the armed forces when incidents of such massive scale have the potential to wreak extreme havoc on civilian lives.<sup>198</sup> These catastrophes should be identified by the size of the geographic region facing a threat, the potentially large loss of life, and the magnitude of likely economic damage.<sup>199</sup> While the law reserves police power in the states and provides governors with command of state National Guards, the realities of extreme disasters demand a unified command structure,

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194. See *supra* note 96-101 and accompanying text (observing discussion post-Katrina to expand military involvement in ultra-catastrophes).

195. See Kealy, *supra* note 54, at 424-25 (noting heightened expectation of command's response participation); see also *supra* note 142 (highlighting Washington's contemplation of expanded duties for federal response team).

196. See SENATE REPORT, *supra* note 18, at 18 (recommending DHS policy address common emergency capabilities needed for terrorist attack and natural disasters); see also *id.* at Recommendations-5 (charting overlap of emergency management functions needed in wake of terrorist attack or natural disaster).

197. See Arnold M. Howitt, Taubman Ctr. For State and Local Gov't, *Federalism and Homeland Security in ANNUAL REPORT ON EMERGENCY PREPAREDNESS 5*, 6-7 (2002) (explaining potential duplication of efforts to prepare for terrorism and disasters). "In the highly decentralized system of American federalism, does homeland security require costly and duplicative capacity building? Or can the federal government and individual state and local jurisdictions effectively mesh their efforts as the country seeks to enhance and institutionalize its preparedness for terrorism?" *Id.* at 6. Howitt argues "[f]ederal policy guidance and technical assistance about 'best practices' are also needed to structure activities unfamiliar to many jurisdictions, particularly when compatibility from state to state is desirable." *Id.* The lack of communication amongst federal, state, and local actors (military and civilian alike) in Katrina demonstrates this compatibility has not been achieved and further strengthens argument that the federal government must assume a leadership role in driving disaster preparedness. *Id.* at 6-7 (calling for federal leadership); *supra* notes 166-167 and accompanying text (identifying poor communications capability as major impediment to Katrina response).

198. See *supra* notes 97-101 (summarizing proposal to increase military role and emphasizing strengths military has to offer). But see generally Matthews, *supra* note 193 (listing politicians' and Defense Department leaders' concerns about expanding military role in disaster relief). When the press asked Secretary of Defense, Donald Rumsfeld, about President Bush's proposal to expand military involvement or responsibility, Rumsfeld "offered a ringing endorsement of the status quo" and asserted the "Guard, as opposed to the active force, tends to have a higher proportion of people who do things that are appropriate in a domestic setting." *Id.* Rumsfeld highlighted the Guard's training in civil affairs as opposed to the artillery and weapons focus of active forces' training. *Id.*

199. See NATIONAL RESPONSE PLAN, *supra* note 184, at CAT-1 (defining catastrophic incident by size and scope of disaster impact); Schneider, *supra* note 17 at 143 (arguing federal response should be greater in severe disasters, dismantling local capabilities); see also *Hearing on Perspectives of FEMA Operations Professionals*, *supra* note 127, at 13 (statement of Sen. Susan Collins, Comm. Chair) (observing need to ascertain whether national response system is scalable). Collins asserts that the government should determine "whether it makes sense to expect state and local governments to play the role that is envisioned when the magnitude of the catastrophe may wipe out all the capability at the state and local level . . ." *Id.*

a coordinated relief effort, and the expansive resources that only the federal government may bring to bear.<sup>200</sup> The lack of leadership in the days following Katrina resulted in delayed rescue, wasted time and money, and greater fear in the country about our inability to respond to unanticipated attacks.<sup>201</sup>

Investigators repeatedly noted the need for a greater “push” by the federal government prior to the disaster’s strike.<sup>202</sup> Many factors contributed to the delayed arrival of needed supplies and evacuation plans to waiting victims, including: FEMA’s failure to act proactively by waiting for governors’ requests; the inability to secure accurate situational awareness of victim location and needs because of inefficient communication and chain of command; and the lack of experienced emergency management officials on the ground.<sup>203</sup> While distribution and management of supplies was far from perfect during Katrina, the DOD and the Department of Transportation (DOT) have massive existing infrastructure to move commodities and deliver goods quickly and efficiently.<sup>204</sup> Expanding federal authority in catastrophic situations would not only grant FEMA better access to the existing infrastructure of the DOD and DOT but also would enable FEMA to consider mission assigning to DOD prior to disaster striking.<sup>205</sup>

This expanded federal authority would be delegated to the President under the Stafford Act and be exercised at his or her declaration in a manner similar to the current disaster declaration process.<sup>206</sup> Declarations of catastrophic incidents and the executive’s expanded authority should be narrowly defined to limit the infringement on states’ rights; and authority should be limited in duration to observe the constitutional provisions that prevent a standing army from assuming domestic control.<sup>207</sup> Such expansion may be vulnerable to a constitutional attack, if viewed as infringing upon the retained sovereignty of the states.<sup>208</sup> Arguably, such expansion could be justified as a legitimate

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200. See *supra* notes 29-67 (documenting federalism, states’ reserved police power, and control of National Guard).

201. See *supra* notes 133-163 and accompanying text (describing problems with Katrina response).

202. See SENATE REPORT, *supra* note 18, at 6-9, Recommendations-11 (describing FEMA and other federal agencies unprepared pre-landfall and urging greater “surge capacity” going forward).

203. See *Failure of Initiative*, *supra* note 75, at 2-5; SENATE REPORT *supra* note 18, at 6-8; THE WHITE HOUSE, *supra* note 12, at 1-3 (detailing government failures in prior planning and execution of response).

204. See SENATE REPORT, *supra* note 18, at 10-14 (noting need for inter-agency coordination to ensure efficiency and effective delivery of supplies).

205. See SENATE REPORT, *supra* note 18, at 11 (discussing FEMA’s transfer of commodity movement to DOD at first week’s end as FEMA over extended).

206. See *supra* note 72 (defining Presidential disaster declaration process).

207. See Winthrop, *supra* note 29, at 10 (explaining ten-day “emergency work” authority for President to deploy active forces for disaster relief). This ten-day authority is intended to be a “gap-filler” in the immediate aftermath of a disaster that is exercised prior to a Presidential declaration. *Id.* It is a narrow exception to the requirement of disaster declaration prior to the involvement of active forces and still requires the affected state’s governor to request assistance. *Id.*

208. See Abbott et al., *supra* note 39, at 1-12 (outlining constitutional authority for federal response actions and possible challenges to expansion).

exercise of Congress's power under the Commerce Clause.<sup>209</sup> The expansion of federal authority over disasters would only apply to catastrophic incidents, meaning those affecting multiple states simultaneously and causing devastation to a wide geographic region.<sup>210</sup>

As Katrina demonstrated, disasters of this magnitude have a substantial impact on interstate commerce, the economy, and the availability of goods nationwide.<sup>211</sup> The Supreme Court has repeatedly upheld acts of Congress that showed "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."<sup>212</sup> By ensuring fast, effective, and immediate response in times of catastrophe, a grant of authority to the President to take charge of a disaster of Katrina-like magnitude would potentially remove the burdens and obstructions to interstate commerce created by such an emergency.<sup>213</sup> Once the time period limiting this authority has passed, the amended Act should require consent by governors of damaged states prior to lengthening the federalized response effort.<sup>214</sup> While the federalized portion of emergency response is in effect, the commander of the joint forces must also have ability to call upon existing mutual aid agreements for assistance of National Guard units in those states.<sup>215</sup>

In times of danger and crisis, citizens need reassurance that someone is in charge.<sup>216</sup> Citizens take comfort in trained forces leading rescue efforts.<sup>217</sup>

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209. Abbott et al., *supra* note 39, at 1-2 (suggesting constitutional power may permit federalized response to catastrophe but expansion requires caution).

210. *See generally infra* notes 211, 212 (analyzing impact of disaster on economy and federal power to act under Commerce Clause).

211. *See* Press Briefing, The White House, Federal Response to Hurricane Katrina and Energy Issues (Aug. 31, 2005) (statement of Pres. Bush) (noting disruptions in crude oil supplies to nation resulting from damage in Gulf Coast).

212. *See* Jennifer L. Benedict, Note, United States v. Morrison: *Progressive Legislation Is Down, But Not Out*, 33 U. TOL. L. REV. 411, 413 (2002) (quoting NLRB v. Jones & Laughlin Steel Corp.). This author describes the balance the Supreme Court strives for while reviewing federal legislation rooted in the Commerce Clause power. *Id.* In *Jones & Laughlin Steel, Co.*, the court advocated for "a balancing test that respects states' rights but also realistically evaluates the effect of local activity on interstate commerce." *Id.*

213. *See supra* notes 156-158 and accompanying text (making case for increased federal role).

214. *See supra* note 35 and accompanying text (noting requisite consent by governor for federal assistance); *see also* McCarthy, *supra* note 75, at 27 (arguing for necessary but limited military involvement in disaster relief due to expertise). While a narrow expansion of federal authority would permit immediate large-scale relief and a coordinated command structure, limiting this expansion would ensure that the federal military could not encroach upon the police powers traditionally held by the states. *Id.* at 27-28.

215. *See supra* notes 64-67 and accompanying text (explaining mutual aid agreements and their successful use during Katrina). The ability to call upon neighboring state National Guards in future disaster efforts would be helpful: first, it would limit the impact of increased federal involvement on the standing missions of active duty troops; second, National Guardsmen have specialized experience and training to support local first responders in all disasters. These soldiers would be adeptly suited to aiding in catastrophic incidents. *See* Matthews, *supra* note 193, at 8.

216. *See Hearing on Managing the Crisis, supra* note 101, at 12 (statement of Sen. Coleman) (observing need for clear authority figure to "lift people up" in crises).

217. *See supra* note 193 (noting relief upon eventual arrival of federal Army trucks in flood-ravaged New

The federal armed forces have had success aiding humanitarian rescue and international disaster response, and the National Guard already trains for missions in disaster response.<sup>218</sup>

Federalized management of catastrophes would provide a unified command structure prior to an event's occurrence.<sup>219</sup> The Stafford Act amendment should require that a single commander be placed in charge of the joint military effort.<sup>220</sup> Appointing a National Guard officer from one of the affected states makes the most sense.<sup>221</sup> This commander would be the best suited to combine regional expertise with disaster response training.<sup>222</sup> Four previous missions involving joint operational forces (National Guardsmen and federal armed forces) operated under a single commander.<sup>223</sup> In each instance, the commander chosen was a National Guard officer.<sup>224</sup> The Senate Homeland Security and Governmental Affairs Committee questioned whether a similar dual-hatted single-commander approach should have been used in responding to Hurricane Katrina.<sup>225</sup> If federalized, this commander would report up the established military chain of command to the President.<sup>226</sup>

A federal catastrophe management plan must also designate an experienced FEMA manager to lead the coordinated FEMA effort.<sup>227</sup> The military

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Orleans).

218. See *supra* note 97 and accompanying text (noting U.S. military actions in international aid efforts); see also *supra* notes 52–67 and accompanying text (describing use of National Guard in disaster response).

219. See NATIONAL RESPONSE PLAN, *supra* note 41, at CAT-1-6 (introducing NRP's catastrophic incident annex and recognizing need for federal authority when locals overwhelmed); *Hearing on Katrina and the Defense Dep't Response*, *supra* note 82, at 16 (statement of Paul McHale, Asst. Sec'y, Homeland Defense) (asserting need for unity of command reporting to single chief-executive in ultra-disasters). "[I]n a crisis environment, unlike pre-planned events, in a crisis environment dual-hatting is probably not an effective approach . . . [u]nity of command can be achieved, but not through dual-hatting because . . . in a crisis environment, I think it's almost inevitable that a president and a governor will have differences of opinion." *Hearing on Katrina and the Defense Dep't Response*, *supra* note 82, at 16.

220. See *supra* notes 49-101 (describing use of both National Guard and active forces in disaster response). Joint effort is comprised of National Guard troops and active forces deployed for disaster relief.

221. See *supra* notes 45, 55-56 and accompanying text (noting importance of local connection to affected area and typical Guardsmen use in disaster response).

222. *Hearing on Katrina and the Defense Dep't Response*, *supra* note 82, at 9-10 (statements of Sen. Susan Collins and Paul Mchale, Asst. Sec'y of Defense, Homeland Defense) (discussing previous success of joint Guard and active force missions with Guard commander).

223. *Hearing on Katrina and the Defense Dep't Response*, *supra* note 82, at 10.

224. *Hearing on Katrina and the Defense Dep't Response*, *supra* note 82, at 10.

225. See SENATE REPORT, *supra* note 18, at 11 (documenting lack of coordination between National Guard and Northern Command units). *But see id.* (conceding separate command worked well in Katrina due to cooperation and previous acquaintance of commanding officers).

226. See SENATE REPORT, *supra* note 18, at Recommendations-2-4 (suggesting new position within DHS, Director National Preparedness and Response Authority, reporting directly to President in catastrophes). Although the Senate committee discusses a potential civilian chain of reporting, one could argue that any military operational involvement could follow a similar track.

227. See Witt interview, *supra* note 111 (arguing necessity for well-trained experienced emergency management to lead disaster response); see also Grunwald & Glasser, *supra* note 5, at A01 (noting mass exodus of senior experienced FEMA officials shortly after move to DHS depleted preparedness).

commander and FEMA commander should report directly to the President and operate side-by-side at a chosen response headquarters.<sup>228</sup> Finally, a narrow exception must be created for Posse Comitatus. When the Guard is federalized in a catastrophe to effectuate unified command and control, Guard units must still be able to assist local law enforcement.<sup>229</sup> The Guard units are trained in local law enforcement, and placing them under the President's control for a limited time should not prohibit the commander from assigning law enforcement activities to ensure civil order.<sup>230</sup>

It is apparent from the failures in Katrina, that civil disaster management can learn more from the military about how to take command of disaster situations, whether caused by weapons of mass destruction or by nature.<sup>231</sup> Military officers have a common experience in training and military command structure.<sup>232</sup> Emergency management may benefit from providing common training experiences to emergency responders and managers in the field and from identifying a clearer command structure for all to follow in disaster situations.<sup>233</sup>

FEMA must improve its training of emergency management officials while also bettering the relationship between federal and state officials.<sup>234</sup> A return to former director James Witt's approach, focusing attention on mitigation and preparation, could lessen the devastating impact of future disasters.<sup>235</sup> Congress must carefully review the DHS and FEMA budget to allocate funding for training, preparation, and hiring qualified emergency officials.<sup>236</sup>

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228. See SENATE REPORT, *supra* note 18, at 18-19 (discussing need for DCO and FCO to work side-by-side during immediate disaster response).

229. See *Hearing on the Role of the Governors*, *supra* note 62, at 21 (statement of Kathleen Blanco, Governor, State of Louisiana) (recalling hesitation to federalize Guard after Katrina for fear of losing law enforcement support); *Hearing on Katrina and the Defense Dep't Response*, *supra* note 82, at 13 (statement of Gen. Landreneau) (commenting on missions of Guardsmen and active forces in disaster relief); see also *supra* notes 88-95 and accompanying text (explaining existing Posse Comitatus limits on use of federal troops). General Landreneau notes a "large number of critical missions . . ." can be accomplished by active troops and Guardsmen can offer law enforcement support. *Id.*

230. See *supra* note 56 and accompanying text (explaining National Guard able and trained to conduct traditional law enforcement functions).

231. See THE WHITE HOUSE, *supra* note 12, at 94-96 (noting post-Katrina recommendations concerning military input and joint-planning with DHS); SENATE REPORT, *supra* note 18, at Recommendations-14 (discussing needed collaboration between DOD and FEMA or any future FEMA-like agency).

232. See Miskel, *supra* note 51, at 108-09 (describing military as preeminent trainers and planners).

233. SENATE REPORT, *supra* note 18, at Recommendations-14 (suggesting government officials receive better training).

234. See *Hearing on Perspectives of FEMA Operations Professionals*, *supra* note 127, at 6 (statement of Scott Wells, FEMA's Federal Coordinating Officer in Louisiana for Hurricanes Katrina and Rita) (recommending larger federal role in catastrophic situations while listing improvements, including increased training).

235. See *supra* note 114 and accompanying text (describing focus on mitigation successes under Director Witt).

236. See THE WHITE HOUSE, *supra* note 12, at 117-19 (arguing for enhanced uniform training standards for local, state, and federal/Homeland Security emergency personnel).

## 2. *State and Local Governments*

Hurricane Katrina highlighted both areas needing improvement and existing successes at the state and local level. The mutual aid agreements encouraged by the Stafford Act worked extremely well and enabled Louisiana and Mississippi to receive timely assistance from neighboring states.<sup>237</sup> In the future, the federal government must encourage states and cities to execute a greater number of pre-event services and supplies contracts.<sup>238</sup> These advance preparations diminish delays in delivering needed supplies to disaster victims and limit the potential for high cost negotiations when demands are unusually high.<sup>239</sup> This is an area where Congress should consider conditioning federal disaster planning assistance on states' securing advance contracts for disaster supplies.<sup>240</sup> FEMA, too, must improve its advance contracting and supply streams as was evidenced by the difficulties securing adequate temporary housing for Katrina victims and the inability to efficiently and accurately keep track of and distribute supplies post-landfall.<sup>241</sup>

The difficulty evacuating areas on time, especially the most vulnerable citizens (those with disabilities, in hospitals or in nursing homes), highlighted the need for better planning by both the public and private sectors.<sup>242</sup> As with FEMA, it is imperative that state governments invest in preparation and training exercises prior to disasters.<sup>243</sup> Hiring qualified and experienced emergency management officials will aid in developing successful response plans and training responders to better implement those plans.<sup>244</sup>

## IV. CONCLUSION

*“During a catastrophe, which by definition almost immediately exceeds state and local resources and significantly disrupts governmental operations and emergency services, the role of the federal government is particularly vital, and it would reasonably be expected to play a more substantial role in*

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237. See *supra* notes 64, 190, and accompanying text (noting successful use of mutual aid agreements in Katrina response).

238. See SENATE REPORT, *supra* note 18, at 20 (recommending more anticipation and stringency in disaster contracting).

239. See SENATE REPORT, *supra* note 18, at 17 (describing use of ultimately costly no bid contracts).

240. See *supra* notes 178, 179 and accompanying text (discussing authority and examples of conditioning state receipt of federal funds).

241. See *supra* notes 151, 152 and accompanying text (summarizing complaints regarding ineffectual FEMA administrative management).

242. See *Hearing on Managing the Crisis*, *supra* note 101, at 7-8 (statements of Sen. Susan Collins and Mayor Ray Nagin) (describing troubling delayed and problematic evacuation of vulnerable citizens).

243. See SENATE REPORT, *supra* note 18, at Recommendations-23-24 (introducing model for credentialing and training emergency management officials through all governmental levels).

244. See SENATE REPORT, *supra* note 18, at Recommendations-23-24 (highlighting need to develop “a culture of preparedness in America”).

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*response than in an 'ordinary' disaster.*"<sup>245</sup>

If nothing else, America's experience with Hurricane Katrina highlights an inevitable obstacle: no matter how detailed and comprehensive a plan is written, if it cannot, or is not implemented effectively, it is a failure. The best of plans are only as good as the implementation of their components. It may never be possible in a time of crisis to anticipate or to respond completely to all needs. The U.S. government and its citizens must commit to building the level of preparation, needed infrastructure, and public education programs that will equip us to avoid a recurrence of the disastrous unmet needs in Katrina.

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245. SENATE REPORT, *supra* note 18, at 3.