

When First Responders Are Victims: Rethinking Emergency Response

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By now most Americans are familiar with the federal government's hapless response to Hurricane Katrina. A sample of what went wrong in the aftermath of one of the worst natural disasters to hit the United States shows a system trapped in a dangerous bureaucratic gridlock. The Federal Emergency Management Agency (FEMA), the agency responsible for the federal response, would not let doctors practice medicine on the hurricane victims because they were not licensed in Louisiana; denied local officials' requests for rubber rafts needed to rescue the victims;¹ issued a press release telling first responders in neighboring states not to respond to the hurricane without being requested and lawfully dispatched by state and local authorities;² turned away trucks filled with water and refused to accept much needed generators; did not allow food to be delivered to New Orleans by the Red Cross; and left 20,000 trailers that were needed to shelter the homeless sitting in Atlanta. Then there were the 91,000 tons of ice cubes that were hauled back and forth across the nation but never reached New Orleans, where they were needed to cool food, medicines, and victims sweltering in the 100 degree heat.³ No wonder Senator Fritz Hollings once called FEMA's administrators "[t]he sorriest bunch of bureaucratic jackasses I've ever known."⁴ No wonder tourist shops in New Orleans sell T-shirts that say "FEMA—Federal Employees Missing in Action."⁵

How could the wealthiest and most powerful government in the world fail so badly? This question has been asked repeatedly in the year since Hurricane Katrina hit. There are, of course, two kinds of explanations: the easy ones and the not so easy ones.

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¹ Bill Walsh, *Squabbles Hindered Rescue Efforts; FEMA Denied Request for Rubber Boats*, NEW ORLEANS TIMES-PICAYUNE, Jan. 31, 2006, at A1.

² Press Release, FEMA, *First Responders Urged Not To Respond To Hurricane Impact Areas Unless Dispatched By State, Local Authorities* (Aug. 28, 2005), <http://www.fema.gov/news/newsrelease.fema?id=18470>.

³ Scott Shane & Eric Lipton, *Stumbling Storm-Aid Effort Put Tons of Ice on Trips to Nowhere*, N.Y. TIMES, Oct. 2, 2005, at 1.

⁴ Daniel Franklin, *The FEMA Phoenix; Reform of the Federal Emergency Management Agency*, WASH. MONTHLY, July-Aug. 1995, available at <http://www.washingtonmonthly.com/features/2005/0509.franklin.html> (referring to the FEMA conduct in the aftermath of Hurricane Andrew).

⁵ Lisa Griffis, *Building a Future Along the Bayou*, CLEVELAND PLAIN DEALER, Feb. 19, 2006, at A14.

Let's start with the easy ones. Number one on that list is "Brownie," President Bush's nickname for Michael Brown, the hapless FEMA director at the time of the hurricane. Much has been made of the fact that, before joining FEMA, Brown's most significant employment had been as a commissioner of the International Arabian Horse Association. The absence of prior experience in emergency management and the discovery that his thin resume was even thinner than it first appeared because of some judicious padding led many to believe that failed leadership was the big explanation for FEMA's problems.⁶ Press reports indicating that he spent the critical early hours of the emergency worrying about his clothes, restaurants, and what kind of pro-administration spin could be put on the government's response reinforced the notion that the FEMA chief was in over his head.⁷

But the "Brownie" explanation fails on several fronts. He had been working in FEMA for nearly four years when the hurricane hit, time enough to absorb lessons of emergency management resulting from the attacks of September 11 and the series of devastating hurricanes that hit Florida in 2004. Indeed, FEMA performed ably under his leadership in 2004. Prior to Katrina, criticism of Brown is hard to find. After Katrina hit and the scale of FEMA's problems emerged, some people pointed to the fact that he was a political appointee. But James Lee Witt, the highly respected FEMA director during the Clinton years was also a political appointee—albeit one with more emergency response experience than Brown.⁸

The real reason to be suspicious about blaming everything on Brown is the fact that the federal government is, fundamentally, a government of laws, not men. When Richard Nixon resigned in the summer of 1974, the federal government went on as usual—on autopilot. A well-oiled emergency response machine with clear lines of authority, previously negotiated contracts, and working relationships with state and federal first responders should have kicked into action regardless of whether or not the head of the agency was choosing restaurants.

This brings us to the next easy explanation—FEMA had been degraded and demoralized by its inclusion in the Department of Homeland Security (DHS). Just as Brown's lack of experience is important but not dispositive, so is the fact that FEMA's inclusion in DHS hurt its capacity. When FEMA went from a free-standing agency to one of twenty-two agen-

⁶ See, e.g., Daren Fonda & Rita Healey, *How Reliable is Brown's Resume?*, TIME, Sept. 8, 2005, <http://www.time.com/time/nation/article/0,8599,1103003,00.html>.

⁷ Molly Ivins, *Brownie Memos Too Awful For Words*, BUFFALO NEWS, Nov. 9, 2005, at A9.

⁸ Eric Boehlert, *The Politics of Hurricane Relief*, SALON.COM, Sept. 5, 2005, http://dir.salon.com/story/opinion/feature/2005/09/05/hurricane_track_record/index.html. But see, e.g., Jon Elliston, *The Disaster that Shouldn't Have Been*, INDEP. WKLY., Sept. 7, 2005, available at <http://www.indyweek.com/gyrobase/Content?oid=oid%3A25117>.

cies folded into a giant—and ultimately dysfunctional—department, experienced civil servants began to leave in droves.⁹

Since the big border agencies concerned with customs and immigration constitute the bulk of the department's money and personnel, it is no surprise that the border problem dominates the attention of DHS leadership and that FEMA, a much smaller department, received little attention from either of the two secretaries—Tom Ridge or Michael Chertoff.¹⁰ In fact, FEMA director Michael Brown waged an internal bureaucratic war against Secretary Chertoff for much of his tenure—alienating an already overworked Secretary.¹¹

But the real problem with putting FEMA in DHS was conceptual. Emergency response is too big and too complex to be dealt with in a department that is really about border protection. FEMA should never have been there in the first place. In the aftermath of September 11, the government was so taken by the importance of being able to respond to a terrorist attack that it forgot something that Hurricane Katrina ultimately brought home. Fundamentally, when it comes to response, a disaster is a disaster. A careless, distraught worker high on drugs at a nuclear plant can be as deadly as a terrorist with a dirty bomb. Afterwards, there are people that need medicine, food, and water; places that need cleaning up; and buildings and homes that need to be rebuilt.

Including FEMA in DHS blurred FEMA's mission and focus—a predictable occurrence when an independent agency is folded into an enormous new department. Prior to Hurricane Katrina, the General Accounting Office (GAO), along with a host of state and local emergency preparedness planners, warned that FEMA's preparedness mission was getting lost in layers of bureaucracy.¹² When FEMA's state grant-making process got rolled into an overall departmental grant-making process, states found that they could get grants to buy protective gear against a bio-chemical attack, but they could not get grants for more traditional and probable threats like flood mitigation.¹³ As FEMA's mission was blurred, and its autonomy

⁹ I was and remain a supporter of the creation of DHS, but too many agencies, tasks, and people were placed in that department. The core of the department should have been an enhanced border patrol agency. Anyone who has worked in the federal government and been privy to the years of dysfunctional management and infighting among federal employees at our nation's borders knows that the combination of immigration and customs into a coherent border entity was long overdue. As it stands, the border problem remains incredibly complex.

¹⁰ SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE 151–54 (2006), available at http://katrina.house.gov/full_katrina_report.htm [hereinafter SELECT BIPARTISAN COMM.].

¹¹ Michael Grunwald & Susan B. Glasser, *Brown's Turf War Sapped FEMA's Strength*, WASH. POST, Dec. 23, 2005, at A01.

¹² See GOVERNMENT ACCOUNTING OFFICE, MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS: FEDERAL EMERGENCY MANAGEMENT AGENCY 4–5 (2003); see also Angie C. Marek, *Bureaucracy and Chain of Command at DHS and FEMA Hampered Response*, U.S. NEWS & WORLD REP., Feb. 22, 2006, at 62.

¹³ SELECT BIPARTISAN COMM., *supra* note 10, at 152–54.

stripped away, it began to lose its long-time executives. The first to go was Joe Allbaugh, the first FEMA director under President Bush, who had been interested in running a free-standing agency that reported directly to the President, but who was not interested in running an agency that was buried several layers down in a new bureaucracy.¹⁴ The loss of Allbaugh in 2003 coincided with the loss of direct access to the President, a feature of timely emergency response that is nearly as important as prior experience.

By the time Katrina made landfall, FEMA had spent slightly over two years buried in DHS. Its vision was blurred, its morale sapped, its talent gone, and its leadership critically weakened.¹⁵ Those who remained were uncertain of their own authority and their relationship to the rest of the government. It is unsurprising both that so many mistakes were made and that confusion reigned. Nonetheless, like fixing the leadership problem, making FEMA independent once again is a necessary but not sufficient solution to its problems. I say not sufficient because FEMA also failed spectacularly when it was a free-standing agency. Most notably, FEMA's response to Hurricane Andrew in 1989 was so late and so lame that then-Congressman Norm Mineta pronounced that FEMA "could screw up a two car parade."¹⁶ By 1993, when President Clinton took office, there were several bills in Congress to abolish FEMA, and there was an emerging consensus that the agency was more trouble than it was worth. Thus, FEMA has had failures both as a free-standing agency and as a part of DHS. Merely making FEMA independent again is no guarantee that it will be successful.

The final easy explanation for why FEMA failed was the unprecedented nature of the catastrophe. Prior to 2005, there had been only three category five hurricanes to hit the United States mainland: the "Labor Day" storm that hit the Florida Keys in 1935; Camille, which hit Mississippi in 1969; and Andrew, which hit Dade County Florida in 1992. Certainly Katrina and the two other category five hurricanes to hit the United States in 2005 were highly unusual, with winds of up to 175 miles per hour.¹⁷ As if the hurricane itself were not bad enough, the levees protecting New Orleans broke as a result, causing unprecedented flooding.

Nonetheless, planners in FEMA and throughout the emergency management community had long anticipated two potentially catastrophic natural disasters for the United States: an earthquake in one or more of the most

¹⁴ See Gene Lyons, Editorial, *An Equal-Opportunity Failure*, ARK. DEMOCRAT-GAZETTE, Sept. 14, 2005.

¹⁵ See Stephen Barr, *Morale of FEMA Workers, on the Decline for Years, Hits Nadir*, WASH. POST, Sept. 14, 2005, at B02; SELECT BIPARTISAN COMM., *supra* note 10, at 151.

¹⁶ Franklin, *supra* note 4.

¹⁷ Jack Williams, *History of Category Five Hurricanes*, USATODAY.COM, May 20, 2005, <http://www.usatoday.com/weather/whcat5.htm>.

populous areas in California and a powerful hurricane in New Orleans.¹⁸ In fact, in July 2004, under the direction of FEMA (headed at that point by Michael Brown), emergency officials conducted a table-top exercise called Hurricane Pam. In that exercise, a hurricane with winds of 120 miles per hour hit New Orleans causing a storm surge that topped the levees. The exercise did what such exercises are supposed to do: it identified the likely scope of the resulting problems—from the fact that it would be very difficult to evacuate the large disadvantaged population of New Orleans, to the problems of debris and the challenge of providing search and rescue and medical care.¹⁹ Obviously the exercise did not impact the leadership of DHS because when Hurricane Katrina hit, Secretary Michael Chertoff called it “breathtaking in its surprise.”²⁰

The easy explanations for the government’s failure in the wake of Katrina do not lead to satisfactory solutions to the problems. Michael Brown was certainly not the ideal leader of FEMA, but much of what went wrong would have gone wrong regardless of who occupied the director’s seat. FEMA should not have been included in the Department of Homeland Security, but FEMA had also failed spectacularly when it was a free-standing agency. And while Hurricane Katrina was hugely destructive, the government, under FEMA, had itself modeled and predicted many of the problems that in fact occurred in the late summer of 2005.

Thus, we need a more complex and more subtle explanation of the government’s failure during Katrina. We can start by noting that in the United States, disaster relief has never been seen as a task for which the federal government is primarily responsible. The design of our disaster-mitigation institutions reflects this. However, in recent decades FEMA has been thrust into the role of director of emergency response, a role for which it was never designed. Arnold Howitt and Herman “Dutch” Leonard of the Kennedy School of Government argue that FEMA “has historically played a much larger role in pre-event planning and post-event recovery than in the management of a disaster in progress.”²¹

Historically, federal involvement in disaster prevention and relief is of recent vintage and has proceeded in an extremely incremental fashion.²² In 1900, when Galveston Texas was decimated by a Hurricane, no substantial federal resources were deployed. In 1950, Congress set aside

¹⁸ See generally *Special Report: Washing Away*, NEW ORLEANS TIMES-PICAYUNE, June 23–27, 2002, available at <http://www.nola.com/hurricane/?washingaway/> (five-part series).

¹⁹ Press Release, FEMA, Hurricane Pam Exercise Concludes (July 23, 2004), <http://www.fema.gov/news/newsrelease.fema?id=13051>; see generally GlobalSecurity.org, Hurricane Pam, <http://www.globalsecurity.org/security/ops/hurricane-pam.htm> (last visited Nov. 6, 2006).

²⁰ GlobalSecurity.org, *supra* note 19.

²¹ See Arnold M. Howitt & Herman B. Leonard, *Katrina and the Core Challenges of Disaster Response*, FLETCHER FORUM WORLD AFF., Winter 2006, at 216.

²² See RUTHERFORD H. PLATT, *DISASTERS AND DEMOCRACY: THE POLITICS OF EXTREME NATURAL EVENTS* 1–2 (1999).

funding in anticipation of disasters, authorizing \$5 million for the purpose, a pittance even then.²³ In 1955 the federal government covered only 6.2% of the total damages caused by Hurricane Diane.²⁴ Fourteen years later, Congress passed the Disaster Relief Act of 1969, which authorized the President to appoint Federal Coordinating Officers who would coordinate all federal disaster relief in a designated disaster area and “assist local citizens and public officials in promptly obtaining the assistance to which they are entitled.”²⁵ In the Stafford Act of 1974, Congress outlined the process by which the President declares and prepares for major disasters and emergencies and extended Federal disaster relief aid to individuals and families.²⁶ Finally, FEMA itself was not created until 1979, when President Carter, noting that more than 100 federal agencies were involved in aspects of disaster response, created the department by executive order.²⁷

However, it was not until 1988 that Congress amended the Stafford Act,²⁸ formalizing the process for handling disasters in the United States. Ever since, the criteria for issuance of a disaster declaration have remained fairly constant. The Act assumes that states and localities are first responders and that they can effectively assess the damage resulting from an event and, if necessary, ask the President for federal assistance. The Act does not assume that the Federal Government will be the primary actor in the event of an emergency, but rather specifies how it will supply help *after* the fact. The relevant portion of the Act states:

All requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State. Such a request shall be based on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary. As part of such request, and as a prerequisite to major disaster assistance under this Act, the Governor shall take appropriate response action under State law and direct execution of the State’s emergency plan. The Governor shall furnish information on the nature and amount of State and local resources which have been or will be committed to alleviating the results of the disaster, and shall certify that, for the current disaster, State and local government obligations and ex-

²³ See *id.* at 12.

²⁴ CHARLES PERROW, *THE NEXT CATASTROPHE* (forthcoming 2007) (manuscript on file with author).

²⁵ Pub. L. No. 91-79, § 9, 83 Stat. 125, 128.

²⁶ See Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 88 Stat. 143 (1974).

²⁷ Exec. Order No. 12,148, 44 Fed. Reg. 43,239 (July 20, 1979). See generally PLATT, *supra* note 22, at 15.

²⁸ See Disaster Relief and Emergency Assistance Amendments of 1988, Pub. L. No. 100-707, 102 Stat. 4689 (codified in scattered sections of 42 U.S.C.).

penditures (of which State commitments must be a significant proportion) will comply with all applicable cost-sharing requirements of this Act. Based on the request of a Governor under this section, the President may declare under this Act that a major disaster or emergency exists.²⁹

Note the heavy reliance on state activity and the heavy burden placed on States—and by implication localities—before the Federal Government takes action. The law assumes that first responders are able to act and that the command and control apparatus of state and local government is intact. But in two instances where FEMA failed spectacularly, Hurricane Andrew and Hurricane Katrina, precious days and hours passed before people realized that the disaster was large enough that the first responders had themselves become victims and were therefore unable to file the statutorily mandated request for assistance.

The following description of Hurricane Andrew tells the story of first responders as victims:

In Florida the hurricane so overwhelmed state officials that they didn't even know what had happened let alone what help they needed . . . Florida was slow to realize its own dire straits because many of its emergency workers were among the storm's victims. Half of the members of the Dade County Police and Fire Departments had lost their homes. Most of the area's fire and police stations were destroyed. Like their fellow southern Floridians, disaster management officials were looking for food, water, shelter and medical care. The state was unable to issue specific requests for aid because it had no one available to assess the damage.³⁰

Note the similarity to the situation sixteen years later during Katrina. Katrina completely decimated local government's ability to communicate even the extent of the damage. The Mayor of New Orleans had to operate out of the Hyatt Hotel for several days, unable to establish communications with anyone; many state and local public safety agencies suffered water and wind damage to their equipment; the breakdown of communications led to an inability to coordinate state and local responses. Evacuation buses were under water, and the bus drivers could not get to them in any event.³¹ In other words, when Katrina hit, the first responders—from the mayor of New

²⁹ *Id.* sec. 106(a)(3), § 401 (codified at 42 U.S.C. § 5170 (2000)).

³⁰ Franklin, *supra* note 4.

³¹ See Julia Malone, *Governor Defends the Response to Katrina*, AUSTIN AM.-STATESMAN, Dec. 15, 2005, at A7.

Orleans on down—were all victims, overwhelmed and unable to play their role in the system envisaged by the Stafford Act.

Interestingly enough, the Bush Administration, in its National Response Plan, had anticipated that there would be events where first responders were incapacitated and where immediate federal intervention would be necessary:

When an incident or potential incident is of such severity, magnitude, and/or complexity that it is considered an Incident of National Significance (INS) according to the criteria established in this plan, the Secretary of Homeland Security, in coordination with other Federal departments and agencies, initiates actions to prevent, prepare for, respond to, and recover from the incident.³²

So, eight months before Katrina struck, the Bush Administration had anticipated what would happen in New Orleans: a complete breakdown of first responder command and control such that the only recourse was to federalize the response. But Bush Administration officials failed to internalize their own National Response Plan. In a Homeland Security Presidential Directive, the President specifically instructed the Secretary of Homeland Security to coordinate the federal response when any one of four situations applies: a federal agency requests his assistance; the resources of state and local authorities are overwhelmed; more than one federal department has become involved in response to the incident; or the Secretary has been asked to manage the incident by the President.³³ These criteria authorize the Secretary to declare a situation to be an Incident of National Significance (INS). Declaration of an INS triggers the authority to call on Emergency Support Functions from *across* the federal government—including the Department of Defense. Secretary Chertoff, unclear of his authority and confused as to the situation on the ground, did not declare Katrina an INS until Tuesday, August 30, thus delaying to a dangerous degree the mobilization of federal, and especially military, resources.

On one level, the failure to immediately federalize the response efforts is understandable. The legal history and tradition of emergency response in the United States starts at the most local level and moves up the governmental food-chain in a series of formalized requests for assistance as described in the Stafford Act.³⁴ Even during the terrorist attacks of September 11, first responders were able to come to the scene in both New

³² DEP'T OF HOMELAND SEC., NATIONAL RESPONSE PLAN 15 (2004), *available at* http://www.dhs.gov/xlibrary/assets/NRP_FullText.pdf.

³³ Homeland Security Presidential Directive HSPD-5, President George W. Bush, Management of Domestic Incidents (Feb. 28, 2003), http://www.fws.gov/contaminants/FWS_OSCP_05/fwscontingencyappendices/A-NCP-NRP/HSPD-5.pdf.

³⁴ *See* Disaster Relief and Emergency Assistance Amendments of 1988, Pub. L. No. 100-707, sec. 106(a), § 401, 102 Stat. 4689, 4696.

York City and in Washington. In each instance, there were communication disruptions, but local police and fire fighters were physically able to reach the scene. Mayor Rudolph Giuliani and his top city leaders were not themselves victims; they were able to control the response.

But, on another level, the failure to immediately federalize the response to Katrina is not so easily explained. In the wake of September 11, many of the terrorist scenarios played out inside the federal government, from nuclear attacks to bio-terror attacks, had assumed that first responders would be incapacitated and that local and state government would be overwhelmed. One can speculate that had New Orleans been struck by a “dirty bomb” resulting in a similar level of local government incapacitation, the federal government would have recognized the situation as an INS and taken charge much earlier than it did.

In retrospect, it is clear that the law itself created a great deal of confusion. As the situation worsened, the Bush Administration wasted precious hours debating whether or not it could invoke the Insurrection Act³⁵ to send in federal troops—even as it became apparent to everyone that only federal troops could begin to correct the situation.³⁶ But the use of federal troops on American soil causes great fear and consternation, and the federal government has traditionally balked at deploying troops.³⁷ There are good reasons why Presidents are leery of such actions, not least of which is the elaborate legal structure that limits use of military forces in domestic law enforcement contexts.³⁸

However, in other contexts, such as drug enforcement and border patrol, Congress has authorized a greater role for the military in law enforcement.³⁹ Moreover, the Coast Guard has long enjoyed greater authority to conduct certain law enforcement inquiries and make arrests.⁴⁰ These ex-

³⁵ 10 U.S.C. §§ 331–336 (2000).

³⁶ Susan B. Glasser & Michael Grunwald, *The Steady Buildup to a City's Chaos*, WASH. POST, Sept. 11, 2005, at A1.

³⁷ See generally JENNIFER ELSEA ET AL., THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES 2 (2005), available at <http://fpc.state.gov/documents/organization/53685.pdf>.

³⁸ See Posse Comitatus Act, 18 U.S.C. § 1385 (2000) (criminalizing use of the Army or Air Force “as a posse comitatus or otherwise to execute the laws”). For a general introduction to the history of the Act and its relationship to other legal restrictions on use of armed forces, see Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86 (2003).

³⁹ See, e.g., Pub. L. No. 100-456, 102 Stat. 2042 (1989) (listing the Department of Defense as the lead agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States).

⁴⁰ See 14 U.S.C. § 89(a) (2000) (“The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests . . . for the prevention, detection, and suppression of violations of laws of the United States When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore . . .”).

amples highlight the ability of Congress to authorize military involvement in law enforcement in particular contexts. Although debate on an expanded role for the military should account for both costs and benefits of changing the current legal regime, it seems likely that protecting Americans from future disasters will require clarifying and codifying situations under which a more proactive and robust federal intervention can happen.

Before turning to some new ways to think about the President's legal authority with regard to disaster response, it is important to understand that we are entering a new era, one in which we can expect more and more catastrophic disasters. The argument comes basically in three parts: first, more and more people and infrastructure have been concentrated in areas that are vulnerable to natural disasters; second, the nature of American politics makes mitigation extremely difficult politically; and finally, as we enter the twenty-first century, we are more and more vulnerable to severe weather and to terrorist attacks than ever before.

In a forthcoming book, Charles Perrow argues that, over time, we have allowed for a dangerous level of concentration of both people and infrastructure in disaster prone areas.⁴¹ California, with its propensity for large earthquakes and its long coastline, is one obvious place where population growth in likely disaster zones has happened at an alarming rate. But California is far from unique in being both disaster-prone and a mecca for economic development. Perrow points out that the southeastern coastal areas of the United States had a population density increase of 75% in the two decades between 1970 and 1990, decades during which the population density increased only 20% in the United States as a whole.⁴²

Second, politics makes disaster prevention extremely difficult. For instance, following the 1993 flooding along the Mississippi River that resulted in the evacuation of 70,000 people, the Clinton Administration bought 7,700 properties along the river at a cost of \$56.3 million in order to relocate people from the flood plains. But political and local development pressure meant that, by the time the Bush administration came into office, political support for mitigation had waned and the program was halted. In fact, in a reversal of the policy of the 1990s, the population of the Mississippi floodplains has increased, and 28,000 new homes have been built on land that was underwater just thirteen years ago.⁴³

A short review of policies vis-a-vis New Orleans in the wake of Katrina illustrates again the political futility of treating natural disasters as preventable. Wetlands are natural buffers between ocean and more solid land. In the case of hurricanes, wetlands act as natural sponges, absorbing

⁴¹ See PERROW, *supra* note 24.

⁴² PERROW, *supra* note 24 (unpublished, on file with author); see also G. van der Vink, et al., *Why the United States Is Becoming More Vulnerable to Natural Disasters*, 79 Eos, TRANS., AM. GEOPHYS. UNION 533, 537 (1998), available at <http://eps.berkeley.edu/~rallen/pub/1998ushaz/index.php>.

⁴³ Perrow, *supra* note 24.

some of the shock of the ocean before it hits dry land. The New Orleans levees “were built on the assumption that they would have forty or fifty miles of protective swamp between the city and the Gulf of Mexico.”⁴⁴ But successive governments have allowed for development on wetlands, and thus the Gulf of Mexico is twenty miles closer to land than it was in 1965. Consequently, hurricanes are more destructive.⁴⁵ The first step in trying to reduce the destructiveness of natural disasters should be to protect wetlands. “But rather than continue a ban on wetlands development instituted by previous administrations, the Bush administration overturned it.”⁴⁶

Banning wetland development means saying no to developers and, in some cases, voters. The lack of political will is evident in another decision. When FEMA finally issued its long-awaited rebuilding guidelines, politics triumphed and common sense lost. The new federal guidelines required only that structures be rebuilt three feet above ground.⁴⁷ Some houses in New Orleans had six feet of water in them. Of these, some had been built three feet above ground, and could thus be legally rebuilt without modification. The leniency of these new regulations was welcomed by all those anxious to get back home. No one in the political system had the will to tell displaced residents they should not return home.

The lack of political will to do anything serious about mitigation ex ante will produce significant ex post harm to federal taxpayers, as disaster relief consumes an increasing share of the federal budget. With costs rising at a rate that threatens to consume the remaining discretionary (non-entitlement) portion of the budget, spending on emergency response threatens to become a major federal entitlement program like Medicare and Social Security.⁴⁸ Since the private market is not subject to political pressures, it will not insure much of what used to be New Orleans. It is left up to the National Flood Insurance Program which, instead of living up to its promise to reduce flood damage, is using old maps that significantly underestimate the danger from flooding. The cost of this short-sightedness will be borne by all taxpayers.⁴⁹

Finally, it is tempting, of course, to look at the first five years of this decade as an aberration. September 11 was an extraordinary event and so was Hurricane Katrina. However, it is plausible that the well-documented and unprecedented warming of the oceans will result in more extreme weather.⁵⁰ Even those who refuse to see global warming as a permanent

⁴⁴ Terry Lynn Karl, *Bush's Second Gulf Disaster*, PROJECT SYNDICATE, Sept. 8, 2005, <http://www.project-syndicate.org/commentary/karl1/English>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ FEDERAL EMERGENCY MANAGEMENT AGENCY, FLOOD RECOVERY GUIDANCE: ADVISORY BASE FLOOD ELEVATIONS FOR ORLEANS PARISH, LOUISIANA 1 (2006), available at http://www.fema.gov/pdf/hazard/flood/recoverydata/orleans_parish04-12-06.pdf.

⁴⁸ See PLATT, *supra* note 27, at 38 (describing the rising cost of emergency response).

⁴⁹ See J. Robert Hunter, *False Claims*, N.Y. TIMES, May 4, 2006, at A31.

⁵⁰ See generally AL GORE, AN INCONVENIENT TRUTH, 81-92 (2006).

problem should recognize that we are in a cycle of warmer temperatures that will likely result in storms of greater frequency and intensity.⁵¹

In addition, we have entered an era in which terrorism is practiced not for specific, tangible, and narrow political objectives, but for broad religious objectives that call for strategies of maximum violence. As terrorism expert Brian Jenkins pointed out long before September 11, the continued growth of religious fundamentalism and political instability in the Middle East creates conditions under which more and more people are willing to use terrorist tactics to achieve their ends, and more and more money is made available to these people by states or others.⁵² When these conditions are combined with the plummeting cost of technology, one result is a massive increase in the likelihood of successful terrorist attacks.⁵³ It is thus unlikely that we will be able to negotiate our way out of terror in the foreseeable future.

If this were not enough cause for worry, technological advances allow ever-smaller groups to access ever-greater destructive capability. Individuals can now command weapons that used to be the sole province of nation states. We can strengthen borders, improve screening of travelers, and destroy terrorist cells, but as long as this brand of violence exists it will, at some point, break through our best defenses, with terrible results.

Thus, for a variety of reasons, we can expect twenty-first-century disasters to be more frequent and more catastrophic than previous disasters. There will be more and more instances where first responders are victims, state and local political authority breaks down, and the federal government is the only hope. Understanding this means that we need to rethink the statutory basis of emergency response. Two concrete suggestions follow.

First, disaster assessment must become an automatic federal priority. The larger the disaster, the greater the probability that first responders and political leaders will also be victims. Waiting for them to make assessments, fill out paperwork, and navigate bureaucratic process can, as we have seen, cost lives. Requiring the federal government to do an assessment does not mean that the states should not, if able, do their own assessments. However, prudent planning should assume that in the worst disasters the locals will not be able to provide assessments. Maintaining the assumption embedded in the Stafford Act that state and local officials, victims of disaster themselves, will be capable of conducting assessments is unrealistic and dangerous in an era when disasters, for the reasons cited above, are likely to turn into catastrophes.

Second, FEMA should be moved out of DHS and given enhanced authority to create a truly federal response capability. This reorganization

⁵¹ *Id.*

⁵² See Brian M. Jenkins, *The Future Course of International Terrorism*, FUTURIST, July-Aug. 1987, at 8–13.

⁵³ *Id.*

of federal emergency response could be modeled on a recent successful transformation of the armed forces. The last major reorganization of the United States military dealt with the traditional divisions—and rivalries—between the services and the need to make these historically separate bureaucracies into a coherent force in battle. One of its most important innovations was creation of the regional Commander-in-Chief (CINC) command structure in the Defense Department. This organization gives one person the power and authority to plan for a conflict and command the assets of the different service branches. Immediately before the September 11 attacks, Lieutenant Colonel Terrence Kelly published an article on homeland defense in which he suggested borrowing the concept of the CINC for a Homeland Defense Agency.⁵⁴ The CINC option may have similar utility when applied to the need for coherent emergency response.

FEMA is the logical place from which to control all emergency responses. As such, FEMA should not only be restored to independent status, with its director having Cabinet rank, it should be given more resources and the formal authority to act as CINC in the preparation and coordination of federal, state and local responses to all kinds of disasters. Given the complexity of the task at hand, an independent and reinvigorated FEMA is the most likely candidate to be able to coordinate other federal agencies and state and local governments into an effective response network.

Even before FEMA was melded into the Department of Homeland Security, the Senate was reluctant to demarcate clear lines of authority, insisting that FEMA share first response, grant-making, and training authority with the Department of Justice's Office of Domestic Preparedness.⁵⁵ Once FEMA was subsumed into DHS, it lost its grant-making authority altogether and was, as became evident during Hurricane Katrina, forced to the sidelines.

In 2002, the federal government staged a simulation of an attack on the United States, wherein terrorists released smallpox on an unsuspecting nation. This simulation, known as "Dark Winter," indicated that such an attack would likely kill huge numbers of Americans while instigating massive confusion.⁵⁶ In "Dark Winter," federalism issues arose that inhibited the overall government response. Former Senator Sam Nunn, who played the President of the United States in the exercise, said, "We're

⁵⁴ See Terrence Kelly, *An Organizational Framework for Homeland Defense*, PARAMETERS, Autumn 2001, available at <http://www.carlisle.army.mil/usawc/Parameters/01autumn/Kelly.htm>.

⁵⁵ Samuel Worman, Peter J. May, & Bryan D. Jones, *Organizing Attention: Agency Agendas and Disaster Preparedness 8–9* (October 2006) (unpublished manuscript on file with the Harvard Law & Policy Review), available at <http://www.appam.org/conferences/fall/madison2006/sessions/downloads/40731.pdf>.

⁵⁶ See Tara O'Toole, Michael Mair & Thomas V. Inglesby, *Shining Light on 'Dark Winter'*, 34 CLINICAL INFECTIOUS DISEASES 972 (2002).

going to have absolute chaos if we start having war between the federal government and the state government.”⁵⁷

The sooner a “CINC-like” authority is vested in FEMA, the better. An independent and reinvigorated FEMA can solve the leadership problem. Power and direct access to the President can lure first-rate talent to the agency, not just at the director level, but throughout the agency’s ranks. Governmental failure on a scale experienced during Hurricanes Andrew and Katrina does not arise from reasons that are easily dealt with. It generally indicates the need for some radical rethinking about the assumptions upon which legal frameworks and operating procedures rest. We are likely entering an era of more and more severe disasters; disasters in which the first responders are likely to be victims. In such an era, legal regimes that rely so heavily on local and state action are not only obsolete but downright dangerous.

⁵⁷ *Id.* at 982.