

Terrorism and the Rule of Law

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WORK PAPER

The Role of State & Local Governments In Responding to Transnational Terrorism: Emergency Preparedness and Response

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I. The State and Local Response to Terrorism in Light of 9/11 and Katrina

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A. THE 9/11 COMMISSION REPORT

Following the tragic events of September 11, 2001, a ten-member national commission studying the terrorist attacks upon the United States published *The 9/11 Commission Report*. Included in this Report were important findings that addressed the role of state, regional and local governments as well as the private sector in preparing for and responding to unprecedented acts of terrorism. The Report illustrated the critical role of emergency responders; those trained personnel on the local level who provided the first and perhaps most significant response to the shocking devastation that occurred when the World Trade Center towers were attacked by guided missiles in the form of two hijacked airliners. The Report also set forth specific recommendations that called for coordinated involvement, teamwork and response on the regional and local level.

1. The Role of First Responders

Although the Report was devoted primarily to a factual analysis of the terrorist attacks of September 11 and the formulation of strategies that included strengthening our homeland defense system, it focused significantly upon the role of first responders. This key point was stated concisely in the Report's Executive Summary at page 8:

Casualties were nearly 100% at and above the impact zones and were very high among first responders who stayed in danger as they tried to save lives. Despite weaknesses in preparations for disaster, failure to achieve unified incident command, and inadequate communications among responding agencies, all but approximately one hundred of the thousands of civilians who worked below the impact zone escaped, often with the help from the emergency responders.

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The 9/11 Commission focused on emergency response in the face of an unprecedented disaster. Its findings underscored the role of local first responders, as well as civilians and others, all of whom made incredible sacrifices:

The civilians, firefighters, police officers, emergency medical technicians, and emergency management professionals exhibited steady determination and resolve under horrifying, overwhelming conditions on 9/11. Their actions saved lives and inspired a nation. Effective decision making in New York was hampered by problems in command and control and in internal communications. Within the Fire Department of New York, this was true for several reasons: The magnitude of the incident was unforeseen; commanders had difficulty in communicating with their units; more units were actually dispatched than were ordered by the chiefs; some units self-dispatched; and once units arrived at the World Trade Center, they were neither comprehensively accounted for nor coordinated. The Port Authority's response was hampered by the lack [of] standard operating procedures and radios capable of enabling multiple commands to respond to an incident in unified fashion. The New York Police Department, because of its history of mobilizing thousands of officers for major events requiring crowd control, had a technical radio capability and protocols more easily adapted to an incident of the magnitude of 9/11.¹

2. Protection Against and Preparation for Terrorist Attacks

The 9/11 Commission's Report outlined a number of strategies that could conceivably be implemented to help prevent similar acts of terrorism in the future, several of which dealt directly with efforts on the regional and local level. Among the proposed strategies set forth in the 9/11 Commission's Report was protection against and preparation for terrorist attacks. *Id.* at 17. Included in this strategy were the following specific recommendations, each calling for coordinated involvement, teamwork and response on the regional and local level:

(a) Address problems of screening people with biometric identifiers across agencies and governments, including our border and transportation systems, by designing a comprehensive screening system that addresses common problems and sets common standards. As standards spread, this necessary and ambitious effort could dramatically strengthen the world's ability to intercept individuals who could pose catastrophic threats.

(b) Underscore that as government power necessarily expands in certain ways, the burden of retaining such powers remains on the executive to demonstrate the value of such powers and ensure adequate supervision of how they are used, including a new board to oversee the implementation of the guidelines needed for gathering and sharing information in these new security systems.

¹The 9/11 Commission Report, Executive Summary, at 15.

©) Base federal funding for emergency preparedness solely on risks and vulnerabilities, putting New York City and Washington, D.C. at the top of the current list. Such assistance should not remain a program for general revenue sharing or pork-barrel spending.

(d) Make homeland security funding contingent on the adoption of an incident command system to strengthen teamwork in a crisis, including a regional approach. Allocate more radio spectrum and improve connectivity for public safety communications, and encourage widespread adoption of newly developed standards for private-sector emergency preparedness - since the private sector controls 85% of the nation's critical infrastructure. *Id.* at 19-20.

3. Pre-9/11 Exercises: Catastrophic Terrorism

This was not the first time that recommendations had been made by a public or private body to deal with catastrophic terrorism through coordinated involvement, teamwork and response on the regional and local level. In June 2000, a two-day conference sponsored by the ABA Standing Committee on Law and National Security and the Robert L. McCormick Tribune Foundation brought together a number of leading experts who addressed, *inter alia*, "the degree to which the legal authorities support necessary antiterrorist actions without unduly compromising the freedoms that are at the heart of American democracy."² The proceedings of this conference were set forth in a report entitled *Catastrophic Terrorism: Imminent Threat, Uncertain Response*.

With reference to law enforcement, the Report noted the crucial nature of disseminating information in situations involving domestic terrorism, the guidelines for which should be in place.³ According to Robert M. Blitzler, Associate Director for Counterterrorism Technology and Practice at Science Applications International Corporation:

There are 26 joint terrorism task forces strategically located around the United States. They all have necessary security clearances. They include state, local, and other federal agencies. These people work with the [Federal Bureau of Investigation] every single day, on the street, and they have the necessary security clearances. There are a number of effective electronic systems in place to kick out both classified and unclassified threats. It has worked relatively well, without revealing sources and methods.⁴

The Report also contained the local perspective of Robert Sullivan, City Attorney for Portsmouth, New Hampshire, a participant in "TOPOFF," a simulated biological disaster exercise in Denver, Colorado and simulated chemical attack in Portsmouth. According to

²*Catastrophic Terrorism: Imminent Threat, Uncertain Response* at 5 (Robert R. McCormick Tribune Foundation 2001).

³*Id.* at 55.

⁴*Id.*

Sullivan, the exercise revealed a tendency on the part of federal law enforcement to step in and take control, disregarding a fully functional emergency operations center set up by the City. This led to great concern by local emergency responders and local law enforcement over whether they would have been better off handling the entire situation themselves. Sullivan noted that new protocols such as those between the City and surrounding municipalities would be useful, but would have to be very simple. Such protocols would not necessarily be a document someone would have to look at, but would be a policy capable of immediate implementation. According to Sullivan:

[The protocols] have to be state policies so obvious that they're committed to memory and implemented by memory in times of emergency and stress. In general, if any law enforcement agency determines it needs some help, it calls for it. When the help arrives, the help is under the complete control of the agency seeking help, although responsibility for salary, benefits, overtime, workers' comp, and so forth, stays with the law enforcement agency providing the assistance.

The key to a successful protocol is for the assisting agencies, including the FBI, to appreciate and utilize the expertise of the local responders. ... Once it's been determined to be a terrorist act, it makes great sense that the FBI have control, but the FBI needs to understand that having the authority to control does not mean they have the knowledge or the ability to do it without any help.⁵

The Report also noted the importance of pre-planning, advance coordination of emergency authorities in times of crisis and the need for practice and training, such as the simulated biological disasters and chemical attacks in the "TOPOFF" exercise.⁶ With regard to practice and training, as one conference participant put it, "Authority is not the same thing as ability."⁷ According to Robert Blitzer, the existence of a "unified command" following the 1995 Oklahoma City bombing was due in part to the fact that the fire chief, the police chief and the FBI Special Agent in Charge "were friends who got along well."⁸ The clear need exists, therefore, to go beyond a written organizational chart for crisis management and engage in realistic exercises. This means actually putting the exercise and coordination of emergency authorities into practice. This means doing so in a real-time environment, one in which the participants realistically implement the actual roles and responsibilities of those exercising

⁵Id. at 57.

⁶The Top Officials (TOPOFF) exercise in April 2005 revealed, unfortunately, that the federal government had made little, if any, "progress in addressing a number of preparedness deficiencies, many of which had been identified in previous exercises." Less than 16 months later, Hurricane Katrina exposed deficiencies, and they were publicized by the White House in its report, *The Federal Response to Hurricane Katrina: Lessons Learned*, Appendix A, Training, Exercises, and Lessons Learned, <http://www.whitehouse.gov/reports/katrina-lessons-learned/appendix-a.html>

⁷Id. at 58.

⁸Id. at 57.

emergency authorities. This means constantly updating, learning, practicing and implementing such emergency authorities, rather than engaging in an exercise that is merely an isolated event.

4. *Post-9/11 Exercises: Law Amid the Ruins: Doing Business After Disaster*

In May 2005, a three-day conference organized by the ABA Standing Committee on Law and National Security and National Strategy Forum and sponsored by the Robert L. McCormick Tribune Foundation, brought together experts from all public sectors: government, business, legal, law enforcement, emergency response, public health, public works and non-profit. They discussed continuity of operations for both the public sector and the private sector in the event of a catastrophic event, one that would have "widespread, potentially disastrous impact on U.S. critical infrastructure including medical, communications, transportation, financial, commercial, commerce, utility and trade services."⁹

The conference proceedings were reported in *Law Amid the Ruins: Doing Business After Disaster*. Focusing on emergency preparedness, response and recovery planning for a catastrophic event in the United States, participants addressed, *inter alia*, the need for "a comprehensive, national infrastructure protection and response plan that encompasses federal, state and local governments, the private sector and other stakeholders." The report of the conference proceedings illustrates that the most important step in the prevention, protection, response and recovery process was the planning stage. Common ground for dialogue must be established in the planning stage, along with understanding and collaboration among agencies "at all levels and between sectors."¹⁰ The conference participants agreed that an important step in the planning process is to reach a consensus about what is expected of a National Response Plan, and that one must be able to determine beforehand what is expected of the people and agencies involved at the federal, state, and local levels and the private sector. It should also be determined what each of these stakeholders should expect of each other and what the public expects of local, state and federal agencies. Unfortunately, each sector "has its own idea of what it is responsible for, its own set of plans, and its own set of expectations of the responsibilities and functions of other sectors."¹¹

Given this potential for massive turf battles in the midst of a crisis, be it a dirty bomb attack or a natural disaster that results in the inundation of New Orleans, a significant challenge lies in identifying and triggering agency-specific responsibilities for continuity of operations. If no one branch of government or no one sector has total authority, then it is essential to know and understand: (1) the role of the federal government for response, restoration and recovery, (2) the role of state and local government agencies, (3) the role of the private sector, (4) the relationships of each of these sectors to one another and (5) in which one should rest the initial responsibility for responding, restoring and recovery.

⁹*Law Amid the Ruins: Doing Business After Disaster*, 27 National Security Law Report, No. 5 (ABA Standing Committee on Law and National Security, Oct. 2005).

¹⁰*Id.* at 3.

¹¹*Id.*

In this regard, the participants in the 2005 *Doing Business After Disaster* conference noted the critical nature of this issue of interdependency among agencies and sectors during and after a disaster. This issue is particularly difficult to resolve in light of the tendency to rely on the federal government to "save the day", thereby hindering the process of identifying agency-specific and sector-specific roles and responsibilities in a time of disaster.¹² The conference participants addressed operational responsibility in the initial aftermath of a disaster, agreeing that:

operational responsibility for (a) providing support and (b) serving as a conduit to the federal government to request assistance for emergency first responders is at the state and local levels.¹³

5. *Checklist for State and Local Government Attorneys to Prepare for Possible Disasters*

For state and local government attorneys who recognize the need to be prepared for the legal advisor role they may be asked to play in times of disaster and crisis, a checklist has been prepared by Ernest B. Abbott, former General Counsel for FEMA, and Professor Otto J. Hetzel, who served as the Chair and Vice-Chair, respectively, of the Committee on Homeland Security and Emergency Management, State and Local Government Law Section of the American Bar Association. Entitled *Checklist for State and Local Government Attorneys to Prepare for Possible Disasters*, this document provides a well-organized, comprehensive and extraordinarily helpful list that addresses legal issues likely to arise in emergency situations facing state and local governments. The checklist addresses natural disasters as well as terrorist attacks and provides guidance for such situations as the 1993 World Trade Center bombing or the devastating attacks of September 11, 2001, or a natural disaster like the catastrophic 1993 flooding of the Missouri River or the devastating Hurricane Katrina in August 2005.

The checklist addresses essential preparation before and during a disaster. It is organized to assist counsel in anticipating and reviewing those emergency issues, policies and legal questions that are likely to arise in the context of catastrophic events in addition to those listed above.

Reflecting the substantial expertise and experience of its authors, the topics covered in the Checklist include the following:

- preparation of an emergency and disaster response handbook,
- identification of authorities available to protect public health and safety,
- ascertaining surveillance authority and protection of security information,

¹²*Id.* at 3.

¹³"For example, in the event of the hypothetical nuclear attack scenario, local agencies might conduct situational and intelligence information assessments of the operational emergency area where the disaster occurred, which would then be transmitted to the state level in order to develop a collaborative understanding of what type of support might be needed." *Id.*

intergovernmental joint powers agreements and actions,
dissemination of critical information to the public,
establishing guidance for administrative functions in emergency and disaster
crises,
liability of governmental units in emergencies, and
development of knowledge of key federal and state government laws, regulations
and authority in handling disasters, whether natural or non-natural.

The ABA Section of State and Local Government Law has made this Checklist available online as a .pdf document at <http://www.abanel.org/state/local/checklist/06.pdf>. It fulfills its promise to be "of real assistance to state and local government attorneys as they help their clients prepare for, respond to, and recover from catastrophic events." The Checklist's usefulness is enhanced, moreover, by a newly updated video entitled "Are You Ready? What Lawyers Need to Know About Emergency Preparedness and Disaster Recovery," produced by the ABA State and Local Government Section and the Jefferson Fordham Society with a substantial and generous grant from the Public Entity Risk Institute. The Are You Ready video has already been disseminated to state and local government authorities throughout the nation and is available through the State and Local Government Law Section of the ABA.

The need for advance preparation is a theme constantly and most effectively invoked throughout this Checklist. As Ernie Abbott and Ouo Hetzel observed:

When a disaster strikes, unless some advance preparation has taken place, counsel may find that a number of the issues they are being asked to consider will not only be new to them, but, if they had been better prepared, many options that might have been available for dealing with emerging issues are no longer available. In addition, attorneys operating in the midst of catastrophes may find their working conditions difficult, to say the least. The disaster may disrupt the infrastructure - such as working computers, telephones, and Internet connections - that counsel would normally rely upon to research and generate legal documents to address issues that arise. Given the scope of actions that could arise and the potential impact that terrorist-caused and major natural disasters may entail, preparation is essential.¹⁴

The United States of America was transformed by the horrific events of September 11, 2001. In light of the specific recommendations of the 9/11 Commission, it is clear that state, regional and local governments can and should play an integral role in contributing to and helping assure the unity of purpose and unity of effort that will make this Nation "safer for our children and grandchildren."¹⁵ As we shall see, however, the lessons learned from 9/11 were not enough to assure adequate levels of emergency preparedness, responsiveness, and functioning

¹⁴Introduction, *Checklist for State and Local Government Attorneys to Prepare for Possible Disasters* (Abbott and Hetzel, ABA State and Local Government Law Section, April 8, 2005).

¹⁵*The 9/11 Commission Report, Executive Summary*, at 26.

communications networks between the federal, state and local governments and private sectors when a natural disaster of epic proportions struck the U.S. Gulf Coast in late August 2005.

B. HURRICANE KATRINA TASK FORCE REPORT FEBRUARY 2006

1. Focus of the Katrina Task Force Report

The working group in the American Bar Association that produced the Katrina Task Force Report in February 2006 focused on the sufficiency of existing laws and regulations that applied to the response by state and federal officials. This involved several questions, including the following:

- (a) Were those laws sufficient to deal with the catastrophic events surrounding this natural disaster?
- (b) Did those laws adequately facilitate the coordination and cooperation of local, state and federal authorities during all stages of emergency management?
- (c) Is there any need to modify the power and ability of state and local governments to act as first responders?¹⁶

The Katrina Report did not focus on, nor did it include, an assessment of the legal authorities that would apply to a catastrophic public health emergency, such as an Avian flu pandemic.¹⁷ It nonetheless provides a good insight into the interagency and intergovernmental

¹⁶See *Hurricane Katrina Task Force Subcommittee Report*, February 2006, at vii-bx (ABA Standing Committee on Law and National Security, ABA Section of State and Local Government Law, ABA Section of Administrative Law and Regulatory Practice) (hereinafter "Katrina Report").

¹⁷*Id.* at viii n3. An excellent starting point for such an assessment is the *Checklist for State and Local Government Attorneys to Prepare for Possible Disasters*, *supra*. Bioterrorism threats and other public health threats that escalated following the post-9/11 anthrax scare prompted the issuance of Homeland Security Directive 9, which identified the need for "safe, secure, and state-of-the-art agriculture biocontainment laboratories that research and develop diagnostic capabilities for foreign animal and zoonotic (transmitted from animals to humans) diseases." This directive sets forth the policy of the USA to protect the agriculture and food system from terrorist attacks, major disasters and other emergencies, with the DHS Secretary leading, integrating and coordinating implementation of efforts among federal departments, state and local governments, and the private sector to protect critical infrastructure and key resources. See <http://www.whitehouse.gov/news/releases/2004/02/20040203-2.html>. DHS is considering a next-generation biocontainment, biological and agricultural defense facility to replace the aging Plum Island Animal Disease Center. DHS recognizes that close international cooperation and coordination with friends and allies will maximize the USA's capabilities for mutual defense against biological weapons threats. A national bioawareness system will be built upon and reinforce existing federal, state, local and international surveillance systems. Capabilities required for response and mitigation against biological attacks are to be based on interagency-agreed scenarios derived from plausible threat assessments, with these plans to be regularly tested as part of federal, state, local and international exercises.

coordination and communication, or the inadequacy or sheer lack thereof, that were substantial factors contributing to and magnifying the extent of one of the worst natural disasters in the history of this Nation. Indeed, as the White House Report on Katrina candidly acknowledged, "[t]he deficiencies in federal, state and local response to Hurricane Katrina highlight the need for a more efficient National preparedness system."¹⁸

2. Role of Private Sector and NGOs

With regard to the involvement of the private sector, the Katrina Report examined the prominent role of nongovernmental organizations (NGO's) in recovery operations as well as access to funding, supplies and rescue personnel. The Report also examined the laws and regulations that apply in directing and coordinating private businesses as an essential element of emergency relief.¹⁹

3. State and Local Government Authorities as First Responders

(a) The Katrina Report emphasized the core fact that every natural catastrophe, as well as every non-natural catastrophic event, is experienced first in a local jurisdiction. This ranges from tornadoes, ice storms, earthquakes, wild fires and hurricanes to chlorine leaks from derailed tank cars, bombs at abortion clinics or Olympic events, or a terrorist release of anthrax or some other contagious biological agent.²⁰

(b) The Katrina Report also noted that when the local government capability to respond to such an incident is exceeded, that is when state and federal support may become necessary.²¹

(c) Governmental authority to act during the immediate response phase of the Hurricane Katrina disaster could be described by three primary characteristics:

http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0719.xml and
<http://www.dhs.gov/dhspublic/display?theme=27&content=1927>

Our neighbor, Canada, through the Food and Agriculture Emergency Response System (FAERS), has designed an all-hazards emergency management system designed to link the federal, provincial and private sectors to better manage and coordinate response to emergencies. The purpose of FAERS is to mobilize all agri-food sector resources to mitigate the effects of emergencies on the sector and to ensure the continuity, adequacy and safety of Canada's agri-food system. <http://www.inspection.gc.ca/english/animat/heasan/far/faers99e.pdf>

¹⁸The Federal Response to Hurricane Katrina: Lessons Learned, Appendix A, National Preparedness System, Recommendation 20, <http://www.whitehouse.gov/reports/katrina-lessons-learned/appendix-a.html>

¹⁹Id. at bc.

²⁰Id. at 2.

²¹Id. at 2.

First, there was a disconnect or difference of opinion between state and federal officials over what the federal government had been asked to do, what it in fact could do and what conditions would be imposed by federal officials on states before acting.

Second, the public perception was that there was confusion over who was in charge, whether and to what extent federal active-duty military trumped or had to be coordinated with civilian control, and what role remained for state control.

Third, there was a public perception [of] confusion over the [role of the] federal government, apparent lack of federal agency ability to act, and delays in the arrival of federal life-saving assistance and security forces.²²

As the Katrina Report summarized it, the ability of federal, state and local officials to communicate and the resulting efforts devoted to planning and preparedness were inadequate when put to the ultimate test.

4. Management of Complex Incidents Through NIMS and NRP

The Katrina Report pointed out that the Executive Branch of the federal government has developed two separate but complimentary processes for managing complex incidents with multiple levels of governmental involvement.

(a) NIMS (National Incident Management System) is a standardized incident management structure that enables multijurisdictional management and coordination of complex incidents. NIMS is a consistent, nationwide approach for incident management that requires federal, state and local governments to work together before, during and after incidents. Under NIMS, a local incident commander is in charge of the incident regardless of the source of local, regional, state, federal, military or civilian resources brought in to assist.

(b) NRP (National Response Plan), is an agreement between federal agencies with roles in catastrophic response, and the American Red Cross, specifying the framework under which federal agencies will interact with state and local governments, the private sector and nongovernmental organizations during catastrophic response. The NRP was not followed by the federal government in all respects during the Hurricane Katrina disaster, as concluded by the task force in its Report.²³

5. Implementation of Post-9/11 Broadened Authority on State & Local Level

The Katrina Report pointed out that Hurricane Katrina exposed a difficulty on the part of state and local government officials in implementing their broadened authority conferred under

²²*Id.* at 3.

²³*Id.* at 13-14, 19.

the post-September 11 revisions of disaster and emergency statutes relating to catastrophic incident response.²⁴

(a) Specifically, state and local government officials, according to the Katrina Report, must prepare effectively for catastrophic incident response. Such effective preparedness requires those officials to design effective plans, procedures and protocols that facilitate the execution of existing authority. It also requires those officials to design exercises that will test the execution and implementation of that authority.²⁵

(b) As a part of effective preparedness, government must set benchmarks for implementing that authority. This requires all levels of government, federal, state and local, to make sure that elected officials, emergency managers and government and affected private sector attorneys, understand the scope of their legal authority and how it can best be translated into effective plans, procedures and protocols. Effective emergency response can be compromised by failure in any of the key aspects of effective preparedness.

(c) Emergency response powers exercised by states have been codified by statutory or executive authority, and along with local governments, the states have developed plans and procedures for responding to catastrophic incidents.²⁶

C. FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED

On February 23, 2006, the White House released its review of the federal response to Hurricane Katrina, entitled *The Federal Response to Hurricane Katrina: Lessons Learned*.²⁷ This 228-page Report was the product of a review led by the President's Homeland Security Advisor and identified systemic problems in federal emergency preparedness and response. The White House Report recommended solutions to address those problems, including recommendations that called upon coordination in both preparation and response on the local, state, federal and private sector levels before the next hurricane season begins June 1, 2006. The White House Report, perhaps moreso than the House Bipartisan Report²⁸ released the week

²⁴*Id.* at 13.

²⁵*Id.* at 13.

²⁶*Id.* at 18-21.

²⁷ Available online at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>

²⁸ The Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina was entitled *A Failure of Initiative: The Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina*, made a stark comparison was made between 9/11 and Hurricane Katrina concerning our readiness at the federal, state and local level:

The failure of local, state, and federal governments to respond more effectively to Katrina — which had been predicted in theory for many years, and forecast with startling

before, addressed specific actions at the state and local level that had a bearing on federal decisions or operations.

1. Integration and Synchronization of Policies, Strategies and Plans

The White House Report emphasized the need to integrate and synchronize the Nation's homeland security policies, strategies, and plans "across federal, state, and local governments, as well as the private sector, non-governmental organizations (NGOs), faith-based groups, communities, and individual citizens."

The White House Report identified three immediate priorities to achieve this objective:

First, we must implement a comprehensive National Preparedness System to make certain that we have a fully national system that ensures unity of effort in preparing for and responding to natural and man-made disasters;

Second, we must create a Culture of Preparedness that emphasizes that the entire Nation - at all levels of government, the private sector, communities, and individual citizens - shares common goals and responsibilities for homeland security; and

Third, we must implement corrective actions to ensure we do not repeat the problems encountered during Hurricane Katrina.

2. Comprehensive National Preparedness System

The White House Report called for improvements to the existing National Preparedness System in order to minimize the impact of disasters on lives, property and the economy. In this connection, the Department of Homeland Security has now developed an Interim National Preparedness Goal. The Report called for the following action on this stated goal:

We must now translate this Goal into a robust preparedness system that includes integrated plans, procedures, training, and capabilities at all levels of government. The System must also incorporate the private sector, NGOs, faith-based and other

accuracy for five days — demonstrates that whatever improvements have been made to our capacity to respond to natural or man-made disasters, four and half years after 9/11, we are still not fully prepared. Local first responders were largely overwhelmed and unable to perform their duties, and the National Response Plan did not adequately provide a way for federal assets to quickly supplement or, if necessary, supplant first responders.

Executive Summary at 1, A Failure of Initiative, available at <http://a257.g.akamai.net/7/257/2422/15feb20061230/www.gpoaccess.gov/katrinareport/execsummary.pdf>

grassroots groups, communities, and individual citizens. The objective of our National Preparedness System must be to achieve and sustain risk-based target levels of capability to prevent, protect against, respond to, and recover from major natural disasters, terrorist incidents, and other emergencies.

The Report acknowledged that the inadequacy of the response to Hurricane Katrina was due in part to "a lack of familiarity with incident management, planning discipline and field-level crisis leadership." The Report also noted that the federal government

must clearly articulate national preparedness goals and objectives. It must create the infrastructure for ensuring unity of effort. The federal government must manage the National Preparedness System for measuring effectiveness and assessing preparedness at all levels of government.

Of the five elements outlined in the Report as critical for a National Preparedness System, the Report emphasized the need to strengthen the Department of Homeland Security's capacity to direct the federal response effort "while providing resources to responders in the field." It also called for a strengthening of homeland security education, exercises, and training programs, as well as "ensuring that homeland security assessments, lessons learned, and corrective action programs are institutionalized throughout the federal government."

3. Creating A Culture Of Preparedness

The White House Report emphasized the need to create and build upon a foundation of partnerships that will lead to a "culture of preparedness" through which the United States as a whole shares common goals and responsibilities for Homeland Security. Such a culture of preparedness "must build a sense of shared responsibility among individuals, communities, the private sector, NGOs, faith-based groups, and federal, state, and local governments."

In this regard, the Report described several guiding principles that were central to the development of this "culture of preparedness," including the principle that "federal, state, and local governments must work in partnership with each other and the private sector."

The Report also underscored the fact that the 2006 Hurricane Season was just months away and that specific steps would have to be taken in order to ensure that the federal government did not repeat problems encountered during the 2005 disaster, as well as be better prepared generally for future emergencies. Included in the critical actions necessary to strengthen the federal response capabilities, the Report highlighted the following actions in which state and local government would play a role, directly or indirectly:

- (a) Ensure that relevant federal, state, and local decision-makers, including leaders of State National Guards, are working together and in close proximity to one another in the event of another disaster;

(b) Identify and develop rosters of federal, state, and local government personnel who are prepared to assist in disaster relief;

(c) Encourage States to pre-contract with service providers for key disaster relief needs, such as debris removal and the provision of critical commodities;

(d) Improve the delivery of assistance to disaster victims by streamlining registration, expediting eligibility decisions, tracking movements of displaced victims, and incorporating safeguards against fraud; and

(e) Enhance ongoing review of state evacuation plans and incorporate planning for Continuity of Government to ensure the continuation of essential and emergency services.

4. Shared Commitment to Preparedness for Future Catastrophic Events

The White House Report concluded with a call for change as the lessons of Hurricane Katrina are learned and put into action for future emergencies. The key to this change is a strengthened ability to prepare for, protect against, respond to and recover from catastrophic events:

As the federal government works to implement the near-term critical activities and 125 recommendations, state and local governments, the private sector, NGOs, faith-based and community organizations, the media, communities, and individuals should undertake a review of their respective roles and responsibilities in preparing for and responding to catastrophic events. ...

The lessons learned from Hurricane Katrina and the recommendations set forth in today's Report will yield preparedness dividends that transcend federal, state and local boundaries. Their full implementation will help the entire Nation achieve a shared commitment to preparedness.

5. Federal Government Assumption of State and Local Responsibilities

Among the many recommendations contained in an addendum to the White House Report, one calls for a revision of the National Response Plan to address situations in which the federal government may need to assume on a temporary basis "some inherently state and local responsibilities and augment state and local incident command staff during a catastrophic incident."²⁹ Under this recommendation, in which collaboration between the federal government and state and local authorities is the underpinning, the federal government is called on to

develop plans to build and temporarily command the ICS until the local or state authorities are able to recover from the initial impact of the catastrophic incident

²⁹ Appendix A, National Preparedness, Recommendation 1.a,
<http://www.whitehouse.gov/reports/katrina-lessons-learned/appendix-a.html>

and perform their roles under ICA. These plans should utilize any available state or local assets that may remain operational and necessarily require collaborative planning between federal, state and local authorities.³⁰

6. Training, Exercises and Lessons Learned Programs

Critical challenges identified in the White House Report include recognizing the need for the DHS to "establish specific requirements for training, exercise and lessons learned programs linked through a comprehensive system and common supporting methodology throughout the federal, state and local governments."³¹

7. "What We Got Here Is ... Failure To Communicate"

The American Film Institute has a list of most memorable movie lines. This is one of them. For those in our international audience not familiar with American actor Paul Newman and a movie for which he received an Academy Award nomination as best actor in a leading role, Cool Hand Luke, here is a quick synopsis of the 1967 movie's most famous scene: confrontation arises between Luke, seeking to escape from a Florida prison camp, and the diminutive warden, who punishes poor Luke severely each time Luke attempts to escape. The confrontation takes place after Luke has been severely beaten and placed in solitary confinement, regarding which the warden opines, "What we got here is ... failure to communicate."

Failure to communicate among and between emergency management officials, local municipal officials, state elected officials and federal officials during and immediately after Hurricane Katrina is the central theme of a number of recommendations delineated in the White House Report appendices. Many of us can recall the conflicting accounts of who-said-what-to-whom-at-what-time - as the United States, then the world, finger-pointing by local state and federal officials. From Mayor to Governor to President, each postured and engaged "spin" to achieve a public perception and a position in media coverage that would put them in the best light possible, and each wished to show that another sector of government had delayed unreasonably in asking for help, or had not asked with sufficient specificity, or had not provided a sufficient response, or had delayed in providing help. This type of failure to communicate relates to the two people, the Governor and the President, who were actually talking to each other but whose mistrust of each other's motivations and actions was apparently so great, and political stakes were so high, that fingerpointing resulted rather than development of a common public position.

Failure to communicate occurred in another form as well. It was this failure to communicate effectively that was addressed in the ABA Katrina Report's recommendations and that is in much of what NIMS does - by assuring that responders from different

³⁰Id.

³¹Appendix A, Training, Exercises, and Lessons Learned,
<http://www.whitehouse.gov/reports/katrina-lessons-learned/appendix-a.html>

organizations have technical capability to communicate; have a unified command structure that (a) allows leaders of response resources to communicate and agree upon a common plan of action, and (b) allows resources from multiple jurisdictions to 'plug into' the response effort; and will have a common understanding of what is meant by words; describing an operational need for resources and the operational capability of a resource. With respect to both forms of 'failure to communicate', one can readily conclude that involving leaders in exercises and assuring that all stakeholders and participants understand how the system is supposed to work and does work will also tend to reduce the political grandstanding and miscommunication that occurred in Katrina.

The White House Report acknowledged the need for the Department of Homeland Security to "review our current laws, policies, plans, and strategies relevant to communications," and then recommended, using a carrot-and-stick approach, that federal, state and local entities should develop emergency communications strategies that "will enhance operability and support future interoperable communications capabilities." It further recommended that state and local standards and performance measures for achieving such interoperability "should be tied to Homeland Security Grant Program funding criteria."³² The Report also recommended that the National Response Plan be modified to include "sufficient guidance on communications operations when responding to a disaster," and that such guidance "ensure that response operations employ all available communications assets to support operability and interoperability."³³ This NRP revision and the updating of communications guidance is to "emphasize the ability of emergency responders and private security officials to share information and use available communications systems to connect with authorities at all levels of government." The planning should "cover not only system connectivity, but also operating practices, business processes, and initial data sets to make the system work."³⁴

Closely related to this recommendation is Recommendation 37, which calls for DHS to "establish and maintain a deployable communications capability, to quickly gain and retain situational awareness when responding to catastrophic events."³⁵ During the height of Hurricane Katrina, as the storm surge topped and then poured through the breach in the canal levees and the massive flooding of the lower 19th ward and other areas was underway, there were multiple instances of "inadequate situational awareness," as the White House Report put it. This resulted in decisionmakers relying on incorrect or incomplete information, making clear the need for connectivity to be provided among federal, state and local authorities in order to restore operability and achieve interoperability. The recommended way to provide a framework for such connectivity is to have "rapidly deployable, interoperable, commercial, off-the-shelf equipment," that will keep pace with technology changes, with the ultimate goal of ensuring that

³²The Federal Response to Hurricane Katrina: Lessons Learned, Appendix A, Communications, Recommendation 34.d, <http://www.whitehouse.gov/reports/katrina-lessons-learned/appendix-a.html>

³³The Federal Response to Hurricane Katrina: Lessons Learned, Appendix A, Communications, Recommendation 35, <http://www.whitehouse.gov/reports/katrina-lessons-learned/appendix-a.html>

³⁴Id., Recommendation 35.b.

³⁵Id., Recommendation 37.

decisionmakers at all levels of government "have accurate and complete data to assess courses of action."³⁶

B. Logistics System and Evacuation

The White House Report acknowledged the need for DHS, "in coordination with state and local governments and the private sector" to develop an efficient, transparent and flexible logistics system. The Report noted that the federal government "must develop the capacity to conduct large-scale logistical operations that supplement and, if necessary, replace state and local logistical systems by leveraging resources within both the public sector and the private sector." When disasters overwhelm or incapacitate state and local governments, the Report noted, the Department of Transportation should "be prepared to conduct mass evacuation operations."

D. Applications to Other Levels and Forms of Government: Responsibility for Emergency Functions, Preparedness and Response

As we noted earlier, the observations made in this presentation will have applications to other levels of government responsible for these emergency functions. In nations and states with different forms of government, emergency preparedness and response functions may be performed through a top-down command-and-control structure, or these responsibilities may be delegated to other sub-state entities or political subdivisions, or perhaps a combination or variation of each may be utilized.

For example, the post-Katrina recommendations should not be limited to hurricane-related disasters. Recall that during the first precious hour after the WTC attack of September 11, 2001, the emergency radios of New York City firefighters operated inadequately inside the twin towers. While the White House Report faulted decisionmakers' "inadequate situational awareness" during Hurricane Katrina, the 9/11 Commission conversely faulted the responders' inadequate situational awareness as they climbed to the higher floors of the twin towers to rescue the occupants, even as the decisionmakers outside watched the towers approach the verge of collapsing.³⁷ The need for deployable communications capability, as noted in the Katrina recommendations, was also present during 9/11, and such a capability might have dramatically

³⁶ *The Federal Response to Hurricane Katrina: Lessons Learned*, Appendix A, Logistics and Evacuation, Recommendations 38-43. <http://www.whitehouse.gov/reports/katrina-lessons-learned/appendix-a.html>

³⁷ According to a New York Times article published July 7, 2002, minutes after the south tower collapsed, the pilot of a helicopter hovering near the remaining tower reported "I don't think this has too much to go. I would evacuate all people within the area of that second building." This clear warning was captured on police radio tapes 21 minutes before the north tower fell, yet most firefighters never heard those warnings. "Cut off from critical information, at least 121 firefighters, most in striking distance of safety, died when the north tower fell. ..." See 9/11 Exposed Deadly Flaws in Rescue Plan at http://mishalov.com/wtc_rescueplan.html

improved the ability of first responders to quickly gain and retain situational awareness when responding to the catastrophic events of September 11, 2001.

1. International Perspective and Proactive Response

Other nations throughout the world have watched, listened, learned and taken action. The UN Security Council took a stance on combating terrorism in Resolution 1373, which was adopted in 2001, requiring all states to "deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens" and "prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for these purposes against other states or their citizens."³⁹ As S.L. Bachman observed in *Global Terror Threats Pose Great Local Challenges to First-Responders*,³⁹

Since 2001, cities from New York to New Delhi, Istanbul to Kabul have upgraded first-responders' equipment, training and command. But there is a long, long way to go. Helping local first-responders to meet a global threat is in many ways more difficult than equipping, training, and commanding national military forces. The local puzzle contains many more pieces: more political officials, city bureaucracies and political micro-climates; local sources of revenue or lack thereof, and the ability and willingness to do the job among people who have never prepared for it.⁴⁰

Even with the knowledge and lessons learned following 9/11, other nations were not immune from "ideological and political blunders" that rendered readiness, preparedness and responsiveness problematical. The Madrid commuter train bombings that killed almost 190 people in March 2004 were not prevented by Spain's anti-terrorism measures on that tragic day.

National political leaders initially blamed Basque terrorists, a target of the sitting government's reelection statements. The failure to quickly identify the bombs as the work of Islamic terrorists spurred Spanish voters to oust the pro-U.S. government and replace it with one that vowed to remove Spanish troops from Iraq.⁴¹

2. EU Action Plan: Updated, Revised, and Ongoing

Following the Madrid bombings, the EU undertook a reevaluation of the anti-terrorism policy it had adopted in 2001.⁴² Included among the measures that were identified and that

³⁹Paul Wilkinson, *International Terrorism: The Changing Threat and the EU's Response* 19 (ISS/Challot Paper No. 84, Oct. 2005), available online at www.iss-eu.org

⁴⁰Available online at <http://yaleglobal.yale.edu/display.article?id=4288>

⁴¹*Id.*, *Global Terror* at 4.

⁴²*Id.*, *Global Terror* at 5.

⁴³07-EU Antiterrorism Action Plan: Operational Measures (2001), available online at <http://www.011investigations.net/document410.html>. See Paul Wilkinson, *International*

In an increasingly interconnected world, building local capacity is a critical component of preparation against global terrorism. But preparing to meet global threats locally means balancing unpredictable global threats against known, immediate needs.⁴⁹

**4. Collaborative Interdependence and Mutual Cooperation:
Local, State, National and International**

State and local governments have a collaborative, interdependent and mutually cooperative role to play with the federal government in the field of emergency preparedness and timely, adequate response to disasters, be they man-made as in acts of terrorism inflicted upon innocent citizens, or natural as in devastating hurricanes, tsunamis, fires or floods. With the American experience in 2001 and 2005, our nation's leadership, capabilities, resources and best efforts were called upon in the face of disasters. One was an unprecedented, carefully planned and executed act of terrorism that claimed over 3000 lives. The other, a natural disaster of epic proportions, resulting in great loss of life and property damage inflicted upon the U.S. Gulf Coast region. In both disasters, the role of local first responders, those local government officials trained to react, rescue, protect and save lives, was pivotal. In both disasters, the effectiveness of communications between the federal government through various federal agencies, on the one hand, and state and local government agencies, on the other, was inadequate. The lessons learned with respect to emergency preparedness and response have clear implications for the global war on terrorism. The lessons learned have clear implications, moreover, for the interdependence of the global community and the need for mutual cooperation and effective communication on an international scale. Sub-state, sub-national and other local political subdivisions have a clear role in building local capacity as a critical part of preparing global terrorism. As these lessons evolve into pragmatic principles that can be applied to anti-terrorism efforts on a multinational level, their implementation will also be facilitated and strengthened in a substantial and ongoing way through coordinated efforts on the part of sub-state, sub-national and other local political subdivisions within each country.

⁴⁹ *Id.*

CONCLUSION

Change sometimes comes with a high price. The lessons learned following 9/11 and Hurricane Katrina are painful. Perhaps these are things we should have known or discovered earlier. But this much is true: In the face of terrorist threats that have been carried out against U.S. citizens on our own soil, and in the face of a natural disaster that exposed the inadequacies of the United States' intergovernmental system of emergency preparedness, communications and response, we have learned valuable lessons. As a consequence, we are now experiencing a massive change. This is a change for the better. It is a change in the interconnectedness, the spirit of collaboration and mutual cooperation, the essence of effective coordination in planning, preparation, and response on the part of federal, state and local governments, as well as private sector and NGOs. This system of preparedness, communications and response may not yet be perfect, but it is moving aggressively in the right direction: (1) enabling each sector - federal, state, local and private - to realize the strength and synergy that results from intergovernmental cooperation and coordination⁵⁰, (2) enabling each sector - federal, state, local and private - to maximize its potential effectiveness in order to achieve optimum results in emergency management, delivery of services in the areas of law enforcement, safety, health, and security⁵¹. To expand this system and work in tandem with the EU, China, Russia and other members of the United Nations to achieve a truly multinational, long-term anti-terrorism strategy is not just an option. It is a necessity. It is a vital necessity if the member states of the United Nations, and the sub-state entities, governments and political subdivisions that comprise them, are serious about winning the war against transnational terrorism.

⁵⁰While beyond the scope of this segment of the presentation, many reported decisions illustrate the progress, gray areas and setbacks in this area of the law, particularly with respect to immunity, financial and control issues. See generally *Flander v. Yakima County*, 56 P. 2d 559 (Wash. 2002), *State v. Knight*, 904 P. 2d 1159 (Wash. App. 1995), 914 P. 2d 65 (Wash. 1996), *Brassinga v. City of Mtn. View*, 66 Cal. App. 4th 195 (Cal. App. 1988), *Berger v. Mead*, 338 N.W. 2d 919 (Mich. App. 1983), *Timberlake v. Benton*, 786 F. Supp. 676 (M.D. Tenn. 1992) (local government-regional response team relationship).

⁵¹See generally *Enlow v. U.S.*, 811 F. Supp. 503 (C.D. Cal. 1992), rev'd and remanded, 1994 W.L. 649979, and *Roma v. U.S.*, 344 F. 3d 352 (3d Cir. 2003) (intergovernmental agreements for emergency preparedness and response); *Karr v. State*, 765 P. 2d 316 (Wash. App. 1988), *Cougar Business Owners v. State of Washington*, 647 P. 2d 481 (Wash. 1981) (liability and damages issues post- and pre-Mount St. Helens volcanic eruption); *Invest v. County of Blaine*, 471 N.W. 2d 368 (Minn. App. 1991), *Commerce and Industry v. Grinnell Corp.*, 280 F. 3d 566 (5th Cir. 2002), and *Hell v. U.S.*, 1991 W.L. 23685 (D. Cal. 1991) (intergovernmental agreements in context of fire disasters).