

THE ALFONSE AND GASTON OF
GOVERNMENTAL RESPONSE TO NATIONAL
PUBLIC HEALTH EMERGENCIES:
LESSONS LEARNED FROM HURRICANE
KATRINA FOR THE FEDERAL
GOVERNMENT AND THE STATES

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*“The only mistake we made with Katrina was not overriding the local government.”*¹

Karl Rove, White House Deputy Chief of Staff

*“I am going to need all the help you can send me.”*²

Kathleen Babineaux Blanco, Governor, Louisiana, to President Bush

INTRODUCTION

The recent devastation and destruction by Hurricane Katrina in August 2005 in the Gulf Coast exemplifies the critical need for better federal, state, and local government coordination during a catastrophic public health emergency. Relying on only one or two of these governmental entities, or an uncoordinated response by all three, to spearhead disaster relief on a national scale only exacerbates the disaster, costing thousands of lives and billions of dollars.

Criticism of the federal response to Katrina, especially that of the Department of Homeland Security (DHS) and the Federal Emergency Management Agency (FEMA) was widespread.³ In the immediate wake of Katrina, President Bush promised a “swifter federalization of response operations and deployment of military forces” in future catastrophes,⁴ including a greater readiness to have the federal government take charge of the state and local responses during similar future crises of national

1. *Rove Off the Record on Katrina: The Only Mistake We Made Was Not Overriding the Local Government*, THE HUFFINGTON POST, Sept. 17, 2005, http://www.huffingtonpost.com/2005/09/17/rove-off-the-record-on-ka_n_7513.html.

2. Eric Lipton, et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, § 1, at 11 (quoting Governor Blanco as telling President Bush “I need everything you’ve got . . . I am going to need all the help you can send me”).

3. See, e.g., Eric Lipton & Scott Shane, *Leader of Federal Effort Feels the Heat*, N.Y. TIMES, Sept. 2, 2005, at A17 (noting the “remarkable confession” of Michael D. Brown, former Director of the Federal Emergency Management Agency (FEMA), who had only just learned of the three-day plight of thousands of citizens without food or water at the New Orleans convention center). On September 12, Michael Brown resigned as Director of FEMA amid heavy criticism of FEMA’s response to the effects of Hurricane Katrina. See Richard W. Stevenson, *After Days of Criticism, Emergency Director Resigns*, N.Y. TIMES, Sept. 13, 2005, at A26; see also Jennifer Steinhauer & Eric Lipton, *FEMA, Slow to the Rescue, Now Stumbles in Aid Effort*, N.Y. TIMES, Sept. 17, 2005, at A1 (“Nearly three weeks after Hurricane Katrina cut its devastating path, FEMA . . . is faltering in its effort to aid hundreds of thousands of storms victims” and “serious problems remain throughout the affected region.”); FRANCES FRAGOS TOWNSEND, THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 69 (Feb. 2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf> [hereinafter TOWNSEND] (“... [T]he Federal response to Hurricane Katrina demonstrated that the energy and professionalism of DHS personnel was not enough to support the Department’s role as the manager of the Federal response.”).

4. Chris Strohm, *Officials Consider Quicker Federalization, Use of Military in Disaster Response*, GOVEXEC.COM, Sept. 20, 2005, <http://www.govexec.com/dailyfed/0905/092005c1.htm>.

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proportion.⁵

Indeed, the White House February 2006 self-evaluation of its Katrina response, *The Federal Response to Hurricane Katrina: Lessons Learned*, included recommendations to be implemented by June 1, 2006 (the first day of the 2006 hurricane season) involving increased military involvement in hurricane response.⁶ Accordingly, state and local emergency response planners need to be ever more mindful and aware of the role and power of the federal government in disaster response, and the interaction among federal, state, and local laws and regulations in these emergencies.

To be sure, state or local governments zealously guard what they view as their prerogative of playing the primary role in emergency response. For example, just days after President Bush's post-Katrina proposal to increase the federal role in responding to national catastrophes, the Chairman and Vice Chairman of the National Governor's Association,⁷ Governor Mike Huckabee (R-Ark.)⁸ and Governor Janet Napolitano (D-Ariz.) respectively,⁹ sharply criticized the notion of federal preemption of "the constitutional authority of states and the nation's governors during an emergency," contending that "[s]tate and local governments are in the best position to prepare for, respond to, and recover from disaster and emergency."¹⁰

Moreover, Representative Peter T. King (R-NY), Chairman of the House Committee on Homeland Security, backed the governors by arguing that

5. Press Release, The White House, President Discusses Hurricane Relief in Address to the Nation (Sept. 15, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html>.

6. See Press Release, The White House, Fact Sheet: The Federal Response to Hurricane Katrina: Lessons Learned (Feb. 23, 2006), available at <http://www.whitehouse.gov/news/releases/2006/02/20060223.html> [hereinafter *Lessons Learned*] (summarizing the federal government's planned response to Hurricane Katrina). Upon establishment of a Federal Joint Field Office (JFO), a Department of Defense (DOD) point of contact must be present "at the JFO and FEMA regional offices to enhance coordination of military resources supporting the [hurricane] response." *Id.* Additionally, locations must be designated "throughout the country for receiving, staging, moving, and integrating military resources to ensure the most effective deployment of Federal disaster relief personnel and assets." *Id.*

7. NATIONAL GOVERNORS ASSOCIATION 2005-2006 Committees (Mar. 13, 2006), <http://www.nga.org/Files/pdf/COMMITTEELIST.pdf>.

8. NATIONAL GOVERNORS ASSOCIATION, Governor's Information Arkansas Governor Mike Huckabee, <http://www.nga.org/portal/site/nga/menuitem.29fab9fb4add37305ddcbeeb501010a0/?vgnextoid=3026ae3effb81010VgnVCM1000001a01010aRCRD> (last visited June 26, 2006).

9. NATIONAL GOVERNORS ASSOCIATION, Governor's Information Arizona Governor Janet Napolitano, <http://www.nga.org/portal/site/nga/menuitem.29fab9fb4add37305ddcbeeb501010a0/?vgnextoid=d008224971c81010VgnVCM1000001a01010aRCRD> (last visited June 26, 2006).

10. *Federalism and Disaster Response: Examining the Roles and Responsibilities of Local, State, and Federal Agencies: Hearing Before the H. Comm. on Homeland Security, 109th Cong. 2* (2005) (statement of Janet Napolitano, Governor of Arizona), available at <http://homeland.house.gov/files/TestimonyNapolitano.pdf>.

the existence of “constitutional, legal, and practical constraints on the [f]ederal government’s ability to preempt the local and [s]tate role in responding to disasters and emergencies,” shows that “local and [s]tate governments—and not the Feds—are primarily responsible for responding to natural disasters and other emergencies.”¹¹

However, some at the local level continue to support a strong federal role in this area. In October 2005, for example, the U.S. Conference of Mayors met with DHS Secretary Michael Chertoff, requesting greater active military involvement in the immediate response to a catastrophic event.¹² Similarly, George Annas, a leading public health law expert at Boston University Law School, advocates that if a national plan codifying public health emergency policy should be created, it should be at the federal level, not the state.¹³ In some ways, Professor Annas’ call for a federal plan was answered in the National Response Plan (NRP),¹⁴ which provides for federal coordination of federal, state, and local responsibilities in addressing a public health crisis amounting to an “incident of national significance.”¹⁵

I. THE MODEL STATE EMERGENCY HEALTH POWERS ACT AND ITS IMPLICATIONS

The central role of the states in responding to public health emergencies was confirmed by the promulgation of the Model State Emergency Health Powers Act (hereinafter, “the Model Act”).¹⁶ In October 2001,¹⁷ officials

11. Press Release, Comm. on Homeland Security, Statement by Chairman Peter T. King, Federalism and Disaster Response: Examining the Roles and Responsibilities of Local, State, and Federal Authorities 2 (Oct. 19, 2005), available at <http://homeland.house.gov/files/KingOpeningStatement10192005.pdf>.

12. See Press Release, The United States Conference of Mayors, The U.S. Conference of Mayors Hold Special Meeting on Emergency Response and Homeland Security, Update “National Action Plan for Safety in America’s Cities” (Oct. 24, 2005), available at http://www.usmayors.org/uscm/news/press_releases/documents/HomelandSecurityRelease_102405.pdf.

13. See George J. Annas, *Bioterrorism, Public Health, and Human Rights*, 21 HEALTH AFF. 94, 95 (2002).

14. See U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE PLAN iii (Dec. 2004), available at http://www.dhs.gov/interweb/assetlibrary/NRP_FullText.pdf [hereinafter NRP].

15. An “incident of national significance” is “an actual or potential high-impact event that requires a coordinated and effective response by and appropriate combination of [f]ederal, [s]tate, local, tribal, nongovernmental, and/or private-sector entities in order to save lives and minimize damage, and provide the basis for long-term community recovery and mitigation activities.” *Id.* at 67.

16. See THE CTR. FOR LAW AND THE PUB.’S HEALTH AT GEORGETOWN AND JOHNS HOPKINS UNIVS., THE MODEL STATE EMERGENCY HEALTH POWERS ACT (Dec. 2001), available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf> [hereinafter MODEL ACT].

17. See James G. Hodge, Jr. & Lawrence O. Gostin, *The Model State Emergency Health Powers Act – A Brief Commentary*, at 3, Jan. 2002, available at <http://www.publichealthlaw.net/MSEHPA/Center%20MSEHPA%20Commentary.pdf>.

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at the Center for Disease Control and Prevention (CDC), in collaboration with organizations representing states and localities, requested the development of a more effective legal structure to respond to catastrophic public health emergencies.¹⁸ The Center for Law and the Public's Health at Georgetown University and the Johns Hopkins Bloomberg School of Public Health, under contract to the CDC, responded with the Model Act, published in its current form on December 21, 2001.¹⁹

Under the Model Act, once a governor has declared a state of public health emergency, the governor and the state's public health authority have extraordinarily broad powers over public health emergency response.²⁰ A governor may make such a declaration with no outside consultation, and only a majority vote in both chambers of the state legislature can terminate the declaration against the governor's wishes.²¹ Once declared, the governor's authority includes suspending many state laws, directing all state resources toward emergency response, and mobilizing the state militia.²²

The state's public health authority "coordinate[s] all matters pertaining to the public health emergency response."²³ The public health authority may access and take control of any facilities and/or property and perform medical examinations and testing, including vaccination.²⁴ Any person refusing compliance with gubernatorial directives may be isolated or quarantined, which the public health authority may compel with criminal sanctions.²⁵ The Model Act's proposed establishment of sweeping state powers have sparked serious and widespread debate, particularly with regard to civil liberties.²⁶ Based on these concerns, some states, such as

18. See Lawrence O. Gostin, et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 JAMA 622, 622 (2002), available at <http://jama.ama-assn.org/cgi/content/full/288/5/622>.

19. See MODEL ACT, *supra* note 16.

20. See *id.* at art. IV.

21. See *id.* §§ 401, 405.

22. *Id.* §§ 403, 404.

23. *Id.* § 403(b).

24. *Id.* §§ 502, 505, 602-604.

25. *Id.* § 604.

26. See generally Larry Copeland, *CDC Proposes Bioterrorism Laws*, USA TODAY, Nov. 8, 2001, at 3A (noting concern that the Model Act would give states too much power); Marcia Coyle, *Pushing Tough State Health Laws*, NAT'L L.J., Nov. 12, 2001, at A1 (citing debate over whether the Model Act encroaches on individual liberties); Deirdre Davidson, *Inadmissible*, LEGAL TIMES, Nov. 5, 2001, at 3 (discussing debate spurred by the Model Act over states' power to control people during a health crisis); Alice Keesing, *Sweeping Health Powers Sought*, HONOLULU ADVER., Nov. 19, 2001, at 1A (citing civil liberties concerns); Michael Lasalandra, *War On Terrorism; Smallpox Attack Preparedness Plan Would Give Officials Sweeping Powers*, BOS. HERALD, Nov. 8, 2001, at 16 (citing civil liberties concerns); Raja Mishra & Beth Daley, *New Bill Targets Disease Spread Plan Raises Issue of Quarantining*, BOS. GLOBE, Nov. 11, 2001, at B7 (questioning the effectiveness of quarantine at countering epidemics); Wendy E. Parmet & Wendy K. Mariner, *A Health Act*

California, refused to consider the Model Act.²⁷ Although there continues to be substantial debate within the public health community about the model legislation, the Center for Law and the Public's Health states that (as of this writing) thirty-seven states and the District of Columbia have passed bills or resolutions that include provisions from or are closely related to the Model Act.²⁸ Some scholars dispute these numbers, claiming that the drafters of the Model Act "grossly overstate their support" and use "language of salespeople, not legal scholars."²⁹ However, it cannot be disputed that the Model Act has focused debate on the primacy of the states in emergency response.

II. SUPREME COURT JURISPRUDENCE AND THE MODEL ACT

Quoting the Supreme Court's 1824 decision in *Gibbons v. Ogden*,³⁰ a drafter of the Model Act contended upon its promulgation that "states have a deep reservoir of public health powers [encompassing an] immense mass of legislation [including] 'inspection laws, quarantine laws, and health laws of every description.'"³¹ Because of *Gibbons*, the drafters asserted that the "power to act to preserve the public's health is constitutionally reserved primarily to the states as an exercise of their police powers."³²

Yet, as other scholars have convincingly demonstrated,³³ even Chief Justice Marshall's statements in *Gibbons* in 1824 suggest a "more complex relationship" between Congress' power and state power over public health,³⁴ i.e., that *Gibbons* does not propose that states have exclusive or dominant power over health, but instead "that the power to protect the public health is an inherent and undeniable aspect of sovereignty that states

That Jeopardizes Public Health, BOS. GLOBE, Dec. 1, 2001, at A15 (questioning the necessity and wisdom of the Model Act); Nancy Shute, *Germs and Guns*, U.S. NEWS & WORLD REP., Nov. 19, 2001, at 50 (questioning whether a quarantine would be enforceable and be able to control an epidemic in modern times).

27. George J. Annas, *Blinded by Bioterrorism: Public Health and Liberty in the 21st Century*, 13 HEALTH MATRIX 33, 60 (2003) [hereinafter *Blinded*].

28. THE CTR. FOR LAW & THE PUB.'S HEALTH AT GEORGETOWN & JOHNS HOPKINS UNIVS., MODEL STATE PUBLIC HEALTH LAWS, THE MODEL STATE EMERGENCY HEALTH POWERS ACT, LEGISLATIVE STATUS UPDATE, Feb. 1, 2006, <http://www.publichealthlaw.net/Resources/Modellaws.htm#MSEHPA>.

29. See *Blinded*, *supra* note 27 (discussing inconsistencies in the number of states adopting a complete version of the Model Act). Some state legislatures adopted only select provisions of the Model Act, while others adopt a more complete version. *Id.*

30. 22 U.S. (9 Wheat.) 1 (1824).

31. Lawrence O. Gostin, *The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX 3, 24 (2003) (quoting *Gibbons*, 22 U.S. at 203) [hereinafter *Public Health and Civil Liberties*].

32. Gostin, et al., *supra* note 18, at 622.

33. See Wendy E. Parmet, *After September 11: Rethinking Public Health Federalism*, 30 J.L. MED. & ETHICS 201, 201-02 (2002) (discussing Chief Justice Marshall's statements in *Gibbons v. Ogden*).

34. *Id.* at 202.

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may exercise unless and until Congress preempts that power by exercising one of its own enumerated powers.”³⁵

The jurisprudence emanating from *United States v. Lopez*³⁶ and *United States v. Morrison*³⁷ also influenced the Model Act drafters. In these cases, the Supreme Court held, respectively, that regulating the possession of firearms near school zones and enacting the civil remedy provisions of the Violence Against Women Act (VAWA)³⁸ were not within Congress’ power under the Commerce Clause.³⁹ Citing *Lopez*, for example, one of the Model Act drafters argued that the “Supreme Court . . . has regarded federal police powers as constitutionally limited, and has curtailed the expansion of national public health authority.”⁴⁰

Yet, even *Lopez* and *Morrison* define commerce broadly as “includ[ing] the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.”⁴¹ The Court in both *Lopez* and *Morrison* maintained that where “activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”⁴² Local gun sales and enforcement of the VAWA may not have been considered commerce, but legislation regulating catastrophic public health emergencies with nationwide implications (such as Katrina) self-evidently affects economic activity which certainly affects interstate commerce.

A more recent Commerce Clause case decided after promulgation of the Model Act, strongly suggests that catastrophic public health issues will almost always be deemed as “substantially affect[ing] interstate commerce.” In *Gonzales v. Raich*,⁴³ the Court held that Congress’ Commerce Clause power includes the “power to prohibit the local cultivation and use of marijuana in compliance with California law.”⁴⁴ The two respondents in *Raich*, Angel Raich and Diane Monson, used medical marijuana pursuant to the terms of the California Compassionate Use Act

35. *Id.*

36. 514 U.S. 549 (1995).

37. 529 U.S. 598 (2000).

38. *See Morrison*, 529 U.S. 598 (construing the civil remedy provisions of the Violence Against Women Act (VAWA), 42 U.S.C. § 13981 (2000)).

39. *See Lopez*, 514 U.S. at 549 (holding that regulating firearms near school zones “exceeds Congress’ Commerce Clause authority”); *Morrison*, 529 U.S. at 602 (holding that “Congress lacked constitutional authority to enact [VAWA’s] civil remedy”); *see also* Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 HEALTH MATRIX 265, 289- 91 (2001) (discussing public health and the federal government’s power under the Commerce Clause).

40. *Public Health and Civil Liberties*, *supra* note 31, at 24 (citing *Lopez*, 514 U.S. at 566-68).

41. *Lopez*, 514 U.S. at 558-59; *Morrison*, 529 U.S. at 609.

42. *Morrison*, 529 U.S. at 610 (quoting *Lopez*, 514 U.S. at 560).

43. 125 S. Ct. 2195 (2005).

44. *Gonzales*, 125 S. Ct. at 2199.

of 1996 (CCUA).⁴⁵ That legislation “ensure[d] that ‘seriously ill’ residents of [California] have access to marijuana for medical purposes. . . .”⁴⁶ After federal Drug Enforcement Administration agents, relying on the federal Controlled Substances Act (CSA),⁴⁷ seized and destroyed the marijuana plants in question, both respondents challenged those actions,⁴⁸ arguing that the CSA’s prohibition of intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeded Congress’ authority under the Commerce Clause.⁴⁹

In rejecting this argument, the Supreme Court held, *inter alia*, that Congress’ assertion of authority under the Commerce Clause has “evolved over time,” and even the intrastate growth of marijuana does encompass interstate commerce. In so holding, the Court affirmed that Congress has the power to “regulate purely local activities that are part of an *economic* ‘class of activities’ that have a substantial effect on interstate commerce.”⁵⁰ It is difficult to imagine that if the Court finds that the wholly intrastate growth of marijuana affects interstate commerce and that the Congressional public health initiative to control substance abuse was an appropriate use of the Commerce Clause, then the Court would not also conclude that a massive public health catastrophe, such as Katrina or a pandemic flu, also substantially affects interstate commerce.

Considering *Raich*’s confirmation of federal authority over even purely local economic activities if they have a substantial effect on interstate commerce, any catastrophic public health disaster is likely to be considered subject to Congress’ commerce powers. The recent holding of *Raich* should diminish concerns about the ability of the federal government to

45. *Id.* at 2199-200; CAL. HEALTH & SAFETY CODE § 11362.5 (West 1991 & Supp. 2006)).

46. *Id.* at 2199 (paraphrasing CAL. HEALTH & SAFETY CODE § 11362.5(b)(1) (West 1991 & Supp. 2006)).

47. *Id.* at 2200 (construing Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801-802, 811-814, 821-830, 841-844a, 846-853, 854-864, 871-881, 882-887, 889-904 (2005))).

48. *Id.*

49. *Id.* at 2204-05.

50. *Id.* at 2205 (emphasis added) (citing *Perez v. U.S.*, 402 U.S. 146, 151 (1971); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942)). The Court in *Raich* stressed in its ruling that the California Compassionate Use Act fell within the purview of Congress’ power under the Commerce Clause. The word “‘economics,’” used by the Court, refers to “‘the production, distribution, and consumption of commodities.’” *Id.* at 2211 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). The Court notes that the Controlled Substances Act regulates a commodity (marijuana) for which there is an interstate market, and that prohibitions of intrastate possession or manufacture of an article of commerce is an established means of regulating commerce in that product. *Gonzales*, 125 S. Ct. at 2211 (citing 16 U.S.C. § 668(a) (2000) (prohibiting the possession, sale, or transport of bald and golden eagles); 18 U.S.C. § 175(a) (2000) (prohibiting biological weapons); 18 U.S.C. § 831(a) (2000) (prohibiting nuclear material); 18 U.S.C. § 842(n)(1) (2000) (prohibiting certain plastic explosives); 18 U.S.C. § 2342(a) (2000) (prohibiting contraband cigarettes)).

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intervene, and if necessary, supervise the response to a catastrophic public health disaster. While states and localities should universally be looked to as the first line of defense in public health catastrophes, when those levels of government are overwhelmed, as they were in Katrina, they must be aware of the possibility of federal intervention in, and possible takeover of, disaster relief.

III. THE MODEL ACT AND THE FEDERAL ROLE: AN EXAMPLE OF OVERLAP

In this regard, a vast array of federal laws and regulations exist that provide federal authority in areas that overlap with state powers afforded in the Model Act.⁵¹ One important example is the issue of quarantine.⁵² The Model Act grants state officials the authority to examine, vaccinate, isolate, and quarantine individuals who pose a threat to public health.⁵³ Yet Congress has granted quarantine power to the Surgeon General and Secretary of the Department of Health and Human Services (HHS) to “prevent the introduction, transmission, or spread of communicable diseases [and they] may provide for such inspection, fumigation, disinfection, sanitation, [and] destruction of . . . articles.”⁵⁴ The regulations implementing this grant of authority provide that the Director of the CDC may utilize the quarantine authority whenever it is “determine[d] that the measures taken by health authorities of any [s]tate or possession . . . are insufficient to prevent the spread of any of the communicable diseases from such [s]tate or possession to any other [s]tate or possession.”⁵⁵

This essentially means that any quarantine measures taken by a state may

51. For a summary of the major federal statutes and regulations involving federal public health powers, *see* Topic 7 of the U. OF MD. CTR. FOR HEALTH AND HOMELAND SECURITY, OFF. OF THE ATT’Y GEN. DEP’T OF HEALTH AND MENTAL HYGIENE, MD. PUB. HEALTH EMERGENCY PREPAREDNESS LEGAL HANDBOOK 34 (2005), *available at* <http://www.umaryland.edu/healthsecurity/docs/Handbook%209-9-05.pdf>.

52. *See* MODEL ACT, *supra* note 16, at § 604.

53. *See id.* §§ 602-604; *see also id.* at §§ 401-405, 501-507, 601-608 (describing all powers the Governor has during a public health emergency under the Model Act).

54. 42 U.S.C. § 264(a) (2000). This section is the Quarantine and Inspection part of the General Powers and Duties subchapter of the Public Health Service chapter of the Public Health Service Act (PHSA), 42 U.S.C. §§ 264-272 (2000). President Bush issued an executive order to amend the PHSA in 2005 to address “[i]nfluenza caused by novel or reemerging influenza viruses that are causing, or have the potential to cause, a pandemic.” Exec. Order No. 13,375, 70 Fed. Reg. 17,299 (Apr. 1, 2005).

55. 42 C.F.R. § 70.2 (2005) (defining measures to be taken “in the event of inadequate local control”). As of this writing, these quarantine regulations are undergoing a highly controversial proposed expansion that may afford the federal government even greater quarantine powers than are now available to it. *See, e.g.*, CDC, Control of Communicable Disease, 70 Fed. Reg. 71,892 (Nov. 30, 2005) (to be codified at 42 C.F.R. pts. 70 & 71), *available at* <http://www.cdc.gov/ncidod/dq/nprm/index.htm>; *see also* Lawrence K. Altman, *C.D.C. Proposes New Rules in Effort to Prevent Disease Outbreak*, N.Y. TIMES, Nov. 23, 2005, *available at* <http://query.nytimes.com/gst/health/article-page.html?res=9802E7DF1631F930A15752C1A9639C8B63> (last visited Apr. 19, 2006).

conflict with or duplicate measures taken by the CDC. It is well-established that federal authority will legally preempt state actions, whenever state legislation, such as legislation patterned after the Model Act, conflicts with existing federal law.⁵⁶ The federal laws and regulations discussed above dealing with quarantine illustrate the possibility of that preemptory power. To enact or implement state legislation without a recognition of existing comparable federal law may frustrate the very purpose of state emergency laws, i.e., to provide comprehensive, direct, and meaningful guidance for action in a public health emergency.

These potential conflicts are particularly worrisome in light of the impending possibility of a pandemic influenza outbreak. As do all nationwide catastrophes, such a pandemic would begin in localities, but ultimately affect the nation as a whole. In the event of an outbreak, resources should not be devoted to quibbling over who has quarantine and isolation authority, but toward coordinated efforts through all levels of government to address the potential catastrophe.

IV. THE FEDERAL GOVERNMENT AND HURRICANE KATRINA

Hurricane Katrina is a prime example of the impact of a catastrophic public health emergency on interstate commerce.⁵⁷ In the immediate aftermath of the hurricane, the destruction sent thousands of victims across state borders in search of food and shelter and required delivery of relief workers and supplies from across the nation.⁵⁸ The extended aftermath dramatically affected major nationwide industries.⁵⁹ For example, the

56. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW § 9.2 (1st ed. 2004) (explaining the preemption of federal authority over state authority); NORMAN REDLICH, ET AL., UNDERSTANDING CONSTITUTIONAL LAW § 6.09 (3rd ed. 2005) (illustrating congressional conflict and preemption).

57. HHS Secretary Mike Leavitt declared a federal public health emergency on August 31, 2005 for the states of Louisiana, Alabama, Mississippi, and Florida. Press Release, Department of Health and Human Services, HHS Delivering Medical Care to Help Evacuees and Victims (Aug. 31, 2005), available at <http://www.hhs.gov/news/press/2005pres/20050831.html>; see also Associated Press, *Before Katrina, the Economy was Doing Fine*, N.Y. TIMES, Sept. 8, 2005, at C6 (discussing the prediction by private economists and the Congressional Budget Office that "fallout from the storm would cause overall economic activity to slow in the second half of this year by one-half to a full percentage point on an annualized basis").

58. See James Dao, *Off the Map; No Fixed Address*, N.Y. TIMES, Sept. 11, 2005, at 41 (discussing "resettling evacuees" from the Gulf Coast who fled to other states after Katrina); Kirk Johnson, et al., *President Visits as New Orleans Sees Some Gains*, N.Y. TIMES, Sept. 12, 2005, at A1 (describing the extent of relief efforts from all over the nation); Robert D. McFadden & Ralph Blumenthal, *Bush Sees Long Recovery for New Orleans; 30,000 Troops in Largest Relief U.S. Relief Effort*, N.Y. TIMES, Sept. 1, 2005, at A1 (illustrating evacuation attempts for the city of New Orleans as well as New Orleans's Mayor C. Ray Nagin's fear that the hurricane might have killed thousands in his city).

59. See *Prices for Energy Futures Soar in the Wake of Hurricane Katrina*, N.Y. TIMES, Aug. 31, 2005, at C2 ("Economists warned that Katrina was likely to leave a deeper mark on the national economy than previous hurricanes because of its profound disruption to the

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hurricane severely impaired substantial portions of the country's oil refineries and curtailed offshore production of oil and gas.⁶⁰ As a result, the nation experienced a sharp and immediate spike in gasoline prices.⁶¹

Moreover, DHS' promulgation in December 2004 of the NRP further suggests that the federal government contemplates a significant role for itself in disaster response.⁶² DHS developed the NRP pursuant to the Homeland Security Act⁶³ and Homeland Security Presidential Directive 5.⁶⁴ It was intended to be an "all-discipline, and all-hazards approach to domestic incident management . . . built on the template of the National Incident Management System (NIMS), which provides a consistent doctrinal framework for incident management at all jurisdictional levels, regardless of the cause, size, or complexity of the incident."⁶⁵ The NRP provides "mechanisms for the coordination and implementation of a wide variety of incident management and emergency assistance activities," such as "[f]ederal support to [s]tate, local, and tribal authorities; interaction with nongovernmental, private donor, and private-sector organizations; and the coordinated, direct exercise of [f]ederal authorities, when appropriate."⁶⁶ The NRP strongly suggests that any time the President declares an emergency under the Stafford Act, it is an "Incident of National Significance,"⁶⁷ calling into play broad federal oversight mandated by that plan. While it is now widely acknowledged that the NRP was triggered belatedly,⁶⁸ Secretary Michael Chertoff did finally activate the NRP by declaring an "Incident of National Significance" as a result of the

Gulf of Mexico's complex energy supply network."); *see also id.* at C4 ("The airline industry felt the delayed brunt of Hurricane Katrina, with some airports running low on jet fuel and carriers canceling hundreds more flights.").

60. Jad Mouawad & Simon Romero, *Gas Prices Surge as Supply Drops*, N.Y. TIMES, Sept. 1, 2005, at A1.

61. Some states reached higher gas prices than they had ever experienced pre-Katrina. *See* Associated Press, *Gasoline Pricing Violations*, N.Y. TIMES, Sept. 11, 2005, at 14NJ-6 ("New Jersey's gasoline prices hit their highest levels ever on Labor Day, averaging \$3.16 a gallon for regular. . ."); Jad Mouawad, *Storm Stretches Refiners Past a Perilous Point*, N.Y. TIMES, Sept. 11, 2005, at 27 ("The hurricane also knocked off a dozen refineries at the peak of summer demand, sending oil prices higher and gasoline prices to inflation-adjusted records."); Mouawad & Romero, *supra* note 60 at A1 ("While gasoline averaged \$2.60 a gallon earlier in the week [of Aug. 29 to Sept. 2], unleaded regular gas was selling [on Aug. 31] at \$3.09 at stations in West Palm Beach, Fla.; \$3.49 in Indianapolis; and \$3.25 in San Francisco. Premium fuel was going for up to \$3.89 a gallon in Chicago.").

62. *See* NRP, *supra* note 14.

63. 6 U.S.C. § 112 (2000).

64. *See* NRP, *supra* note 14, at 1 (discussing the NRP's objectives).

65. *Id.* at i.

66. *Id.*

67. *Id.* at 4.

68. *See generally* Editorial, *Unprepared*, WASH. POST, Sept. 5, 2005, at A30 (providing critical discussion of the delay in declaring an "incident of national significance"); Spencer S. Hsu & Steve Hendrix, *Hurricanes Katrina and Rita Were Like Night and Day*, WASH. POST, Sept. 25, 2005, at A1 (highlighting differences between delayed response of federal government after Hurricane Katrina compared to the response for Hurricane Rita).

destruction caused by Hurricane Katrina.⁶⁹

The NRP authorizes a strong federal response even without requests for assistance from the states. It expressly provides that “[s]tandard procedures regarding requests for assistance may be expedited or, under extreme circumstances, *suspended* in the immediate aftermath of an event of catastrophic magnitude.”⁷⁰ The NRP also provides for federal law enforcement assistance and immediate response authority for “[i]mminently serious conditions [when] time does not permit approval from higher headquarters. . . .”⁷¹ When this situation exists, the NRP makes it clear that the Department of Defense (DOD) has authorized local military commanders and responsible officials from DOD to “take necessary action to respond to requests of civil authorities consistent with the Posse Comitatus Act (PCA).”⁷² Indeed, President Bush recognized this power under the NRP in his September 15, 2005 speech in Jackson Square, New Orleans by stating that “a challenge on this scale requires greater federal authority and a broader role for the armed forces[–]the institution of our government most capable of massive logistical operations on a moment’s notice.”⁷³

The NRP also emphasizes the importance of deploying the federal

69. Press Release, Department of Homeland Security, United States Government Response to the Aftermath of Hurricane Katrina (Sept. 1, 2005), *available at* <http://www.dhs.gov/dhspublic/display?content=4777>.

70. NRP, *supra* note 14, at 44 (emphasis added).

71. *Id.* at 42.

72. *Id.* at 43. The Posse Comitatus Act (PCA), 18 U.S.C. § 1385 (2000), prohibits the willful use of the Army or the Air Force for law enforcement purposes. *Id.* This includes interdiction of a vehicle, vessel, aircraft or other similar activity; directing traffic; search or seizure; an arrest, apprehension, stop and frisk, or similar activity. See U.S.N. COMMAND, FACT SHEETS, POSSE COMITATUS ACT, *available at* http://www.northcom.mil/about_us/posse_comitatus.htm (last visited Apr. 21, 2006). The PCA expressly applies to the Army and Air Force, and Congress has included the Navy and Marines through the Departments of Defense and Navy regulations. See 10 U.S.C. § 375 (2000) (ordering the Secretary of Defense to prescribe “such regulations . . . to ensure that any activity [regarding civilian law enforcement] does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity”); see also U.S. DEP’T. OF DEFENSE, DIRECTIVE NO. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, at 21 (Jan. 15, 1986), *available at* <http://www.dtic.mil/whs/directives/corres/pdf2/d55255p.pdf>. The PCA does, however, allow the use of the military to “execute the laws” if there is a statutory or a constitutional basis to do so. See 18 U.S.C. § 1385 (2000). Therefore, the federal government may apply military force if it can rely on the express language of federal statutes authorizing such force or if there is a recognized constitutional basis to do so, such as the inherent power of the President to act as a Commander-in-Chief. See, e.g., Insurrection Act, 10 U.S.C. §§ 331–335 (2000); 10 U.S.C. §§ 372(b), 382 (2000) (describing emergency situations involving chemical or biological weapons of mass destruction); Stafford Act, 42 U.S.C. §§ 5170b(c), 5192 (2000) (discussing federal emergency assistance and utilization of DOD resources); 18 U.S.C. § 831(e) (2000) (clarifying military assistance in emergency situations involving nuclear materials).

73. Press Release, The White House, President Discusses Hurricane Relief in Address to the Nation (Sept. 15, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html>.

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National Disaster Medical System (NDMS), a coordinated effort by HHS, DHS, DOD, and the Department of Veteran Affairs.⁷⁴ The NDMS works in collaboration with the states and other appropriate public and private entities in providing medical response, patient evacuation, and definitive medical care to victims and responders of a public health emergency.⁷⁵ This federal medical assistance is deployed through Emergency Support Function Annex #8 (ESF #8), “Public Health and Medical Services,” within the NRP.⁷⁶ ESF #8 provides for federally directed medical assistance to supplement state and local resources in response to an incident of national significance.⁷⁷ Katrina, as the first incident of national significance under the NRP, demonstrated the effectiveness of the NDMS and ESF #8, even when belatedly deployed.⁷⁸ For example, NDMS teams treated over 100,000 patients.⁷⁹ By September 3, HHS had delivered one hundred tons of medical supplies from the Strategic National Stockpile to Louisiana.⁸⁰ Despite this success, HHS and FEMA struggled to balance their respective roles in the deployment of NDMS teams.⁸¹ As such, *Lessons Learned* suggests a legislative return of NDMS back to HHS, where it was located prior to the creation of DHS.⁸²

Evidence of the potentially all-encompassing federal role in responding to a catastrophic public health emergency can be found by looking no further than the federal assets that were brought to bear—however belatedly—in the wake of Katrina. Roughly thirty federal departments and agencies were a part of that response effort.⁸³ This response exemplifies the vast resources of the federal government and includes everything from providing food, water, shelter, and first aid to offering immediate income assistance to displaced workers and supporting the operation and recovery of national banks in affected areas.⁸⁴ As an example, the help given by the federal government in the wake of Katrina included: deploying more than

74. NRP, *supra* note 14, at 69.

75. *Id.*

76. *See id.* at ESF #8-1.

77. *See id.* This support is categorized into the following areas: assessment of health/medical needs; health surveillance; medical care personnel; health/medical equipment and supplies; patient evacuation; in-hospital care; food/drug/medical device safety; worker health/safety; all-hazard consultation; mental health care; public health information; vector control; potable water/wastewater and solid waste disposal; victim identification/mortuary services; and veterinary services. *Id.* at ESF #8-6.

78. *See supra* note 3 and accompanying text.

79. *See* TOWNSEND, *supra* note 3, at 46.

80. *Id.*

81. *Id.* at 47.

82. *Id.* at 105.

83. *See* DEP’T OF HOMELAND SEC., HURRICANE KATRINA: WHAT GOVERNMENT IS DOING, <http://www.dhs.gov/interweb/assetlibrary/katrina.htm> [hereinafter What Government Is Doing] (providing a complete list of assistance given by federal departments and agencies as of February 28, 2006).

84. *See* What Government is Doing, *supra* note 79.

72,000 unified federal personnel; housing approximately 89,400 people in shelters nationwide; completing roughly 55,000 housing damage inspections; rescuing more than 33,000 lives; restoring more than 73% of affected drinking water systems in Louisiana and 78% in Mississippi; and serving more than 12 million hot meals and more than 8.2 million snacks to survivors.⁸⁵ These federal actions and the implementation of policies and programs under the NRP demonstrate the strong level of commitment and involvement by the federal government in preparation for and response to catastrophic public health emergencies.⁸⁶

This effort exemplifies the federal government's potential for and commitment to comprehensive disaster relief. The federal government has huge and diverse resources that state and local governments will simply not be able to access without the federal government during a catastrophic event. Accordingly, states must plan for a response to such an event with an eye toward the federal government. They should be aware of the substantial assistance the federal government can provide and be prepared to advise the federal government specifically of the role the state wants it to play. Generalized requests like Louisiana Governor Kathleen Babineaux Blanco's now famous plea, "I am going to need all the help you can send me,"⁸⁷ are unhelpful and may provoke the kind of floundering we saw from the federal government during Katrina. If states do not properly acknowledge the federal government's resources and powers in their disaster planning in this post-Katrina environment, they may find federal preemption of their authority. Only such an acknowledgement will ensure a healthy balance between the state and federal role during a catastrophic public health emergency.

The White House February 2006 self-evaluation, *The Federal Response to Hurricane Katrina: Lessons Learned*, acknowledges once again that, in the future, the federal government will aggressively assert its responder role in national public health catastrophes with nationwide consequences.⁸⁸ It requires DHS to act promptly to implement its "Interim National Preparedness Goal" to develop a National Preparedness System, i.e., to develop "integrated plans, procedures, training, and capabilities *at all levels of government*,"⁸⁹ by "establishing mechanisms for improved delivery of [f]ederal preparedness assistance to State and local governments, and

85. See What Government is Doing, *supra* note 79; U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, IN WASHINGTON: FEDERAL AGENCIES MAKE ADDITIONAL RESOURCES AND WAIVERS AVAILABLE TO ASSIST THOSE AFFECTED BY HURRICANE KATRINA, <http://www.ich.gov/> (last visited Apr. 21, 2006).

86. See *supra* notes 62-85 and accompanying text.

87. See Lipton, et al., *supra* note 2.

88. See *Lessons Learned*, *supra* note 6.

89. *Id.* (emphasis added).

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outlining actions to strengthen preparedness capabilities of [f]ederal, [s]tate, and local entities.”⁹⁰ *Lessons Learned* also introduces the concept of a National Operations Center (NOC).⁹¹ The NOC would operate as a super-coordinating center, “integrat[ing] the national response and provid[ing] a common operating picture for the entire [f]ederal government.”⁹² It would “ensure [n]ational-level coordination of [f]ederal, [s]tate, and local response to major domestic incidents.”⁹³ Yet *Lessons Learned* also recognizes that a much more aggressive approach from the federal government, and even possibly a takeover of a response effort, may be necessary during catastrophic events:

... [T]he response to Hurricane Katrina demonstrated that our current system is too reactive in orientation. Our decades-old system, built on the precepts of federalism, has been based on a model whereby local and [s]tate governments wait to reach their limits and exhaust their resources before requesting [f]ederal assistance. Federal agencies could and did take steps to prepare to extend support and assistance, but tended to provide little without a prior and specific request. In other words, the system was biased toward requests and the concept of “pull” rather than toward anticipatory actions and the proactive “push” of [f]ederal resources.⁹⁴

CONCLUSION

In conclusion, the federal government is taking great strides in its recognition of the need for coordination between the various levels of government during a catastrophic public health emergency. It is undisputed that states and localities have primary responsibility over public health emergencies, pursuant to their constitutional police powers.

90. Press Release, The White House, December 17, 2003 Homeland Security Presidential Directive/Hspd-8 (Dec. 17, 2003) *available at* <http://www.whitehouse.gov/news/releases/2003/12/20031217-6.html>.

91. *See* TOWNSEND, *supra* note 3, at 69.

92. *Id.*

93. *Id.* The White House proposal to create the NOC outside of the framework of DHS appears to contemplate the transfer of federal “response” leadership away from DHS. *Id.* at 69-70. This leadership is expressly granted to DHS in the NRP. *See, e.g.,* NRP, *supra* note 14, at 9. *Lessons Learned* does not clearly indicate to what part of the federal government this leadership will be transferred. However, one can fairly assume that because the White House drafted *Lessons Learned*, this leadership would transfer back to the White House, in the form of its domestic security advisor, who was the principal author of *Lessons Learned*. Ironically, this schema mirrors the leadership structure as it was prior to the creation of DHS, when Governor Ridge coordinated the federal efforts before he became Secretary of Homeland Security. *See* Press Release, The White House, Executive Order Establishing Office of Homeland Security (Oct. 8, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/10/20011008-2.html>. Wherever the federal leadership resides, it is critical that federal leadership is skillfully deployed. *See* Editorial, N.Y. TIMES, Feb. 25, 2006, at A14 (“If there’s one thing that Hurricane Katrina has taught us, it is that just shuffling the bureaucratic deck does not make us safer.”).

94. *See* TOWNSEND, *supra* note 3, at 66.

Catastrophic public health emergencies that are aptly deemed incidents of national significance, such as Katrina and potentially a pandemic flu outbreak, are important exceptions to this rule. If deployed as intended, the NRP, as supplemented by the recommendations of the *Lessons Learned* self-evaluation, addresses these exceptions without destroying the rule. When DHS labels a catastrophe an “incident of national significance,” it is not an immediate call for a federal takeover of disaster relief. In fact, what the NRP contemplates by examining its recommended incident command structures is a coordinated, high-level, real time federal communication with states and localities that in the best of circumstances would encourage a coordinated and collaborated effort deploying federal assets as a supplement to state and local supervision of an emergency response.⁹⁵ Only in a worst-case scenario would the federal government find it necessary to takeover a relief effort. To avoid the latter result, states must fully comprehend the massive power of the federal government to act in such a fashion that makes it a supportive ally, rather than upending the states’ lead in the response.

95. NRP, *supra* note 14, at 29-30.