

False Conflict: Who's in Charge of National Public Health Catastrophes

By Michael Greenberger*

Hurricane Katrina's devastation renewed an old debate: which level of government is in charge of catastrophic disaster with national impact? Wild finger-pointing among different levels of government after Katrina has been premised upon many theories about what went wrong during those fateful days. Certainly a major focus of that debate was the federal government's failure to implement effectively the Department of Homeland Security's (DHS) December 2004 National Response Plan.¹ This plan is designed to coordinate capabilities and resources of all levels of government into a unified, all-discipline, and all-hazards approach to domestic incident management.

To be sure, states and localities are undeniably the primary responders to a traditional public health emergency. This notion is well established by precedent going back to the 1824 Supreme Court decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), which firmly stated that "health laws of every description, as well as laws for regulating the internal commerce of a State," were under the authority of the individual states, pursuant to their police powers. That precedent was confirmed in the early twentieth century in the landmark case of *Jacobson v. Massachusetts*, 186 U.S. 11 (1905), in which the Supreme Court upheld Massachusetts legislation authorizing the City of Cambridge's board of health to compel smallpox vaccinations pursuant to state police powers.

Reacting to criticism of the federal government's response during Katrina,

federal officials, including President Bush, have since suggested federalizing response operations to national public health catastrophes, including deployment of military forces. Addressing the nation about Hurricane Katrina on September 15, 2005, President Bush stated, "[i]t is now clear that a challenge on this scale requires greater federal authority and a broader role for the armed forces." Karl Rove, President Bush's chief advisor and Deputy White House Chief of Staff, reportedly opined that "the only mistake that we made with Katrina was not overriding the local government."

As we show below, the federal government in fact has a broad panoply of powers to respond to a catastrophic public health emergency. Although this point has been debated in the past, recent Supreme Court authority has seemingly settled the issue of whether there can be federal supremacy in dealing with these kinds of public health matters. For example, in the 2005 case of *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), the Supreme Court held that the Controlled Substances Act, a federal public health provision enacted under the Commerce Clause, properly preempted the California Compassionate Use Act of 1996, allowing access to and distribution of marijuana to seriously ill patients. Specifically, the Court held that the federal government could regulate the purely intrastate commerce of marijuana in California, because this activity has interstate effect. Similarly, the federal government must surely be able to supervise the response to events such as a catastrophic health emergency affecting the nationwide movement of food, fuel, clothing, medicine, and people, because this kind of event would also clearly impact interstate commerce.

In the wake of Katrina, and statements about the need for federal control in this area, localities and states have sharply criti-

cized claims of federal supremacy. For example, Governors Mike Huckabee (R-Ark.), and Janet Napolitano (D-Ariz.), on behalf of the National Governors Association, recently stated that "[s]tate and local governments are in the best position to prepare for, respond to, and recover from disaster and emergency." Representative Peter T. King (R-NY), chairman of the House Committee on Homeland Security, has argued that "local and State governments – and not the Feds – are primarily responsible for responding to natural disasters and other emergencies."

It is the thesis of this paper, however, that this ongoing argument between the federal government and its state and local counterparts presents a false dichotomy. The solution to these seemingly contradictory views can be found in the National Response Plan (NRP). Although, concededly, states and localities are the primary responders to public health emergencies, response to emergencies on a catastrophic and nationwide scale similar to Katrina require many more resources, both in quantity and diversity, than a state and/or city can provide. It is these catastrophic situations that the NRP addresses. The NRP is activated when the Secretary of the DHS declares a catastrophe to be an "incident of national significance," *i.e.*, "an actual or potential high-impact event that requires a coordinated and effective response by an appropriate combination of Federal, State, 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."

Contrary to the beliefs of many, however, activation of the NRP is not necessarily a green light for the federal government to supersede the response efforts of local and state authorities. In fact, a fair reading of the NRP is that it

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¹ DHS, NATIONAL RESPONSE PLAN (NRP) (Dec. 2004), available at http://www.dhs.gov/interweb/assetlibrary/NRP_FullText.pdf (last visited Jan. 19, 2006).

contemplates a coordinated, real time response with the states and localities working together with the federal government, deploying federal assets as a supplement to state and local supervision of an emergency response. Only in a worst-case scenario would the federal government find it necessary to direct and supervise the relief effort.

The NRP was promulgated by DHS in December 2004 under direction of Congress, through the Homeland Security Act (Pub. L. 107-296), and the President, through Homeland Security Presidential Directive 5. It is “an all-discipline, 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.” The NRP provides “mechanisms for the coordination and implementation of a wide variety of incident management and emergency assistance activities,” such as “Federal support to State, local, and tribal authorities; interaction with nongovernmental, private donor, and private-sector organizations; and the coordinated, direct exercise of Federal authorities, when appropriate.” (Emphasis added.) The NRP recognizes that any time the President makes a declaration of an emergency under the Stafford Act (the legislation establishing programs and processes for the federal government to provide all-hazards disaster and emergency assistance to states and localities), the emergency automatically becomes an “incident of national significance,” calling into play a broad range of federal assistance.

For example, the NRP emphasizes the importance of deploying the federal National Disaster Medical System (NDMS), a coordinated effort by DHS, the Department of Defense (DOD), the Department of Health and Human Services (DHHS), and the Department of Veteran Affairs. 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. This federal medical assistance is deployed through Emergency Support Function (ESF) Annex #8, “Public Health and Medical Services,” within the NRP. ESF #8 provides for federally directed medical assistance to supplement state and local resources in response to an incident of national significance.

The NRP provides for federal law enforcement assistance and immediate response authority for “[i]mminently serious conditions [when] time does not permit approval from higher headquarters.” When this situation exists, the NRP clarifies that DOD has authority to use local military commanders and responsible officials from DOD components and agencies to “take necessary action to respond to requests of civil authorities consistent with the Posse Comitatus Act,” the statute making it illegal to use the active military to enforce laws.

Yet it is clear that all of this can be done as a *supplement* to state and local supervision. Every coordination effort contemplated by the NRP has a state coordinating officer or official at the top level of planning. Such command structures ensure that States’ rights and interests will not be put to the side. Accordingly, the NRP expressly and repeatedly recognizes that states and localities know their jurisdictions and their needs more intimately than their federal counterparts, while simultaneously providing for those states and localities to utilize federal resources to which they would not otherwise have access.

The organizational charts for the federal response under the NRP (at pages 29-32) foster an image of a war room central processing or executive operation unit with cabinet or sub-cabinet level participation under the direction of the Secretary of Homeland Security at the table, planning strategy in a constant and real-time communication with state and local authorities. Coordination of this type, if skillfully provided as a supplement to state and local leadership, may very well ensure that the question of “who’s in charge” need not be reached. As Federal Emergency Management Agency (FEMA) Regional Director John Pennington puts it:

Most emergency incidents are handled on a daily basis at the local level, but the challenges we face as a nation are far greater than the capabilities of any one community or state. . . . In any disaster, the coordination, planning, and unity of our response are the key determinates of success, and are in fact the guiding principles of the new National Response Plan.

It is now widely acknowledged that the NRP was triggered quite belatedly during Katrina. On a practical basis, however, there is every indication that it was never implemented as intended, *i.e.*, there was almost certainly no central federal operations unit composed of cabinet or sub-cabinet level representatives sitting in an executive operations center communicating on a real-time basis with state and local government. Instead, the federal response, even after the NRP was enacted, was mostly ad hoc, and to the extent it was centralized, the federal representatives were not sufficiently high-level.

Even when belatedly triggered, the eventual federal response to Katrina exemplifies the potential of the NRP, as a supplement to state efforts. For example, FEMA deployed more than fifty-seven NDMS teams and twenty-eight search and rescue teams with nearly 1,800 personnel to save lives and render medical assistance. Over 5,000 Coast Guard personnel worked to save or evacuate 33,520 lives. Through Emergency Management Assistance Compacts, more than 320,000 National Guard members from throughout the country were made available to support emergency operations, including augmenting civilian law enforcement. In addition to shipping basic first aid materials and supplies to the devastated area, DHHS established a network of forty medical shelters, staffed by 4,000 medical personnel, with a collective capacity of 10,000 beds. The Department of Agriculture’s Food and Nutrition Service provided food at shelters and mass feeding sites, issuing

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frequently do not receive their appropriate due in assessing whether to regulate.

As Chairman Donaldson put it, “I want us to become better equipped to see over the hills and around the corners for problems that may be looming in the distance.”² The decision to regulate hedge funds was just one instance of this proactive approach. In Enron’s wake, the SEC regulated hedge funds – over the cautions of Federal Reserve Board Chairman Greenspan and others regarding the costs of regulating the industry – largely on the basis that it had become a \$1 trillion industry and future abuses might occur.

Designing a “goldilocks” regulatory regime that does not go too far or do too little is hard. To craft an effective regime, regulators have to appraise objectively and rationally the costs and benefits of regulating; regulators’ judgment cannot be obscured by cognitive biases. An unbiased, more probabilistic assessment of the consequences of risk regulation should result in more effective regulation that better achieves whatever goal is set out. An SEC that emphasizes protecting investors against fraud may by its own lights crack down too heavily if it irrationally fears another series of scandals.

A Suggestion

Because securities regulators have imperfect information and thus regulate under uncertainty, the SEC cannot escape the risk that it will get it wrong. The impact politics and psychology can have on regulatory decision making

² SEC Chairman William H. Donaldson, Remarks Before the Practicing Law Institute, Mar. 5, 2005, available at <http://www.sec.gov/news/speech/spch030504whd.htm>.

exacerbates the risk that the SEC will get it wrong by overregulating, at least after periods of crisis.

If overregulation is a risk – because of imperfect information, politics, and/or psychology – what can be done about it?

Policymakers often see themselves as having two choices: adopt mandates or do nothing. A third option exists. Instead of an all-or-nothing approach, the Commission should increasingly consider default rules that parties can opt out of. Defaults allow parties room to order their affairs to fit their needs. The ability to opt out also provides a safety valve against overregulation. This approach would have been particularly appropriate for regulating hedge funds since hedge fund managers and investors are sophisticated parties who negotiate. Instead of mandating that a hedge fund manager register as an investment adviser, the SEC could have required a hedge fund manager to register or disclose to the fund’s investors why the manager has chosen not to. Investors could then evaluate the importance of investment adviser registration against the backdrop that managers must register as a default.

Precedent exists for a default-rule approach. Two examples under the Sarbanes-Oxley Act include the requirement that public companies adopt a code of ethics for senior financial officers or explain why no code was adopted and the requirement that public companies have a financial expert on the audit committee or explain why not. In early 2005, the SEC demonstrated the use of defaults when it authorized, but did not require, mutual funds to impose a redemption fee on short-term trading.

The SEC could consider an even less intrusive approach. The SEC, in appro-

priate cases, could simply articulate best practices to guide securities markets. The Commission could express its view of best practices formally through releases or informally through the speeches of commissioners and division directors. For example, instead of the new hedge fund rule, the SEC could have emphasized particular best practices for the hedge fund industry that hedge fund managers and investors would have been encouraged, but not required (even as a default matter), to follow. By emphasizing best practices, the Commission can provide investors concrete guidance that facilitates market discipline. Such guidance provides a yardstick against which investors can evaluate directors, officers, mutual funds, hedge funds, etc. to see how they measure up. Investors can then allocate their capital as they see fit.

A best-practices approach presents challenges. One could easily imagine best practices as roadmaps for the plaintiffs bar. Second, there is no guarantee that commissioners would agree on best practices. Still, such an approach merits consideration.

Conclusion

Although I believe that the SEC should have stayed the course and abstained from regulating hedge funds, I understand regulators’ discomfort with standing by in the post-Enron era as the hedge fund industry ballooned to \$1 trillion.

When the SEC regulates in the future, the agency increasingly should consider a more restrained style of securities regulation that relies more on default rules. In some cases, the SEC should consider doing nothing more than recommending best practices that market participants can evaluate for themselves. ○

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emergency food stamps and infant formula, and distributing food packages directly to needy households.

In sum, the NRP is a well-thought out, all-hazards plan that addresses the

necessity of a delicate balance between different levels of government. If implemented as intended, with true coordination between stakeholders from all levels of government in a classic war

room-like setting, the NRP should end the false dichotomy about whether state and local units or the federal government supervises the response and recovery effort. ○