

KATRINA: CATATONIA COMPOUNDS CATASTROPHE

John C. Wohlstetter, Senior Fellow, Discovery Institute (release 9/7/05)

While more information will surely come in, it appears that enough is known to draw six lessons taught anew by Katrina. At bottom the prime policy failure seems to be that state officials were unwilling to surrender authority to the federal government, but wanted the federal government to take responsibility and provide vast resources. *A fundamental managerial truth: When power is decoupled from responsibility—especially when key decision-makers lack sufficient mutual trust—the result is policy paralysis.*

Here are six key lessons from Katrina and its aftermath: (1) prevention beats recovery as a strategy—especially when timely measures to limit damage require drastic decisions taken when whether disaster strikes remains highly uncertain; (2) lax leaders are lethal when disaster strikes; (3) in race-obsessed urban America, the politics of race can trump civil order; (4) when multiple jurisdictions must cooperate, it is essential that there be mutual trust at all levels of joint administration, plus power fully commensurate with relative responsibility; (5) when catastrophe strikes, the President gets the credit or blame; (6) in a global media age, America's credibility is on the line, always.

Put another way, there was a massive strategic failure of long-term federal planning that dwarfed tactical federal failures this past week, and a massive strategic and tactical failure of medium- and short-term state and local planning that dwarfed myriad cases of individual heroism. Worse, it is now clear that state officials refused to give their legally required consent to surrender control to federal authorities despite their own massive default on their obligation to protect the public. Instead, state officials jealously guarded their ultimate legal power of decision while shifting maximum responsibility to the federal government, thus creating an intolerable situation. Democratic Governor Kathleen Blanco thus refused a direct request on Friday, Sept. 2, from President Bush that the National Guard be federalized; Bush made the request after becoming disgusted with anarchic conditions at the Convention Center.

Each of the above points is explored in depth below. After that comes a look at the future, discussion of four policy recommendations, and a few closing thoughts. The recommendations: (1) Build ASAP Category 5 storm protection for the restored New Orleans and the Louisiana port complex; (2) Deploy survivable electric power and communications for first responders; (3) When catastrophe endangers civil order and raises the plausible prospect of harm nationwide in scale, establish emergency federal authority—for 30 days in the President's sole executive discretion free of legislative and judicial review, and for 90-day increments thereafter per Congressional authorization and subject to judicial review; (4) in such emergencies make it a federal felony punishable by a mandatory minimum ten-year sentence to commit crimes, state or federal, that foster deterioration of civil order, and permit discretionary imposition of the death penalty.

Introduction: A Capsule Chronology. Katrina began life as Tropical Depression 12 (winds <39 mph) near the Bahamas, so designated by the National Hurricane Center on

Tuesday, Aug. 23. Wed. Aug. 24 Katrina pointed toward the Florida Keys and was designated a Tropical Storm (winds 39-73 mph). Thu. Aug. 25 it reached Category 1 Hurricane status (winds 74-95 mph, storm surge 4-5' per the Saffir-Simpson Scale); Governor Jeb Bush declared a state of emergency in Florida. Fri. Aug. 26 it hit Florida as a Cat 1 and then crossed into the Gulf of Mexico. Sat. Aug. 27 it jumped Cat 2 (winds 96-110 mph, surge 6-8') to Cat 3 (winds 111-130 mph, surge 9-12'). *Moving slowly, Katrina was bound to increase in strength, barring a wind change.* Katrina's Gulf Coast landfall was then estimated to be 48-60 hours away. *Two days before the storm struck, President Bush declared New Orleans a federal disaster area, making expedited aid possible upon state request.* Governor Blanco, at a press conference with New Orleans Mayor Ray C. Nagin, told reporters that the President had telephoned her and urged mandatory evacuation of the city. The Sept. 6 American Prowler, however, cites a source stating that Bush actually demanded they order evacuation. (Reality: 43 couldn't legally force this.)

Sun. Aug. 28 it jumped Cat 4 (winds 131-155 mph, surge 13-18') to Cat 5 (winds >155 mph, surge >18'). Mayor Nagin ordered a "mandatory" evacuation. President Bush declared Mississippi, Alabama and Florida federal disaster areas. The Federal Emergency Management Agency (FEMA) pre-positioned supplies at staging centers in Georgia and Texas. Monday, Aug. 29, at 7:10 AM, Katrina made landfall as a mid-range Cat 4 (140 mph winds, 15' storm surge at New Orleans) and proceeded inland as a tropical storm. Louisiana called up National Guard reserves. Tues. Aug. 30, past New Orleans, Katrina became a tropical depression again. Federal versus state actions since then remain in sharp dispute. (For more details see section 2 below.)

Radio hostess and blogger Laura Ingraham helpfully posted the key weather advisory for Sunday mid-morning, August 28, re Katrina and New Orleans. It demolishes the argument that officials lacked adequate warning. Herewith pertinent parts of that bulletin (1011 AM CDT Sun. Aug 28 2005 Weather Message National Weather Service New Orleans LA), 21 hours before Katrina made landfall:

"Hurricane Katrina most powerful hurricane with unprecedented strength...rivaling the intensity of Hurricane Camille of 1969. Most of the area will be uninhabitable for weeks...perhaps longer. At least one half of well constructed homes will have roof and wall failure...all gabled roofs will fail...the majority of industrial buildings will become non-functional....All wood framed low rising apartment buildings will be destroyed...concrete block low rise apartments will sustain major damage....high rise office and apartment buildings will sway dangerously...a few to the point of total collapse. All windows will blow out. Airborne debris will be widespread...and may include heavy items such as household appliances and even light vehicles....Power outages will last for weeks...As most power poles will be down and transformers destroyed. Water shortages will make human suffering incredible by modern standards."

1. Prevention Beats Recovery as a Strategy—Especially When Timely Measures to Limit Damage Require Drastic Decisions Taken When Whether Disaster Strikes Remains Highly Uncertain. No entity of government—federal, state or local—seems to have applied lessons from the UK and Netherlands response in 1953 to the great North Sea flood that sent 12-1/2 feet of water in a surge, killing 307 English and 1,835 Dutch. The

UK built the Thames Barrier; the Netherlands built the Delta Works. *Compare Dutch and US posture: The Dutch erected, at huge expense, protection against a 10,000 year flood; the US protected New Orleans against a 50-year storm. Federal, state and local authorities built a barrier good only for a medium storm passing by with convenient haste.* (The Dutch spent \$5 billion over a 50-year period—about \$15 billion in current dollars; a *per capita* equivalent investment by the US, whose population is 18 times that of the Netherlands, would be \$270 billion over 50 years.)

Among the links below are two with maps showing the auto routes out of New Orleans. (There are, of course, airport and train exits; why these were not better used is still unanswered.) In short, *there are but five exit roads out of New Orleans, three fully dependent upon the water level in Lake Pontchartrain* (a 41-mile by 25-mile lake 12-14'): (1) Interstate 10, which branches east and west around Lake Pontchartrain. (2) the Pontchartrain Causeway, which spans north across the lake. I-10 West branches fairly quickly, into I-10 West and I-55 North, which runs between Lake Pontchartrain (east of I-55) and Lake Maurepas (west of I-55). I-10 East traverses the southeastern corner of Lake Pontchartrain (nearest the Gulf of Mexico) before reaching I-59 North and I-12 West, both north of Lake Pontchartrain. (3) U.S. Highway 90 crosses a land bridge between the Lake and Lake Borgne, which empties into the Gulf of Mexico; (4) U.S. Highway 11 crosses the Lake over water; (5) U.S. Highway 61 goes west-northwest, not too near the Lake (near the railway line. Check out the map, and see just how vulnerable to disruption egress from the city is. Drivers needed to decamp early.

Having most exit spans dependent upon the water level of a huge lake staying below multiple roads violates the cardinal rule of infrastructure disaster planning: Never leave critical single-, low-number or common points of failure. Lake Pontchartrain Causeway, at 23.5 miles, is the longest over-water span on the planet; 30,000 cars cross it each normal weekday. It is only six feet above the lake in spots (average height is 25 feet. *But it is the lowest point that determines how survivable a bridge over hurricane-troubled water is), and is closed when winds top 39 mph*—NOT a misprint. It was closed Monday, Aug. 28 and collapsed Tuesday, Aug. 29, around 9 AM. To appreciate the Pontchartrain span vulnerability, check out the picture of the Causeway in the links below. Interstate 10 is at least elevated for most of its route.

Everyone knew that *the New Orleans 475-mile levee system (average height: 16 feet) was built to withstand a Category 3 storm—but only if (unlike Katrina) it was moving rapidly over the area.* One Army Corps of Engineers regional director's estimate was a \$14 billion, 30-year project for full Cat 5 protection, with six years alone for a feasibility study. A press report cites another regional Corps project manager quoting \$2.5 billion for full protection. *The part of the levee that was breached (17th St.) was concrete, not earthen, and had just been reinforced.* OMB, for its part, rated the Corps Flood Damage Reduction Program "Results not Demonstrated" in 2003, for want of long-term outcome measures; OMB proposed that the Corps widen its program. For the FY2005 federal budget, the Corps sought \$105 million in hurricane & flood funding for New Orleans. The White House cut it to \$40 million and Congress approved \$42.2 million. *None of the cut funding would have affected the levee breach.* Insurance is expected to cover \$25 to

\$35 billion of a bill whose preliminary estimate is \$100 billion; flood losses are excluded from insurance coverage. Federal officials believe it will take three months to drain and three months to dry the city. NY Times op-ed pundit John Tierney suggests that federal flood insurance protection encourages locals to live in flood-prone areas, and undermines local initiative to take protective measures.

2. Lax Leaders Are Lethal When Disaster Strikes. WSJ's James Taranto argues that it is too early to apportion blame and, in terms of a definitive evaluation he is right; but enough is known now to make a solid preliminary assessment. Former Oklahoma Governor Frank Keating explained that the Federal Emergency Management Agency (FEMA) coordinates based upon *local* request. He said: "Leadership in the local area is everything." *Locals that regard Washington as an all-purpose bailout Nanny are asking for trouble.* New Orleans chose to rely on levees only able to keep out fast Cat 3 storms, coupled with evacuation; it had no serious plan to rapidly evacuate the helpless if hit harder.

Federal responders were actually close to New Orleans within 12 hours, but roads were swamped; Swift boat inflatables were brought in, but had to be trucked into the immediate area. (A friend who has lived down there says she bets the construction of the levee upgrade was done shoddily, with lower-grade concrete purchased than was intended, and the difference pocketed by various parties. In a city whose corruption is epic, this is easy to credit. The Sept. 6 American Prowler believes that if Congress seriously investigates misuse of federal funds by state and local officials—nearly all Democrats—lots of mischief will come to light.

Despite 43's having declared New Orleans a disaster area two days before Katrina hit, the state Governor apparently did not promptly request assistance. By the time she did, the waters had cut New Orleans off from rapid emergency entry. That is most of the reason why the feds arrived late on the scene. A retired FEMA official with two decades of disaster experience vouchsafed to me that given a firm request for assistance from a Governor, it is inconceivable that a President would refuse aid.

Now, check out the picture in the links below and count the empty school buses sitting in a flooded parking lot, as of Sept. 1. I counted about 200, per-bus capacity (about 15 windows each—so figure two on each side of the aisle) about 60. Washington Times editor Wesley Pruden informs us that the city has 2,000 buses. So, even with 25 percent in maintenance and another 25 percent to ferry folks to the train station and airport. In a single trip 60,000 of the city's estimated 134,000 needy residents could have been evacuated; starting Saturday morning would have enabled one round-trip plus a second one-way trip for bus riders. City data gives 8 hours each way to the nearest three cities given evacuation traffic volume; so figure one round-trip plus a one-way haul consumes 24 hours; add in 12 hours for two loadings and one unloading (there is no need to return after the second outbound trip, as evacuation is then complete). Bus total: 120,000, using half the city's buses.

The remaining 14,000? By train or plane, running outside normal commercial hours, so that commercial exit is not impeded. Louis Armstrong International Airport handled 160 flights and 14,000 passengers per day in June 2005. At this writing, statistics for the city's Union Passenger Terminal are not available, but surely thousands could have been taken out by train. *Still, given a Saturday dawn decision and everyone should have made it by Sunday evening, 12 hours before Katrina made landfall. True, the Mayor did order on Sunday a complete evacuation of the city, but telling 98-year-old grandmas to clear out of Dodge without offering transport is King Canute squared.*

The NY Times reports that local official assumed that neighbors would play "Good Samaritan" and transport the immobile. How improbable is this? Consider that an astonishing 85 percent of New Orleans residents are native-born, in a country whose population relocates with dizzying regularity. Folks are thus very reluctant to leave. On July 22, 2005 AP reported that a recent survey conducted by the University of New Orleans showed that 60 percent of New Orleans residents would not evacuate in event of a Cat 3 hurricane. A Labor Day front-pager in the Washington Post is replete with stories of residents refusing to leave—some finally are doing so only at gunpoint—after a week of catastrophe. *The continued refusal of residents to evacuate underscores the futility of the Mayor's "Samaritan" notion of rapid pre-flood exit.*

And what kind of environment are they living in? It now appears that 140,000 to 160,000 homes have been destroyed by Katrina. 78,000 barrels of oil have been dumped into Lake Pontchartrain, and 2,000 flooded underwater fuel tanks have leaked, creating a toxic pool, a breeding round for pathogens. With decaying corpses floating all over the place, a public health emergency seems just around the corner.

What about the state? Under the State's *Emergency Operations Plan* (EOP) the Governor is tasked with the following in event of a "catastrophic" hurricane (like Katrina): "(a) proclaim a state of emergency; (b) issue supplementary declarations and orders, as the situation requires; (c) authorize and direct the use of state government personnel and other resources to deal with the emergency; (d) authorize and direct the authorities of non-risk parishes to coordinate the operation of shelters with {the Department of Social Services] in conjunction with [the American Red Cross], and lend all possible assistance to the evacuation and shelter effort; (e) *request Federal government assistance as needed.*" (Emphasis added.)

Part II of the EOP (Situations and Assumptions) says, in pertinent part: (II-A-3) a Cat 3, 4 or 5 hurricane could cause tidal surges of 20 feet in some parishes, not counting tidal effects (which can add 2' to the height of a surge), wind waves and storm rainfall; (II-A-4) above normal water levels and hurricane surge could cause over-topping or failure of levees; (II-A-5) *it will take a long time to evacuate large numbers of people from the region*; (II-A-6) many evacuation roads are new bodies of water and susceptible to flooding" (II-A-7) the majority of the greater area population (nearly 1.5M) are thus at risk; (II-A-8) many of the Region's emergency shelter facilities could be inundated in event of a slow-moving Cat 3 or greater hurricane; (II-A-9) in event of a "catastrophic" hurricane the evacuation of over a million refugees could overwhelm shelter resources. A

table attached to Annex D gives times for each parish, based upon whether the storm is a slow Cat 3, a 4 or a 5: (1) number of evacuees; (2) number of vehicles needed; (3) cut-off hours—when winds prevent evacuation; (4) clearance hours—the total time needed, allowing two hours each at start and finish and assuming smooth traffic flow; (5) total decision hours—the time for a final call before the storm arrives. On what appears, none of this was done in a serious way. (I could not find the table for Annex D online, which would give specific times for decisions; the document warns that it will take “a long time” to evacuate people. (Emphasis added.)

It gets worse. A Sept. 5 Newsmax posting shows: *Even Friday, Sept. 2, the Governor wouldn't act, despite being urged by the Mayor to immediately request federal aid.* Worse still: *A report on Fox Cable's "The O'Reilly Factor" Gov. Blanco did not sign an evacuation order until Wednesday, Aug. 31; the levee having caved Monday night, Aug. 29.* Newsmax reports:

“After days of blaming the federal officials for not responding quickly enough to the Hurricane Katrina crisis, [the mayor] praised [President Bush]—and charged that [the governor] has delayed federal rescue efforts by 24 hours.

“I'm so happy that the president came down here {Nagin told CNN re Bush's Friday Sept. 2 visit}. He came down and saw it, and he put a general on the field....And when he hit the field, we started to see action.’

“But Nagin had harsh words for his state's leaders, telling CNN: ‘What the state was doing, I don't frigging know. But I tell you, I'm pissed. It wasn't adequate.’

“[Nagin] said he urged Bush to meet privately with [the governor] during the visit. The meeting took place aboard Air Force One, he said.

“After reviewing the crisis with Gov. Blanco, Bush summoned Nagin for a private chat—where, according to Nagin, Bush explained: ‘Mr. Mayor, I offered two options to the governor, I said...I was ready to move today. The governor said she needed 24 hours to make a decision.

“Reacting to the governor's foot-dragging, Nagin lamented: ‘It would have been great if we could of [*sic*] left Air Force One, walked outside, and told the world that we had this all worked out.’“

Now, let's check out the New Orleans *Emergency Guide for Citizens*. Re storm surge flooding it says: “Hurricane protection levees have been built in many coastal communities, especially the New Orleans area, to protect life and property from storm surge. While these levees do a very good job in protecting communities during minimal hurricanes, sophisticated computer modeling of storm surge effects indicate most levees in southeast Louisiana would be over-topped from the storm surge generated by a direct strike by a major hurricane. The result would be widespread flooding.” On evacuation: “The Greater New Orleans Metropolitan Area presents a difficult evacuation problem due

to the large population and a limited road system which is susceptible to flooding. The public is encouraged to act in their best interest and voluntarily evacuate the high risk areas (outside the levee system) before a recommended evacuation.”

There are specific sections re mandatory evacuation, local shelter, and drive times from New Orleans to safe cities. As to evacuation you are on your own. Re shelter, bring food and water. Estimated drive times (four times drive normal) run 8 to 20 hours.

Flashback: The *New Orleans Times-Picayune* ran a five-part series in 2002 detailing everything state and local officials needed to know. Check out the chart in Part I, showing the Pontchartrain levee—14.5’—and what each level of hurricane does. A Cat 4 storm (19’ surge) causes “catastrophic” flooding. A Cat 5 (24’ surge) puts the entire city under water—including the Mississippi River levee (21.4’). (*Sunday Aug. 27 forecasts called for a 25-30 foot surge.*) The city is sinking three feet per century, and is already six feet below sea-level, on average. (Thus, upon its 1718 founding, it was above sea level. The levees, ironically, accelerate subsidence by blocking sediment deposit from the water side.) Between 1950 and 2002 fourteen hurricanes made landfall within 75 miles of New Orleans, with 5 being Cat 3. *Evacuation? 72 to 84 hours (3 to 3-1/2 days is needed; people need to get 80 miles north, which in traffic can take 6 hours or more.* Up to 90 percent of buildings in New Orleans are vulnerable to a Cat 5 storm; the New Orleans building code requires resistance to 100 mph winds for all of three minutes.

So: *The governor and mayor are the key figures—not the President:* pre-positioning the National Guard and guiding federal assistance. Mayor Nagin left his city. Why wasn’t he at the Superdome, with satellite communications, bringing a sense of order, instead of fleeing to Baton Rouge? Evergreen foundation chairman Bob Williams reports that in 1998 14,000 residents were sent to the Superdome before the arrival of Hurricane George; crime was rampant then, and problems were simply not addressed. 13 months ago, he also notes, a simulated drill with federal, state and local officials was enacted, assuming that 300,000 residents would be trapped; problems then identified appear to have been fixed. The State plan calls for capability to evacuate 300,000.

Would Rudy have fled NYC to Albany? It is a measure of the relative character—or lack of it—of 43 versus the New Orleans mayor that while the mayor was yammering for the President to “get off his ass” the President had this to say: “Many of our citizens are simply not getting the help they need, especially in New Orleans, and that is unacceptable.” He also said: “Where our response is not working we’ll make it right. Where our response is working we will duplicate it.”

Mayor Nagin? Safe in Baton Rouge, citing communications problems. Massive communications outages did happen. Did anyone think that in the aftermath of a major flood ground-level electric power would survive? Battery-powered phones, generators on higher floors, apparently escaped notice as possible back-ups. Is it truly beyond the resources of a state to store caches of \$1,000 (battery-powered) satellite phones, dispersed in diverse secure locations? *Does anyone think Rudy would have abandoned the Apple, even without communications? Hid up in Albany while his constituents were*

murdered, raped, robbed and terrorized by roving wolf packs? Former New York City Parks Commissioner Henry Stern, in his blog *New York Civic*, asks why couldn't air-drops have been used to quell the anarchy at the Superdome. The answer: Without *carte blanche* from state authorities, Bush was paralyzed; 43 could not risk his soldiers' lives under the command of (rightly) distrusted, incompetent, state and local leaders.

Absolutely critical for keeping civil order are, of course, the police. The Sunday NY Times reports that at least 200—two hundred—New Orleans cops have left the force (two committed suicide) since Katrina struck—this on a force of 1,640, of which some 500 are deployed each day; with Katrina there were 1,200 on duty. *Think of it: One in eight members of the city's police force have checked out when their city faces its most desperate crisis ever.* (A comparable resignation percentage for NYPD on 9/11 would have been 5,000.) It gets richer: The Sept. 6 NY Times reports that “defiant” New Orleans officials are offering police, fire and emergency workers—per Dave Barry, I am not making this up—5-day furloughs in Las Vegas.

To the credit of the police is Democratic Senator Mary Landrieu's account (on ABC's *This Week*) of how the sheriff and others swam across water, handcuffs in teeth, to shackle 1,300 prisoners for transport and ferry them out before they escaped. The Senator spent the rest of the ABC interview demanding that 43 fix it all and rejecting any criticism of local under-performance. Further, the NY Sunday Times ran a long story detailing individual acts of dedication by local personnel. But the failure to have a serious evacuation plan—one with provision to evacuate those unable or unwilling to go—is simply inexcusable. And blaming the feds after such an appalling overall performance is worse. Even strongly partisan Democrat NY Senator Chuck Schumer said of the locals (also on *This Week*): “Certainly the state and local governments weren't up to snuff.”

The July 24 New Orleans Times-Picayune carried a story quoting city, state and federal officials as warning residents that the city could not help an estimated 134,000 who would need evacuation assistance, stating: “In event of a major hurricane, you're on your own.” Mayor Nagin, City Council President Oliver Thomas and the local Red Cross executive director appeared in a scripted video for a local group, Total Community Action. Thomas says on the video: “You're responsible for your safety, and you should be responsible for the person next to you. If you have some room to get that person out of town, the Red Cross will have a space for that person outside of the area.”

As John Tierney's Sept. 6 op-ed puts it: “What the city needed most was coldly effective local leaders, not a president in Washington who could feel their pain. It's the same lesson we should have learned from Sept. 11 and other disasters, yet both liberals and conservatives keep ignoring it.” Tierney cites plans in Newport News, where officials were ready to use school and other buses, plus borrowed cars, to evacuate residents, and tell locals who say they plan to stay to use a magic marker and put their Social Security numbers on their body parts, so clean-up workers can identify them. This “magic marker strategy usually convinces locals to leave.

But state officials made some meritorious claims, too. A Labor Day NY Times story makes clear that FEMA impeded both state officials and private companies seeking to alleviate distress. It is incomprehensible how FEMA officials could: (a) turn back three Wal-Mart rucks loaded with water; (b) block Coast guard deliverance of 1,000 gallons of diesel fuel; (c) cut one parish's emergency communications line. As to this last transgression, the state sheriff properly restored the connection and posted armed guards to protect it—thus inevitably diverting guards from other tasks. Such federal failings (and surely many others) justify 43's "unacceptable" regarding federal performance. As a Sept. 3 NRO editorial put it: "[A]n administration whose FEMA director knew less about on-the-ground conditions in the stricken city this week than the average TV viewer has a real vulnerability." A Sept. 6 Wall Street Journal article recounts a federal blunder of monumental imbecility: Planes were delayed while the Transportation Security Administration rounded up air marshals and screeners. *TSA could not grasp that with catastrophe approaching FEMA & TSA might waive the minuscule risk of a bomb or hijacking in favor of more rapid evacuee exit.* One puzzle: Homeland Security Secretary Michael Chertoff, quoted early on as saying that there was no trouble at the Superdome, said on *Fox News Sunday* that state officials gave no indication of problems, but news reports told viewers what went on.

Thus Governor Blanco was, the Washington Post reported, "infuriated" when the President had the temerity to seek federal takeover on Friday, Sept. 2, after four days of "Lord of the Flies" anarchy, with residents cowering in the fetid Superdome and Convention Center, and roaming thugs engaging in an orgy of violent felonies at the expense of terrified locals and tourists. Compare this to NYC on 9/11: 37 Port Authority and 23 NYPD heroes gave their lives on 9/11 (along with 343 firemen, the worst-ever loss in America's history), walking—running—into the Twin Towers.

State laxity raises the question: Should the President have pushed aside an ineffectual Governor, Mayor and police force, and declared federal martial law? A threshold limitation is that under the U.S. Constitution the traditional "police power"—guarding the health, safety and welfare of citizens—is reserved to the States. Art. I sec. 8 cl. 15 empowers Congress "to provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasion."

The principal statutory Presidential disaster relief authority is per the Stafford Act, and does not provide for martial law. The key section reads:

TITLE V - EMERGENCY ASSISTANCE PROGRAMS

PROCEDURE FOR DECLARATION

Sec. 501. (a) Request and Declaration. All requests for a declaration by the President that an emergency exists shall be made by the Governor of the affected State. Such a request shall be based on a finding that the situation is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary. As part of such request, and as a prerequisite to emergency assistance under this Act, the Governor shall take appropriate action under State law and direct execution of the State's emergency plan. The Governor shall furnish information describing the State and local efforts and resources which have been or will be used to alleviate the

emergency, and define the type and extent of Federal aid required. Based upon such Governor's request, the President may declare that an emergency exists.

(b) Certain Emergencies Involving Federal Primary Responsibility. The President may exercise any authority vested in him by section 502 or section 503 with respect to an emergency when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority. In determining whether or not such an emergency exists, the President shall consult the Governor of any effected State, if practicable. The President's determination may be made without regard to subsection (a).

To do (b) could the President have cited the significance of the South Louisiana port complex (includes New Orleans), which is the largest in the US (more on the economics below)? Traditional natural disaster recovery falls under (a), and thus requires a request from the Governor to trigger federal action. Federal military power is curbed by the Posse Comitatus Act of 1878, but that law specifically allows Congress to pass exceptions, which the Stafford Act manifestly is. The President can federalize the National Guard (which consists of the Army NG and the Air NG) only in event of invasion, rebellion, or if "unable with the regular forces to execute the laws of the United States". Title 42 provides a broad federal role in public health and disaster relief, and perhaps might enable the President to declare a public health emergency, which may yet happen. (An upcoming test: Will authorities cremate corpses to minimize public health risk, or instead succumb to sentimental family pressure, thus endangering public health?)

What of the National Emergency Act? It, too, provides for executive authority, but not true martial law. The president is strictly accountable to Congress for declarations made, actions taken and funds spent. What constitutes a "national emergency" is left undefined. The Congressional Research Service, in a January 7, 2005 paper (*Martial Law and National Emergency*—see link below) explains that true "martial law" is when civilian administration is taken over by the military. In American history it has been declared only by President Andrew Jackson in 1814 and often during the Civil War and the Reconstruction. Since then no true martial law has been declared.

On a number of occasions during the 20th century a form of "qualified martial law" has been declared, to quell race riots and labor unrest; on other occasions an undeclared martial law was applied a number of times in times of labor unrest. In World War II FDR approved the Hawaiian Territory governor's declaration of martial law, and in at least one internment camp housing Japanese FDR imposed martial law. Since 1945 no President has invoked martial law. Whenever federal troops have been sent in to restore public order in event of civil unrest or riot, the military has operated under civilian control. Military force to restore public order without martial law was used in 1932 by President Hoover against the Bonus Army, by Ike to desegregate Little Rock in 1957, by JFK to desegregate the University of Mississippi in 1962 and the University of Alabama in 1963, and by LBJ to stop riots in Washington, Detroit, Chicago and Baltimore in 1967 and 1968. CRS notes that Presidential action in this area remains subject to judicial review (a precedent established in an 1866 post-Civil War case, *Ex Parte Milligan*, in which an Indiana prisoner was commended to trial in civilian courts, with military tribunals held permissible only in the absence of functioning civilian courts). Presidential aversion to

martial law is exemplified by JFK's instruction to a high-level emergency planning committee (not named by CRS, but presumably it refers to ExComm, the 13-member committee assembled to advise JFK during the October 1962 Cuban Missile Crisis) that even in event of a nuclear attack "nationwide martial law is not an acceptable planning assumption."

The legal bottom line: In a natural disaster, the President cannot lawfully move without a prior request from the Governor. Were he to do so, he arguably violates the Anti-Deficiency Act, a law that makes it a crime to spend funds not lawfully authorized. Only after looting rises to the level of a breakdown in civil order, might a President conceivably declare federal martial law, but historical precedent does not favor such a move. One other potential argument: because globally televised anarchy in one of America's most famous cities is seriously harming American credibility abroad, and thus hampering our ability to fight a war on terror, there is a national security justification for federal martial law; again, this does not fit prior precedent.

3. In Race-Obsessed Urban America, the Politics of Race Can Trump Civil Order. Big Easy is 67 percent black (DC is only 58 percent). George Neumayr on TAS notes that NO had 421 murders in 1994 and seemed headed for 300 this year. Compare this to New York City's anticipated 518 murders for 2005, applying a *per capita* equivalent based upon NYC's 8.1 million population, which is 17.5 times the 462,000 figure for NO. The 1994 NO peak figure would equal 7,368 for NYC—20 murders per day all year long; the 2005 NO figure equates to 5,250 murders for NYC; conversely, NYC's projected 2005 number of 518 would translate into but 30 murders for NO this year.

National Guard "shoot to kill" orders were not given until Thursday, Sept. 1. NR's Eugene Methvin tells the story on how to control disorder: Instant crackdown at the first sign of civic breakdown. While Detroit burned in 1967, Toledo did not, because its Mayor and Governor responded immediately. But Republicans are limited by four decades of race-baiting: a too vigorous police or military response would bring cries of racism, that if the residents were white the feds might be gentler, etc. Using helicopter gunships, for example, makes for a nasty TV picture. Failure to stop looting makes for rotten pictures also, but there are no accusations of excessive force, always the most damning and dangerous in any Western democracy, when force is used domestically against fellow citizens. The President thus found himself politically between the proverbial rock and hard place.

Rich Lowry of NRO had this to say:

"If President Bush pays a political price for the images of lawlessness that have played out in New Orleans, it will be the second time looting has hurt his cause.

"The other, of course, was in Baghdad in 2003. It is a matter of consensus now that the rip-the-place-apart looting in the initial days after the fall of Saddam Hussein set the occupation off on the wrong foot. Secretary of Defense Donald Rumsfeld explained the looting away at the time as the natural exuberance of a newly liberated people. One wonders: Has anyone in the administration read their Hobbes? Or does he not make the "compassionate conservative" reading list? "

” New Orleans has provided a corrosive lesson about government. At all levels, government is overbearing and nagging, paying for people’s prescription drugs and telling us whether we can smoke in restaurants or not. But when it comes to its most elemental task of maintaining order and protecting property, it might not be up to the task when it is needed most.

“Keep that in mind and buy a gun, just in case.”

Manhattan Institute scholar Nicole Gelinas notes that a longtime lack of local law enforcement enabled the breakdown of civil order:

“Was this week’s looting preventable? Failure to put violent criminals behind bars in peacetime has led to chaos in disaster. New Orleans’ officials had only the remotest prayer on Monday of coordinating police officers with no electronic equipment to rescue survivors while at the same time stopping looting before it descended into wholesale terror. Now, those uncoordinated police officers are themselves victims—according to multiple accounts, dead officers, their bodies marked with gunshot wounds, litter the city.”

Robert Tracinski, publisher of the *Intellectual Activist*, wrote in the Labor Day LA Times that the culture of public housing and welfare undermined public morale and led to the chaos that wrecked early rescue efforts: “What Hurricane Katrina exposed was the psychological consequences of the welfare state. What we consider “normal” behavior in an emergency is behavior that is normal for people who have values and take the responsibility to pursue and protect them. People with values respond to a disaster by fighting against it and doing whatever it takes to overcome the difficulties they face. They don’t sit around and complain that the government hasn’t taken care of them. And they don’t use the chaos of a disaster as an opportunity to prey on their fellow men.”

4. When Multiple Jurisdictions Must Cooperate, It is Essential That there Be Mutual Trust at All Levels of Joint Administration, Plus Power Fully Commensurate With Relative Responsibility. In 2004, President and Governor (Jeb of Florida) Bush worked harmoniously together and successfully minimized the damage done by a spate of hurricanes. After 9/11 the President worked with New York’s Governor Pataki and the world’s Mayor Rudy. In times of savage partisanship it is still possible for a federal and state chief executive to cooperate, provided neither succumbs to partisan urges. Had Democratic Louisiana Senator John Breaux, a classy moderate, been Governor things would likely have been far different. It is hard to imagine Breaux resisting full federal intervention, while seeking to shift blame and watching his state’s citizens sinking to Darwinian desperation. Ditto for a Democrat like the late Louisiana Senator Russell Long.

Decoupling power from responsibility poses two alternative dangers: (a) where power exceeds responsibility, reckless behavior is encouraged; (b) where responsibility exceeds power, timorous behavior is encouraged. In the instant catastrophe, the decoupling of power from responsibility carried two terrible consequences: (1) because state power exceeded the level of responsibility state and local officials were prepared to accept, the most helpless residents of the doomed city were left to fend for themselves when

evacuation was ordered; (2) because federal officials had less power than the *de facto* responsibility that public opinion saddled the President with, federal officials were excessively cautious, awaiting a state transfer of additional power that did not come in time to avert anarchy in the streets and shelters. *In a crisis situation where power and responsibility cannot be cleanly separated, one entity must be given full control. Given this calamity of this magnitude, clearly that had to be the federal government.*

5. When Catastrophe Strikes the Homeland, the President Gets the Credit or Blame. As JFK said, “Life is unfair.” Images of Road Warrior warfare and misery among New Orleans blacks trump rational argument about locals having primary responsibility. Iraq? Cindy Sheehan? Supreme Court confirmations? NEW ORLEANS. David Brooks writes in an NY Times op-ed that the massive failure in New Orleans, in the wake of reverses in Iraq, will trigger a public pre-occupation with the dark side and calls for a strong government to deal with disasters. An ABC News-Washington Post poll showed 2/3 of respondents faulting the feds and 3/4 faulting the state and local authorities. In the event, the President had best pay attention: *More than 90 million people (over 30 percent of the US population) live within 50 miles of either the Atlantic or Gulf Coasts, and figure to face a Cat 3 or Cat 4 storm every fourth year.* The President, in the future, must go public with his requests to state and local officials, making clear that aid is available and ready to go within hours. Then, if locals do not respond, they will take the fall. 43 was badly hurt at first, but the pathetic performance of the locals may save him.

The long-term political impact is hard to assess. George Will said on *This Week* that he expects Bush to suffer the loss of public trust that Iran-Contra cost Ronald Reagan for the last two years of his Presidency. Fox’s Bill Kristol was more sanguine (on *Fox News Sunday*), predicting Katrina will fade from public view by 2006. Clinton guru Dick Morris sees Bush gaining support as massive federal aid continues throughout the long relief effort. John M. Barry, author of the award-winning history of the 1927 Mississippi River flood, *Rising Tide*, writes in the Sunday NY Times that the 1927 disaster caused Americans to give strong support to interventionist government, and sparked migration of Delta blacks to such cities as Chicago, Detroit and Los Angeles. It also led to passage of the Flood Control Act of 1928, at that time the largest peacetime expenditure bill ever. Barry doesn’t believe, however, that Katrina will produce a shared sense of common humanity as happened in 1927; rather, the Hobbesian chaos in the streets and perceived racist laxity (unfair, but widely believed) of a conservative Republican, mostly-white administration for the plight of poor blacks will deepen divisions. Sadly, Barry’s take is likely on the money.

George Will writes in *Newsweek* of Katrina’s import for political factions: “Katrina has provided a teaching moment. This is a liberal hour in that it illustrates the indispensability, and dignity, of the public sector. It also is a conservative hour, dramatizing the prudence of pessimism, and the fact that the first business of government, on which *everything* depends, is security.”

6. In a Global Media Age, America’s Credibility Is On the Line, Always. One Sri Lankan watching a cricket match said: “I am absolutely disgusted. After the tsunami our

people, even the ones who lost everything, wanted to help the others who were suffering. Not a single tourist caught in the tsunami was mugged. Now with all this happening in the U.S. we can easily see where the civilized part of the world's population is." Australians found themselves targeted inside the Superdome by locals who thought foreigners would get special treatment. Sixty foreigners huddled in a mass inside the Superdome; had they integrated they would likely have been killed. Two Aussie couples were rescued under a bridge—by an *Australian* television crew. America's global visibility is unique. Ralph Peters notes that two summers ago 25,000 European elderly perished in the summer heat wave, while French, German and Italian officials stayed on vacation, and the world did not even notice. (The true figures is closer to twice that.) *It is fair to conclude that America has suffered a severe blow to its prestige, its reputation for competence, that it can ill-afford whilst engaged in a global war against terror.*

7. Does Big Easy Have a Future? So where to go now? WSJ's Dan Henninger notes that government bureaucracies typically coordinate poorly, and are turf-conscious. He suggests outsourcing emergency functions to private sector might help. He cites major company offers to date re water, pharmaceuticals, cars & trucks, communications (including phone cards), toiletries & first aid, and manpower. He proposes that a firm like Bechtel manage, with the government players serving as infantry.

Given the value of New Orleans as a port this isn't enough. The global security firm Stratfor has run several superb articles on this. Stratfor's Dr. George Friedman, a superb commentator and frequent—but responsible—43 critic—recalls Cold War-era grad-student bull sessions where vulnerability was the topic. When asked which single target the Soviets should hit with a nuclear missile Friedman always answered New Orleans, because so much of America's energy and agricultural product passes through the ports of South Louisiana and New Orleans (POSL).

POSL is the US's largest and the world's fifth largest port. It exports 52 million tons annually (more than 50 percent agricultural products) and imports 17 million (including cure oil, chemicals, fertilizers, coal and concrete). Put simply, POSL exports America's bulk commodities of agriculture and imports the world's bulk commodities of industrialism. River (barge) transport cannot be replicated elsewhere—most such cargo has a low value-to-weight ratio, and thus requires massive barge traffic volume not easily switched. Louisiana produces 15 percent of US oil—much in the Gulf of Mexico, and has critical refinery capacity, but the refining capability is more fungible than the barge transport. Total loss would be “extraordinarily painful,” but to date the oil infrastructure is far less badly damaged than the city, and no shifting or silting up of the Mississippi River occurred due to Katrina. At first 90 percent (7 million barrels daily) of oil capacity was lost, with 58 platforms in the Gulf damaged and 11 refineries shut down, but restoration of power is permitting rapid recovery of oil and pipeline capability (including natural gas transport). Hudson Institute scholar Irwin Stelzer informs us that 20 percent of US oil production passes through the port complex.

But mass departure of the workers needed to sustain the industry infrastructure leaves a ghost town, and massive economic damage will likely occur because many who leave

will likely not return—they will find jobs and lives elsewhere. New workers will have to be lured in—an uphill task to say the least. Friedman notes that New Orleans must be revived, seeing (rightly) its presence as essential to the domestic and world economies.

Michael Barone suggests that the city's path may repeat that traced by Detroit, but in a shorter time frame. Detroit's population was 1.67 million in 1960, and is 900,000 today; its decline began after the calamitous 1967 racial riots. Barone fears that the city's twin cultures of "upper class complaisance and political corruption" will militate against successful reconstruction. But given the city's location within the larger port complex, as with Iraq, failure is *not* an option. Some kind of city must be rebuilt.

Four Recommendations. (1) *Build ASAP Category 5 storm protection for the restored New Orleans and the Louisiana port complex;* (2) *Deploy survivable electric power and communications for first responders;* (3) *When catastrophe endangers civil order and raises the plausible prospect of harm nationwide in scale, establish emergency federal authority—for 30 days in the President's sole executive discretion free of legislative and judicial review, and for 90-day increments thereafter per Congressional authorization and subject to judicial review;* (4) *in such emergencies make it a federal felony punishable by a mandatory minimum ten-year sentence to commit crimes, state or federal, that foster deterioration of civil order.*

(1) Cat 5 protection ASAP for the Port Complex. Two reasons compel whatever investment is needed—even spending extra to finish sooner: (a) there is no other viable way to assure the safety of the hundreds of thousands of residents living in close proximity to sea walls; (b) the port complex is vastly important for the nation's own security and for the world economy as well. Re the first, an evacuation strategy is dicey, because the lead time needed to decide whether to take such action is two days, well before the path of a destructive storm is known with sufficient assurance to confidently predict disaster. *It runs counter to human nature to order decisive, drastic action that inevitably will cause great political, economic and social dislocation, at a moment of great ambiguity; rare will be the leader who will do so.*

(2) Deploy survivable electric power and communications for first responders. It is a national embarrassment that four years after 9/11 Katrina brought electric power and communications to a virtual complete halt for days. Local and state responders lacked battery-powered satellite communications gear; mobile systems were incompatible with parishes surrounding New Orleans. Mobile wireless links and handsets are essential. Cell towers will often topple, so satellite links are preferable. Priority access channels must be given for first responders. The federal government must reclaim television spectrum that broadcasters promised to return. Emergency channels can be dedicated to federal use, state use and local use, with common channels for multi-entity communication. Portable emergency equipment, such as satellite earth stations, switches and small-screen video-conferencing equipment (all fitting on cars or small water craft) must be prepositioned in secure locations, with triple redundancy. Mobile power back-up is needed, with in-place power including space above flood water lines.

(3) Special Presidential Authority. Unless doing nothing is the right thing to do in a given case, most critical of all is that a crisis decision be taken within the time necessary to ameliorate the consequences of catastrophe, if it cannot be headed off entirely. The time leaders have to decide will, in case of natural disasters, often lie outside the control of decision-makers. *Flip the famed football maxim “speed kills”: In a crisis with potential catastrophic impact, undue delay kills.* One does not argue over the shape of a table if a bomb sits in the center with fuse burning. Give the President 30 days sole executive discretion to act in emergencies that threaten life and essential national assets, free of legislative and judicial review. Allow serial renewal for 90-day periods, subject to Congressional authorization and judicial review. It is possible in theory to give Congress a limited time to review the initial executive decision, failing which the President may act. But this is impractical in reality for two reasons: (1) Congress is not set up to act quickly; (2) if a divided Congress fails to approve, a President who then acts could find his authority politically impaired after a divisive debate during emergency times, when nationwide unity is a paramount societal value.

But can this reform be squared with the Constitution’s reservation of police power to the states? Yes. First, recovering a major port that is the gateway for traffic coming down the Mississippi from many states is hardly a local matter. Second, the Framers lived in a world where the infant federal government had no resources—an era when travel between Washington, DC and New York City took a week on horseback. Naturally the police power had to lie with the states. And so it should still, for *local* matters. Federal assistance for purely humanitarian relief should require state consent. *But where larger issues are engaged—of substantial national or global impact—federal supremacy is essential; far less is truly local than was the case in 1787.* Third, if federal hate crimes legislation can pass constitutional muster, making recreational looting during major disasters a federal criminal offense can pass muster, too (see below). Fourth, as the President has 60 days of sole authority under the 1973 War Powers Resolution, a month regarding extreme domestic emergencies is reasonable. *Fifth, the proposed executive prerogative is discretionary: A President who finds local authorities highly competent (as with NYC and 9/11) can decline to exercise extraordinary emergency power.*

Wherefore the intellectual rationale for such extraordinary executive power? To begin with, the strongest executive is most needed when the worst disasters strike; add that the public in times of severe crisis inevitably looks to the President for leadership. *As power must equal responsibility, Presidential authority must be pre-eminent at times of greatest national crisis.* Finally, rest on the philosopher whose writings were the main source for Thomas Jefferson’s Declaration of Independence. The President would, in effect, exercise what John Locke called in Chapter XIV of his *Second Treatise of Government* inherent executive “Prerogative” to protect society and public safety:

“159. For the Legislators not being able to foresee, and provide, by Laws, for all, that may be useful to the Community, the Executor of the Laws, having the power in his hands, has by the common law of Nature, a right to make use of it, for the good of the Society, in many Cases, where the municipal Law has given no direction, till the Legislative can conveniently be Assembled to provide for it...’tis fit that the laws themselves shall in some Cases give way to the Executive power, or rather to this

Fundamental Law of Nature and Government, *viz.*, that That as much as may be, *all* the Members of the Society are to be *preserved*. “ (Emphasis in original.)

This recommendation is not dependent upon agreement with a conclusion that state and local officials were more culpable than federal. Divorcing power from responsibility is bad under any circumstances. Unifying the two by no means guarantees sound decisions, but it eliminates certain perverse incentives, and thus improves the odds that good decisions will be made.

(4) Federalize crimes committed during emergency, with a ten-year minimum sentence and discretionary death penalty, that foster deterioration of civil order.

“Looting” as a term must exclude taking food and drink or medical supplies essential to survival; this tracks the common law privilege known as “necessity” as a valid defense to legal action. However, looting non-essential property is much more grave than ordinary theft, as it fosters social breakdown and descent into the savage depths we saw for days after Katrina. *Crimes during emergencies are an extreme form of terrorism—assaults against the very concept of civil order that is the foundation of modern liberal society.* These must not be tolerated, period.

Last Lessons: Perils of Paralysis. Katrina says to us: *Catatonia compounds catastrophe.* Katrina created a catastrophe, but strategic and tactical blunders by federal, state and local (mostly the latter two) governments compounded already immense damage by an order of magnitude. The feds failed to grasp that the strategic significance of America’s largest port complex demanded extra investment for the once-per-century storm, to protect essential assets of immense value; they also blundered in getting ensnared into protracted negotiations with recalcitrant, incompetent state and local officials, when events on the ground demanded promptly breaking the logjam. Federal failings do not, as Mark Steyn notes, give one confidence that Homeland Security is up to snuff. This argues for taking FEMA out of the stultified bureaucracy that a 170,000-person Department inevitably becomes. Steyn also notes that the feds spent \$230 million to build a bridge to an uninhabited island off Alaska, while cutting \$60 million from the Army Corps of Engineers request for New Orleans, a curious relative priority.

State and local officials committed the strategic error of relying upon evacuation as a primary strategy, despite the fact that the long lead time needed to do so meant deciding upon a drastic step when there would clearly be large ambiguity as to where a major storm might make landfall, making a radical early decision highly improbable. They then adopted an ostrich-like tactical pseudo-plan regarding evacuation of the helpless, defaulting upon their bedrock obligation to provide succor for the defenseless, by limiting loss of life. They added a second tactical blunder; trying to shift responsibility to the federal authorities to restore civil order while retaining supervisory control, an arrangement no reasonable federal official could accept. Racial tension made imposition of federal martial law—not done since Reconstruction—politically combustible. Discord between federal and state officials made violent conflict between them a real prospect; even mere lack of cooperation by locals would have impeded administration of martial law. The tragic result of these strategic and tactical blunders—greater than, but

compounded by, federal blunders—was the horrifying spectacle presented in graphic color video to a stunned nation and to even more stunned observers worldwide.

End with Katrina's saddest, and sternest, lesson: "*Laissez les bon temps rouler!*" (French for a New Orleans motto: "Let the good times roll!") is not a program.