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## The Perfect Storm, an Imperfect Response, and a Sovereign Shield: Can Hurricane Katrina Victims Bring Negligence Claims Against the Government?

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# **The Perfect Storm, an Imperfect Response, and a Sovereign Shield: Can Hurricane Katrina Victims Bring Negligence Claims Against the Government?**

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It remains difficult to understand how government could respond so ineffectively to a disaster that was predicted for years, and for which specific dire warnings had been issued for days. If this is what happens when we have advance warning, I shudder to imagine the consequences when we do not.

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[T]he fact remains that Katrina's strength and the potential disaster it could bring were made clear well in advance through briefings and formal advisories. It remains clear that, in response, there was profound government hesitancy at all levels.<sup>1</sup>

## I. INTRODUCTION: A MOST UNWELCOME GUEST

On August 25, 2005, students at Tulane University left their new college campus amidst the freshman orientation program at the request of the university's administration.<sup>2</sup> In the automated fashion that children evacuate a schoolhouse during a fire drill, students either returned to their hometowns to spend some unexpected time with friends and family, or traveled to other regional college campuses in hopes of finding a back-to-school celebration.<sup>3</sup> They were told that a storm was coming, but not to be alarmed – it was a routine occurrence for students to be temporarily evacuated from Tulane's campus in the wake of an approaching hurricane.<sup>4</sup> As experience had suggested, the students were told that the evacuation was merely one of a precautionary nature, and that just as all of the hurricanes in the past decade had done, this one would either completely miss New Orleans<sup>5</sup> or become

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1. *Predicting Hurricanes: What We Knew About Katrina and When*, Hearing Before Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina, 109th Cong. (Sept. 22, 2005) (opening statement of Tom Davis, Chairman, Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina), available at [http://katrina.house.gov/hearings/09\\_22\\_05/davis\\_open\\_state092205.doc](http://katrina.house.gov/hearings/09_22_05/davis_open_state092205.doc). In response to the flood of public criticism regarding the government's response to Hurricane Katrina, the United States created the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina (Select Committee). See H.R. Res. 437, 109th Cong. (2005), available at <http://katrina.house.gov/hr437.pdf>.

2. See Katrina Stories, [http://www2.tulane.edu/katrina\\_messages/view.cfm](http://www2.tulane.edu/katrina_messages/view.cfm) (last visited Feb. 1, 2007).

3. *Id.*

4. Tulane University evacuated its campus in 1998 during Hurricane George, and again in 2004 during Hurricane Ivan. See Tulane University, Wikipedia Encyclopedia, [http://en.wikipedia.org/wiki/Tulane\\_University#Tulane\\_Myth\\_and\\_Lore](http://en.wikipedia.org/wiki/Tulane_University#Tulane_Myth_and_Lore) (last visited Feb. 26, 2007).

5. Three days before Hurricane Katrina arrived at the Louisiana-Mississippi border, the National Hurricane Center predicted landfall in the eastern Florida panhandle, several hundred miles east of New Orleans. Michael Chermekoff & Amy Cowley, *Will Hurricane Katrina Further Define the "Act of God" Defense?*, 30 ST. B. TEX. OIL, GAS, & ENERGY RESOURCES 38 (2005).

mere wind and rainfall by the time it hit.<sup>6</sup> As Tulane students typically equate these “precautionary evacuations” to a second spring break, the student body understandingly welcomed the evacuation as an opportunity to squeeze in one last party weekend before classes began. While the weekend was sure to have been filled with much fun and drink, Monday proved to be quite the sobering experience.

On the morning of Monday, August 29, 2005, the evacuated students, along with the rest of America, gaped at their television sets in horror as Hurricane Katrina crossed Lake Pontchartrain and Lake Borgne to make landfall near the Louisiana-Mississippi border.<sup>7</sup> Arriving as a Category 4 hurricane with sustainable winds of over 140 miles per hour, Katrina easily

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6. Hurricanes George and Ivan missed New Orleans and resulted in mere rainfall and heavy winds. See Tulane University, *supra* note 4.

7. *Id.*; see also Raymond Seed et al., *Preliminary Report on the Performance of the New Orleans Levee Systems in Hurricane Katrina on August 29, 2005*, Report No. UCB/CITRIS – 05/01, at 1-8, Nov. 2, 2005, [http://www.berkeley.edu/news/media/releases/2005/11/leveereport\\_prelim.pdf](http://www.berkeley.edu/news/media/releases/2005/11/leveereport_prelim.pdf). Hurricane Katrina made landfall at 6:10 a.m. on Monday, August 29, 2005, in the lower edge of Plaquemines Parish just outside of the town of Buras, Louisiana. See Chemekoff & Cowley, *supra* note 5, at 38. Often characterized as the worst natural disaster in our country’s history, Hurricane Katrina devastated major parts of the central Gulf Coast of the United States. See Hurricane Katrina, Wikipedia Encyclopedia, [http://en.wikipedia.org/wiki/Hurricane\\_Katrina](http://en.wikipedia.org/wiki/Hurricane_Katrina) (last visited Feb. 1, 2007). While Katrina made landfall as a Category 4 storm, the National Hurricane Center categorized her as a Category 5 only hours earlier. *Id.* At that time, Katrina was the third strongest Atlantic storm in recorded history, with sustained winds reaching 175 miles per hour. *Id.* The National Oceanic and Atmospheric Administration recorded Katrina’s storm surges to be in excess of twenty-five feet. *Id.* Katrina’s surge caused several breaches in the protective levees around New Orleans. *Id.* Most of the city was subsequently flooded, as breached drainage and commercial shipping canals allowed water to flow from the Gulf of Mexico and surrounding lakes into low elevated areas. *Id.* Katrina also devastated the Mississippi and Alabama coasts, making it “the most destructive and costliest natural disaster in the history of the United States.” *Id.* Katrina’s confirmed death toll stands at 1,836. *Id.* 1,577 of these deaths were in Louisiana. *Id.* Around one-half of Louisiana’s fatalities were in Orleans Parish. *Id.* Within days of Katrina’s landfall, public criticism arose regarding local, state and federal government preparation and response. *Id.* Criticism was prompted largely by televised images of dying residents who remained in New Orleans without food, water, or shelter. *Id.* Additionally, many citizens who remained housed in evacuation facilities, such as the Superdome, died from thirst, exhaustion and violence after the storm itself had passed. *Id.* This also fueled much public criticism. *Id.* Critics alleged that race, class, and other factors could have contributed to the hesitation of the government’s response. *Id.* As floodwaters did not completely recede for several weeks, the majority of homes and structures in Orleans Parish and surrounding parishes were destroyed or washed away. See *McWaters v. FEMA*, 408 F. Supp. 2d 221, 223-24 (E.D. La. 2005), *modified*, 408 F. Supp. 2d 221 (E.D. La. 2006), and *dismissed in part*, 436 F. Supp. 2d 802 (E.D. La. 2006). Approximately ninety percent of the buildings lining Mississippi’s Gulf Coast were also wiped away by storm surges that reached up to thirty feet. *Id.* at 224. Katrina eventually passed into Alabama, submerging large sections of Mobile. *Id.* As a result of the high floodwaters, many people, especially in the city of New Orleans, literally had to evacuate their homes and swim to safety. *Id.*

overwhelmed New Orleans' system of protective levees,<sup>8</sup> and floodwaters quickly engulfed more than eighty percent of the city to depths in excess of twenty-five feet.<sup>9</sup> As Katrina's tidal surge destroyed nearly everything in its 250 mile wake, coastal areas of Louisiana, Mississippi, and Alabama suffered catastrophic damage.<sup>10</sup> While property damage caused by floodwaters reached an unprecedented level,<sup>11</sup> the biggest tragedy left behind by Katrina was the loss of life.<sup>12</sup> When Mayor C. Ray Nagin issued a mandatory city-wide evacuation less than a day before landfall, the most impoverished twenty percent of New Orleans' population did not share the same luxury the Tulane students enjoyed, namely the means and ability to evacuate New Orleans.<sup>13</sup> Over 70,000 residents were left behind to greet Katrina head-on as she arrived at their doorsteps.<sup>14</sup> Drowning in the floodwaters and starving to death while awaiting rescue, over 1,800 Americans lost their lives during Hurricane Katrina and its aftermath.<sup>15</sup>

As the deadliest natural disaster in recent American history,<sup>16</sup> Hurricane Katrina shined a spotlight on the government's<sup>17</sup> inability to protect its citizens from Mother Nature's wrath, as well as its inability to coordinate between various administrative branches and agencies to effectively implement disaster preparation and relief measures.<sup>18</sup> More than one year after Katrina devastated the Gulf Coast, something still stinks in the Big Easy. The stench of grave injustice lingers on above the piles of mold and rotting debris that comprise what was once the Ninth Ward neighborhood.<sup>19</sup>

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8. See *infra* Part II.A.1 (discussing the levees).

9. See Chermekoff & Cowley, *supra* note 5, at 38.

10. See *supra* note 7 (discussing damage caused by Hurricane Katrina).

11. See *supra* note 7. The total property damage from Katrina is estimated at \$81.2 billion, nearly double the cost of the second most expensive storm, Hurricane Andrew. See Hurricane Katrina, *supra* note 7.

12. See *supra* note 7 (discussing Hurricane Katrina's death toll).

13. See *McWaters v. FEMA*, 408 F. Supp. 2d 221, 224 (E.D. La. 2005), *modified*, 408 F. Supp. 2d 221 (E.D. La. 2006), and *dismissed in part*, 436 F. Supp. 2d 802 (E.D. La. 2006). More than 90,000 people in the affected areas had an annual household income of less than \$10,000. *Id.* Sixty-five percent of poor elderly households in New Orleans did not own a vehicle. *Id.* Thirty-five percent of black households and fifty-nine percent of poor black households living in New Orleans did not own a vehicle. *Id.* at 224-25.

14. See *id.*

15. Katrina's death toll broken down by state is as follows: Louisiana: 1,577, Mississippi: 238, Alabama: 2, Florida: 14, Georgia: 2, Kentucky: 1, Ohio: 2, additional missing: 705. See Hurricane Katrina, *supra* note 7.

16. Table 1 lists the deadliest disasters in American History. See Appendix, *infra* at Table 1; List of United States Disasters by Death Toll, Wikipedia Encyclopedia, [http://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_disasters\\_by\\_death\\_toll](http://en.wikipedia.org/wiki/List_of_United_States_disasters_by_death_toll) (last visited Feb. 20, 2007).

17. The term "government," when used in this freestanding way, simultaneously refers to all American federal, state, and local governmental bodies and agencies.

18. See discussion *infra* Part II (discussing preparation and response efforts).

19. Arguably the worst hit area of New Orleans, the Lower Ninth Ward was an extremely poor and predominately black neighborhood. See Manuel Roig-Franzia, *Once More, a Neighborhood*

The people of New Orleans<sup>20</sup> were left with no answers as to why their government failed to protect them from this long anticipated disaster, and most importantly, no clearly established legal recourse against a government that seemed to “look the other way” in the face of their suffering.<sup>21</sup> Forms of sovereign immunity<sup>22</sup> complicate and obstruct the path that citizens must take in order to bring valid claims against the government for Katrina-related negligence. An examination of the facts and existing legal framework is needed to answer the question: Do the people of New Orleans have any legal recourse against the government?

It is not the purpose of this Comment to criticize the domestic political agendas of governmental bodies in the United States. A discussion of specific political reforms within the government’s ranks that must transpire before a tragedy like Katrina occurs again is beyond the scope of this discussion. This Comment simply acknowledges that the people of New Orleans were harmed by governmental actions in the wake of Hurricane Katrina, and analyzes the potential for negligence claims to be brought against the responsible parties.

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*Sees the Worst*, WASH. POST, Sept. 8, 2005, at A18. Thirty-six percent of all Lower Ninth Ward residents lived below the poverty line—nearly twice Louisiana’s poverty rate. *Id.* Before Hurricane Katrina hit, the Lower Ninth Ward was home to 20,000 residents. Gabrielle Chwallek, *A Year After Katrina: No Return to Normalcy for New Orleans*, MONSTERS AND CRITICS, Aug. 29, 2006, [http://news.monstersandcritics.com/northamerica/article\\_1195795.php/A\\_year\\_after\\_Katrina\\_No\\_return\\_to\\_normalcy\\_for\\_New\\_Orleans](http://news.monstersandcritics.com/northamerica/article_1195795.php/A_year_after_Katrina_No_return_to_normalcy_for_New_Orleans). Famous past residents include jazz legends Louis Armstrong, Mahalia Jackson, Fats Domino, and the Marsalis brothers. *Id.* Only around 1,000 people have returned to the Ninth Ward since Katrina, and most of them are residing in mobile trailer homes. *Id.*

20. Whenever referring to the destruction that occurred and the residents who were harmed in New Orleans in the wake of Hurricane Katrina, the devastated areas and residents of Mississippi and Alabama are being simultaneously referred to as well. Additionally, “New Orleans” also includes the surrounding areas of southeastern Louisiana that were similarly affected.

21. As one New Orleanian has put it:

We were abandoned. City officials did nothing to protect us. We’re told to go to the Superdome, the Convention Center, the interstate bridge for safety. We did this more than once. In fact, we tried them all every day for over a week. We saw buses, helicopters, and FEMA trucks, but no one stopped to help us. We never felt so cut off in our lives. When you feel like this, you do one of two things. You either give up or go into survival mode. We chose the latter. This is how we made it. We slept next to dead bodies, we slept on streets at least four times next to human feces and urine. There was garbage everywhere in the city. Panic and fear had taken over.

*Hurricane Katrina: Voices from Inside the Storm, Hearing Before Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (Dec. 6, 2005) (statement of Patricia Thompson, New Orleans Resident and Evacuee), available at [http://www.semp.us/publications/biot\\_reader.php?BiotID=306](http://www.semp.us/publications/biot_reader.php?BiotID=306).

22. See *infra* Part III.B (discussing sovereign immunity).

Part II analyzes the government's preparation and response efforts connected to Hurricane Katrina, and determines whether various roles and responsibilities were adequately fulfilled.<sup>23</sup> Part III discusses the areas of the law relevant to bringing negligence claims against the government and how they have evolved to their current state.<sup>24</sup> Part IV presents the hurdles which claimants will face in suits against the government, and discusses how courts can interpret ambiguous law to produce just results.<sup>25</sup> Part V discusses the future implications of Katrina litigation, and offers justifications for spreading costs among American taxpayers.<sup>26</sup> Part VI concludes by asserting the need for Katrina victims to be allowed their day in court.<sup>27</sup>

## II. "WHAT HAPPENED" AND "WHAT SHOULD HAVE HAPPENED": GOVERNMENTAL PREPARATION AND RESPONSE EFFORTS

"The contaminated water that filled the New Orleans 'saucer' was seasoned with government bureaucracy; a recipe for a foul gumbo."<sup>28</sup>

An analysis of the relevant governmental actions undertaken in anticipation of and in response to Hurricane Katrina will help shed light on questions concerning potential governmental liability. The following factual synopsis will assist in determining why governmental preparation and response efforts, if undertaken at all, failed at the federal, state, and local levels. When reviewing the relevant factual information, it is important to simultaneously analyze "what happened" and "what should have happened."

### A. *Governmental Preparation Efforts*

Devastating damage expected . . . Hurricane Katrina . . . a 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 . . . leaving those homes severely damaged or destroyed . . . . Water shortages will make human suffering incredible by modern standards.<sup>29</sup>

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23. See *infra* notes 28-141 and accompanying text.

24. See *infra* notes 142-209 and accompanying text.

25. See *infra* notes 210-392 and accompanying text.

26. See *infra* notes 393-402 and accompanying text.

27. See *infra* note 403 and accompanying text.

28. Faith J. Jackson, *A Streetcar Named Negligence in a City Called New Orleans—A Duty Owed, A Duty Breached, A Sovereign Shield*, 31 T. MARSHALL L. REV. 557, 563 (2006).

29. Public Advisory, National Weather Center (New Orleans, LA), *Urgent Weather Message*:

## 1. The Levees

“What happened to us this year . . . can only be described as a catastrophe of Biblical proportions . . . . We would not be here today if the levees had not failed.”<sup>30</sup>

Positioned in the delta at the mouth of the Mississippi River, the majority of the city of New Orleans lies below sea level.<sup>31</sup> Because of its unique topographical setting, New Orleans has long been and will always be vulnerable to hurricanes and flooding.<sup>32</sup> With flood risks from Lake Pontchartrain to the north, the Mississippi River to the south, and Lake Borgne and the Gulf of Mexico to the east, the city has long maintained a protective flood control system.<sup>33</sup> Floodwalls constructed by the United

*Devastating Damage Expected* (Aug. 28, 2005; 10:11 a.m. CDT), <http://www.weather.gov/os/assessments/pdfs/Katrina.pdf> (last visited Jan. 27, 2007).

30. *Hurricane Katrina: Preparedness and Response by the State of Louisiana, Hearing Before Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (Dec. 14, 2005) (statement of Kathleen Blanco, Governor of Louisiana), available at [http://katrina.house.gov/hearings/12\\_14\\_05/babineaux\\_121405.doc](http://katrina.house.gov/hearings/12_14_05/babineaux_121405.doc).

31. Douglas A. Kysar & Thomas O. McGarity, *Did NEPA Drown New Orleans? The Levees, the Blame Game, and the Hazards of Hindsight*, 56 DUKE L.J. 179, 182, 185 (2006); see also New Orleans, Wikipedia Encyclopedia, [http://en.wikipedia.org/wiki/New\\_Orleans,\\_Louisiana](http://en.wikipedia.org/wiki/New_Orleans,_Louisiana) (last visited Jan. 11, 2006). Much of New Orleans lies one to ten feet below sea level. *Id.*

32. See Kysar & McGarity, *supra* note 31, at 182-83. In 1957, Hurricane Audrey struck Louisiana and Texas, killing 526 people and causing damage totaling \$120 million in Louisiana alone. David Roth, *Louisiana Hurricane History: Late 20th Century*, <http://www.srh.weather.gov/lch/research/lalate20hur.php> (last visited Sept. 10, 2007). In 1965, Hurricane Betsy devastated New Orleans, inundating over 5,000 square miles in Louisiana. See A FAILURE OF INITIATIVE, FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 87-88 (2006), available at <http://www.gpoaccess.gov/katrinareport/mainreport.pdf> (hereinafter FINAL REPORT). Betsy left 81 dead, injured more than 17,600, and caused 250,000 residents to evacuate to storm shelters. *Id.* In 1969, Hurricane Camille struck several states along the Gulf Coast killing 256 people and causing over \$1.4 billion in damage. National Hurricane Center, *Hurricane History*, <http://www.nhc.noaa.gov/HAW2/english/history.shtml> (last visited Sept. 10, 2007). In 1992, Hurricane Andrew caused twenty-three deaths in the United States and \$1 billion in damage in Southern Louisiana. *Id.* In late 2005, less than a month after Katrina, Hurricane Rita brought storm surges which inundated portions of New Orleans previously flooded by Katrina and caused an additional \$10 billion in damage. *Id.*

33. Kysar & McGarity, *supra* note 31, at 182. While a large area of open swampland separates Lake Borgne from populated areas of New Orleans, Lake Pontchartrain runs up against the downtown and western parts of the city. *Id.* at 184. These two lakes pose a particularly high flood risk during the late summer and fall hurricane season. *Id.* Storm surges in Lake Borgne pose the greatest risk to New Orleans East and St. Bernard Parish, and surges in Lake Pontchartrain primarily threaten the downtown area. *Id.* An interconnected system of levees guard the city from surges from these two lakes. *Id.* These levees are smaller than the levees that line the Mississippi River, ranging from 13.5 to 18 feet above sea level in height. *Id.* These levees are the ones that failed in the wake of Hurricane Katrina, and this subsection focuses exclusively on them. *Id.*



States Army Corps of Engineers (Corps), known as “levees,”<sup>34</sup> surround the city in order to protect it from floodwaters.<sup>35</sup>

The current levee system arose from a new plan that was created after Hurricane Betsy struck New Orleans in 1965.<sup>36</sup> In response to Betsy’s devastation, Congress authorized a large-scale hurricane improvement initiative known as the Lake Pontchartrain and Vicinity Hurricane Protection Project (LPVHPP).<sup>37</sup> The LPVHPP was designed to protect the greater New Orleans area from future hurricanes like Betsy.<sup>38</sup> Although the project was federally authorized, it was a joint federal, state, and local effort with shared costs.<sup>39</sup> The levee systems effectively divide the city up into segments known as “polders.”<sup>40</sup> The theory behind this design was that if the levee system in one polder failed,<sup>41</sup> floodwaters would not spill into the other polders.<sup>42</sup>

Because much of New Orleans’ land mass is below sea level and continuously sinking,<sup>43</sup> rainwater that collects in the city’s “bowl-like” base cannot be removed via natural drainage.<sup>44</sup> To alleviate the drainage problem, the Corps constructed a system of massive pumps which force water out of the city into Lake Pontchartrain through three drainage canals.<sup>45</sup> These canals are lined with levees that prevent water from spilling into the city.<sup>46</sup> In addition to the drainage canals, the Corps also constructed three large shipping canals in order to permit oceangoing vessels to freely cross through the city from the Mississippi River.<sup>47</sup> These canals are also confined by protective levees.<sup>48</sup>

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34. See NOLA.com, Last Line of Defense: Hoping the Levees Hold, [http://www.nola.com/hurricane/popup/nolalevees\\_jpg.html](http://www.nola.com/hurricane/popup/nolalevees_jpg.html) (last visited Feb. 21, 2007) (describing the levee system in more detail).

35. Kysar & McGarity, *supra* note 31, at 183.

36. *Id.*; see also *supra* note 32 (discussing Hurricane Betsy’s devastation of southeastern Louisiana).

37. Kysar & McGarity, *supra* note 31, at 186.

38. See *id.*

39. See FINAL REPORT, *supra* note 32, at 87.

40. Kysar & McGarity, *supra* note 31, at 185.

41. See Seed et al., *supra* note 7, at 1-10 (describing the polder system in more detail).

42. See Kysar & McGarity, *supra* note 31, at 185.

43. See FINAL REPORT, *supra* note 32, at 87. Over the years, the city of New Orleans has continued to sink due to drainage, subsidence, and compaction of soil. *Id.*

44. Kysar & McGarity, *supra* note 31, at 185.

45. *Id.* Named after the streets they parallel, the three drainage canals are known as the Seventeenth Street, London Avenue, and Orleans Avenue Canals. *Id.*

46. Kysar & McGarity, *supra* note 31, at 185.

47. *Id.*

The Intercoastal Waterway . . . connects ports along the entire Gulf Coast . . . . The Inner Harbor Navigation Canal (often referred to by the local population as the “Industrial Canal”) slices north-south across the city between the [Mississippi] River and Lake Pontchartrain . . . . The Mississippi River-Gulf Outlet (MRGO) canal bisects the

Once the construction was completed, responsibility for the operation, maintenance, repair, and rehabilitation of the levees was turned over to a number of local administrative bodies.<sup>49</sup> These entities included levee boards for each parish, along with independent sewer and water boards who were responsible for the maintenance of pumping stations.<sup>50</sup> Disagreement among the large number of organizations involved reduced accountability, created weakness in “transition segments” of the levees, and hindered maintenance and repair efforts.<sup>51</sup>

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Industrial Canal . . . and travels east-west to . . . St. Bernard Parish where it forms a “Y” with the Intercoastal Waterway [eventually running to the Gulf of Mexico].

*Id.*

48. See FINAL REPORT, *supra* note 32, at 87.

49. *Id.*

50. *Id.*

51. *Id.* In one instance, improvements to levee strength, which may have prevented or mitigated some of the critical breaches that flooded the downtown area, were rejected by competing local organizations. *Id.* Raymond Seed, a scientist who conducted an investigation of the causes of levee failure, spoke of an instance where Corps officials suggested certain improvements to levee boards, but was unsuccessful in eliciting any sort of response. *Id.* at 92. According to Seed:

“No one is in charge. You have got multiple agencies, multiple organizations, some of whom aren’t on speaking terms with each other, sharing responsibilities for public safety. The Corps of Engineers had asked to put flood gates into the three canals, which nominally might have mitigated and prevented the three main breaches that did so much destruction downtown. But they weren’t able to do that because, unique to New Orleans, the Reclamation Districts who are responsible for maintaining the levees are separate from the Water and Sewage District, which does the pumping. Ordinarily, the Reclamation District does the dewatering pumping, which is separate from the water system. These guys don’t get along.”

*Id.* (quoting *Hearing on Hurricane Katrina: Why Did the Levees Fail? Before U.S. S. Comm. on Homeland Security and Governmental Affairs*, 109th Cong. (Nov. 2, 2005) (statement of R.B. Seed)). There also appear to have been lapses in the maintenance and inspection of the levees, as residents who lived along the Seventeenth Street Canal often reported that water was seeping from the canal into their yards. *Id.* Reported several months before Katrina hit, these leaks turned out to be within several hundred feet of where the levee eventually collapsed. *Id.* A story on National Public Radio reported:

“State and federal investigators say that a leak may have been an early warning sign that the soil beneath the levee was unstable and help explain why it collapsed. They also say if authorities had investigated and found that a leak was undermining the levee, they could have shored it up and prevented the catastrophic breach.”

*Id.* at 92-93 (quoting Frank Langfitt, *Residents Say Levee Leaked Months Before Katrina*, NATIONAL PUBLIC RADIO, MORNING EDITION (Nov. 22, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=5022074>). Additionally, post-Katrina investigators cited instances where wild brush and even trees were allowed to grow along the levees bordering the Seventeenth Street and London Avenue canals. *Id.* at 92. This is a particularly dangerous condition as the growth of vegetation along levees can lead to significant soil erosion. See *id.* at 97. The fact that so many different local organizations were involved created a diffusion of responsibility that resulted in structural weaknesses. See *id.* at 91. Levee breaches were

It is clear that the New Orleans levee system was not designed to endure the most severe hurricanes.<sup>52</sup> A published Corps document admits this fact by noting “the hurricane protection system is not designed for the largest storms and as a result, the metropolitan area is vulnerable to flooding from hurricane storm surges.”<sup>53</sup> When questions were raised about the ability of the Lake Pontchartrain levees to withstand the most severe storms, the Corps discussed the possibility of modifying the existing levees in order to increase their strength, but no actions were ultimately taken.<sup>54</sup> The true explanation of exactly why the levees in New Orleans failed during Hurricane Katrina involves a complex analysis of interacting engineering and policy considerations.<sup>55</sup> Through a series of investigations conducted shortly after the hurricane hit, experts came to a number of preliminary conclusions.<sup>56</sup>

Katrina’s surge caused three major breaches in the Seventeenth Street and London Avenue levees.<sup>57</sup> A team of investigators from the University

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repeatedly observed at transition sections where two different levee boards were responsible for different pieces resulting in two different wall systems being joined together. *Id.* at 91-92. According to a Corps report, “[a]t sections where infrastructure elements were designed and maintained by multiple authorities, and their multiple protection elements came together, the weakest (or lowest) segment or element controlled the overall performance.” *Id.* at 92 (quoting Interagency Performance Evaluation Task Force, *Interim Report to Task Force Guardian, Summary of Field Observations Relevant to Flood Protection in New Orleans*, at 7 (Dec. 5, 2005)). Peter Nicholson, the head of the Corps team in charge of investigating post-Katrina levee failure, commented on the weakness of levee transition sections:

“Well, certainly we find that each individual organization will do as they see fit, and when the two sections of the flood control system operated or owned, designed, maintained by each of those different organizations come together, they may be in two different manners. They may have two different heights. They may be two different materials.”

*Id.* (quoting *Hearing on Hurricane Katrina: Why Did the Levees Fail? Before U.S. S. Comm. on Homeland Security and Governmental Affairs*, 109th Cong. (Nov. 2, 2005) (statement of Peter Nicholson, Associate Professor, Civil and Environmental Engineering, University of Hawaii)).

52. *Id.* at 89.

53. *Id.* (quoting U.S. Army Engineer District, New Orleans, *Un-watering Plan Greater Metropolitan Area, New Orleans, LA*, at 1 (Aug. 18, 2000)). The Corps designed the levees to withstand a hurricane intensity that might occur once every 200-300 years. *Id.* The Corps based the design for the levee system on a hurricane simulation exercise known as the “standard project hurricane” (SPH). *Id.* The SPH was roughly equivalent to a fast moving or moderate Category 3 hurricane. *Id.*

54. *Id.* at 90. When inquiries were made as to whether the levee system could withstand hurricanes more powerful than the SPH, such as a Category 4 or 5 storm, the Corps discussed undertaking a study of needed modifications, but no formal study was ever undertaken. *Id.*

55. Kysar & McGarity, *supra* note 31, at 191.

56. *See id.* In addition to these findings, it was also noted that Jefferson Parish officials ordered the evacuation of pump station operators prior to the storm. John P. Manard et al., *Katrina’s Tort Litigation: An Imperfect Storm*, 20 NAT. RESOURCES & ENV’T 31, 33-34 (2006). The fact that these pumps were left unmanned has been cited as the cause for much of the flooding in Jefferson Parish. *Id.*

57. *See* Kysar & McGarity, *supra* note 31, at 191-92. These breaches allowed floodwaters from Lake Pontchartrain to engulf wide areas of the downtown polder. *Id.*

of California at Berkeley (Berkeley group)<sup>58</sup> concluded that the breaches in the Seventeenth Street and London Avenue Canals were largely due to the erosion of the soil to which the levees were attached.<sup>59</sup> Their report explained that pressure generated from the storm surge caused the weak soil to give way, allowing floodwalls to be pushed back into the protected areas.<sup>60</sup> Additionally, investigations discovered that at the time the levees were constructed, the floodwalls were not sufficiently anchored deep enough into the foundation soils.<sup>61</sup> The Berkeley group concluded that lax maintenance practices further contributed to the breaches, as trees and brush were allowed to grow along the base of many of the levees.<sup>62</sup> Their report indicated that the downtown polder would not have flooded had the Seventeenth Street and London Avenue levees withstood the lateral pressure of the storm surge inside the canals as they were designed to do.<sup>63</sup>

Katrina's largest surge did not come from Lake Pontchartrain to the north, but surprisingly came from Lake Borgne to the east.<sup>64</sup> The levees built on Lake Borgne to protect New Orleans East and St. Bernard Parish were simply not built high enough to repel Katrina, as they were

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58. The Berkeley Group consisted of collaborating teams of scientists and engineers from the University of California at Berkeley, the American Society of Civil Engineers, the Corps, and the Louisiana State University Hurricane Research Center. Seed et al., *supra* note 7, at 1-1. The team's initial field investigations occurred over a span of approximately two and a half weeks, from September 28 through October 15, 2005. *Id.* The principle focus of the investigation was to study the performance of regional flood protection systems during Hurricane Katrina, and determine exactly what caused these structures to fail. *See id.* The project was funded by a grant from the National Science Foundation. *Id.* at i.

59. *See* Kysar & McGarity, *supra* note 31, at 192. The Berkeley group concluded that that the breach on the east side of the Seventeenth Street Canal "appears to have been a stability failure of the foundation soils beneath the earthen embankment" to which the levee was grounded. *Id.* The group's report further stated that the breach on the western side of the London Avenue Canal "occurred as a result of the sheetpile/floodwall being pushed backwards by the elevated water pressures on the outboard side, and that support on the inboard side of the sheetpile/floodwall was reduced as a result of soil failure at or beneath the base of the earthen levee embankment." *Id.*

60. *Id.*

61. *Id.* Floodwalls built in the 1980s were not sufficiently anchored because the soils immediately below the existing levees contained spoil from prior instances of digging and dredging. *Id.* at 193. Floodwall piling extended only ten feet below sea level in many areas, instead of the seventeen foot depth requirement called for in the Corps' original design plan. *Id.* at 194. The Berkeley group concluded that the Corps' safety margins employed in the design for the levees were far lower than the safety margins employed in most other critical engineering projects. *Id.* at 193.

62. *Id.* at 194-95. This weakened the levees by creating "a maze of small cavities that become channels for water to migrate from the canals." *Id.* at 195. State and local officials admitted to skipping over many canal floodwalls during annual levee inspections, and only giving cursory attention to the ones they did inspect. *Id.*

63. *Id.*

64. *Id.*

immediately overtopped and overwhelmed by the storm surge.<sup>65</sup> The failure of these levees resulted in the flooding of the eastern polder, which was mainly inhabited by impoverished residents and businesses that catered to local communities.<sup>66</sup> A levee system more massive in scope could have protected New Orleans East and St. Bernard Parish from the storm surge from Lake Borgne, but no such structures were contemplated as part of the Corps' original plan.<sup>67</sup>

Katrina's storm surge from the Gulf of Mexico and Lake Borgne also hit New Orleans by rushing up the Mississippi River-Gulf Outlet (MRGO) Canal into the Industrial Canal, and subsequently arriving in the heart of the City.<sup>68</sup> The storm's surge easily overwhelmed the levees running along these canals, causing a number of breaches in several different locations.<sup>69</sup> A post-Katrina modeling demonstration conducted by the Louisiana State University Hurricane Center (Hurricane Center) concluded that the MRGO Canal created a "funneling effect" which intensified the storm surge by about twenty percent.<sup>70</sup> G. Paul Kemp, an oceanographer at the Hurricane Center, stated that he had little doubt that the MRGO Canal "was the initial cause of the disaster," as it acted as "a back door into New Orleans."<sup>71</sup> From its creation, the MRGO Canal existed as a "shotgun pointed straight at New Orleans."<sup>72</sup> These levee failures resulted in the flooding of large portions of the polders containing New Orleans East, the Ninth Ward, and St. Bernard Parish.<sup>73</sup>

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65. *Id.* Colonel Richard Wagenaar, the Corps' head engineer in charge of the New Orleans district, reported that the eastern levees were "literally leveled in places." *Id.* Storm surges exceeded the height of some of these levees by as much as five to ten feet. *Id.*

66. *Id.* at 195-96.

67. *Id.* at 196.

68. *Id.*

69. *Id.*

70. *Id.* at 196-97. The MRGO Canal, which narrows from 2000 feet wide where it intersects with the Intercoastal Waterway to 200 feet where it bisects the Industrial Canal, literally acted as a funnel, as it increased the velocity of Katrina's surge from three to 6-8 feet per second. *Id.* Louisiana State University scientist Hassan Madhriqui stated that the funneling effect that increased the height of the storm surge "caused floodwaters to stack up several feet higher than elsewhere in the metro area and sharply increased the surge's speed as it rushed through the MR-GO and into the Industrial Canal." FINAL REPORT, *supra* note 32, at 97 (citation omitted). In designing the MRGO Canal, the Corps should have realized that its funnel-like shape would act to intensify storm surges. Had the Corps selected a safer design, Katrina's power would not have been intensified, and significantly less damage would have occurred. *See id.*

71. *See* Kysar & McGarity, *supra* note 31, at 197 (quoting Jody Warrick & Michael Grunwald, *Investigators Link Levee Failures to Design Flaws*, WASH. POST, Oct. 24, 2005, at A1).

72. John McQuaid & Mark Schleifstein, *Evolving Danger: Experts Know We Face a Greater Threat from Hurricanes than Previously Suspected. But Because the Land is Sinking and the Coastline is Disappearing, Scientists Can't Say Just How Vulnerable We Are*, TIMES-PICAYUNE, June 23, 2002, at J12.

73. *See* Kysar & McGarity, *supra* note 31, at 197. The Industrial Canal's levees experienced a number of small breaches along both the banks of the canal. *Id.* These breaches allowed additional

In the wake of Hurricane Katrina, many levees failed in different places for different reasons. Some levees were overtopped by storm surges and subsequently scoured away by floodwaters from inside the protected areas.<sup>74</sup> Others could not withstand the pressure from the storm surges, and collapsed because they were not sufficiently embedded within the underlying soils.<sup>75</sup> Additional levees may have failed during the storm because the floodwalls came apart at “transition segments.”<sup>76</sup> Whatever the case may be, it is clear that the levees were not adequately designed, built, or maintained to protect New Orleans from a storm such as Katrina, and countless lives were lost as a result.<sup>77</sup> While it may initially seem that the cause of the failures was nature’s wrath, it is clear that man’s folly helped Mother Nature out along the way.<sup>78</sup>

## 2. Evacuation

Evacuation efforts are a critical component of emergency preparation for natural disasters such as hurricanes.<sup>79</sup> Such preparation entails both detailed evacuation planning and the adequate implementation of evacuation plans already in place when it becomes clear that a hurricane will make landfall in a populated area.<sup>80</sup> Much of the suffering in New Orleans and other affected areas that occurred in the wake of Hurricane Katrina can largely be attributed to failures in the evacuation efforts.<sup>81</sup>

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water to flow into the New Orleans East polder. *Id.* The Berkeley group concluded that “storm surges overtopped numerous stretches of levees along this Canal frontage,” and the Hurricane Center noted that the increased velocity of the surge as it traveled up the MRGO Canal also contributed to these failures. *Id.* (quoting R.B. SEED ET AL., CTR. FOR INFO. TECH. RESEARCH IN THE INTEREST OF SOC’Y, PRELIMINARY REPORT ON THE PERFORMANCE OF THE NEW ORLEANS LEVEE SYSTEMS IN HURRICANE KATRINA ON AUG. 29, 2005, at 2-9 (2005), [http://www.ce.berkeley.edu/~new\\_orleans/report/PRELIM.pdf](http://www.ce.berkeley.edu/~new_orleans/report/PRELIM.pdf)).

74. *Id.* at 198.

75. *Id.*

76. *See id.*

77. *See* FINAL REPORT, *supra* note 32, at 115. One analysis stated that “[t]he bodies of at least 588 people were recovered in neighborhoods that engineers say would have remained largely dry land had the [levees] not given way.” *Id.* (quoting John Simerman, *Breaches Took Toll: N.O. Ruin Greatly Increased*, ADVOCATE (Baton Rouge) Dec. 31, 2005, at 1A).

78. *See* discussion *infra* Part III.C (discussing the “act of God” defense).

79. FINAL REPORT, *supra* note 32, at 103.

80. *See id.*

81. *See id.*

Evacuation orders in the days preceding Katrina were given far too late, or in some cases, not at all.<sup>82</sup> The City of New Orleans Comprehensive Emergency Management Plan (New Orleans Plan) allocates the authority to order a mandatory evacuation of residents to both the Governor of Louisiana and the Mayor of New Orleans.<sup>83</sup> Despite sufficient warnings given fifty-six hours before Katrina's arrival, neither Louisiana Governor Kathleen Blanco nor New Orleans Mayor C. Ray Nagin ordered a mandatory evacuation until nineteen hours before landfall.<sup>84</sup> Although explanations for this hesitancy

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82. *See id.*

83. *See id.* at 104. The New Orleans Plan provides:

"The authority to order the evacuation of residents threatened by an approaching hurricane is conferred to the Governor by Louisiana statute." But this power "is also delegated to each political subdivision of the State by Executive Order . . . . This authority [also] empowers the chief elected official of New Orleans, the Mayor of New Orleans, to order the evacuation of the parish residents threatened by an approaching hurricane."

*Id.* (quoting City of New Orleans, Comprehensive Emergency Management Plan, at 51 (2004)). "Under this authority, the Mayor of New Orleans [and/or the Governor of Louisiana] is responsible for giving the order for a mandatory evacuation and supervising the actual evacuation of [the] population." *Id.* The Mayor's Office of Emergency Preparedness must "[c]oordinate with the State . . . on elements of evacuation" and "[a]ssist in directing the transportation of evacuees to staging areas." *Id.* at 104-05 (quoting City of New Orleans, Comprehensive Emergency Management Plan, at 54 (2004)). The importance of effective evacuations is expressed in the New Orleans Plan, as it provides: "The safe evacuation of threatened populations . . . is one of the principle reasons for developing a Comprehensive Emergency Management Plan." *Id.* at 105 (quoting City of New Orleans, Comprehensive Emergency Management Plan, at 48 (2004)). In furtherance of that goal, "[t]he city of New Orleans will utilize *all available resources* to quickly and safely evacuate threatened areas." *Id.* (emphasis added) (quoting City of New Orleans, Comprehensive Emergency Management Plan, at 50 (2004)). Mississippi and Alabama have similar evacuation plans, allocating authority and responsibility to a combination of state and local government. *See id.* at 105-06. Additionally, the Louisiana Homeland Security and Emergency Assistance and Disaster Act (Louisiana Homeland Security Act) gives the governor overall responsibility for emergency management in the state. *Id.* at 49. Among other responsibilities, the governor is to "direct and *compel* the evacuation of all or part of the population from any stricken or threatened areas within the state if deemed necessary for the preservation of life; and, prescribe routes, modes of transportation, and destination in connection with evacuation." *Id.* (emphasis added).

84. *See id.* at 108-09. Fifty-six hours before landfall, the National Weather Service (NWS) predicted that the storm's projected path had shifted 150 miles west, and that Katrina would make landfall as a Category 4 storm. *Id.* at 70. Six hours later, the NWS reported that the storm would most likely make landfall 65 miles southeast of New Orleans, at Buras, Louisiana. *Id.* Katrina's actual landfall occurred only 20 miles away from the NWS's forecast. *Id.* On the evening of August 27, National Hurricane Center (NHC) director Max Mayfield called Blanco and Nagin to warn them of Katrina's likely effect on New Orleans. *Id.* Media reports indicate that Mayfield emphasized the unprecedented level of destruction and urged Mayor Nagin to immediately order a mandatory evacuation. *See id.* However, in his testimony before Congress, Mayfield stated he "just told [the officials] the nature of the storm [and that he] probably said to the Mayor that he was going to have some very difficult decisions ahead of him." *Id.* (quoting *Predicting Hurricanes: What We Knew About Katrina and When, Hearing Before Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (Sept. 22, 2005) (statement of Max Mayfield, Chairman of the National Hurricane Center)). AccuWeather Inc., a private weather service, criticized the NHC for issuing its warning too late. *See id.* at 71. AccuWeather issued a report

are not conclusively known, government officials have attributed the hesitation to reservations about creating unnecessary traffic congestion.<sup>85</sup> As late as the Saturday before the storm hit, news reports indicate that Mayor Nagin was still conferring with his lawyers about the City's legal liability to local businesses for lost revenues incurred due to a premature evacuation of customers.<sup>86</sup> It seems that state and local government delayed the announcement of a mandatory evacuation in order to weigh the cost of traffic jams and lost revenues against the lives of their constituents.<sup>87</sup>

The tardiness of evacuation orders caused evacuation efforts in New Orleans to be largely incomplete.<sup>88</sup> City officials, who were responsible for executing evacuation plans, failed to evacuate or assist in the evacuation of more than 70,000 individuals, who were effectively left behind to greet Katrina's devastating surge.<sup>89</sup> Those left behind largely consisted of residents who lacked the capability to evacuate, namely access to any means of transportation.<sup>90</sup> Despite the knowledge that many residents would not be able to evacuate on their own, officials chose to open the Superdome as a shelter for those remaining in the area, rather than using the authority to either commandeer resources or use "reasonable force" to completely evacuate the remaining population, as the New Orleans Plan directed them to do.<sup>91</sup> The failure to execute a more complete evacuation of New Orleans

predicting the correct location of Katrina's landfall approximately twelve hours before the NHC issued its initial warning. *Id.* Neighboring Jefferson Parish never even ordered a mandatory evacuation, except for in the lower parts of the Parish along the Gulf Coast. *Id.* at 110. While Parish President Aaron Broussard stated that he did not have the "resources to enforce" a mandatory evacuation, requests for supplemental state or federal funds to assist in evacuation efforts were never made. *Id.* The mandatory evacuation was ordered in New Orleans about a day after most other cities along the Gulf Coast had already evacuated. Evan Thomas, *How Bush Blew It*, NEWSWEEK, Sept. 19, 2005, at 26.

85. *Predicting Hurricanes: What We Knew About Katrina and When, Hearing Before Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (Sept. 22, 2005) (statement of Max Mayfield, Chairman of the National Hurricane Center), available at [http://www.katrina.house.gov/hearings/09\\_22\\_05/mayfield092205.pdf](http://www.katrina.house.gov/hearings/09_22_05/mayfield092205.pdf).

86. Bruce Nolan, *Katrina Takes Aim*, TIMES-PICAYUNE, Aug. 28, 2005, at 1.

87. *See id.*; Mayfield, *supra* note 85.

88. *See* FINAL REPORT, *supra* note 32, at 111. In contrast to New Orleans, neighboring Plaquemines Parish, in which officials ordered a mandatory evacuation on the morning of August 27, had an evacuation rate of ninety-seven to ninety-eight percent. *Id.* at 112. In New Orleans, at least one nursing home was unable to evacuate its residents because they were unable to locate bus drivers by the time the mandatory evacuation was ordered. *Id.* at 115.

89. *See id.* at 103.

90. *Id.* The small number of individuals who possessed the means to evacuate, but simply chose not to, must also shoulder some of the blame for the difficulties stemming from the incomplete evacuation. *See id.*

91. *See id.* at 103, 109-14. According to the New Orleans Plan, officials had authority to:



led to catastrophic circumstances, as hundreds of people drowned in their homes and in the streets as floodwaters rose above roof lines.<sup>92</sup> This extraordinary disaster called for extraordinary measures—measures which the local and state government failed to take.<sup>93</sup>

### B. Governmental Response Efforts

“The ‘*single biggest failure*’ of the federal response was that it failed to recognize the likely consequences of the approaching storm and mobilize federal assets for a post-storm evacuation of the flooded city. If it had, then federal assistance would have arrived several days earlier.”<sup>94</sup>

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“[D]irect and *compel, by any necessary and reasonable force*, the evacuation of all or part of the population from any stricken or threatened area within the City if he deems this action necessary for the preservation of life, or for disaster mitigation, response, or recovery” . . . and that “[s]pecial *arrangements will be made to evacuate persons unable to transport themselves* or who require special life saving assistance.”

*Id.* at 109 (emphasis added) (quoting City of New Orleans, Comprehensive Emergency Management Plan, at 45, 50 (2004)). In the face of a threatening hurricane, evacuation is extremely preferable to sheltering within the affected area. *See id.* at 104. Sheltered populations are subject to the most intense effects of the storm, and getting relief personnel and supplies into flooded areas can be a long and arduous process. *See id.* It is also important to note that these New Orleans city officials had the express authority to commandeer resources in order to assist in the evacuation effort. *See id.* at 103. The New Orleans Plan warns that “[i]f an evacuation order is issued without the mechanisms needed to disseminate the information to the affected persons, then we face the possibility of having large numbers of people either stranded and left to the mercy of the storm, or left in areas impacted by toxic materials.” *Id.* at 50 (quoting Office of Emergency Preparedness, City of New Orleans, Comprehensive Emergency Management Plan, at 7 (2004)). Those who were evacuated to the Superdome suffered through horrible conditions, as this sports arena was not designed “to house, feed, and water thousands of people for several days.” *Id.* at 117.

92. *See id.* at 115. The incomplete evacuation led to the necessity for a post-hurricane evacuation which federal, state, and city officials had neither prepared for nor anticipated. *Id.* at 104. This lack of preparation caused crisis planning to be conducted under emergency circumstances, in which communication and “situational awareness” were largely inadequate. *Id.*; *see also* Seed, et al., *supra* note 7, at 2-22 (describing rising water levels in the aftermath of the storm).

93. As noted by the Select Committee:

[T]he failure to order a mandatory evacuation until Sunday, the decision to enforce that order by “asking” people who had not evacuated to go to checkpoints for bus service, and then using that bus service to take people only as far as the Superdome did not reflect the publicly stated recognition that Hurricane Katrina would “most likely topple [the] levee system” and result in “intense flooding” and “waters as high as 15 or 20 feet,” rendering large portions of the city uninhabitable.

FINAL REPORT, *supra* note 32, at 111 (quoting Press Conference by C. Ray Nagin, Mayor of New Orleans, and Kathleen Babineaux Blanco, Governor of LA, MSNBC, Aug. 28, 2005). As a result, more than 70,000 people remained in the City to be rescued after the storm. *Id.* (citing *Hearing on Hurricane Katrina: Preparedness and Response by the State of Louisiana, Hearing Before Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (Dec. 14, 2005) (written statement of Colonel Jeff Smith)).

94. *Id.* at 135 (emphasis added) (quoting *Hearing on Hurricane Katrina: Preparedness and Response by the State of Louisiana, Hearing Before Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (Dec. 14, 2005) (statement of Colonel Jeff Smith, Deputy Director for Emergency Preparedness, Louisiana Office of Homeland

An incomplete pre-landfall evacuation led to the necessity for large-scale post-landfall rescue and evacuation operations.<sup>95</sup> When Hurricane Katrina made landfall on August 29, the 70,000 residents who were unable to evacuate were either bused to the Superdome or other temporary emergency shelters, forced to climb to their roofs and await rescue from rising floodwaters, or left to fend for themselves in the flooded streets.<sup>96</sup> Orleans Parish coroner Dr. Frank Minyard estimated that twenty percent of New Orleans' victims drowned in the floodwaters.<sup>97</sup> This implies that a significant majority of Katrina's victims perished while awaiting rescue on their roofs or in shelters.<sup>98</sup> These individuals did not drown in Katrina's waters. They died because they did not have access to supplies that could fulfill their basic human needs: food, water, shelter, security, and medicine.<sup>99</sup>

In the days preceding Katrina, the federal government knew quite well that a disaster of this magnitude would leave underfunded and overwhelmed state and local authorities virtually helpless, and that federal assistance, leadership, and coordination would be desperately needed in post-landfall rescue efforts.<sup>100</sup> While this much is known, perhaps the greatest question

Security and Emergency Preparedness)).

95. See *supra* Part II.A.2 (discussing pre-landfall evacuation efforts).

96. See FINAL REPORT, *supra* note 32, at 104. Many residents who were still inside their homes when Katrina hit were forced to use tools and crude objects to chop through their rooftops to escape the rising water. *Id.* at 116.

97. *Id.* at 115.

98. See *id.* As conditions inside the Superdome quickly began to deteriorate to unbearable "third-world" conditions, residents who were sheltered there began to perish due to sickness, starvation, and violence. See *id.* at 244. A National Guard report best illustrated the conditions inside the Superdome after Katrina:

The water pressure declined steadily over the first several days and failed to provide toilet functions on or about Wednesday the 31st of August. Unfortunately, many of the toilets had overflowed by then and foot traffic distributed fecal material and urine throughout the facility . . . . The warm temperature, combined with the floodwaters on the lower level, rotting food and other refuse, human and animal (pets) waste material, and the aroma of unwashed humans, produced an increasingly noxious smell in the place.

*Id.* (quoting Tiger Team Katrina Report, LA Nat'l Guard at 27 (Nov. 2, 2005)).

99. According to the Select Committee "Search and rescue efforts were uncoordinated . . . result[ing] in victims being left in shelters or out in the open on high ground for days without food and water." *Id.* at 194.

100. In 2004, FEMA conducted a simulation known as the Hurricane PAM Exercise (PAM). *Id.* at 81. PAM concluded that a Hurricane of Katrina's magnitude would cause the levees in New Orleans to breach and be overtopped, inundate seventy-five percent of the city in waters up to twenty feet, and cause approximately 60,000 deaths. *Id.* at 134. In the event of a storm such as Katrina, PAM also concluded:

300,000 [sic] people would not evacuate in advance; 500,000 to 600,000 buildings would

left unanswered in the minds of those who survived Hurricane Katrina is: “What took the federal government so long to show up?”

This question seems to have the unfortunate result of leading to a seemingly endless torrent of additional questions. In an age where the United States has the ability to invade any foreign territory in the world within eighteen hours by simply dispatching its 82nd Airborne,<sup>101</sup> why did the federal government fail to reach the streets of one of its *own* cities to rescue citizens who were in desperate need of food, water, security, and medical care before it was too late?<sup>102</sup> Why did our country’s leadership fail to act quickly and decisively while so many of its poor, sick, and elderly citizens were rapidly perishing from sickness and starvation?<sup>103</sup> Who within our government was calling the shots? Who failed to act? An examination of the roles and responsibilities of the federal government in responding to catastrophic disasters can help shed light on these troubling questions.<sup>104</sup>

### 1. The Department of Homeland Security and FEMA

In response to the terrorist attacks of September 11, Congress created the Department of Homeland Security (DHS) to serve as an executive arm of the federal government.<sup>105</sup> With the Homeland Security Act (HSA) of 2002, Congress consolidated the duties and responsibilities of various other executive agencies, including those of the Federal Emergency Management

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be destroyed; Phone and sewer services would be knocked out and chemical plants would be flooded; 97 percent of all communications would be down; About 175,000 people would be injured, 200,000 would become sick, and more than 60,000 would be killed; About 1,000 shelters would be needed for evacuees; Boats and helicopters would be needed for thousands of rescues because many residents would be stranded by floodwaters; A catastrophic flood would leave swaths of southeast Louisiana uninhabitable for more than a year.

*Id.* at 81; *see also supra* note 84 and accompanying text (discussing reports of Katrina’s likely devastation to officials from federal weather agencies).

101. *See* Jackson, *supra* note 28, at 561. The 82nd Airborne Division of the United States Army is the world’s most elite airborne fighting unit. *See* GlobalSecurity.org, 82nd Airborne Division, <http://www.globalsecurity.org/military/agency/army/82abn.htm> (last visited Feb. 25, 2007). This division is unique in its ability to be deployed by parachute to gain forcible entry into any area of the world within eighteen hours. *Id.* Almost every piece of the division’s combat equipment can also be dropped onto the battlefield by parachute for immediate use. *Id.* The 82nd Airborne is the Army’s most powerful offensive force, and it maintains the highest level of combat readiness. *Id.*

102. To remain fair, it should be noted that the Army National Guard deployed troops to Louisiana on the day after landfall, and rescued close to 2,000 evacuees. *See* FINAL REPORT, *supra* note 32, at 205-06. Despite this heroic effort, the federal government failed to aid and assist an overwhelming majority of the stranded population. *See supra* note 98 and accompanying text (discussing the death toll during post-landfall evacuation).

103. *See supra* note 7 (discussing Katrina’s death toll).

104. *See* discussion *infra* Part II.B.1-2 (discussing federal response efforts).

105. *See* 6 U.S.C. § 111 (2002).

Agency (FEMA), under the umbrella of the DHS.<sup>106</sup> With FEMA now operating as a department within the DHS, the DHS became the agency that shouldered the primary responsibility for managing the national response to domestic catastrophic disasters.<sup>107</sup>

When responding to a domestic disaster, the DHS is required to follow the guidelines set forth in the National Response Plan (NRP).<sup>108</sup> The NRP

106. FINAL REPORT, *supra* note 32, at 30. Section 101 of the HSA reads:

This section establishes the Department of Homeland Security in the executive branch of the United States government and defines its primary missions and responsibilities. The primary missions of the department include preventing terrorist attacks within the United States, reducing the vulnerability of the United States to terrorism at home, and minimizing the damage and assisting in the recovery from any attacks that may occur. The Department's primary responsibilities correspond to the five major functions established by the bill within the Department: information analysis and infrastructure protection; chemical, biological, radiological, nuclear, and related countermeasures; border and transportation security; *emergency preparedness and response*; and *coordination with other parts of the federal government, with state and local governments*, and with the private sector. These primary missions and responsibilities are not exhaustive, and the Department will *continue to carry out other functions of the agencies it will absorb*.

Analysis for the Homeland Security Act of 2002, Title 1, Section 101, <http://www.whitehouse.gov/deptofhomeland/analysis/title1.html> (last visited Jan. 5, 2007) (emphasis added) (explaining the provisions of 6 U.S.C. § 101 (2002)). After the HSA, the DHS was now responsible for overseeing FEMA in performing its duties. See FINAL REPORT, *supra* note 32, at 30. These duties, include, but are not limited to:

- (1) [E]nhancing the capability of state and local governments to respond to disasters;
- (2) coordinating with other federal agencies that provide resources to respond to disasters;
- (3) giving federal assistance directly to citizens recovering from disasters;
- (4) granting financial assistance to state and local governments; and
- (5) providing leadership for hazard mitigation through grants, flood plain management, and other activities.

*Id.* (citing Keith Bea, Cong. Res. Serv., Order No. RL 31670, *Transfer of FEMA to the Department of Homeland Security: Issues for Congressional Oversight*, App. A: Summary of FEMA Authorities (Dec. 17, 2002); U.S. Gov't Accountability Off., Pub. No. GAO/RCED-93-186, *Disaster Management: Improving the Nation's Response to Catastrophic Disasters* (July 23, 1993)).

107. FINAL REPORT, *supra* note 32, at 30.

108. *Id.* at 32. The NRP outlines the structure and mechanisms to be used for coordinating federal support during emergencies. *Id.* It consolidates the framework of federal prevention, protection, response, and recovery plans into one single operational plan to be used for all domestic emergency response scenarios. *Id.* The NRP also provides procedures for the assistance of state and local governments in disaster management scenarios, and defines situations where the federal government is to provide support, as well as scenarios where it is to assume control. *Id.* It additionally organizes equipment, resources, capabilities, and staffing in terms of functions that are most likely to be needed during domestic disasters, such as effective communications and urban search and rescue. *Id.* The NRP defines the administrative requirements and processes required for its implementation. *Id.* It is intended to give federal, state, and local authorities an adjustable overall framework to be used during emergencies in order to enable efficient and collaborative emergency management at all levels. *Id.* Its aim is to allow rescuers from numerous agencies to effectively work together when

outlines specific procedures the DHS must follow when coordinating a federal response to a domestic emergency.<sup>109</sup> When domestic emergencies requiring a federal response arise, the DHS directly responds through Emergency Support Functions (ESF). For each of the different ESFs, the DHS designates one primary federal agency, and often one or more support agencies to lead the operation.<sup>110</sup> In domestic emergency management situations, FEMA is usually the designated primary agency, and generally serves as the primary vehicle through which the DHS responds.<sup>111</sup>

By declaring a disaster to be an “incident of national significance (INS),” the DHS can trigger the federal government’s most thorough response.<sup>112</sup> This designation is usually limited to catastrophic events that will have a significant and prolonged effect on the country and easily overwhelm state and local capabilities.<sup>113</sup> When a disaster is declared to be

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managing domestic emergencies, regardless of their complexity, location, or size. *Id.*

109. *See id.*

110. *Id.* at 33.

111. *Id.* The events of Hurricane Katrina shined a spotlight on FEMA’s incapability to carry out effective emergency response operations. *See* Thomas, *supra* note 84, at 29. In the storm’s aftermath, FEMA, along with its former director Michael Brown, have been among the primary targets of public criticism and blame. *See* FINAL REPORT, *supra* note 32, at 13. Since its incorporation into the DHS in 2002, the emergency management community has complained that FEMA has been “systematically dismantled, stripped of authority and resources, and suffering from low morale, in part because of the [DHS’s] focus on terrorism.” *See id.* at 151. Many cite the decline of FEMA’s disaster relief capabilities to a loss of qualified personnel, disaster specialists, and senior leadership. *See id.* at 157. During rescue and aid operations, FEMA’s manpower shortage was compounded by a lack of security. *See id.* Of the one-thousand FEMA employees deployed to New Orleans on August 31, many had to turn back due to security concerns. *Id.*; *see also* Eric Lipton, *White House Knew of Levee’s Failure on Night of Storm*, N.Y. TIMES, Feb. 10, 2006, at A1 [hereinafter Lipton, *White House*] (adding to the list of FEMA’s failures: “[There was] no evidence that food and water supplies were formally ordered for the Convention Center, where more than 10,000 evacuees had assembled . . .”). Federally supplied food did not mobilize until the Wednesday after Katrina hit, and the Superdome was out of food and water by Friday. Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at A1 [hereinafter Lipton, *Breakdowns*].

112. *See* FINAL REPORT, *supra* note 32, at 36. The NRP assigns the responsibility of declaring a disaster to be an INS to the Secretary of the DHS. *See id.*

113. *See id.* The DHS defines an INS, or “catastrophic incident,” as “those high-impact events that require a coordinated and effective response by an appropriate combination of federal, state, local, tribal, private-sector, and nongovernmental entities in order to save lives, minimize damage, and provide the basis for long-term community recovery and mitigation activities.” *Id.* at 37 (quoting U.S. Dep’t of Homeland Security, *National Response Plan* at CAT-1 (Dec. 2004)). Another DHS definition defines an INS/catastrophic event as:

Any natural or manmade incident, including terrorism, that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, national morale, and/or government functions. A catastrophic event could result in sustained national impacts over a prolonged period of time; almost immediately exceeds resources normally available to state, local, tribal and private-sector authorities in the impacted area; and significantly interrupts governmental operations and emergency services to such an extent that national security could be threatened.

*Id.* at 36 (quoting U.S. Gov’t Accountability Off., Pub. No. GAO/T-RCED-93-46, *Disaster*

an INS, a component of the NRP known as the Catastrophic Incident Annex (NRP-CIA) is put into effect.<sup>114</sup> The invocation of the NRP-CIA allows the federal government to switch from its standard “pull” system of response, to a more urgent “push” system.<sup>115</sup> Under a “push” system, the federal government can bypass the usual requirement of waiting to receive an official request for assistance from state and local governments, and immediately dispatch a proactive response on its own initiative.<sup>116</sup> The moment an INS is declared and the NRP-CIA is invoked, the DHS must *immediately* begin to provide assistance to overwhelmed state and local governments through the designated federal agencies that correspond to the needed ESF.<sup>117</sup> Additionally, the declaration of an INS allows the

*Management: Recent Disasters Demonstrate the Need to Improve the Nation's Response Strategy* 43 (May 25, 1993)). The Secretary is required to declare a disaster to be an INS the moment it is known that the criteria are met. *See id.* at 37. The text of the NRP states, “Upon recognition that a catastrophic incident condition . . . exists, the Secretary of DHS *immediately* designates the event an INS and begins, potentially in advance of a formal Presidential disaster declaration, implementation of the NRP-CIA.” *Id.* at 137 (emphasis added) (quoting Dep’t of Homeland Security, *National Response Plan* at CAT-4 (Dec. 2004)).

114. *Id.* at 36. The DHS characterizes the NRP-CIA as “establishing the context and overarching strategy for implementing and coordinating an *accelerated, proactive* national response to certain catastrophic disasters.” *Id.* (emphasis added). After the declaration of an INS, the DHS is also required to convene the Interagency Incident Management Group (IIMG). *Id.* at 37. This group consists of high level professionals from governmental and non-governmental agencies with decision making authority. *Id.* at 38. The IIMG is convened in order to anticipate the needs and requirements of the response effort, and make strategic recommendations to the DHS and the White House. *Id.* at 134. With the declaration of an INS, the Secretary is also required to designate a Principal Federal Officer (PFO) to manage the response. *Id.* at 14. The PFO serves as the primary point of contact and source of situational awareness for the Secretary in the event of an INS. *See id.* at 135.

115. *Id.* at 31. When responding to natural disasters that do not arise to the level of an INS, the federal government operates under a “pull” system, and only provides assistance in response to official requests from state and local authorities. *Id.* at 30. In situations such as these, it is assumed that state and local authorities are in the best position to know the exact type and amount of needed assistance, and the federal government accordingly awaits the request so it knows the correct type and quantity of resources to send prior to deployment. *See id.* These requests can be made either before or after the natural disaster occurs. *Id.* During an INS however, it is assumed that state and local governments are overwhelmed, and therefore unable to or incompetent to make an official request for assistance. *See id.* at 31. In these situations, the federal government switches to a “push” system, and proactively provides relief without waiting for specific requests to be made. *Id.*

116. *Id.* During an INS, the federal government may have to mobilize and deploy troops and assets before local and state authorities make official requests through the usual protocols. *Id.* at 36. In catastrophic situations of this sort, the DHS must act quickly, as federal support will most likely be needed in order “to save lives, prevent suffering, and mitigate severe damage.” *Id.*

117. *See id.* The DHS is to provide expedited assistance to state and local authorities by providing services and commodities including, but not limited to: food, water, emergency first aid, onsite medical treatment, medical equipment and supplies, urban search and rescue, decontamination, shelter, housing, casualty management, transportation for the deceased or injured, and human

Department of Defense (DOD) to dispatch federal military troops to assist with disaster relief and security.<sup>118</sup>

With these policies in place, DHS Secretary Michael Chertoff had the responsibility to acknowledge Katrina's catastrophic power as it approached the Gulf Coast (as well as the certainty that city and local governments would be overwhelmed) and declare the storm to be an INS before it even made landfall.<sup>119</sup> As discussed above, the federal government had sufficient knowledge to classify Katrina as an INS two days prior to landfall,<sup>120</sup> and Chertoff should have made the declaration the moment the information became known.<sup>121</sup> By that time, it seemed to be obvious to everyone but Chertoff that the worst case scenario was about to happen.<sup>122</sup>

Had the Secretary acted in accordance with his official duties set forth in the NRP, federal assistance would have arrived in New Orleans much earlier,<sup>123</sup> and the DHS could have provided much needed assistance to city and state officials so that a complete mandatory pre-landfall evacuation could have been successfully staged.<sup>124</sup> At a bare minimum, Chertoff should have declared an INS by the time landfall actually occurred, so that federal assistance could have been in place to carry out an adequately proactive *post*-landfall evacuation. Sadly, for reasons that are difficult to comprehend, he failed to do even this.<sup>125</sup>

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services. *Id.* The DHS acknowledges that response activities may have to begin without the benefit of a complete and detailed assessment of situational needs, as this information may not be clear for twenty-four hours or longer after the incident. *Id.*

118. *See id.* at 38-39.

119. *See supra* notes 108-14 (discussing Secretary's responsibilities under NRP); *see also* FINAL REPORT, *supra* note 32, at 131.

120. *See supra* notes 84, 100 and accompanying text (discussing forecasts of Katrina's severity made by two separate federal weather agencies and PAM exercise).

121. *See supra* notes 108-14 (discussing Chertoff's guidelines under NRP); *see also* FINAL REPORT, *supra* note 32, at 131.

122. By this time, the governors of both Louisiana and Mississippi had declared state emergencies, and the President had issued an emergency declaration for Louisiana. FINAL REPORT, *supra* note 32, at 134.

123. *See id.* at 134-35.

124. *See* discussion *infra* Part II.A.2 (discussing inadequacies of pre-landfall evacuation).

125. *See* FINAL REPORT, *supra* note 32, at 131. According to a letter submitted by the DHS in response to criticism regarding its actions during Katrina, the DHS viewed the NRP-CIA as only applicable to "no-notice" or "short notice" events. *Id.* The text of the NRP-CIA itself, however, states that a catastrophic incident may occur with "little or no warning." *Id.*

Secretary Chertoff did not declare Katrina to be an INS until two days *after* it ravaged New Orleans,<sup>126</sup> and post-landfall evacuation and rescue efforts were severely undermined as a result.<sup>127</sup> Had Chertoff declared an INS at the time he was required to do so,<sup>128</sup> the DOD's military involvement would have been accelerated, and plans to pre-stage aircraft, busses, and boats for the evacuation of the City and the Superdome could have been put into effect.<sup>129</sup> Katrina made landfall on August 29, and federal assistance did not arrive until September 2.<sup>130</sup> At this point, it was already too late for a significant amount of people.<sup>131</sup> Federal troops did not arrive in the disaster areas until around five days after landfall.<sup>132</sup> Armed gangs and looters, like television crews, arrived much quicker.<sup>133</sup> The federal

126. *Id.* at 12. By comparing the events preceding Katrina to those preceding Hurricane Rita, the importance of a timely INS declaration becomes apparent. Hurricane Rita made landfall near the Texas-Louisiana border on September 24, 2005 as a Category 3 hurricane. Hurricane Rita, Wikipedia Encyclopedia, [http://en.wikipedia.org/wiki/Hurricane\\_rita#Louisiana](http://en.wikipedia.org/wiki/Hurricane_rita#Louisiana) (last visited Feb. 27, 2007). Rita caused \$11.3 billion in damage to the Gulf Coast region. *Id.* The federal government declared Hurricane Rita an INS two days prior to landfall. See FINAL REPORT, *supra* note 32, at 12. Evacuation efforts were far more successful in the anticipation of this hurricane. See *id.* at 12-13. Ten-thousand National Guardsmen were brought into Texas in anticipation of this storm, while a dismal 1,500 were summoned prior to Katrina. *Id.* More supplies were stockpiled on the ground prior to Rita than prior to Katrina as well. *Id.* at 12. Had the DHS declared Katrina to be an INS as it did in anticipation of Rita, countless lives could have been saved. *Id.*

127. See *infra* notes 130-35 and accompanying text (discussing DHS's failures during response effort). Critics cite Chertoff's decision to appoint FEMA director Michael Brown as PFO as one of the principal forces behind the inadequate response. See FINAL REPORT *supra* 32, at 135. Brown had not completed the required PFO training, and was not even listed on the roster of approved candidates. *Id.*

128. See *supra* notes 108-14 and accompanying text (discussing the Secretary's responsibility under the NRP).

129. See FINAL REPORT, *supra* note 32, at 134.

130. Jackson, *supra* note 28, at 567.

131. See *supra* note 98 and accompanying text (discussing lives lost while awaiting rescue).

132. See Thomas, *supra* note 84, at 30. According to the Select Committee:

The Louisiana National Guard and DOD active duty forces, under Joint Task Force Katrina, were under separate commands . . . attempts to bring them under the same command were rejected . . . result[ing] in delays in the arrival of DOD active duty troops—troops that provided a robust reservoir of manpower and a wide array of capabilities.

FINAL REPORT, *supra* note 32, at 195.

133. See Thomas, *supra* note 84, at 30. Within a day of landfall, only around thirty police officers were left to fight off looters and riots in the city. *Id.* General violence, rioting, and looting immediately broke out in crowded areas where residents were uncertain of their chances for survival, evacuation, or rescue. See FINAL REPORT, *supra* note 32, at 241. Looting occurred in several locations. *Id.* In some cases, residents broke into stores to obtain items necessary for survival such as food, water, clothing, flashlights, and batteries. *Id.* Other looters broke into businesses to take



government failed to exercise “situational awareness”<sup>134</sup> during a critical time, and hundreds of Americans lost their lives as a result.<sup>135</sup>

## 2. The White House

Some amount of fault should be allocated to the White House as well.<sup>136</sup> The Stafford Act provides that the President is “Commander-in-Chief” of the military’s actions during disaster response efforts, just as he is during times of war.<sup>137</sup> Accordingly, President Bush could have exercised this authority to override Chertoff’s hesitance in order to deploy military troops at an earlier time.<sup>138</sup> Even though the White House received a FEMA report confirming that the levees had in fact breached on the day Katrina hit, it did not consider this assessment “confirmed” for eleven hours.<sup>139</sup> The Select Committee concluded that “the President’s Homeland Security team did not effectively substantiate, analyze, and act on the information at its disposal.”<sup>140</sup> An analysis of the preparation for and response to Hurricane Katrina reveals poor judgment and undue hesitancy at all levels of government.<sup>141</sup> Government entities failed to effectively coordinate adequate preparation and response efforts, and the people of New Orleans paid the ultimate cost.

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resale items and electronic devices. *Id.*

134. See Thomas, *supra* note 84, at 27.

135. See *supra* note 98 and accompanying text (discussing death toll during post-landfall evacuation).

136. See FINAL REPORT, *supra* note 32, at 132 (discussing presidential roles and responsibilities during major disasters).

137. *Id.*; see 42 U.S.C. § 5170a (2000) (“In any major disaster, the President may—(1) direct any Federal agency . . . to utilize its authorities and . . . resources . . . in support of State and local assistance efforts; (2) coordinate all disaster relief assistance . . . (4) assist State and local governments in . . . emergency assistance.”).

138. See FINAL REPORT, *supra* note 32, at 132. President Bush himself has publicly admitted that the federal government’s response to hurricane Katrina was “slow and inadequate.” See *Bush Admits Katrina Response Was Inadequate*, INT’L HERALD TRIB., Sept. 16, 2005, <http://www.iht.com/articles/2005/09/16/europe/web.0915kat1.php>. In a speech given at Jackson Square in New Orleans seventeen days after Katrina made landfall, Bush stated, “The system at every level of government, was not well coordinated and was overwhelmed in the first few days.” President George W. Bush, Speech at Jackson Square, New Orleans (Sept. 15, 2005), <http://www.cnn.com/2005/POLITICS/09/15/bush.transcript/> [hereinafter Jackson Square Speech].

139. See FINAL REPORT, *supra* note 32, at 132. The report stated, “[My] initial flyover lasted about 10 minutes and even in that short time I was able to see that approximately 80 percent of the city was under water, and I confirmed the 17th Street Canal levee break.” *Id.* at 142 (quoting *Hurricane Katrina in New Orleans: A Flooded City, A Chaotic Response, Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 109th Cong. (Oct. 20, 2005) (testimony of Marty Bahamonde, Regional Director, External Affairs, Region One, FEMA)).

140. *Id.* at 143.

141. See *supra* notes 28-140 and accompanying text (discussing government failures during Katrina).

III. HISTORY AND BACKGROUND: NEGLIGENCE, SOVEREIGN IMMUNITY,  
AND “ACTS OF GOD”

## A. Negligence Defined

No one can contest the fact that the citizens of New Orleans suffered an insurmountable amount of harm in the wake of Hurricane Katrina.<sup>142</sup> Whether their property was destroyed<sup>143</sup> or their loved ones taken,<sup>144</sup> only just compensation can begin to make these citizens whole again.<sup>145</sup> But what is a New Orleanian to do? Does he or she have a valid legal claim? If so, who should the claim be brought against?<sup>146</sup>

A cause of action alleging negligence is the obvious legal remedy that first comes to mind. As defined by Black’s Law Dictionary, negligence is “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.”<sup>147</sup> Another common definition of negligence is “conduct that falls below the standard of care established by law for the protection of others against the unreasonable risk of harm.”<sup>148</sup> In order to assert a successful common-law cause of action for negligence, a plaintiff must show that: (1) defendant owed a duty of care to plaintiff,<sup>149</sup> (2) defendant breached that duty,<sup>150</sup> (3) defendant’s conduct was the cause of plaintiff’s injury,<sup>151</sup> and (4) plaintiff suffered damages as a

142. See *supra* note 7 (discussing harm caused by Katrina).

143. See *supra* note 11 (discussing property damage).

144. See *supra* note 7 (discussing lives taken).

145. Monetary damages are largely the only available remedy, as grieving residents cannot be reunited with their lost loved ones.

146. See *infra* notes 154-58 and accompanying text (addressing this question).

147. BLACK’S LAW DICTIONARY 1061 (8th ed. 2004).

148. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS 130 (10th ed. 2000).

149. *Id.* This duty is “an obligation recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.” *Id.*

150. *Id.* A defendant has “breached” this duty when his actions have failed to conform to the legally required standard of conduct. See *id.*

151. *Id.* Causation entails “[a] reasonably close causal connection between the conduct” in question and “the resulting injury.” *Id.* Causation is a “combination of two elements” which must both be sufficiently established: “causation in fact and legal or ‘proximate’ causation.” *Id.* To satisfy the “causation in fact” prong, plaintiff must prove that “but-for” defendant’s conduct, the resultant injury would not have occurred. See *Perkins v. Tex. & New Orleans R.R.*, 147 So. 2d 646, 649 (La. 1962). “Legal causation” is a concept that can cut off liability even where defendant’s conduct was a “cause in fact.” SCHWARTZ ET AL., *supra* note 148, at 290. As a rather complex legal concept, legal causation is often defined as “[a] cause that is legally sufficient to result in liability,” or “an act or omission that is considered in law to result in a consequence, so that liability can be

result of the breach.<sup>152</sup> Without proving all of these elements, a negligence claim cannot withstand a motion to dismiss.<sup>153</sup>

Before claimants can argue these elements in court, they must choose a proper defendant to bring suit against. It is interesting to note that a sort of “best case scenario” exists for a plaintiff when his or her Katrina-related damages were caused by a private company or person, and the most conventional tort suits that can be brought are those involving damages from oil spills.<sup>154</sup> Numerous class action lawsuits alleging negligence have been filed against private oil and gas operators, such as Shell Pipeline and Chevron, for spills that occurred during Katrina.<sup>155</sup> In addition to these types of claims, there exists a potential for negligence claims to be brought against nursing homes and private healthcare facilities in which many people died during the storm or during evacuation efforts.<sup>156</sup> Negligence claims

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imposed on the actor.” See BLACK’S LAW DICTIONARY, *supra* note 147, at 234. Legal causation generally does not exist when the resultant harm from defendant’s actions was too unforeseeable at the time the action was taken or when there were legally sufficient intervening acts that broke the chain of causation stemming from the original action. See *id.* at 234-35. Accordingly, “[a] person must foresee the normal consequences of his conduct, but is not responsible for extraordinarily negligent intervening acts of third persons.” SCHWARTZ ET AL., *supra* note 148, at 322. It is important to note that the elements which must be proved in order to complete a negligence cause of action under Louisiana state law are identical to those of the common law. See Manard et al., *supra* note 56, at 32.

152. See SCHWARTZ ET AL., *supra* note 148, at 130. To fulfill the last prong, “[a]ctual loss or damage resulting to the interests of another” must be shown. *Id.*

153. See *infra* note 221 (discussing government motions to dismiss that claimants will face).

154. See Manard et al., *supra* note 56, at 32. Hurricane Katrina’s storm surges caused countless oil tanks owned by private oil and gas operators to spill into bodies of water and onto private property. See *id.*

155. *Id.* More than twenty class action lawsuits have been filed against Murphy Oil and related entities to recover damages from oil spilled from an 85,000 barrel oil tank in Meraux, Louisiana. *Id.* Another class action lawsuit has been filed against Shell Pipeline, Chevron, and other oil and gas operators on behalf of a large group of commercial fisherman who depended on waterways that were contaminated from oil spills at seven separate facilities in southeastern Louisiana. *Id.* In addition to alleging negligence, many of these lawsuits also assert liability under the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 2701 et seq., which in addition to property damages, provides for the recovery of revenue losses, lost profits, and diminished earning capacities relating to property damage, as well as for the loss of the use of natural resources. *Id.* While some of these claims also assert liability under theories of strict and absolute liability, amendments to Louisiana’s Civil Code from a 1996 tort reform package make recovery under these theories quite difficult. *Id.* Louisiana state law now only imposes strict liability “upon a showing that [defendant] knew or, in the exercise of reasonable care, should have known” of the injury-causing defect. *Id.* The same reform package limits absolute liability for ultrahazardous activities to pile-driving or blasting with explosives. *Id.* Because of the difficulty entailed in succeeding under strict or absolute liability theories, negligence and OPA suits will likely be the primary battlegrounds for litigation over Katrina-related oil spills. *Id.* Louisiana state law also recognizes the doctrine of *res ipsa loquitur*, which could prove helpful to plaintiffs in future Katrina litigation. *Id.* at 33. This doctrine creates a legal inference of negligence when the circumstances demonstrate that the only possible or reasonable explanation for the damages is defendant’s conduct. *Id.*

156. *Id.* As many of these facilities were not fully evacuated before the storm hit, future negligence lawsuits filed against the facilities and their insurers could highlight negligent conduct in

against private companies are somewhat straightforward, as plaintiffs must simply satisfy the required elements of the tort.<sup>157</sup>

But what is to become of residents who are either unable to collect from an insolvent company, or simply do not have the luxury of having a private party as the source of their damages? Can these estranged citizens now bring suit against the governmental bodies that failed them? In the aftermath of Hurricane Katrina, local, state, and federal governmental bodies and agencies have been rendered the only possible sources of recovery for many New Orleans residents. Citizens who bring suit against the government have an arduous road ahead of them, however, as a series of high hurdles lie in their path to recovery.<sup>158</sup>

### B. *The King Can Do No Wrong*

A discussion of the pebbles which litter the road to recovery in Katrina litigation should begin by addressing the supreme boulder. Since the late 1700s, the idea that “the King can do no wrong” has existed in our legal framework in the form of the “sovereign immunity” doctrine.<sup>159</sup> The

the creation of emergency preparedness plans, evacuation efforts, and treatment of patients in the wake of the storm. *Id.*

157. These defendants will likely attempt to assert the “act of God” defense in these suits. See discussion *infra* Part III.C (discussing the “act of God” defense to tort liability). This defense has failed in the past on a number of occasions, as federal courts have reasoned that hurricanes striking hurricane-prone areas during hurricane season cannot be considered “unanticipated.” See *Apex Oil Co. v. United States*, 208 F. Supp. 2d 642, 653 (E.D. La. 2002). Additionally, two Louisiana appellate courts have recently held in past hurricane-related cases that the act of God defense cannot shield a defendant from claims for the cost of removing his displaced property from the property where it came to rest after the storm. See, e.g., *Allen v. Simon*, 888 So. 2d 1140, 1141 (La. Ct. App. 2004) (holding that defendant was liable for costs connected with the removal of a tree that fell from his property onto his neighbor’s house); *Terre Aux Boeufs Land Co. v. J.R. Gray Barge Co.*, 803 So. 2d 86, 94 (La. Ct. App. 2001) (holding that defendant is liable for cost of removing its barge that was swept away onto plaintiff’s marshland property). The actual recovery of damages could prove to be problematic however, as the insurance coverage and assets of most private companies will be quite modest in comparison to the massive scope of damages. See *supra* notes 7, 11 (discussing damage sustained during Katrina).

158. See discussion *infra* Part III.B-C (discussing hurdles to recovery).

159. See *Ayala v. Phila. Bd. of Pub. Educ.*, 305 A.2d 877, 879 (Pa. 1973), *superseded by statute*, Pennsylvania Political Subdivision Tort Claims Act, 42 PA. CONST. STAT. ANN. §§ 8541-8564 (West 2007). It is widely acknowledged that the historical roots of the doctrine of sovereign immunity can be found in the English case *Russell v. Men of Devon*, 100 Eng. Rep. 359 (1788). *Id.* In *Russell*, reflecting the then prevalent societal view of the individual in relation to his government, Justice Ashurst noted that “it is better that an individual should sustain an injury than that the public should suffer an inconvenience.” 100 Eng. Rep. at 362. The *Russell* court also pointed to the absence of a fund “out of which satisfaction is to be made.” *Id.* It has also been suggested that the doctrine of sovereign immunity partially stemmed from the early English courts’ circular reasoning interpreting

reasoning behind the creation of this early English doctrine, allied closely with the concept of the “divine right of kings,” was that it was necessarily a contradiction of the King’s sovereignty to allow him to be sued in his own courts.<sup>160</sup> After its conception in early English common law, this idea that governmental bodies are immune from tort liability was soon adopted in the United States.<sup>161</sup>

For a significant period of time the federal government was immune from any and all liability in tort,<sup>162</sup> and it was “axiomatic that the United States may not be sued without its consent.”<sup>163</sup> It was not until the Federal Tort Claims Act of 1949 (FTCA) that the United States waived its immunity to tort actions under certain circumstances.<sup>164</sup> By enacting the FTCA, Congress effectively waived the immunity to civil suits enjoyed by the federal government,<sup>165</sup> and provided that:

[Federal district courts] shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>166</sup>

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the doctrine of respondeat superior. See Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 210 (1963). The courts acknowledged that respondeat superior was based on the concept of “principle” and “agent,” and that all government employees were “agents” of the King. *Id.* They reasoned that because the King himself could not commit a tort, the theory failed for lack of a valid principal. *Id.*

160. SCHWARTZ ET AL., *supra* note 148, at 638.

161. *Ayala*, 305 A.2d at 880. While the reasoning for the initial acceptance of this feudal and monarchistic doctrine by the United States is largely obscure and unclear to legal scholars, some justifications have been set forth. See SCHWARTZ ET AL., *supra* note 148, at 638. As Justice Holmes noted in *Kawananakoa v. Polyblank*, “[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.” 205 U.S. 349, 353 (1907).

162. SCHWARTZ ET AL., *supra* note 148, at 639.

163. *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (discussing the doctrine of sovereign immunity). The sovereign immunity doctrine has been widely criticized in the American legal community throughout history. See *infra* notes 179-84 and accompanying text (discussing criticism of the sovereign immunity doctrine).

164. *Id.* It is important to note that the FTCA is a *federal* Act, and thus does not apply to state and local governments. See 28 U.S.C. § 1346(b)(1) (1997). Each state has its own laws regarding sovereign immunity. See *infra* notes 180-85 and accompanying text (discussing sovereign immunity in relevant Gulf Coast states).

165. *Deuser v. Vecera*, 139 F.3d 1190, 1192 (8th Cir. 1998).

166. 28 U.S.C. § 1346(b)(1).

This waiver came along with what is commonly known as the “discretionary function exception,” however.<sup>167</sup> The discretionary function exception retains governmental immunity from liability for civil claims “based upon the exercise or performance . . . [of] a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”<sup>168</sup> Essentially, when governmental actions are discretionary in nature, sovereign immunity locks on, and all acts and omissions are immune from judicial review.<sup>169</sup>

In response to confusion surrounding the discretionary function exception, the Supreme Court articulated a workable standard for lower courts to apply.<sup>170</sup> In *Berkovitz ex rel. Berkovitz v. United States*, Justice Marshall presented a two-prong test to be used in determining when the discretionary function exception applies.<sup>171</sup> First, a court must consider if the governmental action in question involved an element of judgment or

167. *Deuser*, 139 F.3d at 1192-93.

168. 28 U.S.C. § 2680(a) (1994). In its entirety, this section covers:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

*Id.* This exception to the FTCA “marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.” *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984). The Supreme Court first addressed the discretionary function exception in *Dalehite v. United States*, 346 U.S. 15 (1953). In *Dalehite*, the Court construed the exception quite broadly, and retained immunity for any decisions which originated at the executive level. *Id.* at 36. The Court reasoned that while the FTCA holds the government liable in situations where a private person would be liable, it precludes liability for activities exclusive to government in which a private citizen could not engage. *See id.* at 27-28. Upholding sovereign immunity to a level almost equivalent to the pre-FTCA era, the *Dalehite* Court held that “[i]t necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.” *Id.* at 36. Many years after *Dalehite*, the Supreme Court once again addressed the discretionary function exception in *Varig*, 467 U.S. at 797. In *Varig*, the Court attempted to clarify the scope of the exception after recognizing that in interpreting the exception, the Supreme Court’s reading of the FTCA had not “followed a straight line.” *Id.* at 811. While the *Varig* Court did attempt to set forth factors to test the applicability of the discretionary function exception, the “factors” were left largely unarticulated, and the exception’s scope remained largely undefined. Nathan Smith, Comment, *Water, Water Everywhere, and Not a Bite to Eat: Sovereign Immunity, Federal Disaster Relief, and Hurricane Katrina*, 43 SAN DIEGO L. REV. 699, 711 (2006).

169. *McWaters v. FEMA*, 408 F. Supp. 2d 221, 228 (E.D. La. 2005), *modified*, 408 F. Supp. 2d 221 (E.D. La. 2006), *and dismissed in part*, 436 F. Supp. 2d 802 (E.D. La. 2006).

170. *See Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531 (1988).

171. *Id.* at 536. The *Berkovitz* Court expanded upon *Varig* in order to clarify the scope of the discretionary function exception. *See id.*

choice on the part of a government actor.<sup>172</sup> The exception cannot apply if a relevant federal statute, policy, or regulation outlines a specific course of action for the actor to follow.<sup>173</sup> Second, if the challenged conduct does involve an element of judgment, that judgment must be of the type the discretionary function exception was designed to shield.<sup>174</sup> In sum, the *Berkovitz* Court provided that immunity can only attach if (1) the government act was the result of a decision involving an element of judgment, and (2) the judgment was based on considerations of public policy.<sup>175</sup> If the government fails to act in accordance with a specific, mandatory directive, the discretionary function exception cannot apply.<sup>176</sup> For a tort claim against the federal government to survive a motion to dismiss,<sup>177</sup> a plaintiff must show that the conduct in question does not fall within the discretionary function exception.<sup>178</sup>

Sovereign immunity exists at state and local levels as well. The Eleventh Amendment of the United States Constitution bars actions against a state in federal court absent consent, waiver, or abrogation of the state's sovereign immunity.<sup>179</sup> The Louisiana Constitution waives immunity in tort for the State and all political subdivisions of the State.<sup>180</sup> The Constitutions of Mississippi<sup>181</sup> and Alabama<sup>182</sup> have not waived state sovereign immunity

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172. *Id.*

173. *Id.* The first prong of the test involves an inquiry of whether a statute or regulation provides a “fixed or readily ascertainable standard” to guide the decision maker in performing his duties. *Powers v. United States*, 996 F.2d 1121, 1124 (11th Cir. 1993) (quoting *Ala. Elec. Coop., Inc. v. United States*, 769 F.2d 1523, 1529 (11th Cir. 1985)). A statute or regulation meets this standard if it “mandates that a government agent perform his or her function in a specific manner.” *Id.* at 1124-25.

174. *Berkovitz*, 486 U.S. at 536-37. The Court further noted, “[t]he basis for the discretionary function exception was Congress’ desire to ‘prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.’” *Id.* (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)).

175. *Id.* at 537. There exists a “strong presumption” that an act authorized by a regulation involves considerations of public policy if the regulation expressly allows employee discretion. *United States v. Gaubert*, 499 U.S. 315, 324 (1991).

176. *Berkovitz*, 486 U.S. at 544.

177. *See infra* note 221 (discussing motions for judgment on the pleadings).

178. *Berkovitz*, 486 U.S. at 544.

179. U.S. CONST. amend. XI. (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by citizens or subjects of any foreign state.”).

180. LA. CONST. art. XII § 10. Personal injury and wrongful death judgments are statutorily capped at \$500,000. LA. REV. STAT. ANN § 13:5106(B) (2006). This cap applies to each person suffering an injury, or each decedent in a wrongful death case. *Id.* Additionally, “[n]o suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court.” *Id.* § 13:5106(A).

181. RESTATEMENT (SECOND) OF TORTS § 895A (1965).

182. ALA. CONST. art. I, § 14. (“[T]he State of Alabama shall never be made a defendant in any court of law or equity.”).

for tort liability. The immunity of local governmental bodies to be sued in tort has been waived in Louisiana<sup>183</sup> and Alabama.<sup>184</sup> Mississippi has not yet waived local tort immunity.<sup>185</sup>

If Katrina claimants have the good fortune of getting past the first hurdle of sovereign immunity<sup>186</sup> in their suits against the government, they must next find their way around Section 702c of the Flood Control Act of 1928 (Flood Control Act).<sup>187</sup> This provision states: “No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . . .”<sup>188</sup> The Flood Control Act was enacted in conjunction with the federal government’s decision to take on primary responsibility for a series of flood control projects after the Great Mississippi Flood of 1927.<sup>189</sup> Courts have traditionally interpreted the words “floods or flood waters” to mean “all water that flows through a federal facility that was designed and is operated, at least in part, for flood control purposes.”<sup>190</sup>

183. See *Hamilton v. City of Shreveport*, 174 So. 2d 529, 531-32 (La. 1965) (holding that the state Constitution waived immunity for local government bodies).

184. See *Jackson v. City of Florence*, 320 So. 2d 68, 75 (Ala. 1975) (abolishing the doctrine of municipal immunity).

185. See *McGrath v. City of Gautier*, 794 So. 2d 983 (Miss. 2001) (applying the doctrine of municipal immunity).

186. See *supra* notes 159-85 and accompanying text (discussing sovereign immunity).

187. 33 U.S.C. § 702c (2000).

188. *Id.*

189. Manard et al., *supra* note 56, at 35; see *infra* note 250 (discussing the Great Mississippi Flood of 1927). The initial reasoning for enacting the Flood Control Act involved:

plac[ing] a limit on the amount of money that Congress would spend in connection with flood control programs. Congress undoubtedly realized that the cost of extensive flood control projects would be great and determined that those costs should not have added to them the floodwater damages that might occur in spite of federal flood control efforts . . . . “[I]mmunity from liability for floodwater damage arising in connection with flood control works was the condition upon which the government decided to enter into the area of nationwide flood control programs.”

*In re Katrina Canal Breaches Consol. Litig.*, 471 F. Supp. 2d 684, 691 (E.D. La. 2007) (quoting *Graci v. United States*, 456 F.2d 20, 25-26 (5th Cir. 1971)).

190. Manard et al., *supra* note 56, at 35. In *United States v. James*, plaintiffs’ injuries were caused by the federal government’s negligent failure to warn of “the release of flood waters from reservoirs that had reached flood stage.” 478 U.S. 597, 601, 604 (1986), *overruled by Cent. Green Co. v. United States*, 531 U.S. 425 (2001). Holding that the Flood Control Act barred plaintiffs’ claims, the Supreme Court stated:

The [Flood Control] Act concerns flood control projects designed to carry floodwaters. It is thus clear from § 702c’s plain language that the terms “flood” and “flood waters” apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

*Id.* at 605 (emphasis added).



This provision often prevents recovery where liability would otherwise be imposed on the federal government under the FTCA for negligence linked to federal flood control projects.<sup>191</sup>

Due to the growing concern that it was not Congress' intention to create "complete immunity from liability for the negligent and wrongful acts of [government] employees *unconnected with flood control projects*,"<sup>192</sup> the Supreme Court subsequently adjusted the standard set forth in *United States v. James*.<sup>193</sup> In *Central Green Co. v. United States*, the Court held that when interpreting the Flood Control Act, courts should consider "the character of the waters that cause the relevant damage rather than the relation between that damage and a flood control project."<sup>194</sup> Thus, the concept that the government may be liable for damages caused by certain floodwaters but not others was officially recognized for the first time.<sup>195</sup> Although it does not directly address the required nexus between floodwaters and a federal flood control project needed for immunity to attach,<sup>196</sup> *Central Green Co.* requires courts to consider the true nature of the flood damage, rather than basing its decision entirely on the fact that a flood control project was involved.<sup>197</sup>

### C. *When God Acts*

In addition to overcoming the doctrine of sovereign immunity<sup>198</sup> and the Flood Control Act,<sup>199</sup> a final obstacle remains in the path to recovery against the government. In upcoming Katrina litigation, a governmental entity may

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191. *Id.* at 598-99.

192. *See In re Katrina Canal Breaches*, 471 F. Supp. at 691.

193. *See supra* note 190 and accompanying text (discussing standard set forth in *James*).

194. *Cent. Green Co. v. United States*, 531 U.S. 425, 437 (2001). In *Central Green Co.*, plaintiffs sued the United States under the FTCA for damages sustained by their pistachio farm caused by water flooding from a federally owned canal. *Id.* at 427. The canal was designed and usually used for flood control purposes. *See id.* The property damage was accrued over a long period of time "in part by flood waters and in part by the routine use of the canal when it contained little more than a trickle." *Id.* at 436. Plaintiffs alleged that the damage was attributable to the government's negligence in designing, constructing, and maintaining the canal. *Id.* at 427. In overturning the Ninth Circuit's decision, the Supreme Court distinguished the current situation from the facts of *James*, and held "in determining whether § 702c immunity attaches, courts should consider the *character of the waters* that cause the relevant damage rather than the relation between that damage and a flood control project" *Id.* at 437 (emphasis added).

195. *See In re Katrina Canal Breaches*, 471 F. Supp. 2d at 694 ("Thus, the concept that the Government might be immune from damage from the effect of some water and not as to other water is recognized in *Central Green*.").

196. *Id.* at 695 ("*Central Green* does not directly answer the question of what nexus to a flood control project is required for floodwaters to trigger immunity.").

197. *Id.* ("[I]n reality *Central Green* requires the Court to identify the *cause of damage* rather than base a decision on the mere fact that a flood control project was involved.").

198. *See supra* notes 159-85 and accompanying text (discussing sovereign immunity).

199. *See supra* notes 187-97 and accompanying text (discussing the Flood Control Act).

also attempt to assert the “act of God” defense.<sup>200</sup> Through this defense, it can be argued that an “act of God” or “force of nature” occurred with such significant force that it constituted an intervening force or superseding cause, thus breaking the chain of causation linking the original wrongdoer to the injury.<sup>201</sup> It is important to note, however, that “[o]ne who fails in his duty to remedy a defective or dangerous condition is liable for injuries resulting therefrom, although the immediate cause of the injury is the [‘act of God’].”<sup>202</sup>

200. The act of God defense has been employed in negligence and strict liability cases for around three-hundred years. See Jackson, *supra* note 28, at 566 (citing Denis Binder, *Act of God? Or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law*, 15 REV. LITIG. 1, 3 (1996)). The act of God defense received prominence in early English decisions concerning strict liability for common carriers. *Id.* at 6. In a unanimous late eighteenth century opinion, Lord Mansfield established “acts of God” as a defense to tort liability, and noted that the burden of proof shifts from plaintiff to defendant in proving the defense:

After stating the case—The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man: for every thing is the act of God that happens by His permission; every thing, by His knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shews it was done by the King's enemies or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

*Forward v. Pittard*, 99 Eng. Rep. 953, 956-57 (1785) (holding that carrier was absolved of liability because damage caused by fire was deemed an “act of God”). Early courts acknowledged that liability would in fact exist if the carrier knew the act of God was coming. Ralph S. Bauer, *Common Carrier's Negligent Delay Plus Act of God*, 8 NOTRE DAME L. REV. 394, 395 (1933). Courts eventually extended the act of God defense to negligence actions. See *Nichols v. Marsland*, 10 L.R.-Ex. 255 (1875). In *Nichols*, the courts absolved liability for damages caused when defendant's dam failed during a powerful storm, as Lord Justice Mellish noted:

In this case I understand the jury to have found that all reasonable care had been taken by the defendant . . . that the storm was of such violence as to be properly called the act of God, or vis major . . . . Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community.

*Id.* at 258-59. The “act of God” defense was adopted by American Courts in the late 1800s. See *Polack v. Pioche*, 35 Cal. 416, 422-23 (1868) (following principles set forth in *Forward*).

201. See *Kimble v. Mackintosh Hemphill Co.*, 59 A.2d 68, 71 (Pa. 1948) (holding defendant liable for damages caused when his negligently maintained roof collapsed as a result of extremely high winds).

202. *Id.* at 72; see also *Bowman v. Columbia Tel. Co.*, 179 A.2d 197, 202 (Pa. 1962) (holding

Generally, the act of God defense entails two specific requirements: “the unforeseeability [of the event] by reasonable human intelligence, and the absence of a human agency causing the alleged damage.”<sup>203</sup> Recognized by Louisiana law as well as the common law, this defense absolves liability when a defendant can prove that the injury is due directly and exclusively to unanticipated natural causes without human intervention, and that his or her negligent conduct did not contribute to the incident.<sup>204</sup> A plaintiff may overcome this defense by conclusively showing that “the act of God coalesces with an act of the defendant,”<sup>205</sup> and that man helped God along the way.

The government will have a wide array of immunities and defenses at its disposal in upcoming Katrina litigation.<sup>206</sup> In order to survive a motion to dismiss,<sup>207</sup> a negligence claim against the government will have to withstand the sovereign immunity doctrine, the Flood Control Act, and the “act of God” defense. Katrina plaintiffs must persuade judges that these immunities and defenses do not apply to the facts at hand if their claims are to succeed in court.<sup>208</sup> As many obstacles complicate Katrina litigation, the road to recovery will require persistence, creative advocacy, and equitable judicial decision-making.<sup>209</sup>

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defendant telephone company liable for damages caused when a telephone pole which was not inspected for fourteen years fell during a snowstorm).

203. Jackson, *supra* note 28, at 566 (citing Binder, *supra* note 200, at 13). Thus, if a similar event has occurred in the past, could have been anticipated through the use of modern technology, or was otherwise reasonably foreseeable, the act of God defense will not preclude liability even if the event was not probable. Binder, *supra* note 200, at 13. The test is not whether the event’s occurrence was likely or probable, but whether it was *reasonably foreseeable*. *Id.* Consequently, the defense is construed narrowly, and is limited to “truly unforeseeable events,” rather than “unusual, but not unprecedented” ones. *Id.* In more recent times, the Alabama Supreme Court explained that “[i]n its legal sense an ‘act of God’ applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.” Bradford v. Stanley, 355 So. 2d 328, 330 (Ala. 1978). For the defense to apply, the injury must also occur “by the direct, immediate, and exclusive operations of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention.” Butts v. City of S. Fulton, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1978).

204. Manard et al., *supra* note 56, at 32.

205. See Binder, *supra* note 200, at 17. If the damage is caused by both “an act of God” and the negligent act, the defendant remains liable. *Id.* at 17-18.

206. See *supra* notes 159-85 and accompanying text (discussing sovereign immunity); notes 187-97 and accompanying text (discussing the Flood Control Act); notes 200-05 and accompanying text (discussing the “act of God” defense).

207. See *infra* note 221 (discussing motions for judgment on the pleadings).

208. See discussion *infra* Part IV.B (presenting arguments to bypass sovereign immunity in Katrina litigation).

209. See discussion *infra* Part IV.

IV. COMPLETING THE TORT: ANALYSIS OF THE POTENTIAL FOR CLAIMS TO  
BE BROUGHT AGAINST THE GOVERNMENTA. *Cause of Action for Governmental Negligence*

When evaluating the actions taken by federal, state, and local governmental entities in anticipation of and response to Hurricane Katrina, instances of inept judgment, undue hesitation, irresponsibility, and improper prioritizing can be found at virtually every stage and every level.<sup>210</sup> The policy decisions made by these governing bodies, or in some cases the decisions that they did not make,<sup>211</sup> either contributed to or caused an unprecedented number of American citizens to lose their homes, lives, or loved ones to Katrina's wrath.<sup>212</sup> Left with nothing but unanswered questions and the clothes on their backs, many Katrina survivors' only chance for salvation lies in bringing a negligence cause of action against the governmental entities that failed them.<sup>213</sup> To analyze the potential for such a

210. See discussion *supra* Part II (discussing governmental ineptitude and misjudgment concerning actions during Hurricane Katrina).

211. See discussion *supra* Part II (discussing governmental decisions made during Katrina).

212. See *supra* note 7 (discussing harm suffered during Katrina).

213. Groups of Katrina victims should bring their claims together in a class action lawsuit to spread the expense among a large group. See Smith, *supra* note 168, at 732 ("On balance, a Rule 23(b)(3) certified class action appears to be the best vehicle for recovery available to Hurricane Katrina victims. A class action retains most features of traditional tort litigation, such as the plaintiff's burden of proving all elements of their claim, but the high cost of litigation can be shared among members of the class."). Rule 23 of the Federal Rules of Civil Procedure states:

One or more members of a class may sue . . . on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. [Additionally,] the court [must find] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(a), (b)(3). Katrina claimants meet these requirements because (1) they are massive in number, (2) the facts and law relevant to their claims are similar, and (3) they will be bringing similar claims. See discussion *supra* Part I (discussing numerosity of Katrina claimants); Part II (discussing facts relevant to Katrina litigation); and Part III (discussing law relevant to the type of claims that will be brought in Katrina litigation). Claims against the United States must be

negligence claim to be successfully brought, the discussion must be rephrased in the following legal context: did the government breach a duty it owed to the citizens of New Orleans, thereby causing them to incur damages?<sup>214</sup>

The answer to this question lies buried somewhere within a body of law that remains to be fully developed and defined.<sup>215</sup> Unlike traditional governmental negligence, governmental negligence framed within the context of an event such as Hurricane Katrina is a concept for which there is little precedent,<sup>216</sup> and no definitive legal guidelines to follow.<sup>217</sup> Many negligence suits have already been filed against the government since Katrina, but most have yet to be heard in court.<sup>218</sup> Many more lawsuits of the same nature will indefinitely be filed in the near future.<sup>219</sup> As discussed below, certain legal standards pertaining to the relevant established law have yet to be set by courts.<sup>220</sup> The ability of the claimants to survive a

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brought in federal district court. See 28 U.S.C. § 1346(b)(1) (2000) (“[Federal] district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . .”). Claims against the United States arising in Katrina affected areas such as Orleans Parish, Jefferson Parish, St. Bernard Parish, Plaquemines Parish, and St. Tammany Parish must be brought in the United States District Court for the Eastern District of Louisiana. See Administrative Office of the United States Courts, PACER Service Center Homepage, <http://pacer.psc.uscourts.gov/psco/cgi-bin/county.pl> (last visited Feb. 27, 2007). On appeal, these claims must be brought in the United States Court of Appeals for the Fifth Circuit. See United States Court of Appeals for the Fifth Circuit Homepage, <http://www.ca5.uscourts.gov/> (last visited Feb. 27, 2007). Claims against the State of Louisiana or its political subdivisions must be brought in Louisiana state courts. LA. REV. STAT. ANN. § 13:5106 (2006) (“No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court.”). The government will likely attempt to consolidate litigation so that multiple actions against it can be heard all at once. See *Graci v. United States*, 456 F.2d 20, 21-22 (5th Cir. 1971) (district court consolidated multiple claims alleging governmental negligence during Hurricane Betsy at the behest of the United States).

214. See *supra* Part III.A (discussing elements necessary to perfect a negligence cause of action).

215. See discussion *infra* Part IV.A.1-2 (discussing undeveloped standards of duty and breach relevant to Katrina litigation).

216. A limited amount of precedent does exist pertaining to claims against the Corps for negligent design of levees, however. See *infra* note 329 (discussing *Graci v. United States*). Due to the lack of binding precedent relevant to the circumstances giving rise to Katrina litigation, unrelated prior instances of governmental conduct during emergencies must be examined, and legal argument must be crafted by analogy. See discussion *infra* part IV.A.1-2 (discussing arguments to be presented in Katrina litigation).

217. See discussion *infra* Part IV.A.1-2 (discussing undefined areas of law relevant to Katrina litigation).

218. See Manard et al., *supra* note 56, at 31 (“Within days of Hurricane Katrina’s landfall . . . numerous lawsuits were filed seeking tort recovery under several theories of liability. Suits continue to be filed for claims related to the immediate impact of the hurricane, and potential new causes of action arise out of the response and ongoing recovery efforts. Suits have been filed in spite of the destruction or closure of courthouses. Flooded offices, power outages, and displacement have not prevented advocates from asserting claims, even when forced to resort to hand-written petitions.”).

219. See *id.* at 36.

220. See discussion *infra* Part IV.A.1-2 (discussing undefined areas of the law relevant to Katrina litigation).

government's motion to dismiss<sup>221</sup> largely depends on how courts define these standards.<sup>222</sup> The purpose of this section is to show that by defining

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221. In upcoming Katrina litigation, the government will file motions for judgments on the pleadings and attempt to have Katrina claims dismissed before their merits are heard. Rule 12(b)(1) of the Federal Rules of Civil Procedure provides that a claim may be dismissed due to a lack of jurisdiction over the subject matter. FED. R. CIV. P. 12(b)(1). The government will likely file 12(b)(1) motions challenging the subject matter jurisdiction of the district court hearing Katrina claims. To overcome a subject matter jurisdictional attack, the FTCA requires plaintiffs to show an element of discretion in the government's conduct. *See supra* note 166 and accompanying text (discussing jurisdiction of claims brought against the government under the FTCA and the discretionary function exception); *see also supra* note 213 (discussing which courts Katrina claims will be brought in). The burden of proof in a 12(b)(1) motion lies with the party asserting the existence of subject matter jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Accordingly, Katrina plaintiffs will bear this burden. As the United States Court of Appeals for the Fifth Circuit has stated:

When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. The court's dismissal of a plaintiff's case because the plaintiff lacks subject matter jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have jurisdiction.

*Id.* (citing *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam)). Under standard circumstances, "the district court can resolve factual disputes in determining jurisdiction pursuant to a Rule 12(b)(1) motion for dismissal." *Montez v. Dep't of the Navy*, 392 F.3d 147, 148 (5th Cir. 2004). When subject matter jurisdiction is challenged, a district court is generally free to weigh evidence and resolve factual disputes in order to determine whether it has power to hear the case. *See Land v. Dollar*, 330 U.S. 731, 735 (1947), *overruled on other grounds*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Furthermore, "[a] court may base its disposition of a motion to dismiss for lack of subject matter jurisdiction on (1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *In re Katrina Canal Breaches Consol. Litig.*, 471 F. Supp. 2d 684, 688 (E.D. La. 2007) (quoting *Robinson v. TCI/US W. Cable Commc'ns, Inc.*, 117 F.3d 900, 904 (5th Cir. 1997)). In short, no presumption of truthfulness attaches to a plaintiff's allegations, and courts can independently resolve disputed issues of material fact in order to determine subject matter jurisdiction. *See id.* However, if the dispute is interdependently determinative of both the jurisdictional question and the merits of the underlying cause of action, a district court may err by resolving the dispute in favor of the government. *See id.* When issues of fact are central *both* to determining subject matter jurisdiction and the merits of an FTCA claim, the Fifth Circuit has held that a district court must assume jurisdiction and proceed on the merits. *See Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981) ("[When] the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case [under Rule 12(b)(6)]."). In *Williamson*, the Fifth Circuit reasoned that:

[N]o purpose is served by indirectly arguing the merits in the context of federal jurisdiction. Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits. This refusal to treat indirect attacks on the merits as Rule 12(b)(1) motions provides, moreover, a greater level of protection to the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule 12(b)(6) . . . or

these standards in fair, practical, and logical ways, a cause of action for

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Rule 56 . . . both of which place greater restrictions on the district court's discretion.

*Id.*; see also *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1347 (5th Cir. 1985) (supporting *Williamson* court's reasoning). Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a claim to be dismissed for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Additionally,

If, on a motion asserting the [12(b)(6)] defense . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion.

*Id.* To overcome challenges to subject matter jurisdiction in upcoming Katrina litigation, claimants must argue that the resolution of the jurisdictional dispute is significantly intertwined with factual issues going to the merits of the FTCA claim, and that dismissal pursuant to a 12(b)(1) motion is therefore improper. See *In re Katrina Canal Breaches*, 471 F. Supp. 2d at 689 (denying United States' 12(b)(1) motion to dismiss FTCA claim due to intertwining of jurisdictional and merit-based issues); see also *infra* note 320 and accompanying text (further discussing *In re Katrina Canal Breaches*). Other Circuits have also followed the Fifth Circuit's standard by denying governmental 12(b)(1) motions to dismiss FTCA claims. See *Green v. Hill*, 954 F.2d 694, 698 (11th Cir. 1992) (holding that an FTCA claim against the United States may not be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) based upon the district court's resolution of the disputed factual question regarding whether an employee of the U.S. Government was acting within the scope of his employment), *withdrawn and superseded in part on reh'g*, 968 F.2d 1098 (11th Cir. 1992); *Lawrence v. Dunbar*, 919 F.2d 1525, 1529-31 (11th Cir. 1990) (holding that the issue of material fact as to whether a government agent was acting within the scope of his employment when he attended Christmas parties and afterwards was involved in automobile accident precluded dismissal of suit for lack of subject matter jurisdiction); *Augustine v. United States*, 704 F.2d 1074, 1079 (9th Cir. 1983) ("Because the jurisdictional issue is dependent upon the resolution of factual issues going to the merits [of the FTCA claim], it was incumbent upon the district court to apply summary judgment standards in deciding whether to grant or deny the government's motion."). As the government will likely file both a 12(b)(1) and a 12(b)(6) motion in Katrina litigation, it is imperative for plaintiffs to persuade a court to dismiss the 12(b)(1) motion and hear the claim under a 12(b)(6) standard. A 12(b)(6) standard is advantageous to claimants because this standard requires courts to take all facts alleged in a complaint as true, and to resolve ambiguities in the current controlling substantive law in plaintiffs' favor. *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004); *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001). Because the current controlling substantive law relevant to upcoming Katrina litigation is littered with ambiguities, it is imperative for claimants to have unclear law resolved in their favor. See discussion *infra* Part IV.A.1-2 (discussing legal ambiguities). Additionally, "[a] court may dismiss a complaint [under Rule 12(b)(6)] only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002) (emphasis added). Motions to dismiss under Rule 12(b)(6) are viewed with disfavor by courts and are rarely granted. *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005). Specifically, claimants should argue that in determining if Secretary Chertoff's actions pursuant to the NRP were discretionary in nature for FTCA jurisdictional purposes, a merit-based analysis of the facts regarding whether the government breached its "duty" cannot be avoided. See *infra* Part IV.B.3 (discussing Chertoff's negligence and the federal government's breach of its duty). Plaintiffs can make this same argument with regard to President Bush's actions governed by the Stafford Act. See *infra* Part IV.B.3 (discussing the President's negligence during Katrina). Finally, plaintiffs should argue that in determining whether the Corps' actions in constructing faulty levees were discretionary for FTCA jurisdictional purposes, factual issues bearing upon the determination of negligence must be concurrently analyzed. See *infra* Part IV.B.1 (discussing negligent actions on the part of the Corps).

222. See discussion *infra* Part IV.A.1-2 (discussing undefined legal standards).

governmental negligence pertaining to its preparation and response efforts during Hurricane Katrina can be conclusively established.

### 1. Duty

“Americans have never left our destiny to the whims of nature, and we will not start now.”<sup>223</sup>

Did the government owe a “duty” to the American people living in New Orleans during Hurricane Katrina?<sup>224</sup> It would be easy to conclude in the affirmative and claim that the government, just like any private citizen, had a duty to conform to a “standard of care established by law” so that its conduct did not subject the people of New Orleans to an “unreasonable risk of harm.”<sup>225</sup> When discussing the government’s “duty,” however, it may be more relevant to ask if the government’s duty goes beyond that of a normal individual’s, in that not only must its conduct conform to “the standard of care established by law,” but that it must actually *exceed* it.<sup>226</sup> It is not the case here that the government struck the people of New Orleans with its car while it was not paying attention.<sup>227</sup> The government did not engage in any affirmative action that directly caused damages to its citizens;<sup>228</sup> it failed to protect and aid Americans in the face of Mother Nature’s actions.<sup>229</sup> With this in mind, the more pertinent inquiry in this analysis seems to be: Did the

223. Jackson Square Speech, *supra* note 138.

224. *See supra* note 149 and accompanying text (discussing “duty” as a required element of negligence claims).

225. *See supra* Part III.A (discussing required standard of care in traditional negligence cases). In traditional negligence cases, government entities are held to the same standard of care required for the rest of society, and liability is determined in the same way as that of a primary defendant. *See generally* Black v. United States, 441 F.2d 741, 743 (5th Cir. 1971). *See also* Ferguson v. United States, 712 F. Supp. 775, 785-86 (N.D. Cal. 1989) (government negligently maintained fence); Atl. Aviation Corp. v. United States, 456 F. Supp. 121, 124 (D. Del. 1978) (government jeep struck aircraft).

226. *See infra* note 234 and accompanying text (addressing heightened governmental duty).

227. If this were the case, a determination of negligence would be made under traditional standards. *See* Brooks v. United States, 337 U.S. 49 (1949) (Army truck collided with plaintiff’s car); Grier v. United States, 291 F. Supp. 1020 (W.D.N.C. 1968) (pedestrian struck by mail truck); Jones v. United States, 265 F. Supp. 858 (S.D.N.Y. 1967) (child struck by mail truck).

228. *But see infra* note 306 and accompanying text (arguing that in designing the MRGO Canal, the government affirmatively caused harm by increasing risk of danger).

229. *See* discussion *supra* Part II (discussing government’s failures during Hurricane Katrina).



government owe a duty to *protect* and *aid* the people of New Orleans in the face of harm?<sup>230</sup>

While most American citizens (and all New Orleanians) would likely answer this question with an overwhelming “yes,” this duty remains to be conclusively articulated in a legal context.<sup>231</sup> The most powerful argument in support of the existence of a governmental duty to protect and aid citizens in the face of harm can be shown by looking at our country’s past.<sup>232</sup> Historically, our government has consistently shielded its citizens from harm’s way, and Americans have come to rely on this protection to their detriment.<sup>233</sup> It logically follows that because the government has historically “assumed” this responsibility, it should be legally obligated to act in accordance with a duty to protect and aid.<sup>234</sup> By assuming this duty,

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230. See *infra* notes 232-36 and accompanying text (discussing governmental duty to protect and aid).

231. While some court decisions and legal discussions have acknowledged a governmental duty to protect and aid, they have neglected to clearly articulate this duty or describe how it can be breached. See *Riss v. City of N.Y.*, 240 N.E.2d 860, 860-61 (N.Y. 1968) (declining to articulate a “general duty of [governmental] protection in the law of tort” [because] “such extension of responsibilities should be dictated by . . . legislative determination”); *DeLong v. County of Erie*, 455 N.Y.S.2d 887, 892-93 (N.Y. App. Div. 1982) (holding that a duty to protect exists under certain circumstances, but stating only that the duty must be fulfilled in a “nonnegligent” manner); *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (stating “[i]f the Coast Guard failed in its *duty* and damage was thereby caused to petitioners, the United States is liable under the [Federal] Tort Claims Act,” but failing to describe standard appropriate to determine breach) (emphasis added); *infra* notes 234, 262 (further discussing *DeLong* and *Indian Towing Co.*); see also Jackson Square Speech, *supra* note 138 (implying the existence of a governmental duty owed to Katrina victims but failing to articulate it in any clear manner); Jackson, *supra* note 28, at 558-71 (“Was a duty owed by the federal government to the citizens of New Orleans? . . . Did the federal government breach its duty? . . . Who should be responsible for what happened to the citizens of New Orleans? . . . The answers to these questions will . . . bring clarity to what happened immediately following Hurricane Katrina . . .”).

232. See *infra* notes 238-54 and accompanying text (discussing history of governmental protection from harm).

233. “Detrimental reliance” is a concept which originated from the common-law notion of “equitable estoppel.” See DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 983 (3d ed. 2002). In essence, the concept of equitable estoppel provides that when a party acts in a certain manner, and others rely on these actions to their detriment, the party is bound by its previous actions. See *United States v. Ga.-Pac. Co.*, 421 F.2d 92, 96 (9th Cir. 1970) (outlining four-part test for estoppel); *Cent. Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1218 (8th Cir. 1982) (outlining three-part test); *Plymouth Foam Prods., Inc. v. City of Becker*, 120 F.3d 153, 156 (8th Cir. 1997) (outlining one-part test). This concept was subsequently adopted by tort law, and can be used as a basis for establishing a governmental duty in the case at hand. See *infra* notes 234-35 (discussing case law that applies the notion of equitable estoppel to questions of tort liability).

234. With respect to the specific geographic area affected by Hurricane Katrina, an even greater governmental duty should be accorded. See *generally* *Kunz v. Utah Power & Light Co.*, 526 F.2d 500, 504 (9th Cir. 1975) (holding that a power company owed a duty to prevent flooding from negligent operation of its dam to downstream landowners). When a government decides to affirmatively enter a region and build protective physical structures, citizens of that region heavily rely on these structures for protection. See *id.* When the federal government chose to assume responsibility for flood control in the Gulf Coast region, it assumed a heightened duty to protect and

the government effectively “R.S.V.P.’d but failed to arrive,”<sup>235</sup> and as Judge

aid the citizens of New Orleans. *See generally supra* Part II.A.1 (discussing the levee system). Hurricane Betsy taught the citizens of New Orleans how dangerous living in New Orleans could be, and many of them would have likely relocated to safer regions had the government not constructed the LPVHPP. *See supra* note 32 (discussing Hurricane Betsy). Many residents chose to remain living in New Orleans solely because the Corps built flood control structures to protect the City, and this reliance caused countless Americans to lose their lives and loved ones. *See supra* note 7 (discussing lives taken by Katrina). The facts at hand are very similar to those in *Kunz v. Utah Power & Light Co.* In *Kunz*, a power company voluntarily undertook flood control responsibilities in a region, and then failed to protect the area from floodwaters. 526 F.2d at 501-02. Noting that landowners had reasonably come to rely on the company’s flood control structures, the court held that “Utah Power must carry the responsibility for avoiding damaging floods,” and that defendant “had a duty of care on which liability for negligent damage can be based.” *Id.* at 504. The court reasoned:

In general, the law does not require one person to act affirmatively to prevent harm to another unless he has himself brought about the condition which threatens the harm. Courts have often found an exception to this rule, however, when one person has voluntarily undertaken to assist another. He is then required to exercise reasonable care to protect the other’s interests. Thus when a railroad voluntarily provides a flagman at an intersection, a relationship with motorists is established which creates a duty of care. In cases in which such liability has been found, the plaintiff’s condition usually was worsened by his reliance on the defendant’s action, though such detrimental reliance has not always been required.

*Id.* at 503. Similar to the defendant in *Kunz*, the Corps created a special relationship with the people of New Orleans when it built the LPVHPP. Courts should therefore hold that the government had a “duty of care” during Katrina, and that damages resulting from the breach of this duty are recoverable. Additional case law has supported the “duty by detrimental reliance” argument in the past. In *DeLong*, a woman was murdered when police failed to respond to her 911 telephone call. 455 N.Y.S.2d at 888-89. The court held that by providing the 911 service, the municipality had assumed a duty to protect its residents, and that it was therefore legally required to act in accordance thereof. *See id.* at 888. The court reasoned that the decision to provide a 911 service caused residents to detrimentally rely on the municipality’s protective services. *Id.* at 892. It further noted that because she had called 911, the victim chose to remain inside her house and await rescue from certain danger, rather than relocating to a safer premises. *Id.* The court concluded that the municipality’s failure to respond was the proximate cause of the victim’s death, and damages should be awarded. *Id.*; *see also* Jackson, *supra* note 28, at 561 (“[The] expectation of the federal government by its citizens to provide protection and assistance is well grounded on past actions of the federal government in coming to the aid of its citizens during a time of crisis.”); *Riss*, 240 N.E.2d at 861 (implying the existence of a governmental duty to protect when “authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks which then materialize into actual losses” (citing *Schuster v. City of N.Y.*, 154 N.E.2d 534 (N.Y. 1958))); *Pierre v. United States*, 741 F. Supp. 306 (D. Mass. 1990) (holding Department of Housing and Urban Development liable for negligently failing to remove lead paint after it voluntarily undertook responsibility to repair plaintiff’s house). President Bush himself has stated “[f]our years after the frightening experience of September 11th, Americans have every right to expect a more effective response in a time of emergency,” and “[w]e have a duty to confront this poverty with bold action.” Jackson Square Speech, *supra* note 138 (emphasis added).

235. Jackson, *supra* note 28, at 562. If plaintiffs cannot persuade a court that the government had a legal duty to protect them from Hurricane Katrina, they can fall back on the following alternative argument: Although the government did not have a duty to act, because it made the decision to

Cardozo once stated, “[t]he hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all.”<sup>236</sup>

Additionally, the preamble to the Constitution of the United States reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, *insure domestic Tranquility*, *provide for the common defense*, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>237</sup>

The government has historically acted in compliance with its constitutional charge to “insure domestic tranquility” and “provide for the common defense,” and it is not unreasonable to derive an implied duty to protect and aid from this language.<sup>238</sup> From the beginning of our country’s existence, the government has acted in a manner which acknowledges and respects this obligation.<sup>239</sup> State and local governments have historically recognized the existence of this duty by establishing police departments, fire departments, emergency medical services, state and county-run hospitals, and various other institutions designed to protect and aid citizens in the face of harm.<sup>240</sup> The federal government has also historically accepted this

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“gratuitously” act, it was legally obligated to exercise reasonable care in doing so. *See* *Kruchten v. United States*, 914 F.2d 1106, 1109 (8th Cir. 1990) (“There is, in general, no duty to protect another from injury or harm which might befall him or her. Nevertheless, in some circumstances one who gratuitously accepts the responsibility of acting to protect another must utilize due care even though no duty would exist otherwise.”); *Isler v. Burman*, 232 N.W.2d 818, 822 (Minn. 1975) (“It is well established that one who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so.”); *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922) (“It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.”). Under this argument, claimants can assert that their damages were caused by the government’s careless acts when it “assumed” a duty to protect by building levees and conducting rescue efforts. *See* discussion *supra* Part II (discussing preparation and response efforts).

236. *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 898 (N.Y. 1928); *see also Kunz*, 526 F.2d at 503 (“The question appears to be essentially one of whether the defendant has gone so far in what he has actually done, and has gotten himself into such a relationship with the plaintiff, that he has begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit upon him.” (quoting PROSSER, *THE LAW OF TORTS* 340 (4th ed. 1971))).

237. U.S. CONST. pmb1. (emphasis added).

238. *See Jackson*, *supra* note 28, a 559 (discussing the creation of FEMA and DHS).

239. *See infra* notes 240-54 and accompanying text (discussing government behavior that conforms to a duty to protect and aid).

240. *See DeLong v. County of Erie*, 455 N.Y.S.2d 887, 891 (N.Y. App. Div. 1982) (“[W]hen a relationship is created between the police and an individual which gives rise to a special duty, the municipality loses its governmental immunity and liability may result.”).

obligation by establishing the most capable military force in the world to protect its citizens against threats from abroad and civil unrest.<sup>241</sup> By creating federal agencies such as FEMA, the DHS, and the DOD, the United States has reiterated its acknowledgement of this duty,<sup>242</sup> and Americans have come to rely on the protection of these agencies.<sup>243</sup> Furthermore, because the funds used to create and maintain these agencies are American tax dollars,<sup>244</sup> citizens should have every right to reasonably expect aid and protection from them.

In the aftermath of attacks of September 11, 2001, government authorities reacted by providing aid and assistance to devastated citizens.<sup>245</sup> While this tragic event was not one that could have been reasonably anticipated, the government's reflexive response of providing immediate medical care is a powerful example of behavior that conforms to the existence of a "duty to aid."<sup>246</sup> In response to the attacks, the government also sent troops overseas to Iraq in order to preemptively extinguish any terrorist cells that may pose a future threat to Americans.<sup>247</sup> This sort of behavior clearly supports the existence of a governmental "duty to protect" citizens.<sup>248</sup>

241. See Jackson, *supra* note 28, at 559. The United States emerged from the Cold War as the strongest military power in the world. See The United States Army 2004 Posture Statement, <http://www.army.mil/APS/04/commitment.html> (last visited Feb. 20, 2007). The American military's technological edge and advanced capabilities allowed the Army to downsize its operations in recent times, while remaining equally as capable. *Id.*

242. See Jackson, *supra* note 28, at 558 ("In essence, the establishment of these entities created a *duty to protect and safeguard* the citizens of this country.") (emphasis added).

243. See *supra* notes 105-06 and accompanying text (discussing the reasons for the creation of DHS and FEMA); Jackson, *supra* note 28, at 561 ("The establishment of the Department of Homeland Security has offered Americans the opportunity to rely on the federal government for protection and safety. The formation of government entities such as the department of Homeland Security and FEMA in response to times of crisis has led the people of the United States, including citizens of New Orleans, to believe that the federal government will provide protection and assistance.").

244. See WhiteHouse.gov, President Bush Signs Federal Funding Accountability and Transparency Act, <http://www.whitehouse.gov/news/releases/2006/09/20060926.html> (last visited Feb. 12, 2007).

245. See *infra* note 363 and accompanying text (discussing governmental response to September 11 attacks).

246. See *infra* notes 363-65 and accompanying text (discussing "duty to aid" and federal response to attacks of September 11).

247. See Jackson, *supra* note 28, at 559.

248. See *id.* at 560 ("The federal government's history of protecting the country has placed its citizens in a position of knowing that their government will take necessary steps to protect them from harm[']s way. This was most recently addressed following September 11 and the present war in Iraq.").

Every war this nation has ever fought reflects a duty to protect Americans.<sup>249</sup> Every governmental response to every major fire, earthquake, flood, or hurricane in this nation's history recognizes a duty to aid on local, state, and federal levels.<sup>250</sup> When the Corps constructed the levees in New Orleans, it did so in order to *protect* citizens.<sup>251</sup> Governmental rescue operations following Katrina, albeit inadequate, were actions taken in fulfillment of an obligation to *aid* citizens.<sup>252</sup> By looking at our country's history, it is clear that the government has always, and will hopefully always continue to, act in a manner that requires it to protect and aid its citizens in the face of danger.<sup>253</sup> By acting in this manner, federal, state, and local governments have adopted a legal duty to protect and aid citizens in the face of harm.<sup>254</sup>

## 2. Breach

After establishing that the government did in fact have a duty to protect and aid the people of New Orleans, the next pertinent legal inquiry is to determine whether the government breached that duty while preparing for and responding to Katrina.<sup>255</sup> It is ludicrous to imagine that there is or should be some sort of strict liability scheme in place, holding that the government breached its duty to protect and aid every time a citizen is harmed or left without assistance.<sup>256</sup> If this were the case, courtrooms would

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249. See *id.* at 559; see also The United States Army 2004 Posture Statement, *supra* note 241 (“We will *protect* our country and our way of life as we have for 228 years. It is our privilege, our *duty*, and our honor to do so.”) (emphasis added).

250. Secretary of Commerce Herbert Hoover's leadership in the government's response to the Great Mississippi Flood of 1927 (Great Flood) earned him a seat in the White House in 1928. See Manard et al., *supra* note 56, at 31. The Great Flood displaced more than 700,000 Americans and engulfed more than 27,000 miles of land. *Id.*

[T]he Great Flood accelerated a *shift away from individual self-reliance in the face of natural disasters*, as more and more people came to believe that government was responsible for protecting individual citizens. In extreme circumstances where state resources were inadequate, people would look to the federal government for that protection. This was a sea change in the public's understanding of an individual's relationship with government.

*Id.* (emphasis added).

251. See *supra* note 234 and accompanying text (discussing reasons for building LPVHPP).

252. See discussion *supra* Part II.B.1-2 (discussing government's response efforts); Jackson Square Speech, *supra* note 138 (“When the federal government fails to meet such an *obligation*, I as [P]resident am responsible for the problem, and for the solution.”) (emphasis added).

253. See Jackson, *supra* note 28, at 559 (“Citizens should be able to expect protection of their welfare during national disasters. This protection of the interest and safety of American citizens has been the norm during disastrous times.”) (internal citations omitted).

254. See *supra* note 234 and accompanying text (presenting “duty by detrimental reliance” argument).

255. See discussion *supra* Part III.A (defining elements needed for a negligence cause of action).

256. See *Schuster v. City of N.Y.*, 154 N.E.2d 534, 537 (N.Y. 1958) (“[Governmental liability] for

be flooded with frivolous lawsuits brought by plaintiffs alleging that the DHS failed to assist them when they were injured while hiking in the woods, or that the sheriff's department failed to protect them from getting rear-ended on the interstate.<sup>257</sup> As the government lacks the ability to be everywhere at once, citizens cannot expect it to serve as a sort of all encompassing protector.<sup>258</sup>

The government can only protect citizens from threats it knows exist, and can only provide aid to distressed citizens it has knowledge of and is able to reach.<sup>259</sup> There is also a limitation as to how much aid and protection our government can afford, as governmental resources are finite.<sup>260</sup> Additionally, even if these criteria are met, it is only fair to allow the government to make reasonable mistakes.<sup>261</sup> Government is, at bottom, a group of fallible human beings just like everyone else. While we hope experience and training allows government officials to perform their duties in an effective manner, the reality remains that human beings are not perfect, and will inevitably make mistakes.

A definitive legal standard for determining exactly when the government has breached its duty to protect and aid citizens has yet to be defined,<sup>262</sup> and any proposed standard must take all of these factors into

every loss caused by outlaws or by fire . . . bespeaks no obligation enforceable in the courts."); *Kruchten v. United States*, 914 F.2d 1106, 1109 (8th Cir. 1990) (dismissing plaintiff's claim that strict liability should be imposed upon the government for failing to maintain an embankment, noting that "[t]here is, in general, no duty to protect another from injury or harm which might befall him or her" (citing *Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979)).

257. See *supra* note 256 and accompanying text.

258. See *supra* note 256 and accompanying text.

259. See *infra* notes 265-68 and accompanying text.

260. See *Riss v. City of N.Y.*, 240 N.E.2d 860, 860 (N.Y. 1968) ("The amount of protection that may be provided is limited by the resources of the community. . .").

261. See *supra* note 256 and accompanying text (discussing unreasonableness of imposing a strict liability scheme on the government).

262. See *supra* note 231 (discussing the lack of an articulated legal standard for determining breach). In a previous decision, the Supreme Court referenced a required standard of care but failed to provide any clear guidelines to determine if the standard has been met. *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). In *Indian Towing Co.*, the owner of a barge sued the federal government for damages due to the Coast Guard's negligent operation of a lighthouse. *Id.* at 61-62. The Supreme Court ruled that once the government decides to undertake protective activities, it is legally obligated to use "due care" in doing so. *Id.* at 69. As Justice Frankfurter noted:

The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light[house] . . . and engendered reliance on the guidance afforded by the light, it was *obligated to use due care* to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.

consideration.<sup>263</sup> Keeping practical limitations in mind, it seems fair to maintain that the government has a duty to protect and assist when it is capable of doing so.<sup>264</sup> When the government fails to protect citizens from a danger of which it was unaware, it cannot be said to have breached its duty.<sup>265</sup> Similarly, when the government fails to come to the aid of a citizen whose distress is unknown, no duty is breached.<sup>266</sup> Accordingly, the government can only have a duty to aid and protect citizens from harm it sufficiently knows to exist.<sup>267</sup> Knowing this, it is clear that the government has breached its duty if it chooses not to respond to a known threat posed to its citizens.<sup>268</sup>

A much more likely and more difficult scenario, however, is when the government does respond to danger or harm, but the response proves to be inadequate.<sup>269</sup> Is the duty still breached because harm has occurred, or is the duty fulfilled because the government made an effort to protect and aid?<sup>270</sup> What is the requisite standard of care the government must exercise in these situations?<sup>271</sup> Two possible standards can be logically set forth.

The first, and more straightforward, standard looks at the standard of care that the government has exercised in the past when protecting or coming to the aid of citizens.<sup>272</sup> Under this standard, the government is in breach if the standard of care it exercises while engaged in a protective or rescue operation falls short of the standard of care it has traditionally exercised during similar operations in the past.<sup>273</sup>

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*Id.* (emphasis added). Because the Court left “due care” undefined, a concrete legal standard for determining whether a governmental duty has been breached has yet to be determined. *See* Kruchten v. United States, 914 F.2d 1106, 1109 (8th Cir. 1990) (holding that a governmental duty to protect landowners against flooding exists under certain circumstances, but failing to discuss the standard for determining breach).

263. *See supra* notes 256-61 and accompanying text (discussing limitations which must be taken into consideration when determining the government’s duty of care).

264. *See supra* note 256 and accompanying text.

265. *See supra* note 256 and accompanying text (discussing unreasonableness of strict liability scheme).

266. *See supra* note 256 and accompanying text.

267. *See supra* note 256 and accompanying text.

268. *See infra* notes 272-81 and accompanying text (discussing proposed standards for determining breach).

269. *See discussion supra* Part II.B.1-2 (discussing federal response to Hurricane Katrina).

270. *See infra* notes 272-81 and accompanying text (discussing standards for determining breach).

271. *See infra* notes 272-81 and accompanying text.

272. *See* Nicolaus Mills, *Herbert Hoover and Hurricane Katrina*, DISSENT MAGAZINE, Winter 2006, available at <http://www.dissentmagazine.org/article/?article=152> (last visited Feb. 22, 2006) (asserting that an analysis of past disasters and the way previous administrations have handled them is helpful in evaluating the Bush administration’s response to Hurricane Katrina).

273. For purposes of this comment, the analysis will be called the “alternative standard.” A discussion of this standard is limited to analyzing the federal government’s preparation and response efforts during Hurricane Katrina, Hurricane Rita, and the attacks of September 11, 2001. *See infra* notes 361-67 and accompanying text (discussing government’s liability under this standard).

The second standard is directly derived from traditional negligence law, which requires individuals to act as a “reasonably prudent person” would have acted under the same or similar circumstances.<sup>274</sup> Having already concluded that the government must at least attempt to aid and protect citizens who face harm,<sup>275</sup> it seems fair to conclude that a government which fails in this attempt did not breach its duty if it nonetheless acted reasonably prudent.<sup>276</sup> But as tort law has long recognized, professionals are held to a higher standard than lay people,<sup>277</sup> and government officials are in fact professionals. When conducting themselves, governmental officials must not act as the “reasonably prudent person,” but rather, as an ordinary “reasonably prudent government official” would under the same or similar circumstances.<sup>278</sup> Government officials are trained to remain level-headed and rational throughout stressful situations so they can exercise proper judgment during emergencies.<sup>279</sup> Because of their expertise, they must be

274. BLACK'S LAW DICTIONARY, *supra* note 147, at 1061; *see supra* notes 147-48 and accompanying text (discussing required standard of care in traditional negligence law).

275. *See supra* note 234 and accompanying text.

276. *See supra* notes 147-48 and accompanying text (discussing the “reasonably prudent person” standard).

277. *See* SCHWARTZ ET AL., *supra* note 148, at 168 n.2 (“The standard is expressed in objective form—the knowledge, training and skill (or ability and competence) of an ordinary member of the profession in good standing.”).

278. *See* RESTATEMENT (SECOND) OF TORTS § 299A (1965). The practice of holding professionals to a higher standard than lay people has been recognized in American courts throughout history. *See* SCHWARTZ ET AL., *supra* note 148, at 168 n.2 (citations omitted). “The standard of skill and knowledge required of [a professional] actor who practices a profession or trade is that which is commonly possessed by members of that profession or trade in good standing.” RESTATEMENT (SECOND) OF TORTS § 299A cmt. e (1965). Accordingly, we must weigh actions of government actors against that of the “prudent government official,” rather than the “prudent layperson.” *See* Wiggins v. Piver, 171 S.E.2d 393, 396 (N.C. 1970) (quoting Starnes v. Taylor, 158 S.E.2d 339, 343 (N.C. 1968)) (holding that physicians and surgeons “must ‘possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess’”); Duffey Law Office, S.C. v. Tank Transp., Inc., 535 N.W.2d 91, 96 (Wis. Ct. App. 1995) (holding an attorney to a higher standard of care); Edward Brodsky & Richard P. Swanson, *The Expanded Liability of Accountants for Negligence*, 12 SEC. REG. L.J. 252 (1984) (discussing heightened standard of care for accountants).

279. FINAL REPORT *supra* note 32, at 152. Federal, state, and local, government officials in Alabama participate in various “training exercises each year ranging from . . . classroom-like discussions to full scale exercises involving all members of the emergency management community.” *Id.* “[A]lmost all of these exercises involve a terrorism-based threat or scenario . . . [and] largely involve the same set of procedures – evacuations, loss of power, communications difficulties, need for shelter, food, and water, and inter-governmental coordination.” *Id.* (citing *Hurricane Katrina: Preparedness and Response by the State of Alabama, Hearing Before Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (Nov. 9, 2005) (statement of Bruce Baughman, Dir., Ala. State Emergency Mgmt. Agency)).



held to a higher standard than ordinary citizens.<sup>280</sup> Under this standard, a breach occurs when, in the course of a protective or rescue operation, the conduct of a government official fails to conform to that of an ordinary reasonably prudent government official in the same or similar circumstances, thereby causing the operation to fail or be compromised.<sup>281</sup>

Although based on different premises, these two standards will generally lead to the same results when analyzing Katrina-related claims.<sup>282</sup> In the case at hand, we can find many breaches at various stages at all levels of government.<sup>283</sup> The key breaches that will be the focus of upcoming litigation are discussed in Subpart B.<sup>284</sup>

### 3. Causation and Damages

There do not seem to be any significant causation issues pertinent to upcoming Katrina litigation.<sup>285</sup> In each scenario, it seems that a plaintiff will be able to sufficiently establish that “but-for” the government’s breach, his or her damages would have either not occurred or been significantly mitigated.<sup>286</sup> No proximate causation issues should surface in upcoming litigation either.<sup>287</sup> Because Hurricane Katrina’s severity and likelihood of hitting New Orleans was sufficiently known well in advance,<sup>288</sup> the government cannot claim that the end result of its negligent conduct was in any way “unforeseeable.”<sup>289</sup> In upcoming litigation, citizens who were harmed as a result of Hurricane Katrina will be primarily suing for compensatory damages.<sup>290</sup> Notwithstanding statutory recovery caps,<sup>291</sup>

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280. See *supra* notes 278-79 and accompanying text.

281. For purposes of this article, this analysis will be called the “traditional standard.”

282. See discussion *infra* Part IV.B (presenting negligence analysis for primary defendants).

283. See discussion *supra* Part II (discussing preparation and response efforts).

284. See discussion *infra* Part IV.B.

285. See *supra* note 151 (discussing causation element of negligence).

286. See *supra* note 151 (discussing “actual cause”).

287. See *supra* note 151 (discussing “proximate cause”).

288. See *supra* notes 84, 100 and accompanying text (discussing NWS warning and PAM exercise).

289. See *supra* note 151 (discussing “unforeseeability” and proximate causation). Additionally, plaintiffs must only prove that the government’s actions were a substantial factor in bringing about their harm, not the sole cause, for sufficient proximate causation to be shown. *Ferguson v. U.S. Army*, 938 F.2d 55, 57 (6th Cir. 1991). It is clear that governmental actions with respect to the levees, evacuation, and response were at least a “substantial factor” in bringing about damages. See discussion *supra* Part II (discussing governmental preparation and response efforts).

290. Compensatory damages represent the closest possible financial equivalent to the loss or harm suffered by the plaintiff. These damages are intended to “make the plaintiff whole again,” by putting him back in the position he was in before the occurrence of the tort. See *SCHWARTZ ET AL.*, *supra* note 148, at 519; see also *supra* notes 7, 11 (discussing damages suffered by Katrina victims).

291. Recovery against the State of Louisiana and its political subdivisions is limited by statute. *Manard*, *supra* note 56, at 35. These subdivisions include municipalities, parishes, levee districts,

plaintiffs will be claiming damages for injuries that they personally suffered, the deaths of their loved ones,<sup>292</sup> and damage caused to their property.<sup>293</sup>

*B. Primary Defendants*<sup>294</sup>

Valid arguments alleging negligent conduct on the part of federal, state, and local governmental entities exist to be made in upcoming litigation.<sup>295</sup>

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and the New Orleans Sewer and Water Board. *Id.* The statutory cap limits recovery to \$500,000 on personal injury and wrongful death judgments, applying to each person suffering an injury, or each decedent in a wrongful death case. *Id.* (citing LA. REV. STAT. ANN. § 13:5106 (2006)). This cap does not apply to property damage claims. *Id.* Public assets are not subject to seizure, and judgments against political subdivisions must be satisfied by funds appropriated by the subdivisions. *Id.* The recovery of punitive damages and pre-judgment interest from the federal government is restricted by statute: “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, *but shall not be liable for interest prior to judgment or for punitive damages.*” 28 U.S.C. § 2674 (2000) (emphasis added).

292. All fifty states have a statutory cause of action that allows plaintiffs to recover for the wrongful death of their loved ones. *See* SCHWARTZ ET AL., *supra* note 148, at 570; *see also* STUART SPEISER, RECOVERY FOR WRONGFUL DEATH AND INJURY (3d ed. 1992) (discussing wrongful death statutes of the individual states).

293. *See supra* note 11 (discussing property damage caused by Katrina).

294. It is important to note that the actual recovery of damages will likely be another hurdle for plaintiffs who bring claims against the State of Louisiana, Louisiana’s political subdivisions, or the City of New Orleans. *See* Manard, *supra* note 56, at 35. Before judgments against the State of Louisiana or its subdivisions can be paid, the state legislature must appropriate the necessary funds. *See* Louisiana House of Representatives Homepage, [http://house.louisiana.gov/slg04/SLG\\_Ch2\\_Pl.htm](http://house.louisiana.gov/slg04/SLG_Ch2_Pl.htm) (last visited Feb. 25, 2007). The City of New Orleans does not have sufficient funding to even conduct its own operations, and it has recently laid off a significant amount of city employees. *See* Manard, *supra* note 56, at 35. Without direct assistance from the United States, it is unlikely that the city would be able to appropriate funds sufficient to satisfy judgments against it. *Id.* The Orleans Levee District, the political subdivision of the State that was responsible for the maintenance of Orleans Parish’s levees, is reportedly insured for \$10 million. *Id.* Without direct action by the state legislature, recovery beyond that amount will be impossible. *Id.* The State of Louisiana is also limited financially, and the appropriation of funds to satisfy large judgments may prove to be unfeasible. *See id.* Historically, judgments against the United States have required specific congressional appropriations for payment. *See* 31 U.S.C. § 724(a) (1954). In 1956, Congress enacted a permanent, indefinite appropriation for the payment of final judgments known as the “Judgment Fund.” *See* 2 LESTER S. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES § 16.12 (1993) (citing 31 U.S.C. § 1304 (1992)). Because “FTCA judgments are [now] payable out of a permanent, indefinite appropriation,” judgments against the United States are paid quite promptly. *Id.* While this makes the federal government and its agencies the primary targets for litigation, it is still important for plaintiffs to name state and local entities in their suits, so that empty chairs are not left in the courtroom for the federal government to point to during trial.

295. *See infra* notes 301-92 and accompanying text (presenting arguments for governmental negligence).

When examining the Katrina timeline from beginning to end, numerous “breaches of duties” can be found.<sup>296</sup> From the early planning and prevention stages, all the way up to the post-landfall rescue operations, instances of federal, state, and local governmental negligence become immediately apparent.<sup>297</sup> In addition to listing the primary defendants and their potential immunities,<sup>298</sup> this subsection suggests how courts should interpret the existing legal framework, so that fair and logical outcomes can come about.<sup>299</sup> Table 2 lists the primary defendants who will be named in upcoming Katrina litigation, as well as the major hurdles plaintiffs must overcome with respect to each entity.<sup>300</sup>

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296. See generally discussion *supra* Part II (discussing governmental preparation and response efforts).

297. See generally discussion *supra* Part II.

298. See *infra* notes 301-92 and accompanying text (discussing primary defendants and their potential defenses).

299. See *infra* notes 301-92 and accompanying text (suggesting how courts should interpret the existing legal framework). The “act of God” defense should be easily overcome in all Katrina-related claims, and is thus only discussed in this footnote. See discussion *supra* Part III.C (discussing the “act of God” defense). This defense is limited to cover events that are truly unforeseeable, and does not apply to events that have occurred before in the region. See Jackson, *supra* note 28, at 566 (citing *Fairbury Brick Co. v. Chi., R. I. & P. Ry. Co.*, 113 N.W. 535, 537 (Neb. 1907)); see also FINAL REPORT, *supra* note 32, at 80 (“That’s probably the most painful thing about Katrina, and the tragic loss of life: the foreseeability of it all.” (quoting *Hurricane Katrina: Preparedness and Response by the State of Louisiana, Hearing Before Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (Dec. 14, 2005) (statement of Chairman Tom Davis))). If an event such as a flood or storm has happened in a region before, there exists “a presumption that the event may occur again.” Jackson, *supra* note 28, at 566 (citing Binder, *supra* note 200, at 14-15). Furthermore, flood damage caused by faulty design, structure, construction, or maintenance is likely not covered by this defense. See *id.* at 567; see also *Apex Oil Co. v. United States*, 208 F. Supp. 2d 642, 647 (E.D. La. 2002) (holding that hurricanes striking hurricane-prone areas during hurricane season cannot be considered “unanticipated”); *Kimble v. Mackintosh Hemphill Co.*, 59 A.2d 68, 72 (Pa. 1948) (“One who fails in his duty to remedy a defective or dangerous condition is liable for injuries resulting therefrom, although the immediate cause of the injury is [the ‘act of God’].”). Finally, if the harm resulted from both defendants and “God’s” actions, the defendant is still liable. Binder, *supra* note 200, at 17-18. New Orleans is located in an area that is prone to hurricanes, and the severity of damage a Category 4 storm would entail was well known to the government. See *supra* notes 84, 100 and accompanying text. The fact that the Corps built the levees in the first place is a testament to the foreseeability of an event such as Katrina. This defense should not be allowed to be asserted on behalf of federal, state, or local entities for their actions, as Katrina was in no way “unforeseeable.”

300. See Appendix, *infra* Table 2.

1. The Levees<sup>301</sup>

## a. Federal Negligence

The Corps designed and constructed the levees and canals in New Orleans in ways that proved to be largely inadequate.<sup>302</sup> The levees were only designed to withstand a Category 3 hurricane, when the likelihood of a much stronger hurricane hitting New Orleans was well known.<sup>303</sup> Many of the floodwalls were constructed poorly,<sup>304</sup> and many were not properly grounded into the underlying soil.<sup>305</sup> The MRGO canal was designed in a way that actually caused Katrina's surge to intensify and drastically increased the amount of damage the city sustained.<sup>306</sup> Had the levees and canals been properly designed and constructed, the levees would not have breached or been overtopped, and a significant number of people would not have lost their lives and property.<sup>307</sup> The Corps knew that a catastrophic hurricane would cause an unprecedented level of destruction in New Orleans,<sup>308</sup> yet it designed and constructed levees which it knew would not withstand a storm such as Katrina.<sup>309</sup> A strong argument can be made that when designing and building the levees in fulfillment of its duty to protect, the Corps's conduct did not conform to that of "reasonably prudent" engineers, and citizens suffered unprecedented damages as a result.<sup>310</sup>

301. Because the federal government had never built a protective levee system of this scale prior to the LPVHPP, the "alternative standard" is non-applicable. *See Kysar & McGarity, supra* note 31, at 185.

302. *See* discussion *supra* Part II.A.1 (discussing inadequate design and construction of levees and canals).

303. *See* discussion *supra* Part II.A.1.

304. *See* discussion *supra* Part II.A.1.

305. *See* discussion *supra* Part II.A.1.

306. *See* discussion *supra* Part II.A.1. Additionally, case law has suggested that liability exists when governmental conduct "in some way increased the risk" the public was exposed to. *See DeLong v. County of Erie*, 455 N.Y.S.2d 887, 892 (N.Y. App. Div. 1982) (citing *Zibbon v. Town of Cheektowaga*, 382 N.Y.S.2d 152, 156 (N.Y. App. Div. 1976)). Plaintiffs should argue that because the MRGO Canal increased the risk of hurricane damage, liability should attach. *See supra* notes 68-73 and accompanying text (discussing MRGO canal); *see also Rodrigue v. United States*, 968 F.2d 1430, 1434 (1st Cir. 1992) (imposing liability on government for "negligently making matters worse").

307. *See* discussion *supra* Part II.A.1 (discussing inadequate design and construction of levees and canals).

308. *See* discussion *supra* Part II.A.1 (discussing the reasons for building LPVHPP).

309. *See* discussion *infra* Part IV.A.1 (discussing governmental duty to protect).

310. *See generally supra* note 281 and accompanying text (discussing "traditional standard").

In addition to proving the necessary elements for a negligence cause of action, claimants must also overcome the sovereign immunity hurdle.<sup>311</sup> By examining the text of the FTCA, we can see that the discretionary function exception applies to an “act or omission of an employee of the Government, exercising due care.”<sup>312</sup> It can hardly be said that the Corps engineers were exercising “due care” when they chose to design levees that they knew would be too weak to adequately protect New Orleans, and inadequately grounded the floodwalls.<sup>313</sup> At a bare minimum, a court should recognize that designing the MRGO Canal to be a deadly “funnel” cannot be considered “due care.”<sup>314</sup> If a court strictly interprets this statute’s natural language, sovereign immunity will not apply in these cases.<sup>315</sup>

Nonetheless, plaintiffs will likely have to show that their claim passes the “*Berkovitz* test,” which exempts the government from liability for actions that involve an “element of judgment or choice”<sup>316</sup> that are “based on considerations of public policy.”<sup>317</sup> While the Corps’ actions in planning and building the levees and canals probably involved elements of “judgment or choice,” courts should not consider judgment calls that lead to the improper grounding of floodwalls as “based on public policy considerations.”<sup>318</sup> As for the dangerous design of the MRGO Canal, the decision to build the canal in the first place was likely based on public policy considerations, as the ability for ships to pass through New Orleans is important for the City’s economy.<sup>319</sup> Courts should hold that the judgment exercised in designing it to be a dangerous funnel, however, did not involve any public policy considerations.<sup>320</sup>

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311. See discussion *supra* Part III.B (discussing sovereign immunity).

312. 28 U.S.C. § 2680(a) (2000) (emphasis added).

313. See generally discussion *supra* Part II.A.1 (discussing negligent design and construction of levees).

314. See *supra* notes 68-73 and accompanying text (discussing MRGO Canal).

315. See *supra* note 312 and accompanying text (discussing language of statute).

316. *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 531 (1988).

317. *Id.* at 537.

318. In the past, the Supreme Court has held the federal government liable under the FTCA for negligence when damages were caused by failed governmental safety mechanisms. See *Indian Towing Co. v. United States*, 350 U.S. 61, 62 (1955) (holding government liable for negligent operation and maintenance of lighthouse). The Court reasoned that while the initial decision to undertake the lighthouse service was a discretionary judgment, the failure to maintain the lighthouse in good working order did not involve any permissible exercise of policy judgment, and the discretionary function did not shield the government from liability. See *id.* at 69.

319. See *supra* notes 68-73 and accompanying text (discussing MRGO Canal).

320. A landmark decision from the United States District Court for the Eastern District of Louisiana has recently come out in support of this argument. In *In re Katrina Canal Breaches*, six New Orleans residents brought a negligence cause of action against the Corps and the United States pursuant to the FTCA. *In re Katrina Canal Breaches Consol. Litig.*, 471 F. Supp. 2d 684, 686 (E.D. La. 2007). Plaintiffs argued that their damages were caused by the negligent design, construction, operation, and maintenance of the MRGO Canal specifically. *Id.* In denying the government’s

The biggest hurdle in claims against the Corps will be the Flood Control Act.<sup>321</sup> Under the “traditional” interpretation of this statute, the federal government is immune from liability for damages caused by “all waters contained in or carried through a federal flood control project for purposes of or related to flood control.”<sup>322</sup> The federal government is likely immune under this interpretation, as the levees during Katrina were sufficiently “connected to” the LPVHPP federal flood control project.<sup>323</sup> Under the Supreme Court’s modified interpretation of the Flood Control Act in *Central Green Co.*, however, courts are now required to consider the “character of the waters,” rather than considering whether a sufficient nexus exists.<sup>324</sup>

In the case at hand, water that entered the City *directly* from Lake Borgne, Lake Pontchartrain, and the Gulf of Mexico when the levees failed will likely be characterized by courts as “floodwaters,” regardless of the standard used.<sup>325</sup> It has been held in the past, however, that water used for commercial purposes is not “floodwater” under the Flood Control Act.<sup>326</sup>

12(b)(1) motion to dismiss, Judge Duval reasoned:

[P]laintiffs’ allegations concerning . . . the numerosity of the decisions made in constructing and maintaining the MRGO and the *inability on this record to characterize such decisions as being grounded in policy*; [as well as] the issue of whether there were non-policy based decisions made that failed to comport with standard engineering practices; raises issues that are inextricably tied to the gravamen of the plaintiffs’ cause of action and are not subject to Rule 12(b)(1) treatment.

*Id.* at 705 (emphasis added); *see also supra* note 221 (discussing methods of overcoming 12(b)(1) motions to dismiss FTCA claims). This case is currently set for trial pending further discovery. *See In re Katrina Canal Breaches*, 471 F. Supp. 2d at 706.

321. *See supra* notes 187-97 and accompanying text (discussing the Flood Control Act).

322. *United States v. James*, 478 U.S. 597, 605 (1986); *see also Boudreau v. United States*, 53 F.3d 81, 82 (5th Cir. 1995) (immunizing federal government from liability when boat owner was injured during Coast Guard’s attempt to tow his boat on a flood control lake); *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427, 428 (5th Cir. 1989) (holding Corps was immune from liability under the Flood Control Act for drowning which occurred in flotation channel, dredged as part of flood control project).

323. *See supra* notes 37-48, 68-73 and accompanying text (discussing the LPVHPP and MRGO Canal).

324. *See Cent. Green Co. v. United States*, 531 U.S. 425, 437 (2001); *see also supra* note 194 and accompanying text (discussing standard set forth in *Central Green Co.*).

325. Even when considering the “character” of these waters under the *Central Green Co.* standard, there are no facts indicating that the waters were anything but “floodwaters.” *See infra* notes 327-33 and accompanying text (presenting arguments as to when water is not “floodwater” under the Flood Control Act).

326. In *Henderson v. United States*, a fisherman sued the Corps for negligence when he was injured by the release of water from a hydroelectric dam. 965 F.2d 1488, 1490 (8th Cir. 1992). The Eighth Circuit held that water used for the commercial purpose of generating electricity is not “floodwater” for the purpose of determining immunity under the Flood Control Act. *Id.* at 1492.

An argument can be made that when the levees along the MRGO *shipping* canal breached from the storm surge, much of the water that spilled from this canal was “commercial water.”<sup>327</sup> Plaintiffs could argue that in enacting the Flood Control Act, Congress did not intend to create immunity from damages caused by this type of water.<sup>328</sup> They should note that the MRGO Canal served no flood control purposes,<sup>329</sup> and was primarily used for commercial transportation.<sup>330</sup> If the affected residents of the Ninth Ward, New Orleans East, and St. Bernard Parish can conclusively show that their damages were caused by waters from this commercial canal,<sup>331</sup> and prove

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327. See generally *supra* notes 68-73 and accompanying text (discussing MRGO Canal).

328. The facts of the situation at hand are very similar to those presented in *Central Green Co.* See *supra* note 194 and accompanying text (discussing *Central Green Co.*). In both cases, the faulty segments of the flood control projects which allowed water to flood were largely unrelated to flood control. In order to follow precedent set by the Supreme Court in *Central Green Co.*, courts should not classify water that spilled from the MRGO Canal during Hurricane Katrina as “floodwater” under the Federal Tort Claims Act. At a bare minimum, courts should hold the Corps liable for damages directly resulting from the negligent design of the MRGO Canal, and the faulty construction of the levees which line it. See *supra* notes 68-73 (describing the MRGO Canal). The government will likely present a counterargument by attempting to distinguish the case at hand from the facts of *Central Green Co.* See *supra* note 194 and accompanying text (discussing *Central Green Co.*). For example, in *Central Green Co.*, the damage was caused by small releases of water over an extended period of time, and the plaintiff failed to allege that any physical failure of the dam caused any of the property damage. See *Central Green Co.*, 531 U.S. at 427. Katrina damages, on the other hand, were caused all at once when a storm surge overwhelmed various protective levees. See *supra* note 7 and accompanying text. Claimants should respond to this argument by reminding the court that it must only “consider the *character* of the waters that cause the relevant damage” when determining if immunity exists. *Central Green Co.*, 531 U.S. at 437 (emphasis added). The “character” of the MRGO Canal waters and the waters released in *Central Green Co.* can similarly be placed in the same category—unrelated to flood control. It is useful to distinguish between cases where claims were not barred by the Flood Control Act and cases where immunity was properly attached. Compare *Peterson v. United States*, 367 F.2d 271, 275 (9th Cir. 1966) (holding that Corps’ negligent decision to use dynamite to break up an “ice-jam” in an attempt to prevent flooding was “wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization”), and *Valley Cattle Co. v. United States*, 258 F. Supp. 12, 16 (D. Haw. 1966) (allowing recovery against the United States for damages caused by negligent maintenance of a stream because funding was not appropriated by Congress for flood control purposes), with *Parks v. United States*, 370 F.2d 92, 93 (2d Cir. 1966) (affirming the dismissal of a claim alleging negligent construction, maintenance, and operation of a federal flood control project pursuant to the Flood Control Act).

329. See *Graci v. United States*, 301 F. Supp. 947, 956 (E.D. La. 1969) (holding that the MRGO Canal is “totally unrelated to any natural waterway or the national flood control program”), *aff’d and remanded*, 456 F.2d 20 (5th Cir. 1971).

330. See *supra* notes 68-73 and accompanying text (discussing MRGO Canal). In the case at hand, claimants should cite *Henderson* and argue that they too were harmed by a defective segment of a flood control project that was being used for commercial purposes. See *supra* note 326 and accompanying text (discussing *Henderson*). If courts follow the precedent set forth by the *Henderson* court, the government should remain liable for damages caused by MRGO Canal waters, and the Flood Control Act should not apply.

331. An additional issue that Katrina plaintiffs must overcome at trial will be the difficulty of proving that their damages were caused by MRGO waters and not other waters. Proving that damages were caused by one body of water and not by another will require a significant amount of

that the MRGO Canal was completely unrelated to flood control,<sup>332</sup> a court should not allow claims to be barred by the Flood Control Act.<sup>333</sup>

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scientific analysis, especially in areas that could have been reached by multiple bodies of water.

332. The Fifth Circuit has supported this assertion in a past decision. In *Graci v. United States*, plaintiff sued for property damages caused by floodwaters during Hurricane Betsy. 456 F.2d 20, 22 (5th Cir. 1971). The plaintiff alleged that the floodwaters were allowed to enter his land due to the negligent construction of the MRGO Canal. *Id.*; see *supra* note 32 and accompanying text (discussing Hurricane Betsy). In affirming the district court's decision, the Fifth Circuit found that because the MRGO "was not a flood control project . . . [§ 702c] did not bar suits against the United States for floodwater damage resulting from the Government's negligence unconnected with flood control projects." *Graci*, 456 F.2d at 22. The Fifth Circuit was posed with the same legal question as courts in upcoming Katrina litigation will be forced to address: "[Is] it . . . reasonable to suppose that in exchange for its entry into flood control projects the United States [should be granted] complete immunity from liability for the negligent and wrongful acts of its employees unconnected with flood control projects[?]" *Id.* at 26. The *Graci* court answered this question in the negative, and it is reasonable to expect courts hearing Katrina claims to follow suit. *Id.* However, a fair counterargument exists to this assertion. The government may argue that circumstances of the LPVHPP have dramatically changed since the time of *Graci*, and that the MRGO is no longer "totally unrelated to any natural waterway or the national flood control program." *Graci*, 301 F. Supp. at 956. Katrina claimants must be prepared to argue that the function of the MRGO canal has not been significantly altered in the last thirty years.

333. In the recent decision of *In re Katrina Canal Breaches.*, the district court supported this argument. *In re Katrina Canal Breaches Consol. Litig.*, 471 F. Supp. 2d 684, 695 (E.D. La. 2007); see *supra* note 320 (discussing the facts of *In re Katrina Canal Breaches*). In its ruling, the court denied the United States' motion to dismiss negligence claims concerning the MRGO Canal based on immunity provided by the Flood Control Act. *In re Katrina Canal Breaches*, 471 F. Supp. 2d at 705-06. In denying the government's motion, Judge Duval stated:

The Government is asking this Court to ignore plaintiffs' pleadings, use Rule 12(b)(1) to rewrite plaintiffs' complaint, find that all of the projects, levees and activities in that area are flood control projects, and as a result, because . . . flood waters caused the damage alleged, . . . find the Government immune as a matter of law. There is intense disagreement as to the scope of the "levees" that were created in the dredging of the MRGO—are these spoilbanks or actual flood control projects? Likewise, there are serious questions as to the relationship between the MRGO and the L[P]V[HP]P . . . [and] a complete understanding of the evolution of the MRGO . . . is required before any legal determination can be made. As such . . . this Court will not dismiss this suit based on [the Flood Control Act].

*Id.* at 695. At the present moment, "it is not clear that as a matter of law, should plaintiffs prove their allegations as to damages caused by MRGO and not the failure of the flood control projects, that § 702c will prevent a recovery for the damages caused by MRGO." *Id.* (emphasis omitted). Judge Duval allowed the suit to continue because it was not clear if the MRGO canal was a "flood control project" or a "navigable waterway," and immunity depended on proof of the former. See *id.* The determination of this issue is currently pending further discovery, and this case is set to go to trial in the near future. *Id.* at 695-96.



*b. Local Negligence*

Without the benefit of sovereign immunity or the Flood Control Act, local entities have fewer defenses at their disposal.<sup>334</sup> Local levee districts and the New Orleans Sewer and Water board, both parish-run political subdivisions of the State of Louisiana, were responsible for the inspection and maintenance of the levees and pumping stations.<sup>335</sup> The levees were improperly maintained, as trees were allowed to grow at the base of the floodwalls and holes were left unpatched.<sup>336</sup> Had the levees been properly maintained, certain breaches would have either not occurred, or been much less severe.<sup>337</sup> Additionally, pump operators were ordered to leave their posts prior to the storm, allowing many canals to overflow.<sup>338</sup> These state subdivisions did not conform to the legally required standard of care when fulfilling their duty, and residents lost their lives and property as a result.<sup>339</sup>

The only major hurdle in suits against local bodies will be the actual recovery of damages.<sup>340</sup> If plaintiffs can prove negligence on behalf of any of these political subdivisions, recovery beyond the amount of its liability insurance will be difficult.<sup>341</sup> There is nothing in Louisiana law that requires the State to pay judgments against the levee districts,<sup>342</sup> and the state legislature is unlikely to appropriate funds for this purpose.<sup>343</sup> Although not completely free from complications, valid arguments exist for claimants to use in bringing suit against the government for the negligent design, construction, and maintenance of the levees.

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334. See *supra* notes 179-84 and accompanying text (discussing waiver of local sovereign immunity).

335. See FINAL REPORT, *supra* note 32, at 87.

336. *Id.* at 92.

337. *Id.* at 92-93.

338. *Id.* at 94.

339. See *supra* Part III.A (discussing standard of care under negligence claims).

340. See Manard, *supra* note 56, at 35.

341. The Orleans Levee District reportedly has \$10 million in liability insurance. *Id.*

342. *Haspel & Davis Milling and Planting Co. v. Bd. of Levee Comm'rs of the Orleans Levee Dist.*, No. 06-3829, 2007 WL 29063, at \*6 (E.D. La. Jan. 3, 2007), *rev'd*, 493 F.3d 570 (5th Cir. 2007).

343. See Manard, *supra* note 56, at 35.

2. Evacuation—City/State Negligence<sup>344</sup>

When analyzing the evacuation efforts, instances of negligence at both state and local levels can be seen. With local and state sovereign immunity abolished, recovery of damages seems to once again be the major hurdle to recovery.<sup>345</sup> Both Mayor Nagin and Governor Blanco had sufficient information to understand the magnitude of destruction that Katrina was sure to bring fifty-six hours prior to arrival, but decided not to order a mandatory evacuation until only nineteen hours before landfall.<sup>346</sup> Had a mandatory evacuation been ordered earlier, many of those who were left behind would have had a chance to find a way to evacuate the city, and many lives could have been spared.<sup>347</sup>

Furthermore, once a mandatory evacuation was finally issued, it was unenforced.<sup>348</sup> Although they had the authority to use “reasonable force” and commandeer resources to enforce a complete evacuation, Nagin and Blanco chose to use the Superdome as a temporary shelter.<sup>349</sup> Had the mandatory evacuation been better enforced, more residents would have been moved out of harm’s way, and countless lives would have been saved.<sup>350</sup> In the fulfillment of their duty to protect citizens, Nagin and Blanco did not adhere to the clear guidelines they were required to follow in the event of an emergency.<sup>351</sup> It cannot be said that Nagin and Blanco’s poor decision-making conformed to that of ordinary reasonably prudent government

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344. A negligence cause of action may potentially exist against the federal government for its actions during pre-landfall evacuation efforts as well. *See infra* Part IV.B.3.

345. *See supra* notes 179-84 and accompanying text (discussing the abolition of sovereign immunity for tort claims against state and local government in Louisiana); *see also* Manard, *supra* note 56, at 35 (describing difficulty of recovering damages from local and state government).

346. *See supra* Part II.A.2 (discussing governmental evacuation efforts).

347. *See supra* Part II.A.2.

348. *See supra* Part II.A.2.

349. *See supra* Part II.A.2.

350. *See supra* Part II.A.2.

351. *See supra* note 83 and accompanying text (discussing responsibilities of Mayor under the New Orleans Plan and responsibilities of Governor under the Louisiana Homeland Security Act). Recovery from the State under the Louisiana Homeland Security Act will be difficult, as this statute provides immunity to state agents “while complying with or attempting to comply with this Chapter,” except in the case of “willful misconduct.” LA. REV. STAT. ANN. § 29:735 (2006). To recover, plaintiffs will either have to argue that Blanco’s conduct was not even an “attempt” to comply with the statute, or that her actions constituted “willful misconduct.” *Id.*

officials.<sup>352</sup> While valid arguments to establish negligence during evacuation can be shown, statutory restrictions and a lack of state and local resources seem to leave suits against the federal government as the most realistic chance of recovery.<sup>353</sup>

### 3. Aid and Rescue—Federal Negligence

As discussed above, federal response efforts were filled with instances of misjudgment and ineptitude.<sup>354</sup> Secretary Chertoff had sufficient knowledge to declare Katrina an INS two days before Katrina hit, yet he decided to wait until after landfall to make the declaration.<sup>355</sup> Had this mistake not occurred, the federal government could have provided assistance to state and local authorities so that a complete pre-landfall evacuation could have been executed.<sup>356</sup> At a bare minimum, the federal government could have provided assistance in time for an effective post-landfall rescue and aid operation.<sup>357</sup> Chertoff's poor judgment caused federal assistance to arrive after it was too late for countless residents.<sup>358</sup> In the fulfillment of the government's duty, Chertoff's conduct did not arise to the level of a reasonably prudent cabinet-level official,<sup>359</sup> and countless lives were lost as a result.<sup>360</sup>

A breach of the federal government's duty can be shown under the "alternative standard" as well.<sup>361</sup> Under this standard the relevant inquiry is whether the federal government's conduct during Katrina arose to its level of conduct during similar emergencies.<sup>362</sup> By comparing the government's decisively urgent response on September 11<sup>363</sup> to its painfully slow and

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352. See *supra* note 281 and accompanying text (discussing "traditional standard").

353. See *supra* notes 340-43 and accompanying text.

354. See discussion *supra* Part II.B.1 (discussing governmental aid and rescue efforts).

355. See discussion *supra* Part II.B.1.

356. See discussion *supra* Part II.B.1.

357. See discussion *supra* Part II.B.1.

358. See discussion *supra* Part II.B.1.

359. See *supra* note 281 and accompanying text (discussing "traditional standard").

360. See *supra* note 98 and accompanying text (discussing lives lost while awaiting rescue).

361. See *supra* note 273 and accompanying text (discussing "alternative standard").

362. See *supra* note 273 and accompanying text.

363. *The 9/11 Commission Report, Chapter 10.1: Immediate Responses at Home*, at 314, available at <http://www.9-11commission.gov/report/911Report.pdf>. In the aftermath of the September 11, 2001, attack on the Pentagon, the federal government immediately deployed agencies including FEMA, a National Medical Response Team, the FBI, the Department of Justice, and the Bureau of Alcohol, Tobacco, and Firearms. *Id.* At 9:55 a.m., the incident commander ordered an evacuation of the Pentagon impact area due to the potential of a structural collapse, and the evacuation was completed by 9:57. *Id.* at 315. It is clear that the government's inadequate response to Katrina did not conform to the standard of care established during the September 11 rescue efforts.

inadequate response in the case at hand,<sup>364</sup> we can see that the DHS's conduct came woefully short of the required standard of care.<sup>365</sup> A breach can also be shown by comparing the government's preparation for Katrina to its efforts in anticipation of Hurricane Rita.<sup>366</sup> Under either analysis, it can be shown that the federal government breached its duty during Hurricane Katrina, and an unprecedented amount of lives were lost as a result.<sup>367</sup>

In bringing claims against the United States, plaintiffs must also consider the Flood Control Act.<sup>368</sup> This statute should not apply to the majority of suits brought against the federal government for negligence during its response to Katrina.<sup>369</sup> The majority of these injuries were not caused by "floodwaters," but by a lack of food, water, medical treatment, and security in the days following the storm.<sup>370</sup> This leaves sovereign immunity as the final and most obvious hurdle in these claims,<sup>371</sup> and immunity turns on whether Chertoff's hesitation to declare an INS<sup>372</sup> falls within the discretionary function exception.<sup>373</sup> The text of the NRP reads "[u]pon *recognition* that a catastrophic incident condition (e.g. involving mass casualties and/or mass evacuation) exists, the Secretary of DHS *immediately* designates the event an INS and begins . . . implementation of the NRP-CIA."<sup>374</sup> While the language "immediately designates" seems

364. See discussion *supra* Part II.B.1 (discussing governmental response efforts).

365. See *supra* notes 273, 281 and accompanying text (discussing standards for determining breach).

366. See *supra* note 126 (discussing preparation for Hurricane Rita). In anticipation of Hurricane Rita, Chertoff declared an INS at the moment sufficient information was known. See FINAL REPORT *supra* note 32, at 12. Because of this decision, evacuation efforts were far more successful than those during Katrina. *Id.* at 12-13. Significantly more supplies were stockpiled prior to landfall, and 10,000 National Guardsmen were able to immediately respond. *Id.* Even though Rita made landfall as a Category 3 hurricane, only 120 fatalities ensued. See Appendix, *infra* Table 1. By comparing the government's preparation for Katrina to its efforts in anticipation of Hurricane Rita, it becomes clear that the DHS's conduct fell extraordinarily short of the required standard of care in the case at hand.

367. See discussion *supra* Part II.B.1 (discussing governmental response efforts).

368. See *supra* notes 187-97 and accompanying text (discussing Flood Control Act).

369. See *supra* notes 187-97 and accompanying text (discussing Flood Control Act).

370. See *supra* note 98 and accompanying text (discussing lives lost while awaiting rescue).

371. See discussion *supra* Part III.B (discussing sovereign immunity).

372. See *supra* notes 123-26 and accompanying text (discussing Chertoff's hesitation to declare INS).

373. See *supra* notes 167-78 and accompanying text (discussing discretionary function exception).

374. FINAL REPORT, *supra* note 32, at 137 (emphasis added) (quoting Dep't of Homeland Security, *National Response Plan*, at CAT-4 (Dec. 2004)).

mandatory in nature, there seems to be an element of discretion involved in “recognizing” an event as catastrophic.<sup>375</sup>

In arguing that Chertoff’s conduct did not fall within the discretionary function exception, plaintiffs should first cite *Berkovitz*.<sup>376</sup> As Justice Marshall noted, the discretionary function exception cannot apply if a relevant federal statute, policy, or regulation outlines a specific course of action for the employee to follow.<sup>377</sup> Courts should hold that the NRP is a policy that outlines a specific course of action for the Secretary to follow, and that Chertoff’s conduct was, thus, not discretionary in nature.<sup>378</sup> If the court holds that it was within Chertoff’s discretion whether or not to recognize Katrina as an INS at an early stage, plaintiffs should respond by arguing that this judgment was not based on “considerations of public policy.”<sup>379</sup> An alternative argument could be that the Secretary’s decision entailed such a gross abuse of discretion that the court should make an exception and allow liability to attach.<sup>380</sup> Judges should be receptive to these arguments if claimants can adequately convey to them the magnitude of damage caused by Chertoff’s misjudgment.<sup>381</sup>

In addition to the DHS, the White House will also be a potential target for upcoming litigation.<sup>382</sup> The President, under the Stafford Act, had the authority to bypass the DHS and direct federal agencies to immediately respond.<sup>383</sup> A recent district court decision has characterized the President’s duties under the Stafford Act as discretionary in nature, and thus falling under the discretionary function exception.<sup>384</sup> While the language of the

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375. See *supra* notes 355-58 (discussing Secretary Chertoff’s failure to declare an INS until two days after Hurricane Katrina made landfall; see also *infra* notes 376-79 (describing plaintiffs’ possible discretionary function argument).

376. *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531 (1988).

377. *Id.* at 536 (“[T]hus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee’s conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.”).

378. See *supra* note 108 and accompanying text (discussing purpose and functions of the NRP).

379. *Berkovitz*, 486 U.S. at 537; see generally *supra* notes 163-74 and accompanying text (discussing discretionary function exception).

380. See *supra* notes 119-35 and accompanying text (discussing Chertoff’s decision and its implications).

381. See *supra* notes 130-35 and accompanying text (discussing damage caused by Chertoff’s misjudgment).

382. See discussion *supra* Part II.B.2 (discussing White House’s role in federal response).

383. See *supra* notes 137-38 and accompanying text (discussing presidential responsibilities under Stafford Act).

384. See *Armstead v. Nagin*, No. 05-6438, 2006 WL 3861769, at \*5-6 (E.D. La. Dec. 29, 2006). In *Armstead*, a New Orleans resident brought suit against FEMA, President Bush, Governor Blanco, and the Board of Commissioners of the Orleans Levee District. *Id.* at \*1. Plaintiff alleged constitutional violations of the Due Process Clause and Equal Protection Clause against the

Stafford Act that states “[i]n any major disaster, the President *may* direct any Federal agency”<sup>385</sup> is without a doubt discretionary in nature, a subsequent amendment to the Act uses language that is more mandatory in nature.<sup>386</sup> Section 5180 provides that: “[t]he President is authorized and *directed* to assure that adequate stocks of food will be ready and conveniently available for emergency mass feeding or distribution in any area of the United States which suffers a major disaster or emergency.”<sup>387</sup> Many stranded residents never received any food during the federal response, and food was never even ordered for some shelters.<sup>388</sup> Plaintiffs in future litigation should cite section 5180 and argue that the Stafford Act does not afford the President “judgment or choice”<sup>389</sup> in deciding whether or not to provide food to stranded victims.<sup>390</sup>

Although it remains unclear how courts will rule in upcoming and pending Katrina litigation, it is imperative that Katrina victims remain

government entities for failing to provide timely assistance during Hurricane Katrina. *Id.* at \*2. Plaintiff additionally alleged that President Bush failed in his duties under the Stafford Act. *Id.* The United States District Court for the Eastern District of Louisiana dismissed the claims, and held that plaintiff had failed to identify “any mandatory duties that President Bush and/or FEMA failed to take,” as “[t]he relevant duties of the President under the Stafford Act . . . are couched in discretionary language.” *Id.* at \*6. The court relied on *Ornellas v. United States*, which states “[l]iability should not be imposed on the federal government for discretionary acts or omissions of its agencies or employees in distributing benefits under . . . gratuitous programs.” 2 Cl. Ct. 378, 380 (Cl. Ct. 1983) (citing *D.R. Smalley & Sons, Inc. v. United States*, 372 F.2d 505, 507 (Cl. Ct. 1967)). While *Armstead* dealt with the alleged deprivation of entitlements due under the Equal Protection and Due Process Clauses and, therefore, may not be binding on Katrina-related negligence claims brought under the FTCA, the government may still cite it to show that the President’s duties under the Stafford Act were discretionary in nature, and thereby immune from judicial review. *See supra* notes 137-38 and accompanying text (discussing presidential duties under Stafford Act). Claimants should respond to this argument by stating that although the President’s decision of whether to respond at all was discretionary, once he decided to intervene, he had the obligation to act in a non-negligent manner. *See Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955) (“[I]t is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his ‘good Samaritan’ task in a careful manner.”); *DeLong v. County of Erie*, 455 N.Y.S.2d 887, 892 (N.Y. App. Div. 1982) (“This voluntary assumption of a duty to act carried with it the obligation to act with reasonable care.” (citing *Schuster v. City of N.Y.*, 154 N.E.2d 534, 538 (N.Y. 1958) (McNally, J., concurring))).

385. 42 U.S.C. § 5170a(1) (2000) (emphasis added).

386. *See Smith, supra* note 168, at 717 (“Unlike many portions of the Stafford Act, the statutory language of § 5180 is mandatory in nature.”).

387. 42 U.S.C. § 5180(a) (2000) (emphasis added). This section additionally provides, “The Secretary of Agriculture *shall* utilize funds appropriated under section 612c of title 7, to purchase food commodities necessary to provide adequate supplies for use in any area of the United States in the event of a major disaster or emergency in such area.” *Id.* § 5180(b) (emphasis added).

388. *See Lipton, White House, supra* note 111, at A1.

389. *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 531 (1988).

390. *See* 42 U.S.C. § 5180(a).

vigilant in bringing their claims. The massive scope of damages,<sup>391</sup> coupled with widespread dissatisfaction,<sup>392</sup> should be sufficient to fuel litigation for a long period of time. For the time being, plaintiffs must continue to bring their claims and hope that the sheer volume of litigation persuades courts to interpret the law in fair and logical ways.

## V. IMPACT

### A. *Why Should We Sue Ourselves?*

While arguments can be made to bypass sovereign immunity for Katrina claims brought against all levels of government, the elephant in every American taxpayer's living room remains to be addressed. A good starting point for this discussion is a review of the justification for sovereign immunity in the first place. In essence, sovereign immunity exists to protect the Federal Treasury from damage judgments.<sup>393</sup> In *Alden v. Maine*, Justice Kennedy expressly addressed this justification:

Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.<sup>394</sup>

This justification necessarily leads us to conclude that sovereign immunity is needed to protect taxpayers. American taxpayers will likely ask: "Why should I have to pay for negligent acts that I in no way contributed to, that occurred hundreds of miles away from my home?" If legislatures appropriate funds to pay judgments to Katrina victims, taxpayers will eventually bear the brunt of these payouts, as tax dollars will ultimately be the funds used to settle these claims.<sup>395</sup> The underlying assumption rooted in the justification for sovereign immunity is that it is better to allow citizens to be injured at the government's hands, than to spread the injury

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391. See *supra* notes 7, 11 (discussing scope of Katrina's damages).

392. See *supra* note 7 (discussing dissatisfaction regarding governmental preparation and response).

393. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1216-17 (2001) (citing Noel P. Fox, *The King Must Do No Wrong: A Critique of the Current Status of Sovereign and Official Immunity*, 25 WAYNE L. REV. 177, 187 (1979); Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1526 (1962)).

394. 527 U.S. 706, 749 (1999).

395. See Chemerinsky, *supra* note 393, at 1217.

among the whole through taxes.<sup>396</sup> It therefore seems that, in addition to an endless sum of unanswered legal questions, Hurricane Katrina has left us with a final question of morality as well. Should the cost of our government's negligence be spread among all Americans, or should the people living in the first and second poorest demographics in America shoulder the entire burden?<sup>397</sup>

While different people will come to different conclusions, many states have abolished sovereign immunity in support of "cost spreading,"<sup>398</sup> and many judges and legal scholars have agreed with that principle.<sup>399</sup> Before

396. *See id.*

397. ARLOC SHERMAN AND ISSAC SHAPIRO, CTR. ON BUDGET & POLICY PRIORITIES, ESSENTIAL FACTS ABOUT THE VICTIMS OF HURRICAN KATRINA 1 (2005), <http://www.cbpp.org/9-19-05pov.htm>. In 2004, the national poverty rate was 13%, while Mississippi's poverty rate was 21.6% (worst), Louisiana's poverty rate was 19.4% (2nd worst), and Alabama's poverty rate was 16.1% (8th worst). *Id.* 2004 median household incomes were as follows: national average: \$44,684; Mississippi: \$31,642 (2nd lowest); Louisiana: \$35,110 (5th lowest); Alabama: \$36,709 (9th lowest). *See also* note 19 and accompanying text (discussing the extreme poverty of New Orleans's Ninth Ward neighborhood).

398. *See, e.g.,* *Ayala v. Phila. Bd. of Pub. Educ.*, 305 A.2d 877, 878 (Pa. 1973) ("We now hold that the doctrine of governmental immunity—long since devoid of any valid justification—is abolished in this Commonwealth [of Pennsylvania]. In so doing, we join the ever-increasing number of jurisdictions which have judicially abandoned this antiquated doctrine.") (internal citations omitted), *superseded by statute*, Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S. §§ 8541-8564; *Klepinger v. Bd. of Comm'rs*, 239 N.E.2d 160, 173 (Ind. 1968) ("It is further our opinion that in determining the tort liability of a county or a city, our courts can now ignore the governmental-proprietary distinction and render judgments and assess damages without regard to the policy limits of any insurance carried by the city or county."), *superseded by statute*, Indiana Tort Claims Act, IND. CODE ANN. §§ 34-13-3-1 to -25; *Holytz v. City of Milwaukee*, 115 N.W.2d 618, 626-27 (Wis. 1962) ("[T]his court must face up to the responsibility of changing a court made rule of law [municipal sovereign immunity], which we deem the interests of justice require be changed, even though the legislature, by positive action short of codification has refused to make the change."), *superseded by statute*, WIS. STAT. ANN. § 893.80 (West 1987).

399. *See* Chemerinsky, *supra* note 393, at 1217 ("Although abolishing sovereign immunity would impose financial burdens on the government, it is better to spread the costs of injuries from illegal government actions among the entire citizenry than to make the wronged individual bear the entire loss."); *Barker v. City of Santa Fe*, 136 P.2d 480, 482 (N.M. 1943) ("It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do no wrong', should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs." (quoting Annotation, *Rule of Municipal Immunity from Liability for Acts in Performance of Governmental Functions as Applicable in Case of Personal Injury or Death as Result of a Nuisance*, 75 A.L.R. 1196, 1196 (1931))); *Robert A. Leflar & Benjamin E. Kantrowitz, Tort Liability of the States*, 29 N.Y.U. L. REV. 1363, 1364 (1954) (arguing that governmental immunity can no longer be justified with "an amorphous mass of cumbrous language about sovereignty"); *Ayala*, 305 A.2d at 883-84 ("Equally unpersuasive is the argument . . . that immunity is required



deciding the matter for themselves, taxpayers should realize that a tragedy of Hurricane Katrina's magnitude can only be remedied by this country as a whole. While most Americans are unconnected to the reasons why this devastating event occurred, every taxpaying citizen has the opportunity to be part of the reason why a tragedy like this never happens again.

### *B. Sending a Powerful Message*

Although the unfathomable losses sustained by Hurricane Katrina victims can never be fully restored, the judicial decision of whether or not to hold the government liable for its Katrina-related negligence holds significant implications for this country's future. The most significant aspect of this decision will be its impact on future governmental accountability. Governmental bodies at every level committed significant errors and misjudgments which resulted in the unnecessary suffering of countless Americans.<sup>400</sup> If Katrina victims are given no recourse against these agencies, which proved to be impotent in the face of danger, there will be no incentive for the government to reevaluate and modify the existing

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because governmental units lack funds from which claims could be paid. It is argued that funds would be diverted to the payment of claims and the performance of proper governmental functions would be obstructed. Initially, we note our disagreement with the assumption that the payment of claims is not a proper governmental function. 'As many writers have pointed out, the fallacy in [the no-fund theory] is that it assumes the very point which is sought to be proved i. e., that payment of damage claims is not a proper purpose.'" (quoting *Molitor v. Kaneland Cmty. Unit Dist. No. 302*, 163 N.E.2d 89, 94 (Ill. 1959)); *Id.* ("Additionally, the empirical data does not support the fear that governmental functions would be curtailed as a result of liability for tortious conduct . . . . The availability of public insurance removes what was the underlying reason for [sovereign immunity].") (citing *Williams v. City of Detroit*, 111 N.W.2d 1, 24 (Mich. 1961)); *Id.* at 884 ("Imposition of tort liability will, thus, be more responsive to current concepts of justice. Claims will be treated as a cost of administration and losses will be spread among all those benefited by governmental action . . . . Moreover, 'where governmental immunity has had the effect of encouraging laxness and a disregard of potential harm, exposure of the government to liability for its torts will have the effect of increasing governmental care and concern for the welfare of those who might be injured by its actions.'" (quoting Note, *The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047, 1057 (1968)); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, 1004-05 (3d ed. 1964) ("Virtually all writers have agreed that no one of these reasons for denying liability is sound, and all of them can be found to have been rejected at one time or another in the decided cases. The current of criticism has been that it is better that the losses due to tortious conduct should fall upon the municipality rather than the injured individual, and that the torts of public employees are properly to be regarded, as in other cases of vicarious liability, as a cost of the administration of government, which should be distributed by taxes to the public.") (footnotes omitted); *Riss v. City of N.Y.*, 240 N.E.2d, 860, 863 (N.Y. 1968) (Keating, J., dissenting) ("The fear of financial disaster is a myth. The same argument was made a generation ago in opposition to proposals that the State waive its defense of 'sovereign immunity'. The prophecy proved false then, and it would now. The supposed astronomical financial burden does not and would not exist. No municipality has gone bankrupt because it has had to respond [to its negligence] in damages . . . [or when] the State and its subdivisions have been held liable for the tortious conduct of their employees.").

400. See *supra* Part II (discussing government preparation and response efforts).

protocols that have proven to be ineffective. Furthermore, by allowing our government to be sued for its negligence during Katrina, taxpayers will be sending a powerful message. Americans will effectively put their government on notice that incompetence of this magnitude will not stand, and fundamental policy changes must immediately be made.

By requiring the federal government to pay damages, the current administration will be forced to make the necessary modifications and adjustments so that it will not be sued again when the next hurricane hits. For example, the President will be forced to ensure that future DHS and FEMA administrations are more competent and better experienced in the field of disaster preparedness and response.<sup>401</sup> The next President who takes office will be required to understand that he or she must act quickly and decisively when federal agencies fail to act. Future cabinet-level Secretaries will realize that their job security depends on their ability to effectively coordinate among various levels of government and that squabbling on the sidelines in the face of a national emergency is unacceptable.

Members of Congress facing reelection will have an opportunity to show their constituents that they care deeply about the Americans affected by this tragedy.<sup>402</sup> By supporting the payment of Katrina judgments, members of the House and Senate can show voters that the American government addresses weakness within its ranks, and takes responsibility for damage resulting from its mistakes. Young politicians should use this opportunity to secure thousands of votes from Americans who are disillusioned by the current administration's apparent lack of compassion and concern for its citizens. Politicians in Gulf Coast regions can include the need to compensate Katrina victims in their platforms, and secure votes over incumbents who do not seem to share this concern.

Accountability and cost-spreading will force America to address the mistakes that were made throughout the course of this tragedy. By allowing damages to be paid to victims, judges can give the government the "shock therapy" it so desperately needs. It is up to the American legal system to insure that a tragedy like this never happens again, and the outcome of Katrina litigation holds momentous implications for this country's future.

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401. See *supra* Part II.B.1 (discussing incompetence of federal agencies during response efforts).

402. In 1928, Herbert Hoover used the Great Flood as a stepping-stone to the presidency. See Mills, *supra* note 272. Hoover's platform was centered around his role in the government's response to the Great Flood, and the public soon came to characterize him as a "great humanitarian." *Id.*

## VI. CONCLUSION

All of the water has since dried up, but questions remain unanswered. How could our government allow one of its greatest cities to be washed away by a threat it has been predicting for decades? Why did federal, state, and local governments remain paralyzed, when the need for action was so apparent? Other than an occasional image on a television screen or a brief reference in passing conversation, the people who were irreparably harmed in Katrina's wake are slowly being forgotten. We can only hope that the voices of the students who evacuated their beloved college campus on that fateful day will continue to remind us of this tragedy which blindly claimed so many lives.

The American judicial system remains as the last institution through which we can heal the wounds our government has failed to mend. The outcome of Katrina litigation will largely depend on judicial interpretations of the duty our government owes to its people and the doctrine of sovereign immunity. For now, we must simply hope that courts will interpret the law in ways that will allow these victims to be made whole again. The people of New Orleans were devastated by Hurricane Katrina while their government seemed to stand idly by. Now it is time for America to hear what they have to say.

Tarak Anada\*

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\*J.D. Candidate, 2008, Pepperdine University School of Law. This Comment is a tribute to those who lost their lives and loved ones to Hurricane Katrina's wrath. It is first and foremost dedicated to the poor, sick, and elderly Americans who were all but left behind during this senseless tragedy. Your plight will not be forgotten, and we will not rest until our society learns the lessons brought by this disaster. This Comment is also dedicated to my loving parents, whose constant support, guidance, and sacrifice throughout the years are the sole reasons that I am here today. The author is a graduate of Tulane University and plans to return to New Orleans, Louisiana upon graduation to pursue a legal career.

## APPENDIX

TABLE 1: DEADLIEST DISASTERS IN THE UNITED STATES OF AMERICA<sup>†</sup>

Year	Event	Number of Fatalities	Location/Areas Affected
1900	Galveston Hurricane	6,000-12,000	Texas
1906	San Francisco Earthquake of 1906	3,000-6,000	California
1928	Okeechobee Hurricane	3,500-4,078	Florida, Puerto Rico, the Bahamas
2001	September 11, 2001 Attacks	2,992	New York, Washington D.C., Pennsylvania
1889	Johnstown Flood	2,209	Pennsylvania
2005	Hurricane Katrina	1,836	Louisiana, Mississippi, Alabama
1912	Titanic Shipwreck	1,490-1,522	Atlantic Ocean
1907	Monongah Coal Mine Disaster	362	West Virginia
1871	Great Chicago Fire	200-300	Illinois
1957	Hurricane Audrey	300	Louisiana, Texas
1969	Hurricane Camille	256	Mississippi, Alabama, Virginia
1995	Oklahoma City Bombing	168	Oklahoma
2004	Hurricane Ivan	124	Texas, Florida
2005	Hurricane Rita	120	Florida, Gulf Coast
1994	Hurricane Betsy	81	Louisiana
1994	Northridge, Earthquake	57	California
1992	Hurricane Andrew	23	Louisiana, Florida

<sup>†</sup> This information was compiled through research conducted on Wikipedia.com. List of United States Disasters by Death Toll, Wikipedia Encyclopedia, [http://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_disasters\\_by\\_death\\_toll](http://en.wikipedia.org/wiki/List_of_United_States_disasters_by_death_toll) (last visited Feb. 20, 2007).

**TABLE 2: PRIMARY GOVERNMENT DEFENDANTS**

<b>Defendant</b>	<b>Level of Governmental Involvement</b>	<b>Negligent Actions</b>	<b>Major Hurdles</b>
DHS/FEMA	Federal	Failure to declare INS in time for adequate responses	Discretionary Function Exception
The White House	Federal	Failure to provide assistance under Stafford Act	Discretionary Function Exception
The Corps	Federal	Improper design and construction of levees and canals	Flood Control Act
The State of Louisiana	State	Failure to declare mandatory evacuation in time, failure to enforce mandatory evacuation	Recovery of Damages
The City of New Orleans	Local	Failure to declare mandatory evacuation in time, failure to enforce mandatory evacuation	Recovery of Damages
Levee Districts, New Orleans Sewage and Water Board	Local	Failure to properly maintain levees, removal of pump station personnel	Recovery of Damages