



ACLU Interested Persons Memo on Katrina Relief Policies and Proposed Legislative Action

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TO: Interested Persons
FROM: Deborah J. Vagins
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The Bush administration and Congress are considering numerous proposals as part of a Katrina relief package, which may have a dramatic effect on the civil rights and civil liberties of victims of Katrina. Some of these proposals may be part of a legislative aid package that will be on the House and Senate in the coming weeks. Others have been implemented already by the administration.

As the people of the Gulf Coast begin the long road to recovery, it remains critically important to provide short and long-term relief to the hurricane survivors. At this pivotal moment in history, it is not the time for any party to push an ideological agenda. As will be discussed below, the administration has taken and Congress is considering actions that significantly impact public education, religious liberty, workers' rights and affirmative action in contracting, voting rights, the authority to invoke emergency powers, immigration, and privacy concerns. Unfortunately, not only do many of these legislative, administrative, and regulatory actions fail to address the pressing needs of these communities, but in several instances they exacerbate existing problems by increasing racial and economic disparities. Indeed, many of the measures being currently considered undermine basic constitutional principles of equal protection and due process. The administration and Congress must not twice victimize those most in need.

The following highlights some of the most significant problems in the administration's efforts and proposed legislation and provides recommended actions.

Education and Religion

Ensuring Access to an Equitable Education and Comprehensive Services

The Bush administration has proposed spending \$488 million on religious and private school vouchers for victims of Katrina. If passed, this would be the largest federally funded private school voucher program in our nation's history. Federal education dollars should go to the public schools across the country that are taking in these children temporarily and to the schools that are trying to rebuild in the affected states. These public funds should not be used to create a controversial voucher program.

Education policy experts from across the country have identified numerous problems with the President's voucher plan. First, vouchers do not provide an adequate safety net for children. Public schools are already accepting the overwhelming majority of displaced students, but they would be ineligible to receive the proposed voucher funds. This is particularly troubling where public schools provide comprehensive services to displaced children and families. Many of the private schools that could be eligible to receive these public funds may be ill-equipped to provide the comprehensive services that hurricane victims may need, including mental health services, counseling, free and reduced price meals, and after school care—all services that public schools provide.

Second, vouchers will not ensure parental "choice." The real beneficiaries of "choice" programs are private and religious schools. Private school administrators select which students they will or will not admit. Private schools can discriminate and refuse to accept students because they have a learning or physical disability, lack English proficiency, or have other special needs. A parent's "choice" extends only to determining to which school they will submit an enrollment application. In many areas of the country "school choice" becomes meaningless either because there are no private schools or because the only private schools are religious, and might not be the particular religion or denomination of the student.

Third, voucher programs lack accountability. Private schools that accept vouchers are not accountable to the public taxpayers who pay for the vouchers. Whereas public schools are required to meet educational standards in order to be accountable to the public. Private schools are not required to meet basic accountability standards, such as open meetings and records laws, or to release test scores, dropout rates, student selection criteria, or other basic information.

As the nation witnessed, the poor, predominately minority communities in the Gulf area were ravaged by the storms. Despite politicians and organizations that favor school vouchers trying to spin vouchers as a "civil rights" issue, vouchers clearly do not protect the civil rights of America's students. This rhetoric is particularly offensive given that the current voucher proposals would not require private institutions receiving publicly funded vouchers to adhere to the same civil rights enforcement and compliance mechanisms that apply to public institutions. In other words, private schools would receive public funds without a corresponding obligation to comply with all federal anti-discrimination laws—laws designed to protect our children. These laws were crafted specifically to address issues of equal access and discrimination in the first place.

The ACLU opposes these efforts to funnel public funds into a controversial voucher program. Federal education dollars should go to the public schools across the country that are

taking in these children temporarily and to the schools that are trying to rebuild in the affected states. The best way to ensure that every child has an equal and valuable education is to invest in our public school system.

Prohibiting Government Funds From Supporting Faith-Based Charities that Proselytize

Numerous non-profit organizations have raised a great deal of money for hurricane relief and have been on the front lines providing shelter, food, and care for victims. FEMA has recently announced that it will be reimbursing some organizations for providing these services. It is critical that FEMA and other government agencies clearly and precisely state exactly how they intend to use taxpayer funds.

Many faith-based groups, like other public-spirited groups, generously took upon themselves the responsibility for distributing food, housing, and clothing to those in need. It appears that some faith-based groups have also used the emergency as an opportunity to promote their particular religious beliefs and doctrines. Although the ACLU defends the right of religious groups to promote their religious beliefs, the ACLU does not support government subsidy of religious activities. FEMA's announcement raises two main concerns. First, religious groups that used the disaster as an opportunity to promote their own particular religious beliefs should not be subsidized or reimbursed by the government for those religious activities.¹ Second, the government should not support, directly or indirectly, religious groups that might want to use this disaster to unduly influence those who are already suffering. While the groups have the right to address people, it is critical that FEMA not underwrite these actions. FEMA has an obligation to exercise appropriate safeguards ensuring that faith-based groups that get government dollars will not be allowed to proselytize. All money should be dispersed consistent with constitutional and civil rights laws – and money should not be granted for the promotion of religious beliefs.

Moreover, if such reimbursement is to go forward, in order to avoid the serious accounting problems that have plagued recent government activities and contracts, strict accounting standards should be implemented. In reimbursing faith-based groups for their hurricane relief expenses, the federal government must set strict accountability standards for the use of all public funds. By monitoring how taxpayer dollars are spent, the government can ensure it is funding relief efforts and not religious conversion.

The Bush administration's faith-based initiatives have long been controversial. The devastation inflicted by the hurricane should not be used as a backdoor to promote or fund this faith-based agenda. This is especially true where the White House has not yet openly or precisely stated exactly how it intends that taxpayer funds be used by faith-based charities. Transparency is essential. A natural disaster should not become the pretext for the government endorsing or promoting religious activities.

¹ For example, Bobby Welch, president of the Southern Baptist Convention, urged church members to proselytize while providing aid. He indicated that “[w]hen you go and give the cup of cold water, you be sure you give a witness of Jesus Christ. Don’t just smile and say, ‘I go to church.’ . . . You give a witness of Jesus Christ to these people . . .” Erin Curry, *‘Give them Jesus!’ SBC President Welch pleads as Baptists minister in Gulf Coast*, BAPTIST PRESS, Sept. 20, 2005, available at <http://www.bpnews.net/bpnews.asp?ID=21671>.

McKinney-Vento

Preventing the Segregation of Homeless, Primarily Black Schoolchildren

The McKinney-Vento Act is a longstanding federal law that, among other things, prohibits segregation of homeless students in elementary and secondary schools. The historical purpose of the act is to ensure that homeless youth have equal access to the same free public education as other children and youth. The act specifically states that homelessness is not a sufficient reason to separate homeless students from the mainstream school environment.

Katrina has displaced at least 372,000 school children. A number of states, including Texas and Utah, want to teach some of the dispersed students in shelters instead of local public schools, a stance supported by the Bush administration. Secretary of Education Margaret Spellings wants Congress to allow her the right to waive requirements prohibiting such segregation of homeless students.² This approach, however, has serious implications for the civil rights of these children. Recently, for example, Senator Kay Bailey Hutchison (R-TX), introduced legislation (S. 1683), purporting to provide relief to students affected by Hurricane Katrina. Hutchison's bill would give Secretary Spellings the authority to waive certain provisions of the McKinney-Vento Act for students displaced by Hurricane Katrina, avoid penalties for violations of the act, and teach displaced students in shelters instead of local public schools.³

Specifically, Senator Hutchison's bill would allow schools to obtain waivers from key provisions of the act that prevent the segregation of homeless students. For example, the bill authorizes the Secretary of Education to waive any provisions of the act, on a school-by-school basis, for periods of up to 30 days until June 30, 2006. Moreover, because the proposed legislation does not articulate precise standards for the Secretary of Education to grant waiver requests, she can exercise virtually unfettered discretion in determining which children could be subject to the waiver. This means that schools could obtain waivers from provisions of the act that prohibit segregating children based on the child's status as homeless.

Because the majority of the students displaced by Hurricane Katrina are African-American, permitting schools to segregate these students raises constitutional questions regarding students' right to equal protection and a racially integrated education established in *Brown v. Board of Education*. In particular, without the protection of the McKinney-Vento prohibition against segregation of homeless students, students displaced by the hurricane could be segregated effectively by race and receive an inferior education with respect to facilities, educational programs, teacher qualifications, extracurricular activities and other essential educational components.

² Daniel Golden, *Separate but Equal? Schooling of Evacuees Provokes Debate*, THE WALL STREET JOURNAL, Sept. 14, 2005, at B1.

³ It should be noted that on September 22, 2005, Senator Hutchinson introduced revised legislation (S. 1764), addressing the education of students affected by Katrina, which passed by unanimous consent. S. 1764 authorizes the Secretary of Homeland Security to transfer funds made available through FEMA to the Department of Education for activities to support students affected by Katrina, such as compensation of school personnel, operation costs, and textbooks and equipment. Unlike S. 1683, discussed herein, S. 1764 does not contain a McKinney-Vento waiver provision.

The ACLU urges members of Congress to oppose such a broad waiver of key provisions of the McKinney-Vento Act. While we are sensitive to the need to afford local school districts flexibility in fashioning remedies that ensure that displaced students receive a quality education, the goal should be integration, not segregation.

Workers' Rights

Paying a Fair Wage to Those Cleaning up After the Hurricanes

In the wake of Katrina, there have also been dramatic efforts by this administration to scale back workers' rights. One day after Rep. Jeff Flake (R-AZ) and 34 other House Republicans urged him to do so, President Bush issued a Proclamation to suspend the application of the Davis-Bacon Act in the devastated areas of the Gulf Coast and similarly affected counties on the east coast of Florida. The Davis-Bacon Act sets a minimum pay scale for workers on federal contracts, requiring employers to pay the prevailing or average wage in the region. The law was designed to protect workers in desperate need of employment from profiteering contractors who could take advantage of their vulnerability and dire need for work. In suspending the act, however, the White House argued that the wage-protection regulations were slowing reconstruction and raising federal costs. But by shelving Davis-Bacon the Bush administration has ensured that contractors responding to this regional economic nightmare will be allowed to slash wages and exploit workers in the very manner that Davis-Bacon sought to prevent.

Despite the administration's posture, Davis-Bacon merely ensures that workers on a federal government project earn a typical wage and is intended to prevent downward pressure on wages by government contractors. For example, prevailing wages in New Orleans are \$13.42 per hour for a carpenter, \$13.93 for a backhoe operator and \$9.25 for a general laborer; in Pearl River, MS it is \$9.16 for sheet metal workers, and in Mobile County, AL only \$8.54 for truck drivers.⁴ These are hardly the exorbitant wages suggested by the White House. Since many of the people who suffered the devastation of Katrina will, and should be, the workers hired to rebuild, it is imperative that the government not undercut wages. Indeed, paying prevailing wages is the key to economic renewal in the area, and ensures that skilled tradespeople will assist and be fairly compensated in the rebuilding.

Among the actions taken in response to the suspension of Davis-Bacon, Congressman George Miller (D-CA) introduced a bill (H.R. 3763) to reinstate the wage protections that were suspended by President Bush's fiat. As of this writing, the Miller legislation had 204 cosponsors – all Democrats, plus Bernard Sanders (I-VT). In the Senate, Sen. Edward Kennedy (D-MA) has sponsored a companion bill (S. 1749) to reinstate the application of the wage requirements of Davis-Bacon in federal contracts in areas affected by Katrina, which could be offered as a floor amendment to the next supplemental appropriations measures.

Some House Republicans are protesting Bush's move suspending prevailing wages. Frank A. LoBiondo (R-NJ) and Steven C. Latourette (R-OH) sent a letter to the White House expressing concern over the suspension of Davis-Bacon in the affected Gulf Coast region. As of September 23, 2005, 37 House Republicans signed onto the letter. The letter writers disagreed

⁴ See 151 CONG. REC. S10302 (daily ed. Sept 21, 2005) (statement of Sen. Kennedy); Letter from Michael R. Bloomberg, Mayor, to George W. Bush, President of the United States (Sept. 20, 2005) (hereinafter "Bloomberg letter"), available at <http://www.nyc.gov/html/om/html/2005b/pr360-05.html>.

with the administration that a suspension of Davis-Bacon would aid in recovery. They indicated that prevailing wages attract workers with more experience and training, leading to increased productivity and lower overall costs. They also emphasized that Davis-Bacon includes provisions that help workers receive healthcare and pensions. They urged the president to terminate his proclamation no later than November 8, 2005.⁵

Having a decent job with fair wages is sure to be one of the most instrumental factors in the resurgence of the Gulf Coast. It is clear that the Bush administration's suspension of Davis-Bacon is the wrong approach, and has not been necessary in times when this country has been faced with other natural and man-made disasters. There is a better approach. For example, New York City's Mayor Bloomberg wrote to the White House in opposition to the suspension of Davis-Bacon, having learned its value during the massive clean up of the World Trade Center site after 9/11.⁶ Mayor Bloomberg indicated that New York City mobilized skilled tradespeople who untangled the wreckage, quickly, safely, and under budget by \$1.4 billion. This feat was accomplished by paying a prevailing wage. Davis-Bacon was essential to the swift, cost-efficient, and high-quality work at the site.

Federal action post-Hurricane Katrina should be lifting workers up, not forcing them into a race to the bottom by undercutting wages in the area. The ACLU supports the bipartisan sentiment to reinstate Davis-Bacon and urges the President to reverse his decision immediately.

Preserving Affirmative Action in Contracting

Agencies have also taken actions that raise serious civil rights concerns. Recently, the Department of Labor temporarily suspended government requirements that first-time government contractors working on reconstruction efforts have an affirmative action plan addressing the employment of women, minorities and the disabled.⁷ Under the rules that normally apply to companies hired by the government, a business with more than 50 employees working on contracts for more than \$50,000 must develop an affirmative action plan. The Department of Labor, however, has waived this requirement purportedly with the goal of reducing the burden of "paperwork" on government contracts and to encourage more companies to assist with rebuilding from the storm damages. The exemption is to last for three months, but can be extended.

While the ACLU believes that providing relief and rebuilding these communities is of utmost importance, it is completely unnecessary for the government to undermine affirmation action requirements of new federal contracts in order to do so. New contractors, which have 120 days to prepare the affirmative action plan, should not be overburdened, and small contractors are subject to abbreviated requirements.⁸ Moreover, it makes little sense to exempt new contractors from preparing affirmative action plans while requiring the existing contractors to continue doing so. Indeed, this exemption could hurt the very people most affected by the hurricane, effectively shutting them out from the opportunity to participate in rebuilding their

⁵ In addition, Rep. Shelly Moore Capito (R-W.Va.) sent her own letter to the White House asking the President to rescind the order before the end of the year.

⁶ Bloomberg letter, *supra*, at n.4.

⁷ Memorandum from Charles E. James, Sr., Deputy Assistant Secretary, U.S. Department of Labor. re: *Contracts for Hurricane Katrina Relief Efforts* (Sept. 9, 2005), available at <http://www.dol.gov/esa/ofccp/pdf/Katrina1.pdf>.

⁸ Tyler Lewis, *Decision to Suspend Affirmative Action Requirements Sharply Criticized*, Sept. 21, 2005, http://www.civilrights.org/tools/printer_friendly.cfm?id=35883&print=true.

own neighborhoods. Failing to ensure equal access to contracting work for women, minorities, and the disabled is even more troubling in light of the fact that more than 80 percent of the \$1.5 billion in contracts signed by FEMA for Katrina relief alone were awarded without bidding or with limited competition.⁹

In light of the disaster, it is important that the federal government and its agencies pay special attention to providing equal opportunity for those individuals who have in the past had the least access to well-paying jobs. Suspension of affirmative action rules, combined with a suspension of prevailing wages, and an increased reliance on no-bid contracts presents a triple threat. Thousands of individuals harmed by this storm – and particularly women, minorities, and the disabled – will not have equal access to the opportunities to lift themselves out of the devastation and help rebuild their communities. The ACLU opposes the Department of Labor's action and urges the agency to restore the affirmative action in contracting requirements.

Voting Rights

Preserving the Right to Vote for All Those Impacted by the Hurricane

Another important priority in the hurricane relief efforts must be preserving the integrity of the electoral systems in the affected area and protecting the voting rights of hurricane victims. There are, however, serious voting rights concerns that are implicated both by the displacement of thousands of citizens, predominately African American, and the physical destruction of the districts and the infrastructure needed to conduct elections. With so much displacement and destruction, states in the disaster area will face unprecedented challenges in conducting elections. Indeed, Louisiana has already postponed elections that were scheduled for October 15 and November 12, 2005,¹⁰ and has recommended postponing elections scheduled for December 10, 2005.¹¹ Even the scheduling of the local elections planned for February 2006, which includes the New Orleans Mayoral election, may be in doubt.¹²

Recently, the Civil Rights Division of the United States Department of Justice has pledged to expedite the review of voting changes resulting from Katrina, which Louisiana, Mississippi and their subdivisions must submit for Section 5 review under the Voting Rights Act.¹³ Section 5 requires certain districts with a history of discrimination to “pre-clear” changes in election law with the Justice Department. Section 5 is critically important to prevent covered states from adopting election law changes that deny minorities' equal access to the political process. Many of the more blatant past abuses,¹⁴ such as poll taxes and discriminatory literacy

⁹ Eric Lipton and Ron Nixon, *Many Contracts for Storm Works Raise Questions*, THE NEW YORK TIMES, Sept. 26, 2005.

¹⁰ Louisiana Exec. Order No. KBB 2005-36 (Sept. 14, 2005), available at <http://www.sos.louisiana.gov/elections/MISC/36DelayVoting-10-15-05&11-12-05.pdf>.

¹¹ See Louisiana Secretary of State, *Secretary of State recommends delaying upcoming elections in Southwest Louisiana*, Sept. 28, 2005, <http://www.sec.state.la.us/admin/press/p092805.pdf>.

¹² See Marsha Shuler, *Proposal aims to ensure N.O. elections will still occur*, Sept. 23, 2005, http://2theadvocate.com/stories/092305/new_elections001.shtml.

¹³ Letter from Bradley J. Schlozman, Acting Asst. Attorney General to Al Ater, Louisiana Secretary of State (Sept. 7 2005) available at http://www.usdoj.gov/crt/voting/la_katrina.htm; Letter from Bradley J. Schlozman, Acting Asst. Attorney General to Eric Clark, Mississippi Secretary of State (Sept. 9, 2005) available at http://www.usdoj.gov/crt/voting/ms_katrina.htm.

¹⁴ See, e.g., *United States v. Louisiana*, 380 U.S. 145 (1965) (describing a myriad of voting-rights abuses, including the use of a discriminatory voting test in at least 21 Louisiana parishes that worked to disenfranchise black voters); *United States v. Mississippi*, 380 U.S. 128 (1965) (describing voting-rights abuses that included a discriminatory literacy requirement and the outright exclusion of black voters from political primaries).

tests, have been eliminated but there remains a wide variety of methods employed to dilute minority votes. Discrimination in voting rights cannot be called a thing of the past.¹⁵ While the need to accommodate the recovery efforts is real, changes to the electoral system must be made with great caution and in a manner that does not discriminate against protected groups. Section 5 review is essential to ensuring that every voter has fair and free access to the polls. It must not be reduced to a rubber stamp, even during a national disaster.

Rather than waive any hard-fought protection for minority voters, DOJ must ensure all displaced persons' ability to vote in upcoming state and local elections; make certain there is a visible public education campaign notifying voters of polling place changes, absentee ballots for those who return, and registration options if they are not returning; and ensure that staff and volunteer training is sufficient to identify potential irregularities once voting begins.

Emergency Powers and Use of Troops

Congress may soon consider legislation that will broaden the emergency powers that could be invoked in a time of natural disaster. Legislation has already been introduced to give broad authority to the federal judiciary to temporarily suspend deadlines for court filings – in both civil and criminal cases – where it is “impracticable” for the government or private litigants to comply. In addition, both the President and the Chairman of the Senate Armed Services Committee have urged a review of the Posse Comitatus Act of 1878, suggesting the law should be amended to make it easier for active duty troops to be used in a law enforcement role on the streets of America.

Ensuring Courts Provide Timely Remedies for Constitutional Violations

House Judiciary Chairman F. James Sensenbrenner has proposed legislation (H.R. 3729) that would allow the Chief Judge of a United States district court (or next most senior judge) to waive court filing deadlines in the event of a natural disaster or emergency. The legislation would apply to all court filings, “including prearrest, post-arrest, pretrial, trial, and post-trial procedures” in criminal cases and all aspects of civil cases.

H.R. 3729 as introduced provides extremely broad authority. For example, the writ of habeas corpus allows someone who is being detained to go to court to force the government to explain the legal basis for detention. A broad waiver of filing deadlines in all cases could have the effect of giving the government the ability to hold people illegally during the waiver period, because the government would be excused temporarily both from prearrest procedures (such as arraignment and filing of criminal charges) and from having to file an answer to a detainee's challenge to being detained without charge.

Supporters of H.R. 3729 plan to amend the bill explicitly to provide that it does not authorize the “suspension” of the writ of habeas corpus and to include a 14-day time limit on the waiver authority (which could be renewed). While these limitations are welcome, many unanswered questions remain. For example, while the bill does not authorize a “suspension” of

¹⁵ Since 1969 the Department of Justice has used Section 5 to issue over 165 objections to proposed electoral changes in Mississippi and over 145 objections to proposed changes in Louisiana. *See* Section 5 Objection Determinations, United States Department of Justice, Civil Rights Division, Voting Section, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm (last visited Oct. 14, 2005). The most recent objections date from 2003. *Id.*

habeas corpus, its waiver authority would still apply to all civil and criminal cases. The bill does not clearly state whether, or under what circumstances, a waiver of a time deadline for the government to file charges or respond to a habeas corpus petition would be barred because it amounts to a “suspension.” Would, for example, the fourteen-day waiver essentially permit detainees to be held for two weeks without charge, or even longer if the waiver is renewed?

Moreover, the bill also does not address many other situations in which time is of the essence to ensure that a remedy is available for violation of constitutional rights. For example, government officials who are under fire for failing to deliver humanitarian aid might issue restrictions on news coverage in the disaster zone or impose censorship on news coverage. Suspension of court filing deadlines calls into question whether the government could temporarily ignore a First Amendment court challenge to such restrictions or censorship.

While no one doubts the need for some flexibility in administering court filing deadlines in a time of calamity that shuts down the courts, H.R. 3729 raises profound constitutional questions. It is certainly premature to consider such legislation without a thorough review of how the judiciary has handled similar situations under its existing authority to handle its own docket. If a review shows that legislation is needed, it should be carefully tailored, and should make special provision for cases where a timely judicial remedy is essential to the preservation of constitutional rights.

Ensuring Use of Active Duty Troops Patrolling the Streets Remains Last Resort

The Katrina disaster has led to proposals to weaken the Posse Comitatus Act of 1878, which generally prohibits active duty military forces from being used within the United States for law enforcement purposes. President Bush is considering designating the Department of Defense, instead of the Department of Homeland Security, as the “lead agency” in responding to some kinds of natural disasters, and has noted that such a designation could require changes to the Posse Comitatus Act. John Warner (R-VA), Chairman of the Senate Armed Services Committee, has likewise suggested the act is outdated. Senator Warner has urged Secretary of Defense Donald Rumsfeld, to review DOD’s regulations implementing the act and invited amendments to the law.

Keeping military forces out of the business of law enforcement is a longstanding principle of American liberty that predates the Posse Comitatus Act. The Posse Comitatus Act of 1878 was passed to reinforce that principle.¹⁶

The Posse Comitatus Act does not forbid the military from engaging in humanitarian relief or in providing logistical and technical support to law enforcement in certain specified areas (including drug enforcement and weapons of mass destruction). Likewise, the Posse Comitatus Act does not apply to the National Guard when it is under the control of a state’s

¹⁶ Indeed, the complaint that King George III had misused military forces to quell unrest in the years before the American Revolution was one of the causes cited in the Declaration of Independence. The Posse Comitatus Act was passed in the wake of the disputed Presidential election of 1876 in which troops were accused of interfering with the balloting in support of the Republican Party. The misuse of troops for law enforcement duties had also been a sore point for the anti-slavery movement. Prior to the Civil War, federal troops had sometimes been used to enforce the Fugitive Slave Law where local authorities had refused to cooperate. See Stephen Young, *The Posse Comitatus Act: A Resource Guide*, Law Library Resource Xchange (Feb. 17, 2003), available at: <http://www.llrx.com/features/posse.htm>.

governor. Indeed, providing additional law enforcement support to state and local police in the case of a riot or other civil disturbance is one of the National Guard's main functions. Likewise, the Coast Guard is a law enforcement agency exempt from the Posse Comitatus Act.

Active duty federal troops are permitted to enforce the law directly in two narrow situations under the terms of the Insurrection Act. First, federal troops may be used to suppress an "insurrection" against state authority at the request of the state legislature or governor. 10 U.S.C. § 331. Second, federal troops may be used in the President's own discretion to suppress any "unlawful obstructions, combinations, or assemblages, or rebellion" against federal authority. 10 U.S.C. § 332.¹⁷

Hurricane Katrina resulted in a major humanitarian crisis. Government at all levels failed to provide for the basic needs of tens of thousands of people who could not evacuate and who were instructed to go to shelters. Given the clear authority to use active duty troops for humanitarian relief, and to use troops for law enforcement in extreme situations based on a request from the state government under the Insurrection Act, the case has not been made that the Posse Comitatus Act is in any need of amendment. Troops did not show up in New Orleans immediately after the hurricane, only to be frustrated in providing security as a result of the Posse Comitatus Act. Rather, first responders were overwhelmed by the hurricane and flood and additional help from state and federal government agencies – both civilian and military – was slow to arrive.

The Posse Comitatus Act is a basic principle of democracy. It permits the use of active duty troops in extremely dire situations, with the approval of officials at the highest level of the state and federal governments. Amending the act to permit use in more routine disasters, or without high-level approval, would have serious consequences for civil liberties by eroding the line between military rule and law enforcement. Instead, a properly executed disaster plan should make sure that there are sufficient state and local police, supplemented by the National Guard, to ensure law and order without active duty forces patrolling the streets. Such a plan would have coordinated the work of all federal and state agencies, ensuring that the military provides the humanitarian and other logistical support that is permitted by the Posse Comitatus Act, freeing police and National Guard forces to do the job of patrolling the streets.

A properly executed disaster plan would also ensure that the governor and the president are kept continuously informed of the security situation, so they could determine whether the security situation was in fact so dire that the use of active duty federal troops for law enforcement should be authorized under the Insurrection Act. The standard for using such troops is appropriately high, and the decision should be based on facts on the ground, not rumors amplified by sensational reporting.¹⁸ Active duty troops should be used for law enforcement only as the very last resort.

¹⁷ These exceptions to the Posse Comitatus Act closely mirror article IV, section 4 of the United States Constitution, which guarantees to every state a "Republican Form of Government" and which permits the use of federal troops to protect a state against "domestic Violence" only at the request of the state's legislature or governor.

¹⁸ In addition to its failure to provide sufficient food, water, and medical care, the government failed to provide adequate security, leading to a breakdown in law and order. Initial media reports of widespread violence, looting, and roving criminal gangs appear, however, to have been based on rumors that have since proven to have been seriously exaggerated.

Immigration

Hurricane Katrina also poses unique problems for the estimated 130,000 noncitizens affected by the disaster. The Department of Homeland Security (DHS) estimates 24,000 lawful permanent residents (LPRs) and 72,000 nonimmigrants (legal temporary residents) were affected by the disaster. Experts estimate that an additional 20,000 to 35,000 undocumented immigrants may also have been affected.¹⁹

In addition to the problems faced by all victims of the disaster, immigrants must cope with special problems relating to the loss of identification documents and immigration papers and legal barriers that render many noncitizens (including legal immigrants) ineligible for many forms of federal assistance.²⁰

Ensuring Fears of Deportation Do Not Interfere with Life-Saving Aid

Following the hurricane, White House officials reached out to Latino organizations and the Spanish-language press, urging victims of the disaster to seek help regardless of their immigration status. Despite a general bar on federal benefits and services, undocumented immigrants are not barred from receiving short-term, in-kind disaster assistance or services that are not means-tested and that are needed for the protection of life or safety. President Fox of Mexico announced on television, in English and Spanish, that all immigrants should seek help, saying that U.S. authorities had assured him that “those who were not documented at the time will not be subject to any pressure or persecution whatsoever.”²¹

Nevertheless, despite these assurances by White House officials, some undocumented victims of Katrina have, in fact, been placed in deportation proceedings after having sought such life-saving assistance. Immigration agents in El Paso, Texas reportedly approached evacuees flown in from the Gulf Coast, questioned them, and placed three in deportation proceedings.²² DHS officials have said, in contradiction to the assurances by President Fox and the White House, that they will use information collected during rescue and recovery efforts in immigration proceedings.²³ Finally, more than 700 agents of Immigration and Customs Enforcement (ICE) were deployed to New Orleans to augment local police and the National Guard, along with personnel from the Border Patrol, which certainly has raised fears among many immigrants.²⁴

While officials must comply with the law in making government assistance available, nothing requires them to exploit the disaster to place victims of the hurricane in deportation

¹⁹ See Ruth E. Wasem, CRS Report for Congress, *Hurricane Katrina-Related Immigration Issues and Legislation*, Sept. 19, 2005, at 1.

²⁰ This memorandum does not address the specific immigration status questions that have arisen because, for example, an applicant for permanent residence loses a sponsor who perished as a result of the hurricane, a worker who lost his or her employer, or a foreign student who no longer has a school to attend. For discussion of these issues, see National Immigration Law Center, *Katrina “Immigration Relief” Falls Short*, Sept. 21, 2005, available at http://www.nilc.org/disaster_assistance/index.htm.

²¹ Suzanne Gamboa, *Handful of Katrina Victims in Deportation*, Associated Press, Sept. 19, 2005.

²² See *id.*

²³ Darryl Fears, *For Illegal Immigrants, Some Aid Is Too Risky: Fears Abound as Government Won't Promise Immunity From Deportation*, THE WASHINGTON POST, Sept. 20, 2005, at A6 (quoting Joanna Gonzalez, DHS spokeswoman).

²⁴ See Jerry Seper, *ICE Agents Restore Order After Katrina*, THE WASHINGTON TIMES, Sept. 8, 2005.

proceedings. Secretary of Homeland Security Michael Chertoff should immediately issue a directive that gives teeth to the assurances given by White House officials to President Fox and to organizations representing immigrants in the United States. Failing to do so has current consequences for those needing assistance, but also serves as a severe disincentive for those needing help to come forward in the face of any future disasters. DHS should also consider whether a status such as deferred departure should be extended to victims of the hurricane.

Guarding Against Discrimination -- Identification and Other Government Documents

As discussed further below, identification is a problem that faces many of those displaced by Katrina. Both citizens and non-citizens must, for example, provide documents that prove identity and their status as either as citizens or as non-citizens authorized to work in the United States.

DHS issued a temporary reprieve for employers to allow them to hire victims of Katrina who, as a result of the hurricane, are unable to produce the documents listed on Form I-9 that establish identity and eligibility to work. The reprieve will allow employers to note on Form I-9 that documents are unavailable due to Katrina. The reprieve will only last for 45 days, and then will be reevaluated.

The rule does not require employers to excuse prospective employees from providing documents, and its effectiveness may be limited as a result. Even this very small step has drawn criticism from Rep. Lamar Smith (R-TX), who questioned whether DHS was “ignor[ing] important laws.”²⁵

The 45-day waiver is warranted, but must be extended further because it is unrealistic to expect anyone – whether citizen or immigrant – to replace lost documentation in such a short time frame. In addition, the waiver should not simply permit employers to hire new workers despite an inability to provide documents for the I-9. Rather, to avoid penalizing victims further and to guard against illegal discrimination against Katrina victims, employers should be required to waive I-9 requirements for Katrina victims who do not have documents as a result of the hurricane.

Providing Fair Standards in Eligibility for Government Benefits

Under a complex set of rules, certain forms of disaster relief are barred completely for all undocumented immigrants and severely restricted even for many legal immigrants, particularly those who arrived after 1996, regardless of their means or needs. Many immigrants have also been deterred from seeking assistance, even assistance for which they may be eligible, because of a fear of deportation.

Asylees and refugees, however, are among those “qualified aliens” who are eligible for food stamps if they have resided in the United States for more than five years in that status. Senators Harkin (D-IA) and Leahy (D-VT) have introduced legislation, S. 1695, that would – among other things – treat non-citizen victims of Hurricane Katrina who are legally in the United States as refugees for purposes of food stamp eligibility.

²⁵ See Wasem, *supra*, n.19 at 2-3.

Congress should enact S. 1695 swiftly, and should consider expanding the forms of assistance that should be available beyond food stamps to include SSI and other programs available to asylees and refugees.

Privacy

Finally, a last serious and over-arching concern facing those rendered permanently or temporarily homeless by the storms is privacy, including concerns regarding the medical records of the displaced survivors and the identification necessary to receive benefits. As the government designs a way to provide benefits to displaced persons, there are two pressing, related problems: (i) how to provide victims who lost all forms of identification documents with new IDs so they can begin to access accounts, obtain credit, benefits, and replacements for vital documents; and (ii) how to assist in the reconstruction of medical and pharmaceutical records that were lost to help patients obtain the proper prescriptions and treatment.

Establishing Identity and Recreating Vital Documents Without Threatening Privacy

Those who evacuated likely brought IDs with them, so the number of people who need replacement or temporary IDs may be a relatively small number consisting of children, the elderly, the extreme poor, the homeless, those who lost their possessions in-transit, and those who were robbed. Government agencies that would provide these groups benefits other than subsistence will need to know to whom they are distributing aid, and thus some form of temporary identification is needed. The issuance of temporary IDs, however, requires proper planning; otherwise such IDs could be used for theft, forgery or fraud. Identity thieves could steal identities and use them to access others' accounts; people could assume new aliases; and others could obtain multiple IDs under different names in order to get duplicate benefits. No one knows how the government could authenticate the identity of people claiming new ID cards.

Even without legislation, people could take the following actions to gain access to accounts and to recreate their paper identities: (i) requesting a new Social Security card, and (ii) filing for a free credit report from one of the three national credit agencies. This can be quickly done over the internet and will provide access to account numbers for mortgages, credits and loans. For those who do not have internet access, shelters or temporary government facilities should provide free short-term access for those displaced by the storm.

To safeguard privacy, the ACLU recommends that any government-issued ID provided for the purpose of distributing benefits be temporary, and that the database supporting that ID be secured, encrypted, and accessible only by those government officials with a need to distribute benefits.

Giving Displaced Patients Proper Care while Protecting their Medical Privacy

Nothing is more private and sensitive than a person's health and medical history. Although no one knows yet whether physical copies of medical records that were destroyed can be recreated entirely through review of the back-up databases of electronic records of health systems, hospitals, pharmacy chains, pharmaceutical manufacturers, or insurance companies, there clearly is a pressing need to attempt this effort. Patients, doctors, and dentists need medical records so that patients can receive the proper prescriptions and treatment. Where possible, the reconstruction of peoples' medical histories would be beneficial.

In response to Katrina, the Department of Health and Human Services waived significant medical records privacy protections that were enacted pursuant to the Health Insurance Portability and Accountability Act (HIPAA). This was done to assist displaced residents and patients in recreating their medical histories and records. In time, however, patient privacy concerns should again predominate and the system set up to solve immediate health concerns should not be made permanent. Pharmaceutical manufacturers and pharmacy chains should never have ownership of, or access to, a patient's entire reconstructed medical history. Further, after a short period of time – perhaps just a handful of months – the shared network established to recreate records for those displaced by Katrina should migrate back to the hospitals and health centers alone, and should not be maintained by the government.

To further protect patient privacy during this transition period where records are being recreated through public-private partnerships, the ACLU proposes that Congress take several steps. First, Congress should immediately create an independent Privacy Advocate to oversee the development, maintenance, and implementation of the reconstruction of medical records and medical histories. This Advocate should have the authority to sanction parties that fail to secure patient data. Second, Congress should explicitly overturn a recent Justice Department ruling that interpreted federal law to suggest that while businesses that contract with the federal government are subject to criminal penalties if they fail to protect personal privacy, their subcontractors, employees and other businesses partners are not. Extending the specter of criminal penalties to these third parties will deter identity theft and encourage related businesses, employees and contractors to protect personal medical privacy.

Conclusion

Right now the Gulf Coast needs relief, effective short and long-term planning, and an increased emphasis on protecting and empowering its most vulnerable communities. Now, when hurricanes have displaced hundreds of thousands of people, is not the time to push a partisan political agenda and forgo civil liberties or undermine civil rights. The Washington Legislative Office will continue to monitor and address these and other upcoming legislative, administrative, and regulatory changes in order to ensure that the administration and Congress do not twice victimize the hurricane survivors.